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THE
AMERICAN AND ENGLISH
ENCYCLOPÆDIA
OF
LAW

EDITED BY
DAVID S. GARLAND AND LUCIUS P. McGEHEE
UNDER THE SUPERVISION OF
JAMES COCKCROFT

SECOND EDITION

VOLUME II

46557
22/6/99

NORTHPORT, LONG ISLAND, N. Y.
EDWARD THOMPSON COMPANY
LONDON: C. D. CAZENOVE, 26 HENRIETTA STREET
1896

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THE AMERICAN AND ENGLISH ENCYCLOPÆDIA OF LAW.

AGER.—A Latin word signifying a field, land, soil, etc.¹

AGGRAVATED ASSAULT.—See the title ASSAULT AND BATTERY.

AGGRAVATION.—See the titles DAMAGES; EXEMPLARY DAMAGES; EVIDENCE; and the various titles such as LIBEL AND SLANDER; TRESPASS, etc. As to pleading, see the ENCYCLOPÆDIA OF PLEADING AND PRACTICE, title DAMAGES, and the various titles of that work, such as LIBEL AND SLANDER; TRESPASS, etc.

Matter of aggravation, correctly understood, does not consist in acts of the same kind and description as those constituting the gist of the action, but in something done by the defendant, on the occasion of committing the trespass, which is, to some extent, of a different legal character from the principal act complained of; as where the plaintiff declares in trespass for breaking and entering his dwelling-house, and alleges, in addition, that the defendant also destroyed his goods in the house, assaulted and beat his domestics, or debauched his daughter or servant.²

AGGREGATE. (As to the distinction between corporations aggregate and corporations sole, see the title CORPORATIONS (PRIVATE).)—This term signifies a number of things united into one.³

1. **Alluvion.** (See also the title ACCRETION, Vol. I., p. 467.)—In *Municipality No. 2 v. Orleans* Cotton Press, 18 La. 122, 36 Am. Dec. 624, upon the question of the right to alluvion, the Supreme Court laid stress upon the meaning of the term *ager* as used in the Roman codes defining this right. The court said: "The Roman legislator, instead of giving the more exact and scientific definition of our modern codes, announces with oracular brevity a great rule of natural equity: '*Præterea, quod per alluvionem agro tuo flumen adjecit jure gentium tibi acquiritur*,' which I translate as follows: 'Moreover, whatever the river has added to your land becomes yours by the law of nature (or nations).'¹ I use the English word land instead of field, because it appears to me that the word *ager* in the text is employed in its primitive sense to signify land or soil in the abstract, without regard to any idea of property or to any particular form or size, or shape, precisely as it is in the Greek, from which it is derived (*agros*), and as it is in the compounds into which it enters both in Latin and several modern languages, such as *agricultura*, *agricola*, *agrarius*, and *agrimensor*. It will not be pretended that agriculture is confined in any language to the culture of a field without a house or other building upon it, as the word *ager* signified

according to Rodrigues and even the Roman Digest. The language itself furnishes internal evidence that such was its primitive meaning, for the earliest as well as the most useful of human arts, that which in a great measure feeds and clothes the great family of man, derives its name from that word in combination with another which signifies to cultivate. Again, alluvion is a right founded on natural law, in which the maxim certainly applies with all its force, that where the reason is the same, the law is the same; and would that law distinguish between two contiguous estates or tracts of land fronting on a watercourse, and equally liable to be wasted by its encroachments—deny to that which should have a building upon it the natural chances of accretion, while it gives it to the other? I think not, any more than agriculture should be taken to mean the tilling of a field on which no edifice exists. That the word *ager* was sometimes employed to signify something different there is no doubt, and so is 'land' in English; its primitive signification is soil, ground, but it sometimes means a country or territory, as 'the land of my fathers,' 'the land of Canaan.'²

2. *Hathaway v. Rice*, 19 Vt. 107.

3. **Aggregate Payments.**—A city charter provided that every ordinance requiring work to

AGGREGATION. (See also the title **PATENT LAW**.)—An aggregation is thus distinguished from a patentable combination: “A combination of well-known separate elements, each of which, when combined, operates separately and in its old way, and in which no new result is produced which cannot be assigned to the independent action of one or the other of the separate elements, is an aggregation of parts merely, and is not patentable; but if to adapt the several elements to each other, in order to effect their coöperation in one organization, demands the use of means without the range of ordinary mechanical skill, then the invention of such means to effect the mutual arrangement of the parts would be patentable. The parts need not act simultaneously, if they act unitedly to produce a common result. It is sufficient if all the devices coöperate with respect to the work to be done and in furtherance thereof, although each device may perform its own particular function only.”¹

AGGRIEVED.—As to person or party aggrieved, see 2 **ENCYCLOPÆDIA OF PLEADING AND PRACTICE**, p. 167; and see this work, **PERSON AGGRIEVED**.

be done “shall contain a specific appropriation from the proper revenue or fund, based upon an estimate of cost, to be indorsed by the engineer on said ordinance, for the whole of the cost of each street, part of street, or other object, respectively; and every contract shall contain a clause to the effect that it is subject to the provisions of the charter that the *aggregate* payments thereon shall be limited by the amount of such work, specific appropriation, etc.” It was contended that *aggregate* payments meant the amount to be paid for the whole work, and not the amount paid by the city alone. But it was held that the *aggregate* payments applied only to payments made by the city treasurer. *Seibert v. Cavender*, 3 Mo. App. 423. The court said: “What, then, is meant by an appropriation for the whole of the cost of the work? Clearly not an appropriation to cover the macadamizing and other items for which the city is not permitted to pay. This would leave nothing to be paid for by the property-owners, and would be in direct violation of the charter. We are, therefore, compelled to interpret the expression ‘whole cost’ as meaning the whole cost of what is to be paid for out of the city treasury, and as not including anything more. The words ‘*aggregate* payments,’ in the next sentence, have, manifestly, the same limit of application. It might be argued that the ‘*aggregate* payments on the contract’ would necessarily include the sums paid to the contractor by the property-owners. But these *aggregate* payments, it is commanded, must not exceed ‘the amount of such specific appropriation.’ Hence it is impossible to suppose that the words, although capable of a larger signification, are here used with reference to anything more than the *aggregate* payments on contract, to be made from the city treasury. We thus perceive that in all these provisions the

mind of the law-maker was occupied with the subjects of expenditures, appropriations, and estimates, as they might affect the municipal finances, and not in any other relation. The ‘specific appropriation for the whole of the cost,’ etc., thus understood, being based on the engineer’s estimate, the latter cannot be even inferentially required to cover any greater extent.”

1. *Standard Oil Co. v. Southern Pac. Co.*, 7 U. S. App. 649. See also *Hailes v. Van Wormer*, 20 Wall. (U. S.) 353; *Reckendorfer v. Faber*, 92 U. S. 357; *Pickering v. McCullough*, 104 U. S. 318.

In *Hailes v. Van Wormer*, 20 Wall. (U. S.) 368, Mr. Justice Strong said: “All the devices of which the alleged combination is made are confessedly old. No claim is made for any one of them singly, as an independent invention. It must be conceded that a new combination, if it produces new and useful results, is patentable, though all the constituents of the combination were well known and in common use before the combination was made. But the results must be a product of the combination, and not a mere *aggregate* of several results, each the complete product of one of the combined elements. Combined results are not necessarily a novel result, nor are they an old result obtained in a new and improved manner. Merely bringing old devices into juxtaposition, and then allowing each to work out its own effect, without the production of something novel, is not invention.”

In *Reckendorfer v. Faber*, 92 U. S. 357, Mr. Justice Hunt said: “The combination, to be patentable, must produce a different force or effect, or result in the combined forces or processes, from that given by their separate parts. There must be a new result produced by their union; if not so, it is only an *aggregation* of separate elements.”

AGISTMENT.

BY JOSEPH R. LONG.

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For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the titles: ANIMALS; BAILMENT; CRUELTY TO ANIMALS; FENCES; INJURIES TO ANIMALS; LIENS; LIVERY-STABLE KEEPERS.

I. DEFINITION AND NATURE—Definition.—Agistment is the taking of another person's cattle into one's own grounds to be fed, for a consideration to be paid by the owner.¹ It follows that an agistor is one who thus takes in horses and other animals to pasture at certain rates.²

Nature.—Agistment is a bailment for the mutual benefit of bailor and bailee, and is subject to the same general principles, as to rights and liabilities, as that class of bailments generally.³ The use of a horse for its keep has been held to be a sufficient consideration to support such a bailment.⁴

1. **Definition**.—Bouv. Law. Dict.; Williams v. Miller, 68 Cal. 290.

2. Bouv. Law Dict.; Schoul, on Bailm. & Car., § 96; Auld v. Travis (Colo. 1895), 39 Pac. Rep. 357; Bass v. Pierce, 16 Barb. (N. Y.) 595; Atwater v. Lowe, 39 Hun (N. Y.) 150.

3. 2 Story on Contracts, § 898; Colton v. Wise, 7 Ill. App. 395; Swann v. Brown, 6 Jones (N. Car.) 150, 72 Am. Dec. 568; Phelps v. Paris, 39 Vt. 511; Sargent v. Slack, 47 Vt. 674, 19 Am. Rep. 136.

4. **The Use of a Horse for Its Keep**.—Where the owner of a horse, having no use for it, in

order to avoid the expense of keeping, requested the defendant to keep the horse through the winter and do his work with it in consideration for its keep, it was held that such a transaction was not a gratuitous loan requiring extraordinary care on the part of the defendant, but a contract for the mutual benefit of both parties and requiring only ordinary care. Chamberlain v. Cobb, 32 Iowa 161.

Where the owner placed a horse in possession of the defendant to be worked for its keep, and to do the plowing and milling for the owner and be subject to the latter's

II. DUTIES AND LIABILITIES OF AGISTOR—1. To Owner of Agisted Animals—

a. DUTY TO TAKE ORDINARY OR REASONABLE CARE.—An agistor is not, like an innkeeper or carrier, an insurer of the safety of cattle intrusted to him, but he is bound to exercise ordinary and reasonable care, and if they are killed or injured through negligence on his part, he will be held responsible.¹ He must exercise such care as a man of ordinary prudence would use under the same circumstances towards his own property.²

Amount of Compensation Immaterial.—In the absence of any special contract, the price to be paid is immaterial in determining the degree of care to be used, but in all cases the bailee must exercise reasonable care; and if no price is fixed, the law will imply that he shall receive a reasonable compensation.³

use, it was held that this was a contract of bailment. *Maxwell v. Houston*, 67 N. Car. 305.

An Apparent Exception occurs in the case of *Bennett v. O'Brien*, 37 Ill. 250, where the contract was essentially a loan, and not a contract for pasturage. In this case the plaintiff let the defendant have the use of his horse without compensation. After a drive of eighteen miles, the horse sickened and died. The defendant was held responsible as not having exercised the extraordinary care required of a gratuitous bailee. Lawrence, J., in delivering the opinion of the court, said: "In regard to the character of the bailment, it may be remarked that the fact of the plaintiff being saved the keeping of his horse by loaning him to the defendant, although to that extent the loan may be considered an advantage to him, does not take from it the character of a gratuitous bailment. Such incidental advantage is not the compensation necessary to make the bailment one of hire. The loan of the use of domestic animals necessarily involves their keeping. He who borrows the horse of another for a week's journey must not only incur the expense of feeding him, but he must take the responsibilities of a gratuitous bailee." See also *Howard v. Babcock*, 21 Ill. 265; *Phillips v. Coudon*, 14 Ill. 84.

Keeping a Cow for Her Milk.—Under the English Act (46 & 47 Vict., c. 61, § 45) restricting the right of the landlord to distrain cattle in possession of a tenant who is agisting them at a "fair price" on the leased premises, it was held that an agreement by which a tenant was to keep a cow for her milk was an agistment within the meaning of this act. *London, etc., Bank v. Belton*, 15 Q. B. Div. 457.

Increase of Cattle.—Where a person delivers cattle to another to be returned within one year, with the natural increase, and compensation for such as were lost, this is a letting for a valuable consideration, the promise to deliver increase being a consideration for the use. *Putnam v. Wyley*, 8 Johns. (N. Y.) 432, 5 Am. Dec. 346.

An agistor who takes a mare to pasture in consideration of her services is not entitled to her increase. *Allen v. Allen*, 2 P. & W. (Pa.) 166.

1. Agistors must Exercise Ordinary and Reasonable Care—England.—*Broadwater v. Blot*, Holt 547; *Smith v. Cook*, 1 Q. B. Div. 79; *Searle v. Laverick*, L. R., 9 Q. B. 122.

Illinois.—*Colton v. Wise*, 7 Ill. App. 395; *Race v. Hansen*, 12 Ill. App. 605; *Umlauf v. Bassett*, 38 Ill. 96; *Halty v. Markel*, 44 Ill. 225; *Mansfield v. Cole*, 61 Ill. 191, 92 Am. Dec. 182; *Union Stock Yard, etc., Co. v. Mallony* (Ill. 1895), 41 N. E. Rep. 888.

Indiana.—*Bunnell v. Davisson*, 85 Ind. 557.
Massachusetts.—*Wood v. Remick*, 143 Mass. 453.

Michigan.—*Dennis v. Huyck*, 48 Mich. 622, 42 Am. Rep. 479.

Missouri.—*Rey v. Toney*, 24 Mo. 600, 69 Am. Dec. 444; *Winston v. Taylor*, 28 Mo. 82, 75 Am. Dec. 112; *McCarthy v. Wolfe*, 40 Mo. 520; *Cummings v. Mastin*, 43 Mo. App. 558.

Nebraska.—*Calland v. Nichols*, 30 Neb. 532.
New Hampshire.—*Sinclair v. Pearson*, 7 N. H. 219.

Texas.—*Brush v. Clarendon Land, etc., Co.*, 2 Tex. Civ. App. 188.

Vermont.—*Eastman v. Patterson*, 38 Vt. 146; *Malaney v. Taft*, 60 Vt. 571, 6 Am. St. Rep. 135. See also *O'Keefe v. Talbot*, 84 Iowa 233; *Auld v. Travis* (Colo. 1895), 39 Mo. App. 357.

2. Must Exercise Same Care as towards His Own Property.—*Cloyd v. Steiger*, 38 Ill. App. 107, 139 Ill. 41; *Maynard v. Buck*, 100 Mass. 40; *Rey v. Toney*, 24 Mo. 600, 69 Am. Dec. 444; *McCarthy v. Wolfe*, 40 Mo. 520; *Swann v. Brown*, 6 Johns. (N. Car.) 150, 72 Am. Dec. 568; *Morgan v. Crocker*, 62 N. Y. 626; *Gibbs v. Coykendall*, 39 Hun (N. Y.) 140; *Murray v. Rhodes* (Pa. C. Pl.), 3 Lack. Jur. 123; *Phelps v. Paris*, 39 Vt. 511; *Sargent v. Slack*, 47 Vt. 674, 19 Am. Rep. 136. See also *Moore v. Mobile*, 1 Stew. (Ala.) 283; *Francis v. Shrader*, 67 Ill. 272; *Wolscheid v. Thome*, 76 Mich. 265.

Responsibility for Skill.—By the Roman and common law an agistor was responsible for reasonable skill as well as reasonable diligence, and ignorance in his business was construed as negligence. *Story Bailm.*, § 443; *Dig.*, lib. 19, tit. 2, l. 1, 9, § 5; *Pothier Pand.*, lib. 19, tit. 2, note 29.

3. Amount of Compensation Immaterial in Determining Degree of Care.—*Maynard v. Buck*, 100 Mass. 40; *Phelps v. Paris*, 39 Vt. 511.

"Breachy" Horse.—Where the owner delivered a horse to an agistor to be pastured, and the horse broke out of the pasture and strayed away and was lost, the evidence showing that the horse was "breachy," and that this fact was known to the owner, it was held that, in the absence of any special agreement, the agistor was bound to use only ordinary care, and the

b. LIABILITY FOR LOSS OR INJURY OF STOCK—(1) In General—Agistor Liable Only when Negligent.—An agistor is liable for injuries that may occur to animals in his charge only when due to negligence on his part, and he is not answerable when the injuries result from the wantonness or mischief of others.¹ For instance, he would be liable for turning a colt into a field to which a vicious bull has access, although he is unaware that the bull is of a vicious disposition;² or where he imprudently allows strangers to enter his stable at night, so that the horses escape and are lost;³ or if he leaves his gates open or fences down, and in consequence of such neglect the cattle stray away and are lost or stolen.⁴

Negligence of Servants.—An agistor is bound to employ reliable servants, and will be held responsible for the results of their negligence and carelessness

owner, knowing the disposition of his horse, ought to have contracted for extraordinary care. *Mansfield v. Cole*, 61 Ill. 191.

Special Contract Construed as Requiring Only Ordinary Care.—A contract by the defendant to keep the plaintiff's stock "as well as he could, considering the hay and the chance," requires only ordinary care on the part of the defendant. *Eastman v. Patterson*, 38 Vt. 146. Where the defendant contracted to take "good care" of plaintiff's mare and colt intrusted to him, and return them in good condition, it was held that this was a contract for only ordinary care. *Ransom v. Getty*, 37 Kan. 75.

Agistor's Duty where the Particulars of Care are Defined by Contract.—If it is explicitly agreed just what the agistor shall do in taking care of the cattle put in his charge, as that he shall feed them on a particular kind of food, keep them in special shelter, etc., the agistor must follow the express stipulations in these respects; and if by reason of such adherence to contract the cattle are injured, the agistor will not be responsible for the consequences. *Bunnell v. Davison*, 85 Ind. 557.

1. Agistor Liable Only when Negligent.—Story on Bailments, § 443; *Hanover on Law of Horses*, §§ 417-420; *Broadwater v. Blot*, Holt 547; *Morgan v. Crocker*, 62 N. Y. 626; *Halty v. Markel*, 44 Ill. 225, 92 Am. Dec. 182; *O'Keefe v. Talbot*, 84 Iowa 233; *Ransom v. Getty*, 37 Kan. 75; *Maynard v. Buck*, 100 Mass. 40; *Conrad v. Hildebrand*, 69 Wis. 396. See also *Phillips v. Coudon*, 14 Ill. 84; *Conwell v. Smith*, 8 Ind. 530; *Mackenzie v. Cox*, 9 C. & P. 632.

Agistor Liable for Damage Remotely Caused by Him.—The agistor is liable, even though the injury be only remotely caused by his conduct, where this amounts to a breach of contract. Thus, where an agistor who undertakes to stable a horse turns him out of doors, he may be held liable for damages if the horse catches cold. *McMahon v. Field*, 7 Q. B. Div. 591.

Working Sick Horse.—The plaintiff hired the defendant to pasture his horse. The horse was in sound condition when received by the defendant, but became sick with distemper, and while in that condition was worked by the defendant, being much injured thereby. The defendant was held liable for the loss resulting from such misuse. *Conrad v. Hildebrand*, 69 Wis. 396.

Damage Caused by Stress of Weather.—An agistor is not liable for the loss occasioned by the death of cattle from stress of weather, when he has been guilty of no negligence, and has bestowed on them such care as a reasonable person would bestow on his own cattle under the same circumstances. *Brush v. Clarendon Land, etc., Co.*, 2 Tex. Civ. App. 188; *O'Keefe v. Talbot*, 84 Iowa 233.

Where an Agisted Mare Escaped from the Pasture and was killed, no negligence being shown, it was held that the agistor was not responsible. *Umlauf v. Bassett*, 38 Ill. 96.

Conversion by Bailee.—A received a horse of B to board. Contrary to the instructions of the owner, A used the horse in his own business, and the horse was foundered. It was held that A was liable for conversion of the horse. *Collins v. Bennett*, 46 N. Y. 490.

Wrongful Sale by Bailee.—A delivered his cow to B to keep, under an agreement that the latter should pay himself for her keep by the milk, and if at any time within four months he should pay thirty-five dollars for the cow she was to belong to him; otherwise, she was to be returned to the owner in good condition. B sold the cow to C, who bought in good faith, supposing B to be the owner. It was held that A could recover in trover from C. *Hart v. Carpenter*, 24 Conn. 426.

Where the Owner has Parted with Title, the agistor is not liable to him for a subsequent wrongful disposal of the animals in his care. *Union Stock Yards, etc., Co. v. Mallory*, (Ill. 1895), 41 N. E. Rep. 888.

2. Smith v. Cook, 1 Q. B. Div. 79.

3. Swann v. Brown, 6 Jones (N. Car.) 150, 72 Am. Dec. 568. In this case the plaintiff delivered his horse to the defendant to be kept in his stable for the night. In the stable were some horses belonging to a certain stagecoach, which were in charge of the driver. During the night the driver removed the stage horses, and in the morning it was found that the horse of the plaintiff had broken out of his stall and escaped, in consequence of which he was killed on a railroad to which he had strayed. It was held that the defendant was guilty of negligence in not having a servant in the stable to see that the door was kept properly closed.

4. Leaving Gates Open.—Story on Bailm., § 443; *Jones on Bailm.*, 92; 1 Bell Com., § 394 (4th ed.), p. 458, 5th ed.; *Broadwater v. Blot*, Holt 547; *Bass v. Pierce*, 16 Barb. (N. Y.) 595.

while in his service. His liability extends to all acts of his servants when done in the course of their employment, or in obedience to his instructions;¹ and he will be liable for all their acts done within the scope of their employment, even though they be done without his knowledge and authority, and contrary to his direction.²

(2) *Warranty of Pasture—Diseases Contracted—Agistor must Provide Suitable Pasture.*—It is implied in the contract for agistment that the cattle shall be kept in a pasture of such a character that they shall not be exposed to the danger of contracting disease, either from the insufficiency or unwholesomeness of the food supplied, or by infection from diseased cattle kept in the same inclosure. If the cattle delivered to an agistor to pasture, sicken or die from improper food, or exposure to disease, he will be responsible to the owner for the damages.³

1. *Agistor Liable for Negligence of Servants.*—Story on Bailm., §§ 400, 403; Schoul. on Bailm. & Car., §§ 108, 145, 147.

A agreed to pasture a number of colts for B, saying that he would build a fence around the pasture and would let B know when the fence was done. When the fence was partly done he told B that he might put the colts in the field, and that he would finish the fence that afternoon. B put the colts in the field, but the fence was not finished as promised. One of the colts was injured by jumping the fence, and subsequently died. It appeared that the colt had gotten out of the pasture, and that defendant's son and hired men were putting it back when the injury occurred. There was conflicting evidence as to whether A's son was dogging the colt at the time, thus causing the injury. The court decided that A was responsible, saying that while the master is not liable for wilful and malicious injuries done by his servants, he is bound to employ careful and trustworthy servants, and is responsible for their careless or negligent acts while in the course of their employment. *Halcy v. Markel*, 44 Ill. 225, 92 Am. Dec. 182.

In *Sinclair v. Pearson*, 7 N. H. 219, the plaintiff delivered his horse to the defendant to be safely kept and boarded. While in the custody of the defendant, the horse was carelessly ridden by defendant's servant so that it ran against a horse and chaise in the highway and was killed. It appeared that the servant was acting in the course of his master's business, and the death of the horse resulted from his carelessness and mismanagement while so engaged. The master was held responsible, although the servant was not acting in pursuance of any express directions from him.

2. *Agistor Liable for All Acts of Servants within Scope of Their Employment.*—Story on Agency, §§ 452, 453 and notes; Story on Bailm., § 402, notes; *Bileu v. Paisley*, 18 Oregon 47. See also *Bard v. Yohn*, 26 Pa. St. 482; *Philadelphia, etc., R. Co. v. Derby*, 14 How. (U. S.) 468.

3. *Agistor must Provide Suitable Pasture.*—1 Bell Comm. 458; *Gibbs v. Coykendall*, 39 Hun (N. Y.) 140; *Cloyd v. Steiger*, 139 Ill. 41, 38 Ill. App. 107; *McAuley v. Harris*, 71 Tex. 631. See also *O'Neal v. Knippa* (Tex. 1892), 19 S. W. Rep. 1020.

Where, through the negligence of the agistor, sheep were permitted to escape into an

adjoining pasture, where they became diseased from contact with other sheep, it was held that the agistor was liable. *Sargent v. Slack*, 47 Vt. 674, 19 Am. Rep. 136.

Defendant agreed to agist plaintiff's cattle, feeding them in winter on hay, straw, and stalk-fields, and in summer on corn, so that they would increase in weight on an average of four hundred and fifty pounds each by a certain time. A large number of the cattle died during the winter, and it appeared that the cattle could not be wintered on the food contracted for. It was agreed that they should be fed on corn, and the defendant should be released from the contract to increase the weight as originally agreed. It was held that the giving of better food was a sufficient consideration to establish the new contract, relieving the defendant from the obligation to increase the weight of the cattle according to the original agreement. *Teal v. Bilby*, 123 U. S. 572.

Special Contract as to Number of Cattle and Time of Pasturage.—A contracted with B to pasture on B's land for a certain price per head, "at his own risk and cost for herding, etc., all the cattle it should be capable of grazing, * * * and in no case less than three thousand head." B agreed to "agist and pasture" the cattle on these terms. About seven hundred cattle were pastured on the land, and paid for at the agreed rate. The pasture became insufficient to provide food for any more, and A refused to put the other cattle on the land. B brought an action to recover the balance claimed for the remainder of the three thousand head, and insisted that the contract was not one of agistment, but in effect a lease of his land, the money to be paid being rent therefor; and that A could not relieve himself from paying the stipulated rent because he was unable to pasture as many cattle, or for so long a time, as he had supposed when the contract was made. The court decided otherwise, and held that the contract was one of agistment, and A was not liable for the balance. *Williams v. Miller*, 68 Cal. 290. Compare *Howard v. Throckmorton*, 59 Cal. 79.

C agreed to pasture about two thousand cattle for M at a certain rate per head, for a term not longer than eight months, and to give all possible protection for the safety and benefit of the cattle, and M reserved the right

Agistor must Inform Customer of Danger of Contagion.—It is the duty of an agistor to know the condition of the cattle in his pasture, and if he knows that any of them are affected with a contagious disease, and does not so inform a customer, whose horse contracts the disease and dies, he will be held responsible for the loss.¹

(3) **Duty to Maintain Good Fences—Agistor must Keep Pasture Inclosed.**—A person who takes cattle to pasture must keep his ground properly inclosed, and free from dangerous places and obstacles. If the fence is in bad condition at the time he receives the cattle, he should repair it at once. He is bound to put and keep it in order, even though the owner of the cattle sees that the fence is bad; for the owner has a right to expect that this will be done, and need not make it an express condition of the contract, the condition being implied in the contract for agistment. Failure to exercise ordinary care in maintaining reasonably good fences to keep the stock in, would render the agistor liable for the immediate damage occasioned by the escape of the stock by reason of such negligence.²

Failure of Adjoining Owner to Keep Up Fence.—The agistor is not excused by the failure of the adjoining owner to properly maintain his portion of the division fence.³

to withdraw the cattle at any time when they might be liable to loss on account of lack of grass and water, and to pay at the rate agreed upon for the time already expired. M claimed that the supply of grass and water became exhausted before the end of eight months, so that a number of cattle died from starvation, and the remainder became poor and unfit for market, he being also put to the expense of moving them before he was prepared to do so. It appeared that the pasture was of sufficient area and open to the inspection of both parties, and all the time the cattle were in the pasture it contained both grass and water. It was held that the contract did not bind C to furnish pasturage for the full eight months, or render him responsible for the continuance of the supply, but that the owner expressly reserved to himself the right of determining as to these things, and of protecting himself from loss by withdrawing the cattle at any time. M was required to pay for the time the cattle were in the pasture, without any allowance for his alleged loss. *Menly v. Corkill*, 75 Tex. 599.

1. Agistor must Inform Customer of Danger of Contagion.—*Costello v. Ten Eyck*, 86 Mich. 348. In this case the defendant, a pasturer of horses, received the plaintiff's mare to pasture. The mare remained in the pasture about three weeks, when the plaintiff learned that the horses in the pasture had distemper. It appeared that certain persons having horses in the pasture had removed them, by reason of the prevalence of this disease, and that the defendant was acquainted with this fact when he took the plaintiff's mare to pasture, but gave no notice of it to the plaintiff. The plaintiff removed the mare on learning of the existence of the distemper, but she soon afterwards died in consequence of the disease. It was held that the plaintiff could recover. See also *Eaton v. Winnie*, 20 Mich. 156, 4 Am. Rep. 377.

Texan Fever.—In *Gibbs v. Coykendall*, 39 Hun (N. Y.) 140, affirmed in 116 N. Y. 666, an action was brought to recover for the loss

of cattle which the plaintiff had hired the defendant to pasture upon his farm. The cattle were sound and in good condition when turned into the pasture, but shortly afterwards became sick, and died of Texan fever, contracted from poisonous and infectious matter left in the field by Texan cattle which the defendant had previously pastured therein, of which fact the plaintiff was ignorant. It was held that as the jury found that the defendant was not aware, at the time of receiving the plaintiff's cattle, that there was danger of native cattle contracting the disease by being pastured upon fields previously occupied by Texan cattle, he was not liable for the damages sustained by the plaintiff, and that the liability of native cattle to contract this disease, under such circumstances, was not sufficiently known among the farmers of New York to charge the defendant with knowledge of that fact.

2. Agistor must Maintain Good Fences.—*Broadwater v. Blot*, Holt 547; *Halty v. Markel*, 44 Ill. 228, 92 Am. Dec. 182; *Cecil v. Preuch*, 4 Martin N. S. (La.) 256, 16 Am. Dec. 171; *Gibbs v. Coykendall*, 39 Hun (N. Y.) 142; *Tewksbury v. Bucklin*, 7 N. H. 518, Pub. Stat. 1891, c. 143, §§ 15-16; *McAuley v. Harris*, 71 Tex. 631; *Sargent v. Slack*, 47 Vt. 674, 19 Am. Rep. 136.

Duty to Provide Safe Housing.—It is the duty of one to whom sheep are let for a rental payable in wool and a share of their increase, under a contract calling for their return, unless they died without his negligence, to provide such sheep sheds as an ordinarily prudent farmer would keep his own sheep in; and where the sheep die from the effects of the damp and wet condition of the sheds into which they were put, through the bailee's negligence, he is liable. *Wolsheid v. Thome*, 76 Mich. 265.

3. Lyons v. Merrick, 105 Mass. 71; *Sargent v. Slack*, 47 Vt. 674, 19 Am. Rep. 136.

As to Injuries of Cattle by Barbed-wire Fences, see *Pim v. Griffith*, 3 Pa. Co. Ct. Rep. 177.

(4) *Injuries by Other Animals*—Agistor Responsible for Such Injuries when Negligent.—An agistor will be held responsible for injuries inflicted by other animals in his pasture, upon cattle intrusted to him, where such injuries are the result of negligence on his part.

When Knowledge of Dangerous Disposition Necessary.—Whether knowledge of a vicious disposition in an animal is necessary to render the agistor liable for injuries resulting therefrom, depends upon whether the animal is one usually dangerous or not. In case of animals not generally mischievous or dangerous, knowledge of such a disposition must be shown to render the agistor liable; but where the animal belongs to a class usually vicious, the *scienter* need not be proved, and the keeper will be presumed to be guilty of negligence.¹ Thus, where an agistor knows of the vicious disposition of a horse, he will be liable for injuries inflicted by it upon other animals in the pasture;² but where a colt was killed by a vicious bull which had access to the pasture, the agistor was presumed negligent, although he was unaware that the bull was dangerous.³

(5) *Negligence—Burden of Proof.*—In an action to recover damages for loss or injury to animals while in the care of an agistor, it seems to be the better doctrine that the burden of proof is on the owner to show that such loss or injury was caused by the negligence of the agistor in caring for the animals.⁴

1. 1 Thomp. on Negligence, pp. 201, 204, 208; Smith v. Cook, 1 Q. B. Div. 79; Schroeder v. Faires, 49 Mo. App. 470. See also the titles ANIMALS; INJURIES TO ANIMALS.

2. *Agistor Liable when Aware of Danger of Injury.*—A delivered a yearling colt to B to pasture, but the colt became sick with distemper, and B got A to take it away with the understanding that it was to be returned. After several months, he told A to turn the colt back into the pasture, which he did. Unknown to A, B had then in the pasture a dangerous and vicious horse, which kicked the colt in the leg, breaking it, so that it was necessary to kill the colt. It appeared that B knew of the vicious disposition of the horse. It was held that B was liable for the death of the colt. Schroeder v. Faires, 49 Mo. App. 470.

3. *Knowledge of Vicious Disposition Not Necessary in Case of Animals Generally Dangerous.*—The plaintiff sent a colt to be pastured by the defendant. The colt was placed in a field with several heifers, and some days afterwards was found dead, apparently gored to death by a bull. A bull was kept on land adjoining the pasture, there being only a shallow ditch between the two fields. The evidence showed that the bull had been several times found on the defendant's land, but it did not appear that the defendant knew that the bull was of a vicious disposition. It was held that the plaintiff could recover for the loss of the colt. Smith v. Cook, 1 Q. B. Div. 79.

4. *General Rule—Burden of Proof on Owner to Show Negligence.*—Story on Bailm., §§ 213-278-454; 2 Story on Contracts, § 902, 5 Am. L. Rev., p. 224; Broadwater v. Blot, Holt 547; Wood v. Remick, 143 Mass. 453; Maynard v. Buck, 100 Mass. 46; Dennis v. Huyck, 48 Mich. 622, 42 Am. Rep. 479; Rey v. Toney, 24 Mo. 600, 69 Am. Dec. 444; McCarthy v. Wolfe, 40 Mo. 520; Calland v. Nichols, 30 Neb. 532; Kemp v. Phillips, 55 Vt. 69.

Burden of Proof Not Shifted.—In an action on the case against a bailee for negligence in ill-

treating and improperly caring for the plaintiffs' hired horse, the plaintiffs conceded that the burden of proof in the first instance was on them to show that the horse was injured through the negligence of the defendant; but they claimed that they discharged that duty by showing that the horse was delivered to the defendant in sound condition, and returned injured in a way that does not usually occur without negligence; and that having shown this, the burden was shifted to the defendant to show that the injury was not due to his negligence. The court held that this might have been sound law, had it been the defendant's duty to return the horse in the same condition in which he received it; but his duty was performed if, during the bailment, he had exercised due care and been guilty of no neglect in his treatment of the horse. In this case he would not have been liable, although he might not have returned the horse at all. This being the measure of his duty, the burden was on the plaintiffs to show negligence, and rested on them throughout the trial. Malaney v. Taft, 60 Vt. 571, 6 Am. St. Rep. 135. Compare Collins v. Bennett, 46 N. Y. 490, cited in Leach v. French, 69 Me. 393, 31 Am. Rep. 296.

There Is, Perhaps, No Absolute Rule for determining in every case upon whom the burden of proof rests, whether upon the bailor to establish the negligence by which the property was lost, or upon the bailee to show that the loss was without any neglect on his part. Sometimes it depends on the form of the action and upon the stage of the cause upon which the question arises. In an action of trover, the plaintiff may rely on a demand, and refusal of the property, and thus put the opposite party on the defense; but in an action of assumpsit, or an action on the case founded on negligence, the plaintiff must make out a *prima facie* case as he charges it, for it is a general common-law principle that every person is presumed to do his duty until the contrary is shown (Story on Bail., §§ 213, 278,

2. To Third Persons for Damage Done by Animals—Agistor Liable when Negligent.—

An agistor is liable for all damage done to third persons by animals in his care and under his control, where such damage is occasioned by his negligence.¹

410, 454). It is also said that when the thing bailed is lost or injured, the bailee is bound to account for such loss or injury; but when this is done, the proof of negligence or want of due care is thrown on the bailor. *Per* Richardson, J., in *Winston v. Taylor*, 28 Mo. 82, 75 Am. Dec. 112. See also *Schoul. on Bailm. & Car.*, § 23; 2 *Parsons on Contracts*, 125 note, 144; *Cross v. Brown*, 41 N. H. 283; *Foot v. Storrs*, 2 Barb. (N. Y.) 326; and see generally the title **BURDEN OF PROOF**.

Duty of Bailee to Account for Change or Loss of the Thing Bailed.—If a bailee receives an animal in good condition, and returns it in an injured state, or fails to return it at all, it has been held in some cases that he must show how the change or loss occurred. *Cumins v. Wood*, 44 Ill. 416, 92 Am. Dec. 189; *Funkhouser v. Wagner*, 62 Ill. 59; *Burlingame v. Horne*, 30 Ill. App. 330. And so in cases of gratuitous bailment. *Baren v. Cain*, 15 Ill. App. 387; *Bennett v. O'Brien*, 37 Ill. 250. See also *Arnot v. Branconier*, 14 Mo. App. 431; *Cummings v. Mastin*, 43 Mo. App. 558; *Belanger v. Quiner* (Quebec), 9 R. L. 530; *S. C.* 1879.

1. Liability to Third Persons for Damage by Agisted Animals.—*Smith v. Jaques*, 6 Conn. 530; *Weide v. Thiel*, 9 Ill. App. 223; *Ward v. Brown*, 64 Ill. 307, 16 Am. Rep. 561; *Frammell v. Little*, 16 Ind. 251; *Weymouth v. Gile*, 72 Me. 446; *Sheridan v. Bean*, 8 Met. (Mass.) 284, 41 Am. Dec. 507; *Reddick v. Newburn*, 76 Mo. 423; *Tewksbury v. Bucklin*, 7 N. H. 518; *Noyes v. Colby*, 30 N. H. 143; *Rossell v. Cottom*, 31 Pa. St. 525; *Moulton v. Moore*, 56 Vt. 700.

Damage by Bull.—In case of an action for damages done by a bull in charge of a bailee, it was held that if the bailee knew all about the animal, it was his business to keep him secure, but that he was only bound to keep him in an enclosure reasonably secure for that purpose, when not interfered with by the agents of the party claiming damages. *Weide v. Thiel*, 9 Ill. App. 223.

An Agistor of Sheep was held liable for damages where the sheep, while trespassing on the plaintiff's land, communicated to his sheep a contagious disease from which many of them died. The action was for trespass for breaking the plaintiff's close, and evidence of the communication of the disease was admitted to enhance the damages. It was not necessary for the plaintiff to prove that the defendant knew that his sheep were diseased, but he might do so to increase the amount of recovery. *Barnum v. Vandusen*, 16 Conn. 200.

Stock Breaking Pasture.—A had possession and control of a pasture containing stock belonging to himself and others. The stock broke down the division fence, and entered the adjacent corn fields of B, and destroyed the corn. A was held liable for the entire damage, on the ground that the stock was ex-

clusively under his control. *Reddick v. Newburn*, 76 Mo. 423.

In an action brought to recover for damages done by a horse, which the defendant was pasturing for hire, and which escaped by his negligence into the plaintiff's field, the judge instructed the jury that the defendant was responsible, so far as the damage resulted from the horse's conducting himself as an animal ordinarily would do, and might fairly be expected to do; but so far as the damage resulted from some peculiar viciousness of the animal, he would not be responsible. *Colt, J.*, held that the defendant had no ground of exception, and said in delivering the opinion of the court: "The owner of an animal, or the person who in his place, and by contract with him, has the exclusive custody and control of it, is liable for injuries which he negligently suffers it to commit. The liability stands wholly upon the ground of actual or presumed negligence. If the injury is committed while trespassing upon the lands of others, the owner is chargeable, and is responsible for the damage which directly results therefrom as the natural and probable consequence. In other cases he may be liable, although there is no trespass, and the animal is rightfully in the place where the mischief is done, as where the injury comes from the vicious disposition or mischievous habits of the animal, of which the owner had previous actual notice; or where, without actual notice, the disposition and habits are so universal among the species that notice is presumed, as in the case of wild and savage beasts. The owner or keeper of such animals, with actual or implied notice of their character, is bound at his peril to keep them, at all times and in all places, properly secured, and is responsible to any one who, without fault on his own part, is injured by them." *Lyons v. Merrick*, 105 Mass. 71. See also *Wilkinson v. Parrott*, 32 Cal. 102; *Cook v. Morea*, 33 Ind. 497; *Marsel v. Bowman*, 62 Iowa 57; *Smith v. Montgomery*, 52 Me. 178; *Brooks v. Taylor*, 65 Mich. 208; *Marsh v. Jones*, 21 Vt. 378, 52 Am. Dec. 67.

Want of Compensation does Not Excuse Agistor.—The agistor will be held liable for damage done by cattle in his charge on the cultivated lands of another, even though he receives no compensation from the owner of the cattle for pasturing them. *Lafin v. Svoboda*, 37 Neb. 368.

Under the Fence Law the Term Owner Includes Agistor.—It has been held that the act rendering owners of cattle liable for damages done by their cattle on the fenced lands of another, apply also to all those having the care and control of the animals. *Smith v. Jaques*, 6 Conn. 530; *Barnum v. Vandusen*, 16 Conn. 200; *Sheridan v. Bean*, 8 Met. (Mass.) 284, 41 Am. Dec. 507; *Lafin v. Svoboda*, 37 Neb. 368. See also *Reddick v. Newburn*, 76 Mo. 423. See generally the title **FENCES**.

III. LIABILITY OF OWNER FOR DAMAGE DONE BY ANIMALS—1. To Agistor.—The owner of animals must notify agistors, or other persons dealing with them, of any vicious trick or habit his animals may have, or he will be responsible to such persons for any injury the animals may inflict on them in consequence of such vicious propensity.¹

2. To Third Persons—Not Liable in General.—The liability for the trespasses of animals arises not from ownership but from possession, for only the person having possession of the animals can exercise control over them, and prevent them from doing mischief. It follows that the owner of animals in charge of an agistor is not liable for their trespasses.² This seems to be the better doctrine, though some authorities give the party injured a right to proceed against either the agistor or the owner, at his election.³

1. Liability to Agistor.—*Keshan v. Gates*, 2 Thomp. & C. (N. Y.) 288; *Campbell v. Page*, 67 Barb. (N. Y.) 113. See also *Story on Bailm.*, § 391 a; *Hadley v. Cross*, 34 Vt. 586, 80 Am. Dec. 699.

Definition of Vicious Propensity.—By vicious propensity is intended a propensity to do any act that might endanger the safety of the person or property of others in a given situation, not such only as would impair the utility of the animal for the purpose for which it is kept. *Per Grover, J.*, in *Dickson v. McCoy*, 39 N. Y. 400.

The vicious habits or propensities which the owner of an animal must, when known to him, guard against, are such as are directly dangerous, such as kicking and biting in horses, hooking in horned animals, and biting in dogs. He must give notice of such vicious habits to persons dealing with the animals, when he knows that serious injury might result if the animal should take occasion to indulge them. But this duty extends only to cases where the habits are ordinarily and directly dangerous to either person or property. *Keshan v. Gates*, 2 Thomp. & C. (N. Y.) 288.

Negligence of Bailee Exonerates Owner.—The owner would not be responsible when the injury resulted from negligence on the part of the bailee himself. *Bard v. Yohn*, 26 Pa. St. 482.

2. Owner Generally Not Liable for Damages Done by Agisted Animals.—*Bac. Abr.*, Trespass, G. 2; 2 Roll. Abr. 546; *Cooley on Torts*, 340; *Weide v. Thiel*, 9 Ill. App. 223; *Ward v. Brown*, 64 Ill. 307, 16 Am. Rep. 561; *Ozburn v. Adams*, 70 Ill. 291; *Reddick v. Newburff*, 76 Mo. 423.

In an action of trespass brought against the owner of agisted cattle for breaking into the plaintiff's wheat field and damaging the wheat, it was held that the owner was not liable. *Rossell v. Cottom*, 31 Pa. St. 525. *Thompson, J.*, said in delivering the opinion of the court: "No direct authority is to be found in our own books illustrative of the case, and but few in the older books; but it is said in 1 Esp. N. P. 387, title Trespass, that 'he who has the care, custody, or possession of the cattle who do the damage is liable to this action,' and adds 'as, if agisted cattle break into another's land, the agistor is liable to the damages.' *Dawtry v. Huggins*, *Clayton* 33, *Trials per Pais* 201. * * * *Dawtry v. Huggins* is as follows: 'It was ruled upon an evidence, if A hath the custody

of the goods of B, as here it was hogs put into the defendant's yard; if these do a trespass to the land of C adjoining, A shall be punished in trespass, and this though the owner's servant did wait upon them; and here it was proved the servant of A did also wait on them and serve them, therefore they were in his special possession; and the like matter was relied on in the case of *Stephen Bateman of Wakefield* for agist cattle, if they do commit trespass, the owner of the soil where, etc., shall answer for that trespass.' *York Assizes*, 1651. * * * Neither *Dawtry v. Huggins*, nor *Bateman's Case*, *Clayton* 33, supports the doctrine that either the owner or agistor of cattle may, at the election of the injured party, be sued for the trespass of agisted cattle. They are authority to the contrary. * * * But, independently of authority, it seems clear that the case is with the plaintiff in error. * * * The point of the argument is, that either [the owner or the agistor] may be made liable in trespass for the depredations of agisted cattle. This cannot be maintained by any legal logic. The reason of liability in such cases arises out of the legal requirements to take the necessary care and control of them, so as to prevent injury, which implies not only the duty but the right of control. * * * It is not the ownership of the trespassing creature, but the possession and use, that raises the liability."

If the Owner Retains the Care and Control of his Cattle kept on the land of another, he will be liable for their trespasses; but if the owner or occupant of the land has the custody, he and not the owner of the cattle, will be liable. *Kennett v. Durgin*, 59 N. H. 560; *Tewksbury v. Bucklin*, 7 N. H. 518.

3. Both Owner and Agistor Held Liable.—*Sheridan v. Bean*, 8 Met. (Mass.) 284, 41 Am. Dec. 507. In this case it was held that the common law gave the plaintiff his election to pursue either the owner or the agistor, at his pleasure, or to seize the cattle damage feasant, but the plaintiff can have but one satisfaction. To sustain this view the court cites 2 Roll. Ab. 546; *Comyns's Dig.*, Trespass, c. 1; 20 Vin. Ab., Trespass, B. It is also claimed in opposition to *Rossell v. Cottom*, 31 Pa. St. 525, decided some years later, that *Bateman's Case* and *Dawtry v. Huggins*, *Clayton* 33, are not authority to the contrary, but that they do not touch upon the question of the owner's liability at all.

Maine.—This decision has been followed in

Qualification of General Rule.—It seems that the owner will be liable in an action on the case, if he selects a careless or irresponsible agistor, or knows, or has reason to believe, that the cattle will commit the trespass when placed in his hands.¹

IV. RIGHTS OF AGISTOR—1. Against Third Persons.—By virtue of the fact that an agistor has the custody of the animals, and is responsible to the owner for their safe-keeping, he may maintain an action of trover or trespass against a stranger for wrongfully taking or injuring them while in his possession.²

Maine, in *Weymouth v. Gile*, 72 Me. 446. Here the defendant pastured five cows on land leased by him. While under his charge they escaped from his premises, and committed the trespass complained of. The court held the agistor and the general owner of the cattle liable for the damage.

New Hampshire.—The same decision has been made in *New Hampshire*. *Blaisdell v. Stone*, 60 N. H. 507.

New York.—In *New York*, in a suit brought to recover for damage done on plaintiff's land by defendant's cattle, which were being pastured by the owner of the adjoining field, it appeared that the fence between the two fields had been divided, and the cattle came through a defect in that part of the fence which it was the duty of the agistor to repair. The court held that the defendant was liable, saying that the plaintiff could have recovered from either the agistor or the owner, but that it was no answer for the defendant to say that the plaintiff might have proceeded against another. *Stafford v. Ingersoll*, 3 Hill (N. Y.) 38. See also *Atwater v. Lowe*, 39 Hun (N. Y.) 150.

1. When Owner would Be Liable.—A agreed with the owner of cattle to pasture them for a certain sum per week, and afterwards, without the knowledge of the owner, made an arrangement with C, by which the cattle were to be placed in the field of C, adjoining A's field, the pay for pasturing to be divided between them. The cattle were first put in A's field, but the fence between the two fields was removed by A and C, and the cattle were allowed to run in both fields, and passed from C's field into that of D, through a portion of the division fence which C was bound to maintain, but which was insufficient to turn stock. While in the field of D, the cattle committed a trespass for which action was brought. The damage was done before the owner of the cattle knew that they had been turned into C's field. It was held that he was not liable for the damage, the court being of opinion that the owner might have been liable in case, had it been shown that he was negligent in selecting a reckless and irresponsible bailee, or had reason to believe that the trespass would be committed, neither of which facts appeared. *Ward v. Brown*, 64 Ill. 307, 16 Am. Rep. 561.

Where the owner of a bull left him in charge of one D, who kept him in a well-fenced pasture which was sufficient to hold him for several weeks, and through the negligence of the appellee's sons the bull escaped and gored appellee's mare, it was held on the authority of *Ward v. Brown*, 64 Ill. 307, 16 Am. Rep. 561, that the owner was not liable, there being no evidence to show that he had been neg-

ligent in selecting an irresponsible bailee, or had reason to believe that the animal would commit the trespass when placed in his care. *Weide v. Thiel*, 9 Ill. App. 223. See also *Reddick v. Newburn*, 76 Mo. 423.

Trespasses by Cattle in Possession of a Tenant.—The owner of cattle is not liable for trespasses committed by them while in the possession of a tenant to whom the owner had rented both farm and cattle, and who had the sole custody and control of them when the injury was done. The latter alone is liable. *Van Slyck v. Snell*, 6 Lans. (N. Y.) 299, *followed* in *Atwater v. Lowe*, 39 Hun (N. Y.) 150. See also *Moulton v. Moore*, 56 Vt. 700.

2. Agistor may Maintain Actions against Strangers.—*Bouv. Law Dict.*, Agistor; 9 *Bacon's Abr.*, Trespass, c. 457; 9 *Bacon's Abr.*, Trover, c. 646; *Story on Bailm.*, § 443; *Hanover on the Law of Horses*, § 416; *Mason v. Morgan*, 24 U. C. Q. B. 328; *Smith v. Jaques*, 6 Conn. 530; *New York, etc.*, R. Co. v. *Auer*, 106 Ind. 219, 55 Am. Rep. 734; *Hurd v. West*, 7 Cow. (N. Y.) 752; *Bass v. Pierce*, 16 Barb. (N. Y.) 595; *Betts v. Mouser*, *Wright* (Ohio) 745. See also *Wilbraham v. Snow*, 2 Saund. 47, note 1; *Burton v. Hughes*, 2 Bing. 173, 9 E. C. L. 368; *Sutton v. Buck*, 2 Taunt. 302; *Magee v. Toland*, 8 Port. (Ala.) 36; *Auld v. Travis* (Colo. 1895), 39 Pac. Rep. 357; *Welyt v. Indianapolis, etc.*, R. Co., 105 Ind. 55; *Poole v. Symonds*, 1 N. H. 289, 8 Am. Dec. 71.

A, having received a horse belonging to his brother to keep for the night, kept the horse in his stable for a short time, and then after dark turned it into his pasture, where he usually kept his own cattle. The next day the horse was found dead in B's field, from which A's pasture was separated by a fence which B was bound to maintain. It appeared that the fence was in bad condition, and the horse was killed in consequence of this by falling from one field into another. It was held that though A was a gratuitous bailee merely, he might recover from B the value of the horse. *Rooth v. Wilson*, 1 B. & Ald. 59.

In *Hare v. Fuller*, 7 Ala. 717, the plaintiff was bailee of hogs of which he had the care and control. Some of them broke into the grounds of the defendant, which were insecurely fenced, and they were injured by the defendant by splitting their hoofs and setting the dogs on them. It was held that the plaintiff could recover damages from the defendant.

Where A employed B to pasture his cow in the daytime, A reserving the use of her for his family, driving her from the pasture in the night and back in the morning, it was held that B was an agistor in the daytime, and could bring an action of trespass against

2. Against Owner—Right to Lien—*a.* AT COMMON LAW—(1) *No Lien in General.*—It is well settled that, independently of statute or special agreement, one who merely feeds or takes care of an animal for another, as an agistor or livery-stable keeper, has no lien on the animal for his charges.¹

(2) *Reasons for Denying Lien.*—An agistor is merely a keeper of the animal intrusted to him, and does not impart any new value to it; nor does he come within the policy of the law which gives to innkeepers and common carriers a lien for the benefit of trade, for he is not, like them, bound to receive all cattle that may be brought to him for the purpose of care and keeping, but may receive or refuse them as he sees fit. He may impose such terms and conditions as he may deem proper, and may thus acquire a lien by agreement to cover his reasonable charge.²

a stranger for taking the cow from the pasture. *Bass v. Pierce*, 16 Barb. (N. Y.) 595.

1. No Lien at Common Law—England.—*Chapman v. Allen*, Cro. Car. 271; *Yorke v. Grenaugh*, 2 Ld. Raym. 866; *Judson v. Etheridge*, 1 C. & M. 743; *Jackson v. Cummins*, 5 M. & W. 342; *Wallace v. Woodgate*, 1 C. & P. 575, 11 E. C. L. 477; *Bevan v. Waters*, 3 C. & P. 520, 14 E. C. L. 424.

Alabama.—*Hickman v. Thomas*, 16 Ala. 666.

California.—*Lewis v. Tyler*, 23 Cal. 364.

Colorado.—*Auld v. Travis* (Colo. 1895), 39 Pac. Rep. 357.

Connecticut.—*Fishell v. Morris*, 57 Conn. 547.

Georgia.—*Jackson v. Holland*, 31 Ga. 339.

Illinois.—*Millikin v. Jones*, 77 Ill. 372.

Iowa.—*McDonald v. Bennett*, 45 Iowa 456;

Munson v. Porter, 63 Iowa 453.

Kansas.—*Kelsey v. Layne*, 28 Kan. 218, 42 Am. Rep. 158.

Maine.—*Miller v. Marston*, 35 Me. 153, 56 Am. Dec. 694; *Allen v. Ham*, 63 Me. 532.

Massachusetts.—*Goodrich v. Willard*, 7 Gray (Mass.) 183; *Goell v. Morse*, 126 Mass. 480; *Vinal v. Spofford*, 139 Mass. 126.

New Hampshire.—*Cross v. Wilkins*, 43 N. H. 332.

New York.—*Grinnell v. Cook*, 3 Hill (N. Y.) 485, 38 Am. Dec. 663; *Fox v. McGregor*, 11 Barb. (N. Y.) 41; *Bass v. Pierce*, 16 Barb. (N. Y.) 595; *Bissell v. Pearce*, 28 N. Y. 252; *Jackson v. Kasseall*, 30 Hun (N. Y.) 231.

North Carolina.—*Mauney v. Ingram*, 78 N. Car. 96.

South Dakota.—*Wright v. Sherman*, 3 So. Dak. 290.

Tennessee.—*Saint v. Smith*, 1 Coldw. (Tenn.) 51; *McGhee v. Edwards*, 89 Tenn. 506. *Vermont.*—*Cummings v. Harris*, 3 Vt. 244, 23 Am. Dec. 206; *Wills v. Barrister*, 36 Vt. 220; *Ingalls v. Vance*, 61 Vt. 582.

Lien Allowed in Pennsylvania.—The Pennsylvania courts have held, in the face of the great weight of authority to the contrary, that an agistor who pastures cattle for hire has a common-law lien on the animals for their keep. *Megee v. Beirne*, 39 Pa. St. 50; *Hoover v. Epler*, 52 Pa. St. 522; *Mathias v. Sellers*, 86 Pa. St. 486, 27 Am. Rep. 723; *Yearsley v. Gray*, 140 Pa. St. 238. See remarks of Gibson, C. J., in *Steinman v. Wilkins*, 7 W. & S. (Pa.) 466, 42 Am. Dec. 254, quoted in note *infra*, this title, *Reasons for Denying Lien*.

Lien Not Created by Usage.—A lien is not created by the force of usage prevailing in particular localities, unless such usage or custom has become established, and is so general that a presumption of knowledge by the parties can be said to arise. *Saint v. Smith*, 1 Coldw. (Tenn.) 51. See generally the title USAGES AND CUSTOMS.

2. Jones on Liens, § 641; *Jackson v. Cummins*, 5 M. & W. 342; *Cross v. Wilkins*, 43 N. H. 332; *Jackson v. Kasseall*, 30 Hun (N. Y.) 231; *Wright v. Sherman*, 3 S. Dak. 290; *McGhee v. Edwards*, 87 Tenn. 506; *Cummings v. Harris*, 3 Vt. 245, 23 Am. Dec. 206; *Wills v. Barrister*, 36 Vt. 220; *Grinnell v. Cook*, 3 Hill (N. Y.) 485, 38 Am. Dec. 663. In this last case *Bronson, J.*, said in his opinion: "The right of lien has always been admitted where the party was bound by law to receive the goods, and in modern times the right has been extended so far that it may now be laid down as a general rule, that every bailee for hire who by his labor and skill has imparted an additional value to the goods, has a lien upon the property for his reasonable charges. This includes all such mechanics, tradesmen and laborers as receive property for the purpose of repairing, or otherwise improving its condition. But the rule does not extend to a livery-stable keeper, for the reason that he only keeps the horse, without imparting any new value to the animal. And besides, he does not come within the policy of the law, which gives the lien for the benefit of trade. Upon the same reasons the agistor or farmer, who pastures the horses or cattle of another, has no lien for their keeping, unless there be a special agreement to that effect."

The Usual Cases in Which the Law Creates a Lien are where the person performing services would have no other sure remedy, as a blacksmith shoeing a horse for a stranger, or a watchmaker cleaning a watch for a stranger, or an innkeeper furnishing entertainment for travelers; and where the persons applying for these services are not strangers, the usage of their deal may be such that the law will create a lien. For instance, the course of their deal may be that payment for the services is always made before the property is taken away. But where the business is done under a personal contract, the law implies no lien; but the parties may so form their contract as to create a lien, which the law will enforce. Here was a personal contract, and no lien was

(3) *Lien for Special Services.*—Where the person intrusted with a horse has to perform some special service, as breaking or shoeing a horse, training a horse for a race-course, curing a sick horse, etc., the better doctrine seems to be that he will be entitled to a lien for such special service.¹ But there would be no lien where such service was merely incidental service rendered in the usual course of keeping.²

(4) *Lien by Agreement.*—The agistor may, by special contract, acquire a lien on animals for their keep;³ and if the owner fraudulently takes them away for the purpose of destroying the lien, the agistor may retake the animals, and the lien is not lost by such fraudulent removal.⁴

b. LIENS BY STATUTE.—In most of the states statutes have been enacted giving to farmers, ranchmen, livery-stable keepers, agistors, and others to whom horses, cattle, sheep, etc., have been intrusted for purposes of feeding and pasture, a lien on such animals for pasturing and board, and authorizing

created by the terms of it. Of course, the plaintiff was entitled to her sheep, and the defendant had a right of action to recover his pay for keeping them, but the defendant had no lien upon the sheep for his pay for such keeping. *Per Hutchinson, J., in Cummings v. Harris, 3 Vt. 245, 23 Am. Dec. 206.*

Doctrine Denying Lien Questioned in Pennsylvania.—In a general review of the doctrine of liens in *Steinman v. Wilkins, 7 W. & S. (Pa.) 466, 42 Am. Dec. 254, Gibson, C. J.,* said in his opinion: "From the case of a chattel bailed to acquire additional value by the labor or skill of an artisan, the doctrine of specific lien has been extended to almost every case in which the thing has been improved by the agency of the bailee. Yet in the recent case of *Jackson v. Cummins, 5 M. & W. 342,* it was held to extend no further than to cases in which the bailee has directly conferred additional value by labor or skill, or indirectly by the instrumentality of an agent under his control; in supposed accordance with which it was ruled that the agistment of cattle gives no lien. But it is difficult to find an argument for the position that a man who fits an ox for the shambles, by fattening it with his provender, does not increase its intrinsic value by means exclusively within his control. There are certainly cases of a different stamp, particularly *Bevan v. Waters, 3 C. & P. 520, 14 E. C. L. 424,* in which a trainer was allowed to retain for fitting a race-horse for the turf. In *Jackson v. Cummins, 5 M. & W. 342,* we see the expiring embers of the primitive notion that the basis of the lien is intrinsic improvement of the thing by mechanical means; but if we get away from it at all, what matters it how the additional value has been imparted, or whether it has been attended with an alteration in the condition of the thing? It may be said that the condition of a fat ox is not a permanent one; but neither is the increased value of a mare in foal permanent; yet in *Scarf v. Morgan, 4 M. & W. 270,* the owner of a stallion was allowed to have a lien for the price of the leap. The truth is, the modern decisions evince a struggle of the judicial mind to escape from the narrow confines of the earlier precedents, but without having as yet established principles adapted to the current transactions and convenience of the world.

* * * Chief Justice Best declared, in *Jacobs v. Latour, 5 Bing. 130, 15 E. C. L. 388,* that the doctrine of lien is so just between debtor and creditor that it cannot be too much favored. In *Kirkman v. Shawcross, 6 T. R. 17,* Lord Kenyon said it had been the wish of the courts in all cases and at all times to carry the lien of the common law as far as possible; and that Lord Mansfield also thought that justice required it, though he submitted when rigid rules of law were against it."

This opinion was quoted with approval in *Hoover v. Epler, 52 Pa. St. 522.* See also *Kelsey v. Layne, 28 Kan. 218, 42 Am. Rep. 158; Lord v. Jones, 24 Me. 439, 41 Am. Dec. 391; Harris v. Woodruff, 124 Mass. 205, 26 Am. Rep. 658.*

1. Lien Allowed for Special Services.—Story on Bailments, § 289; 2 Kent Com. 634-635; *Bevan v. Waters, 3 C. & P. 520, 14 E. C. L. 424, M. & M. 235, 22 E. C. L. 301; Scarfe v. Morgan, 4 M. & W. 270; Forth v. Simpson, 13 Q. B. 680, 66 E. C. L. 680; Lord v. Jones, 24 Me. 439, 41 Am. Dec. 391; Mason v. Thompson, 9 Pick. (Mass.) 280, 20 Am. Dec. 471; Harris v. Woodruff, 124 Mass. 205, 26 Am. Rep. 658; Towle v. Raymond, 58 N. H. 64. See also Grinnell v. Cook, 3 Hill (N.Y.) 485, 38 Am. Dec. 663; Jacobs v. Latour, 5 Bing. 130, 2 Moo. & P. 20, 15 E. C. L. 388; Jackson v. Holland, 31 Ga. 339; Elliott v. Martin (Mich. 1895), 63 N. W. Rep. 525. Compare *Allen v. Ham, 63 Me. 532.* In this last case it was held that no lien attaches for shoeing a horse or for the taxes assessed on him which were paid by the agistor.*

2. Miller v. Marston, 35 Me. 153.

3. Agistor may Acquire Lien by Special Contract.—Hanover on the Law of Horses, § 425; *Wallace v. Woodgate, 1 C. & P. 575, 11 E. C. L. 477; Richards v. Symons, 8 Q. B. 90, 55 E. C. L. 90; Lewis v. Tyler, 23 Cal. 364; Jackson v. Holland, 31 Ga. 339; Millikin v. Jones, 77 Ill. 372; Goodrich v. Willard, 7 Gray (Mass.) 183; Perkins v. Boardman, 14 Gray (Mass.) 481.*

A contract to pay the agistor's charges "before moving the cattle" will create such a lien. *McCoy v. Hock, 37 Iowa 436.*

4. Wallace v. Woodgate, 1 C. & P. 575, 11 E. C. L. 477; Richards v. Symons, 8 Q. B. 90, 55 E. C. L. 90.

the keepers to retain possession of the animals until the charges are paid.¹ A full discussion of this branch of the subject will be found elsewhere.²

AGNOSTIC.—See the titles OATHS; PUBLIC OFFICERS; RELIGIOUS LIBERTY; WITNESSES.

AGREE. (See also PROMISE, and the title CONTRACTS.)—The word “agree” is sometimes used to signify an offer merely, but, properly speaking, it imports concurrence or assent.³

1. **Statutory Liens.**—See *Case v. Allen*, 21 Kan. 217. The statutes vary widely in terms. In some states the lien is given to livery-stable keepers alone, while in others it is given to agistors as well. Some of the statutes create a lien only in favor of those whose regular business it is to board horses, or keep and pasture cattle, while others extend the lien to isolated cases of such boarding and pasturing. 1 Jones on Liens, § 646.

Circumstances held Not to Constitute Waiver of Lien.—In *Willard v. Winfield* (Kan. 1896), 43 Pac. Rep. 314, it is held that where an agistor leaves the stock that he is feeding and caring for to be herded temporarily by another party, and they are driven off during his temporary absence by the owner, or one having a special ownership in them, the agistor will not lose his lien if, within a reasonable time, he demands the return of the stock.

The Laws of Scotland give a lien to agistors. 2 Bell Com. 110.

2. See the titles LIENS and LIVERY-STABLE KEEPERS.

3. *Thornton v. Kelly*, 11 R. I. 498.

“The term *agreed* is a technical word, and is synonymous with ‘contracted.’” *McKisick v. McKisick*, Meigs (Tenn.) 433.

Importing a Concluded Agreement.—In *Ives v. Hazard*, 4 R. I. 14, 67 Am. Dec. 500, it was held that the words “*I agree to sell*,” etc., in a contract for the sale of land, imported a concluded agreement, and not a mere offer to sell. The court said: “The counsel for the respondent contend that the words of the memorandum import an offer to sell, and nothing more. We think the language imports an agreement to sell. The language is, ‘*I agree to sell*,’ the consideration is expressed, and the time when possession is to be given is fixed by the memorandum. The mention of the time when possession is to be given, and when the price of the land is payable, indicates that the parties deemed the agreement a concluded one.” See also *Baldwin v. Humphrey*, 44 N. Y. 609; *Richards v. Edick*, 17 Barb. (N. Y.) 263; *Thorton v. Kelly*, 11 R. J. 498; *Martin v. Adams*, 104 Mass. 262. Compare *McGrath v. Boston*, 103 Mass. 371; *Browne v. Warner*, 14 Ves. Jr. 159.

Same—Agree to Rent.—“The question whether a written instrument is a lease, or only an agreement for a lease, depends on the intention of the parties to be collected from the whole instrument. *Bacon v. Bowdoin*, 22 Pick. (Mass.) 401. The form of expression, ‘we *agree to rent or lease*,’ is far from being decisive upon this question, and does not necessarily import that a lease is intended to be given at a future day. On the contrary, those

words may take effect as a present demise, and the words ‘*agree to let*’ have been held to mean exactly the same thing as the word ‘*let*,’ unless there be something in the instrument to show that a present demise could not have been in contemplation of the parties. *Doe v. Benjamin*, 9 Ad. & El. 644, 36 E. C. L. 228. The test seems to be that if the agreement leaves nothing incomplete it may operate as a present demise. *Doe v. Ries*, 8 Bing. 178, 21 E. C. L. 261. The agreement relied upon by the plaintiffs contains no stipulation for a lease at any future time, and there is nothing to show that any more formal document was contemplated. It is not prospective or executory, and it does not indicate that anything remained to be done on the part of the plaintiffs. It gave to the defendants an immediate right of possession. *Staniforth v. Fox*, 7 Bing. 590, 20 E. C. L. 249; *Jackson v. Ashburner*, 5 T. R. 163; *Jenkins v. Eldredge*, 3 Story (U. S.) 325.” *Kabley v. Worcester Gas, Light Co.* 102 Mass. 392. See also *Weed v. Crocker*, 13 Gray (Mass.) 219; *Chapman v. Bluck*, 4 Bing. N. Cas. 187, 36 E. C. L. 317; *Averill v. Taylor*, 8 N. Y. 44; *Western Boot, etc., Co. v. Gannon*, 50 Mo. App. 646.

Importing a Consideration.—See also the title FRAUDS, STATUTE OF. The word *agree* imports a consideration. *Schneider v. Turner*, 27 Ill. App. 231; *Andrews v. Pontue*, 24 Wend. (N. Y.) 289; *Davies v. Wilkinson*, 1 Jur. Am. Dec. by Halst. and Doorh. 372. See also *Ives v. Hazard*, 4 R. I. 27, 67 Am. Dec. 500. But see *Newcomb v. Clark*, 1 Den. (N. Y.) 228, and compare *Packard v. Richardson*, 17 Mass. 134, 9 Am. Dec. 123.

Agreed Imports the Assent of Both Parties.—If, in a written contract signed by two, it is said that it is *agreed* that one shall furnish the other with certain property at a specified price, this imports a promise by the latter to accept and pay; for *agreed* is to be deemed the word of both parties. *Barton v. McLean*, 5 Hill (N. Y.) 256.

“*Agreed, ex vi termini* means that it is the agreement of both parties (whether both sign it or not), each and both consenting to it.” *Aikin v. Albany, etc., R. Co.*, 26 Barb. (N. Y.) 298. See also *Elderton v. Emmens*, 6 C. B. 175, 60 E. C. L. 174; *Pordage v. Cole*, 1 Saund. 319.

Same—Free Pass.—See also the title TICKETS AND FARES.

Plaintiff accepted a free ticket from a railroad on which was indorsed: “The person accepting this free ticket assumes all risks, etc., and expressly *agrees*,” etc. In an action for personal injuries, it was held that plaintiff could not recover. The court, by Gould,

J., said: "There being made some question whether the indorsement on the ticket ('the person accepting this free ticket assumes all risks, etc., and expressly *agrees*,' etc.) is a contract on the part of the passenger with the company; it seems necessary to say that the word *agreed* means the concurrence of two parties, and that the act of acceptance binds the acceptor as fully as his hand and seal would. (Co. Litt., § 217, note; *Barton v. McLean*, 5 Hill (N. Y.) 259; *Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Van Rensselaer v. Smith*, 27 Barb. (N. Y.) 140, and cases there cited.) The point is too well settled to admit of debate." *Wells v. New York Cent. R. Co.*, 24 N. Y. 183.

The Words "Agreed and Undertook" Amount to a Promise.—"In the first, second and third counts it is alleged that the defendant, in consideration of certain things done by the plaintiff, *agreed* and undertook to effect an insurance on the plaintiff's house. The words '*agreed* and undertook' amount to a promise. It is not necessary that the word 'promised' should be used, the word *agreed* being equivalent to it. *Mountford v. Horton*, 2 B. & P. R. 62." *Bodley v. Roop*, 6 Blackf. (Ind.) 158.

Same—Where there is No Act to be Done Except by One of the Parties.—In *Dawes v. Tredwell*, 18 Ch. Div. 359, the court said: "The rule is that where you have such words as 'it is hereby *agreed* and declared between and by the parties to these presents,' that some one will do an act or make a payment, and that some one is a party to the deed, it is a covenant by him with the others, not a covenant by all of them. Anything more absurd than to hold it a covenant by all of them could not be imagined. Suppose you had these words, 'Provided always it is hereby *agreed* and declared between and by the parties to these presents that the said A B shall pay £5,000 to the said C D on the 6th of January next,' it would be absurd to say that this amounts to a covenant by C D, the recipient of the money, that A B shall pay him, as well as a covenant by A B that he will pay him. If, therefore, we find that no act is to be done except by one of the parties, these words only amount to a covenant by that one party with the others." See also *In re De Ros*, 55 L. J. Ch. Div. 73; *Butcher v. Butcher*, 14 Beav. 222; *In re D'Estampes*, 53 L. J. Ch. 1117; *Randel v. Chesapeake, etc., Canal Co.*, 1 Harr. (Del.) 172.

Assumpsit—"Agreed" Equivalent to "Promised."—In *Corbett v. Packington*, 6 B. & C. 268, 13 E. C. L. 170, it was held that the word *agreed* was equivalent to the word *promised*. In that case it was argued that a count could not be in assumpsit because the word "promised" did not appear, but the court held, upon the authority of *Mountford v. Horton*, 2 B. & P. N. R. 62, that the word *agreed* implied this.

In a declaration in assumpsit the word "promised" is not necessary; any other intelligible word of the same import, as *agreed*, for instance, is sufficient. *Avery v. Tyingham*, 3 Mass. 160, 3 Am. Dec. 105.

In a Deed—Covenant.—The word *agree* in a deed will make a covenant; and though in the

connection it is applicable to both parties, it may be referred to that party upon whom the doing or not doing the thing agreed upon, devolved. *Randel v. Chesapeake, etc., Canal Co.*, 1 Harr. (Del.) 172. See also *Dawes v. Tredwell*, 18 Ch. Div. 359.

Same—In the Sense of Grant.—In a deed containing the following clause: "And the said grantors *agree* that no building shall be erected on said lot next east of said granted premises nearer to the west line of said lot than four feet, being the east line of the premises hereby conveyed," it was held that the word *agree* must be read to mean "grant," and attached an easement in fee to the grantees. *Hogan v. Barry*, 143 Mass. 538.

Imports Legal Agreement.—Where a pleading alleged that a party *agreed* to do a certain thing, it was held that this would be taken to mean that he *agreed* to do the thing in a valid and legal manner. Thus, if a parol agreement was insufficient, it would be presumed that the agreement was in writing. The court said: "*Agreed*, as here used, is synonymous with 'promised' or 'undertook.'" *Packard v. Richardson*, 17 Mass. 131, 9 Am. Dec. 123. But defendant says the amount and manner of payment was fixed by the original written contract, and its terms could not be changed by a subsequent parol promise. The complaint does not plead the subsequent agreement as an oral one, and it cannot be assumed that it was oral. The presumption is the other way. It alleges that the defendant *agreed*. If, under the circumstances, an oral promise could not constitute an agreement, then an oral promise is not meant nor pleaded. If a written promise only would be valid as an agreement, then the effect of the allegation is to plead a written promise; otherwise, the defendant would not have *agreed*, and for the purpose of this objection the allegation must be taken as true. Upon the trial, if plaintiffs seek to alter the terms of the original written agreement by a subsequent promise, they must show such promise in writing, but the allegation is sufficient to let in such proof." *Jenkinson v. Vermillion*, 3 S. Dak. 238.

In the Sense of "Find"—Jury Trial.—A verdict that the jury, after deliberation, *agree* that the said defendant is guilty, was held sufficient. The court said: "The word 'find' is more commonly used, but the word *agree*, where employed with reference to the verdict of a jury, particularly in criminal cases, means precisely the same thing. Both signify that the jury, upon consideration of the evidence, have determined that the accused is guilty or not guilty of the crime charged. The word *agree* is almost invariably used when the jury are addressed upon the subject of their verdict. Mr. Chitty says (1 Chitty's Crim. Law, 635), 'that when the jury have come to a unanimous determination with respect to their verdict, and return to the box to deliver it, the clerk then calls them over by their names and asks them whether they *agree* on their verdict; and it certainly cannot be a bad answer, if they reply that they do *agree*, and state what that agreement is.'" *Benedict v. State*, 14 Wis. 423.

Treaty—Agreed upon Terms of Peace.—In

AGREEABLE.—In accordance with one's wishes.¹

AGREEABLY.—See note 2.

AGREEMENT. (See also the title **CONTRACTS**.)—Agreement is the concord of two or more minds, or mutual assent.³ But the word in its most popular

Hylton v. Brown, 1 Wash. (U. S.) 351, it is said that terms of peace are *agreed* upon when the ministers have come to an understanding as to the terms of the treaty and have reduced them to writing; and that they are concluded when the agreement thus understood has received its last form by being signed and duly executed by the ministers. See also the title **TREATIES**.

Judgment Agreed to.—A judgment which recited a hearing and purported to have been rendered upon the evidence, was indorsed "*agreed to*." It was held that this did not constitute a consent judgment, especially as the alleged stipulation of consent was not made a part of the bill of exceptions. The words "*agreed to*" might mean nothing more than that the judge *agreed* to the judgment as properly expressing the judgment ordered by the court. *San Francisco Sav. Union v. Myers*, 76 Cal. 624.

Same—Dismissed Agreed.—The words "dismissed agreed," entered as the judgment of a court, do not of themselves import an agreement to terminate the controversy, nor imply an intention to merge the cause of action in the judgment. The court said: "Whatever may be the effect given by the courts of *Kentucky* to a judgment entry 'dismissed *agreed*,' it is manifest that the words do not of themselves import an agreement to terminate the controversy, nor imply an intention to merge the cause of action in the judgment. Suits are often dismissed by the parties; and a general entry is made to that effect, without incorporating in the record, or even placing on file, the agreement. It may settle nothing, or it may settle the entire dispute. If the latter, there must be a proper statement to that effect to render it available as a bar. But the general entry of the dismissal of a suit by agreement is evidence of an intention, not to abandon the claim on which it is founded, but to preserve the right to bring a new suit thereon if it becomes necessary. It is a withdrawal of a suit on terms, which may be more or less important." *Haldeman v. U. S.*, 91 U. S. 584.

Assumpsit and Debt.—In an action of assumpsit upon a contract, which is set out *in hæc verba* in the declaration, the use of the word *agreed*, in an averment as to the extension of the time of performance of the contract, does not make the count one in debt. *North v. Kizer*, 72 Ill. 173.

Assumed and Agreed.—An allegation in the complaint in an action to foreclose a mortgage, that the grantees of the mortgagor, who were made defendants, "assumed and *agreed*" to pay the mortgage debt, is not the statement of two distinct propositions, but the word "assumed" as used in the allegation is synonymous with the word *agreed*; and a denial in the answer by such grantees, that they "assumed and *agreed*" to pay the mortgage debt, is not a conjunctive or evasive denial,

but is sufficient to raise an issue as to such allegation; and a finding of fact, based upon a supposed admission of the pleadings as to their assumption and agreement to pay the debt, is erroneous. *Jones v. Eddy*, 90 Cal. 147.

It Is Mutually Agreed.—Where a printed receipt containing the words "it is mutually *agreed*" was given by a common carrier to a shipper on the taking of goods to be sent to a certain place, it was held that a loss of the goods beyond the line of the company which gave the receipt must be paid for, as the shipper did not know that the company's line only extended to a certain point; there could be no mutual agreement in such a case. *Mosher v. Southern Express Co.*, 38 Ga. 37.

1. Testatrix gave the residue of her personal estate "in trust for such of my nieces as shall be living at my death, my desire being that they shall distribute such residue as they think will be most *agreeable* to my wishes." *Jessel, M. R.*, observed: "What is that but to make them judges of the mode of distribution, and place the residue at their absolute disposal?" *Stead v. Mellor*, 5 Ch. Div. 225.

2. **United States Statute.**—Congress has provided that the preliminary proceedings against persons accused of a violation of a criminal enactment shall be "*agreeably* to the usual mode of process against offenders in such state." In *U. S. v. Rundlett*, 2 Curt. (U. S.) 41, the court, by Curtis, J., said: "My opinion is that it was the intention of Congress by these words, '*agreeably* to the usual mode of process against offenders in such state,' to assimilate all proceedings for holding accused persons to answer before a court of the United States, to proceedings had for similar purposes by the laws of the state where the proceedings should take place; and, as a necessary consequence, that the commissioners have power to order a recognition to be given to appear before them in those states where justices of the peace, or other examining magistrates, acting under the laws of the state, have such power. * * * The prisoner is not only to be arrested and imprisoned, but bailed, *agreeably* to the usual mode of process in the state." This is *approved* in *U. S. v. Horton*, 2 Dill. (U. S.) 97. See also the titles **BAIL**; **UNITED STATES COMMISSIONERS**; and **ENCYC. PL. AND PR.**, title **PRELIMINARY EXAMINATION**.

3. *Sage v. Wilcox*, 6 Conn. 86. In that case, the court said: "In *Wain v. Warlters*, 5 East 17, it was said by Lord Ellenborough, that the word *agreement*, in a loose and incorrect sense, is sometimes used as synonymous with 'promise' and 'undertaking,' but in its more proper and correct sense, as signifying a mutual contract or consideration between two or more parties. But the word *agreement*, with much deference to the learned and able jurist, I affirm is, beyond all comparison, used more frequently to denote a mutual

sense is frequently used as declaring the engagement of one only¹.

AGRICULTURAL COLLEGE.—See the title UNIVERSITIES AND COLLEGES.

AGRICULTURAL LIENS.—See the titles CROPS; LIENS.

assent of minds without legal consideration (such as his lordship intended) than it is to denote the promise or undertaking of one; and for the truth of this assertion I appeal to every mind. This is a subject as level to the capacity of an ignorant as of a learned man, and presents this sole inquiry: In what manner do mankind promulge that operation of minds, denominated *mutual assent*? Is it not by the term *agreement*? Are there not hundreds of instances, in which persons are said to agree, where no legal consideration exists, to one where there is such consideration? Most unquestionably. This fact conclusively shows the broad error of Lord Ellenborough's remark. With the usual felicity of discrimination for which that learned judge was distinguished, his mind would have perceived that he blended together two distinct subjects; that is, an *agreement*, and the cause or consideration inducing it."

As to whether a consideration is included in the idea of *agreement*, see AGREE, and also the title FRAUDS, STATUTES OF.

An *agreement* respects something done or to be done; in other words, executed or executory. As defined by Plowden, *aggregatio mentium in re aliqua facto vel facienda*. Talbot v. Bedford, Cooke (Tenn.) 454.

An *agreement* is *aggregatio mentium*; that is, where two or more minds are united in a thing done or to be done, or where a mutual assent is given to do or not to do a particular act; and every contract or *agreement* ought to be so certain and complete that each party may have an action or other remedy upon it. Mactier v. Frith, 6 Wend. (N. Y.) 133, 21 Am. Dec. 262.

1. Packard v. Richardson, 17 Mass. 131, 9 Am. Dec. 123.

Intent.—As the meaning of the law is the law-maker, so the meaning of the contracting party is the *agreement*. Whitney v. Wyman, 101 U. S. 396.

Compact or Agreement.—See also the title STATES.

The Constitution of the United States prohibits, without consent of Congress, any *agreement* or compact of one state with another. In Wharton v. Wise, 153 U. S. 168, the court says: "The terms *agreement* or 'compact,' taken by themselves, are sufficiently comprehensive to embrace all forms of stipulation, written or verbal, and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting states, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control. * * * Looking at the clause in which the terms 'compact' or *agreement* appear, it is evident that the prohibition is directed to

the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States."

"The word *agreement* does not necessarily import any direct and express stipulation, nor is it necessary that it should be in writing. If there is a verbal understanding to which both parties have assented, and upon which both are acting, it is an *agreement*. And the use of all of these terms, 'treaty,' *agreement*, 'compact,' shows that it was the intention of the framers of the Constitution to use the broadest and most comprehensive terms, and that they anxiously desired to cut off all connection or communication between a state and a foreign power; and we shall fail to execute that evident intention, unless we give to the word *agreement* its most extended signification, and so apply it as to prohibit every *agreement*, written or verbal, formal or informal, positive or implied, by the mutual understanding of the parties." Holmes v. Jennison, 14 Pet. (U. S.) 572.

Statute of Frauds—Contract to be Performed within a Year.—"The word *agreement*, as used in this section, signifies a mutual contract on consideration between two or more persons, and, *ex vi termini*, includes the several parties to the contract and their respective stipulations—everything, indeed, which is to be done on both sides. Wain v. Warlters, 5 East 10; Sears v. Brink, 3 Johns. (N. Y.) 210, 3 Am. Dec. 475; Sherburne v. Shaw, 1 N. H. 157, 8 Am. Dec. 47; Champion v. Plummer, 1 B. & P. N. R. 252; 2 Stark Ev. 482, Phil. ed. of 1842. In this case there were mutual stipulations between the parties; the defendant was to clear the land, and, in part, make a fence at one end of the lot. This fence was to be completed by the plaintiff; and he stipulated that the defendant should have all the timber cut on the land, except what might be required for the fence, and also the use of the land for a summer crop in 1842. As this *agreement* was made in January, 1841, and could not be completely executed until the close of the season of 1842, it was within the statute, and not being in writing and signed, was void." Broadwell v. Getman, 2 Den. (N. Y.) 89.

Same—As to whether Agreement Imports a Consideration.—"That the word *agreement* imports a consideration within the statute of frauds, see Stadt v. Lill, 9 East 348. See also the title FRAUDS, STATUTES OF; and AGREE.

Agreement and Memorandum Distinguished.—"There must be a difference between *agreement* and memorandum or note of *agreement*. And what must that be? I take it, the difference between completeness and incompleteness. *Agreement* is the contract complete; memorandum or note of *agreement* is the contract incomplete, imperfect even, it may be, somewhat inaccurate, but which may aid us in getting at the complete contract." Durham v. Taylor, 29 Ga. 176.

AGRICULTURAL SOCIETIES.

BY JOSEPH R. LONG.

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CROSS-REFERENCES.

For other matters of *SUBSTANTIVE LAW AND EVIDENCE* related to this subject, see the titles: *BY-LAWS; CORPORATIONS (PRIVATE); EXEMPTIONS (TAXATION); GAMING; INTOXICATING LIQUORS; MASTER AND SERVANT; MUNICIPAL CORPORATIONS; OFFICERS AND AGENTS (OF PRIVATE CORPORATIONS); PUBLIC OFFICERS; SOCIETIES AND CLUBS; ULTRA VIRES.*

I. DEFINITION.—An agricultural society is an aggregate corporation organized under legislative authority by the voluntary consent and active procurement of its members, and having for its object the promotion of agriculture and all kindred arts.¹ It is generally held to be a private corporation,²

1. Definition.—1 Spelling on Private Corporations, § 24; *A'Hern v. State Agricultural Soc.* (Iowa 1894), 58 N. W. Rep. 1092, 24 L. R. A. 655; *Dunn v. Brown County Agricultural Soc.*, 46 Ohio St. 93, 25 Am. & Eng. Corp. Cas. 467, 15 Am. St. Rep. 556.

"A corporation organized to further the interest of agriculture, to improve and encourage the breeding of fine stock, to hold expositions of agricultural products and stock, to hold and give annual fairs, and to do and perform everything necessary and incident thereto." *Bathe v. Decatur County Agricultural Soc.*, 73 Iowa 11, 5 Am. St. Rep. 651. See also *Livingston County Agricultural Soc. v. Hunter*, 110 Ill. 155; *Thompson v. Lambert*, 44 Iowa 239; *Bronson Agricultural, etc., Assoc. v. Ramsdell*, 24 Mich. 441; *Kent County Agricultural Soc. v. Houseman*, 81 Mich. 609; *Downing v. State Board*, 129 Ind. 443.

An association whose purpose it was "to provide, maintain, and manage grounds for the exhibition of farm and fancy stock, to-

gether with domestic animals of all kinds, agricultural, horticultural, mechanical, and industrial products of every description, including works of art; also for speeding horses, giving exhibitions of riding and driving, and such other displays as will conduce to the interest and entertainment of the community, for profit," was held to be an agricultural society within the provisions of the *Ohio* statute (Rev. Stat., § 6446) forbidding the sale of intoxicating liquors within two miles of the place where an agricultural fair was being held. *State v. Long*, 48 Ohio St. 509.

2. Private Corporations, According to Some Authorities.—The question as to the public or private nature of agricultural societies may be somewhat affected by the peculiarities of their individual articles of incorporation. Although the purpose of agricultural societies may be considered public in the sense that their establishment conduces to the public welfare by promoting agricultural and manufacturing interests, such public benefit is but the consideration and justification for the special

though some courts give it a public or *quasi*-public character.¹

II. ORGANIZATION.—The statutes authorizing the formation of agricultural societies generally prescribe the conditions and particulars of their organization.

1. State Societies.—These associations, having the general supervision of the agricultural interests of the state, are incorporated by statute, and are usually composed of delegates from the county and district societies, and other persons specially mentioned in the act of incorporation or elected by the society.²

2. County and District Societies.—The method of incorporation of these societies varies somewhat with the provisions of the several statutes, and the

privileges and franchises conferred on them, and does not make them agencies of the state, or otherwise distinguish them from other private corporations. *Dunn v. Brown County Agricultural Soc.*, 46 Ohio St. 93, 25 Am. & Eng. Corp. Cas. 467, 15 Am. St. Rep. 556.

In an action on the case to recover damages for injuries occasioned by the fall of a portion of a building on the fair grounds belonging to an agricultural society, Cutting, J., in a discussion of the nature and liabilities of such societies, thus distinguishes them from *quasi*-corporations:

"*First*, they were invested with particular powers, not without but with their consent, and on their application; *second*, they are not territorial; a voluntary subscription only entitles them to membership; *third*, they are authorized to hold a corporate fund, viz., real and personal estate, limited only by the annual income; and although the income is specifically appropriated, yet the capital is not, but may be subject to attachment and execution; *fourth*, the action must be brought against the corporation, *eo nomine*, and not against the corporators; *fifth*, the members in their individual capacity are not responsible; *sixth*, they are not intrusted with any of the ordinary attributes of sovereignty for the purpose of local government. * * * They [the defendants] are not a *quasi*, but an aggregate corporation, which, as defined, consists of several persons, united in one society, continued by a succession of members, and, being the mere creature of the law, possesses only those properties conferred by charter, either expressly or as incidental to its existence, and best calculated to effect the object of its creation." *Brown v. South Kennebec Agricultural Soc.*, 47 Me. 275, 74 Am. Dec. 484.

With reference to the Scott County (Iowa) Agricultural Society, organized under Rev. Code 1888, § 1091, relating to the organization of associations other than those for pecuniary profit, it was held that while the objects of the society were public, it was essentially a private corporation. Its character was not affected by the fact that it was organized for another object than pecuniary profit. Its property was the private property of the corporation. The use and enjoyment of this property by the public were regulated solely by the corporation, and upon its dissolution the stockholders became entitled to the property. The public authorities could in no way control or derive any pecuniary benefit from the use of

the property. *Thompson v. Lambert*, 44 Iowa 239.

In an action brought against the *Indiana* State Board of Agriculture, organized under the Act of February 14, 1851, it was held that the loaning of money by the state to the society was a legislative construction of its charter as a private corporation, for otherwise it would be a case of the state loaning money to itself. *Downing v. State Board*, 129 Ind. 443. To the same effect see *Warren County Agricultural, etc., Co. v. Barr*, 55 Ind. 30; *Com. v. Bacon*, 13 Bush (Ky.) 210, 26 Am. Rep. 189; *Lane v. Minnesota State Agricultural Soc.* (Minn. 1895), 64 N. W. Rep. 383; *State v. Long*, 48 Ohio St. 509.

1. Held by Some Courts to Be Public Corporations.—Some courts deny the private character of agricultural societies, and hold them to be public or *quasi*-public corporations, or agencies of the state.

So a society organized under the laws of *Michigan* (How. Stat., §§ 2303-2312) for "the promotion of agriculture and all its kindred arts," having no capital stock, and none being provided for by the statute under which it was organized, was held to be a *quasi*-public corporation. *Kent County Agricultural Soc. v. Houseman*, 81 Mich. 609.

So the "Canebrake Agricultural District," an association for the encouragement and promotion of agricultural pursuits in what was known as the "Canebrake" region, was held to be a public corporation, having many of the elements of a municipal corporation. *Dillard v. Webb*, 55 Ala. 468. See *Stewart v. Agricultural Soc. (Ohio)*, 7 Am. L. Rec. 668.

Agricultural Societies as Agencies of the State.—In *State v. Robinson*, 35 Neb. 401, it was held that agricultural societies are not corporations in the ordinary sense of the term, but rather agencies of the state, created for the purpose of assisting in promoting its most important industry.

A state agricultural society is one of the agencies of the state, and exists for the sole purpose of promoting the public interest in the business of agriculture. It is in no sense a corporation for pecuniary profit. *A'Hern v. State Agricultural Soc. (Iowa 1894)*, 58 N. W. Rep. 1092, 24 L. R. A. 655. See also *Livingston County Agricultural Soc. v. Hunter*, 110 Ill. 155.

2. State Agricultural Societies.—See *Downing v. State Board*, 129 Ind. 443. As to the appointment and qualification of a member of

rules of the courts within whose jurisdiction the societies are organized. The requirements are similar to those providing for the formation of other private corporations.¹

III. AID FROM STATE AND COUNTY.—Under some of the statutes, agricultural societies are entitled to receive, upon compliance with certain conditions, appropriations from the public treasury for their support and advancement.²

the state board of agriculture, see *People v. Perkins*, 85 Cal. 509.

1. Statutory Provisions for Formation of County Societies.—The statutes generally provide that whenever a certain number of the inhabitants of a state who desire to form a town, county, or district agricultural society, shall file before the proper authorities duplicate copies of their articles of association, setting forth the legal title of the society, its business and objects, the number and character of its officers, etc., the persons signing such articles, and their associates and successors, shall become a body corporate under the name and for the purpose stated in the articles. In some of the states the regulations for forming county and district societies are furnished by the state board of agriculture. As a general rule, only one county or town society may be organized in any one town or county, though two or more contiguous towns or counties may unite in forming district societies. In some states this rule is not observed. See, as to organization of agricultural societies under the *Canadian* statute, *Martin v. Corporation d'Argenteuil*, 7 Legal News, 139 C. C. 1884.

Reorganization—New Society with Old Name.

—Where an agricultural society was organized as a joint-stock company, and held its regular fairs and elections for a number of years and then ceased to act, and a new company, formed by some of the stockholders of the old company, together with other persons, was organized with capital stock increased, and a race-track feature added, the new society retaining the name of the old company, it was held that the new society was distinct from the old, and did not succeed to its property rights. A conveyance by it of land owned by the former company was void, and the grantee under the new company could not dispossess a former stockholder of the old association, who was not a member of the new one, and who held the land in trust for himself and his former associates. *Allen v. Long*, 80 Tex. 261.

Old Society with New Name.—The "Livingston County Agricultural Society" was incorporated with a constitution declaring its object to be "to improve the condition of agriculture, horticulture, the mechanic and household arts." Some years later it was reorganized under *Illinois* Rev. Stat. 1874, § 9, c. 5, as a joint-stock company, known as the "Livingston County Agricultural Board," whose objects were "to improve the condition of agriculture, horticulture, floriculture, mechanic and household arts." It was held that the new society was not separate and distinct from the old, but merely a continuation of it, and succeeded to all its rights and liabilities; and that creditors of the old concern were not affected by the reorganization, but had

the same remedies against the new society as against the old. Nor did the reorganization as a joint-stock company render it a corporation for private gain or profit, or change its character from a public to a private institution. *Livingston County Agricultural Soc. v. Hunter*, 110 Ill. 155.

Doctrine of Non-User—when Not Applicable.

—Where an agricultural society held annual fairs for some years and then ceased to act, and leased its grounds to another society, and the lessee continued to hold fairs thereon, it was held that the doctrine of non-user did not apply, and the property did not escheat to the state. *Kent County Agricultural Soc. v. Houseman*, 81 Mich. 609.

2. Nemaha Fair Assoc. v. Myers, 44 Kan. 132; *Nemaha Fair Assoc. v. Thummel*, 47 Kan. 182; *Hall v. Kellogg*, 16 Mich. 135; *Hogelskamp v. Weeks*, 37 Mich. 422; *Silsbee v. Stockle*, 44 Mich. 561; *Harding v. Bader*, 75 Mich. 316; *State v. Robinson*, 35 Neb. 401; *Dunn v. Brown County Agricultural Soc.*, 46 Ohio St. 93, 25 Am. & Eng. Corp. Cas. 467, 15 Am. St. Rep. 556; *State v. Timme*, 56 Wis. 423. See *Warren County Agricultural, etc., Co. v. Barr*, 55 Ind. 30; *Boyce v. Auditor-Gen.*, 90 Mich. 314.

Public Notice of Formation Required.—Where an agricultural association known as the "Farmers' Club" was reorganized into an "agricultural society," and raised by voluntary subscription the sum required to entitle it to state aid, it was held, upon an application for a mandamus to compel the payment of the money, that to entitle the society to such aid it must have been formed after due public notice to all the inhabitants of the county. *Agricultural Soc. v. McIntyre*, 17 Johns. (N. Y.) 87.

Payment of Society's Debts.—In an action brought by a tax-payer to enjoin the payment of an order issued by the county commissioners to an agricultural society for the payment of its debts, it was held that the *Indiana* act to encourage agricultural fairs, authorizing the commissioners, on petition of a majority of the voters of a county, to purchase real estate for the purposes of such fairs, did not give them authority to use the funds of the county to pay the debts of a private corporation, and the payment of the order was enjoined. *Warren County Agricultural, etc., Co. v. Barr*, 55 Ind. 30.

Two or More Societies Entitled to Aid at the Same Time.—The *Iowa* Code (Rev. Code 1888, § 1111) provides that upon the performance of certain specified conditions, county agricultural societies shall receive a certain amount of aid from the state and county authorities. The statute does not declare in terms whether or not there may be more than one agricultural society in the same county entitled to

IV. RIGHTS AND POWERS—1. In General.—Agricultural societies, being bodies corporate, are invested with the powers and subject to the liabilities usually belonging to corporations in general, and have, in addition, such special powers and privileges as may be requisite to effect the purposes of their organization.¹

2. Special Powers and Privileges.—The special powers and privileges conferred on agricultural societies, either expressly or by implication, are determined by their articles of incorporation, and the language of the statutes under which they are created. For a full exposition of these statutory powers in the several states, reference must be made to their respective statutes authorizing the formation of such societies.²

such aid, but does provide that not more than one thousand dollars shall be paid to any one society. It was held that more than one society in each county might receive such aid upon compliance with the required conditions. *Poweshiek County Cent. Agricultural Soc. v. Shaffer* (Iowa 1892), 53 N. W. Rep. 304.

Upon an application for a mandamus to compel the county board of supervisors to include in their estimate of expenses for the year a certain sum allowed by law to an agricultural society, it was held to be no answer to the application that another society was also entitled to the fund, when it did not appear that such society had made any claim for a contribution from the county treasury. *State v. Robinson*, 35 Neb. 401.

Priority of Conflicting Claims.—Where a regularly organized county agricultural society has been receiving the aid provided by statute, it cannot, without its consent, be ousted of its rights and privileges as a county society by another society subsequently organized in the same county. So where two societies were organized in the same county, but at different times, and each applied for the state bounty, and the board of supervisors decided in favor of the one last organized and the auditor issued his warrant for it, it was held, upon an application for a mandamus by the other society to compel the auditor to issue a warrant in its favor, that the decision of the supervisors could not affect the case, and the mandamus was awarded. *Iroquois Agricultural Soc. v. Bates*, 61 Ill. 490.

1. General Powers of Agricultural Societies.—For the purpose of effecting the objects of their incorporation, the powers of agricultural societies are as broad and comprehensive as those of an individual, unless the exercise of the asserted power be expressly prohibited. Among the most important of the general powers belonging to an agricultural society as a corporation are, power to have a corporate name by which it shall have succession, and be capable of suing and being sued; power to have and use a corporate seal, and to change the same at pleasure; power to adopt a constitution and by-laws, and to elect officers; and power to purchase and hold, or to take and receive, by gift, will, or otherwise, real and personal estate, not to exceed a certain amount, to be used for the purposes of the organization. 1 *Spelling on Priv. Corp.*, § 24; *Dillard v. Webb*, 55 Ala. 468; *Downing v. State Board*, 129 Ind. 443; *Thompson v. Lam-*

bert, 44 Iowa 239; *Brown v. South Kennebec Agri. Soc.*, 47 Me. 275, 74 Am. Dec. 484.

2. See *Bathe v. Decatur County Agricultural Soc.*, 73 Iowa 11, 5 Am. St. Rep. 651; *Com. v. Ruggles*, 6 Allen (Mass.) 588; *Dunn v. Brown County Agricultural Soc.*, 46 Ohio St. 93, 25 Am. & Eng. Corp. Cas. 467, 15 Am. St. Rep. 556, and the local statutes.

Mortgage of Society's Property.—By virtue of the fact that an agricultural society has power to do whatever may be necessary to effectuate its purposes, in the absence of any prohibitory provision in its charter it may borrow money and execute notes, and give mortgages on its property as security for indebtedness necessarily incurred in carrying out its objects. *Thompson v. Lambert*, 44 Iowa 239.

An agricultural society incorporated under Laws of *New York* 1855, c. 425, was reorganized under a special act into a joint-stock company. The original statute authorized the society to sell its land by permission of the court, but the new act provided that the society might dispose of its property by a vote of the holders of two-thirds of its stock. It was held that the requirements of the original statute were superseded, as to this society, by the provisions of the special act, and a mortgage by the officers of the society in accordance with the required vote of the stockholders was valid. *Preston v. Loughran* (Supreme Ct.), 12 N. Y. Supp. 313.

A county agricultural society organized under the laws of *Ohio* was held to be a corporation for public purposes, and as such without authority to mortgage its property. A mortgage of its fair grounds would accordingly be *ultra vires* and void. *Stewart v. Agricultural Soc. (Ohio)*, 7 Am. L. Rec. 668.

Officers Holding Over—Michigan.—In the absence of an election, the directors and officers of a county agricultural society, organized under How. Stat. (Michigan), §§ 2303–2312, hold over. *Kent County Agricultural Soc. v. Houseman*, 81 Mich. 609.

President and Secretary Voting upon Sale of Lands—Michigan.—Under Michigan statute (Local Acts 1885, No. 378), authorizing the sale of land belonging to an agricultural society, by a vote of the "directors," the president and secretary, who are *ex-officio* directors, are entitled to vote the same as those who are specifically so called. *Kent County Agricultural Soc. v. Houseman*, 81 Mich. 609.

V. AGRICULTURAL FAIRS—1. Right to Hold.—Agricultural societies, in order to better effect the purposes of their organization, are authorized to hold annual fairs or other exhibitions, and to offer rewards and premiums for such articles, productions, and improvements as they may deem best calculated to promote the agricultural and household manufacturing interests of the district and state in which they are located.¹

2. Employment of Special Police—Their Appointment.—The officers of agricultural societies are generally authorized to appoint as many persons, to act as special police, as may be necessary to preserve order during fairs and exhibitions.

Their Powers.—These special officers usually have the powers of constables at common law, and may eject all persons improperly within the grounds, or who, while in attendance at fairs, shall be guilty of disorderly conduct or refuse to observe the rules of the society. They may arrest any one found

Malfeasance of Officers—Ultra Vires.—A person lending money to the officers of an agricultural society must ascertain whether or not they have the power to borrow, but he is not required to see that the money is applied to the corporate purposes. It is no defense, either on behalf of the corporation or of a stockholder, that the money so borrowed has been misapplied by the officers, unless the lender participated in the fraud. The stockholder who seeks to prevent the consummation of such an illegal corporate act, or to avoid its consequences, must act immediately, and assert his rights through the proper tribunals. The doctrine of *ultra vires* in case of contracts of such corporations prevails in full force only while the contracts are wholly executory. *Thompson v. Lambert*, 44 Iowa 239.

Rights of Members to Vote by Proxy.—Where the charter of an agricultural society gives to life-members the right to vote by proxy at all elections of officers thereof, this right cannot be limited by a resolution that no proxy shall be voted on at any meeting unless it shows within itself that it was specifically intended to be used at such meeting. If the name of the proxy is left blank by the maker of the power, and the blank is filled by the holder immediately before the election, the maker may challenge the completeness of the proxy. In the absence of any challenge by the maker of the power, the presumption is that the name was written in the blank by his authority. *White v. State Agricultural Soc.*, 45 Hun. (N. Y.) 580, 10 N. Y. St. Rep. 594.

Legislative Control of Property Belonging to Agricultural Societies.—The legislature cannot control the property of agricultural societies, for they are not public corporations within the rule that the legislature can interfere with their property rights. *Thompson v. Lambert*, 44 Iowa 239.

Impairing Obligation of Contracts.—An act of legislature abolishing one agricultural society and transferring its assets, liabilities, and credits to another society, is unconstitutional, as impairing the obligation of contracts, and taking private property without due process of law. *Downing v. State Board*, 129 Ind. 453.

Disposing of Property and Investing Proceeds

—Michigan.—In Michigan, agricultural societies being considered as *quasi*-public corporations, it was held that, unlike private corporations, they might be incorporated for a period exceeding thirty years, and might be authorized by special legislation to dispose of their property and invest the proceeds. *Kent County Agricultural Soc. v. Houseman*, 81 Mich. 609.

1. Livingston County Agricultural Soc. v. Hunter, 110 Ill. 155; *Downing v. State Board*, 129 Ind. 443; *Thompson v. Lambert*, 44 Iowa 239; *Delier v. Plymouth County Agricultural Soc.*, 57 Iowa 481; *Bathe v. Decatur County Agricultural Soc.*, 73 Iowa 11, 5 Am. St. Rep. 651; *Bronson Agricultural, etc., Assoc. v. Ramsdell*, 24 Mich. 441; *Dunn v. Brown County Agricultural Soc.*, 46 Ohio St. 93, 25 Am. & Eng. Corp. Cas. 467, 15 Am. St. Rep. 556; *State v. Robinson*, 35 Neb. 401.

Personal Liability of Members of Unincorporated Society for Premiums Offered.—Where the defendant contributed money to the support of an unincorporated fair association, and acted as judge at its races, his name being advertised as an officer of the society, it was held that he was a member, and liable as a partner for the premiums awarded by it. *Murray v. Walker*, 83 Iowa 202.

Sale of Privileges.—For the purpose of defraying expenses, agricultural societies may sell privileges, as the privilege to sell and distribute upon the grounds score-cards of the races to be run, etc. *Robinson v. Clark*, 53 Ill. App. 368; *Bower v. Robinson*, 53 Ill. App. 370.

Preservation of Peace and Order.—Since agricultural fairs are of public benefit and attract large numbers of people, regulations for the preservation of order are necessary, and the state legislature has power to enact such laws and provide for such regulations as will preserve the good order and promote the interests and comfort of those who assemble at such places for purposes of pleasure or for the advancement of agricultural interests. *State v. Stovall*, 103 N. Car. 416.

Prohibition of Private Stables near Fair Grounds Unconstitutional.—A provision in the charter granted to an agricultural society making it unlawful for any person, without the consent of the society, to open, within

wilfully injuring or destroying the property of exhibitors and visitors, or violating the laws of the state.¹

3. Horse Racing.—The statutes of some of the states expressly prohibit horse racing at fairs for any bet or stake.² But under a statute providing that "all county agricultural societies shall annually offer and award premiums for the improvement of stock," etc., such a society has the power to offer a premium to the winner at a horse race or trial of speed to be held on its grounds during its annual fair.³

three hundred yards of the grounds of the society any lot, stable, etc., for the purpose of receiving horses or vehicles for pay, during the continuance of its fair, is unconstitutional. *Com. v. Bacon*, 13 Bush (Ky.) 210, 26 Am. Rep. 189.

1. *Robinson v. Clark*, 53 Ill. App. 368; *Bower v. Robinson*, 53 Ill. App. 370; *Magovern v. Staples*, 7 Lans. (N. Y.) 145; *Com. v. Ruggles*, 6 Allen (Mass.) 588.

Forcible Ejection of Visitor from Fair Grounds.—A purchased a ticket admitting him to the grounds of an agricultural fair. The society had erected on the grounds elevated seats for the use of the spectators, and charged a special fee for admission thereto. It appeared that the gate in front of these seats was open, and no one was there to ask or receive pay for their use. A entered and occupied one of the seats, thinking that he was entitled to it by his ticket admitting him to the grounds. Some time afterwards, B, an officer employed by the society, ordered him to vacate the seat, without assigning any reason for the requirement or demanding pay for the use of the seat. Upon A's refusal to leave, B, with others, forcibly ejected him from the grounds. In an action brought to recover damages from B, the court held that an agricultural society has a right to employ persons to preserve order, and to eject all those who persist in causing disorder after a request to maintain order and conform to the regulations of the society which are made known to them. The society has a right to erect seats on its grounds and to charge an additional price for their use, but the officers have no right to use force in removing a person who occupies a seat without paying for it, without first informing him of the charge and demanding pay for the use of the seat. The occupant may be removed upon a persistent refusal to pay the charge or leave the seat, when the officer has established his right to demand such payment. But the authority to exclude the visitor from the seats does not extend to putting him out of the grounds to which he has paid the price of admission. *Magovern v. Staples*, 7 Lans. (N. Y.) 145.

Unlawful Arrests—Liability of Officer.—The officers of an agricultural society have no right to obstruct travel by unlawfully fixing bounds in the public highway for the purpose of exhibiting horses therein, and the question is not affected by the fact that there may be sufficient room for the public on that part of the highway outside of their bounds. They may be convicted for assault and battery for arresting without a warrant a person within such bounds, who, when ordered to stand

back, refused to do so, and struck, though without malicious intent, the horse of one of the officers. The fact that the person arrested was within the bounds for the purpose of obstructing the exhibition does not justify the arrest without legal process. *Com. v. Ruggles*, 6 Allen (Mass.) 588.

Liability of Society.—In an action brought against a state agricultural society for alleged unlawful arrest by its agents, the defendant was held not liable. The court, by Kinne, J., said: "Not being a corporation for pecuniary profit, the defendant society's liability is not controlled by the rules of law applicable thereto. The society is an arm or agency of the state, organized for the promotion of the public good and for the advancement of the agricultural interests of the state. It would be manifestly wrong to permit its funds to be used to pay damages arising out of the commission of wrongful acts by its officers and servants, and which are in no wise connected with the object and purpose of the society's creation." *A'Hern v. Agricultural State Soc.* (Iowa 1894), 58 N. W. Rep. 1092, 24 L. R. A. 655.

2. See *Bronson Agricultural Assoc. v. Ramsdell*, 24 Mich. 441; *Willson v. Owen*, 30 Mich. 474; *Edwards v. State*, 8 Lea (Tenn.) 411.

The *Michigan* statute (How. Stat., § 9387) enacts that "all running, trotting [etc.], of horses or any other animals for any bet or stakes, in money, goods, or other valuable thing, * * * excepting such as are by special laws * * * expressly allowed, shall be deemed racing, * * * and are hereby declared to be common and public nuisances." It was held (prior to the amendment of 1877 providing "that the giving of premiums by agricultural and other societies and associations for the running and trotting of horses at fairs or regularly appointed meetings shall not be illegal or unlawful") that the section (How. Stat., § 2306) giving to agricultural societies the power to hold fairs, and "distribute premiums for the best and most meritorious animals," does not repeal the other act, nor constitute a special law within its provisions. *Bronson Agricultural, etc., Assoc. v. Ramsdell*, 24 Mich. 441.

3. *Delier v. Plymouth County Agricultural Soc.*, 57 Iowa 481. See also *West v. Carter*, 129 Ill. 249.

Postponement of Race—Recovery of Entry Fees.—Under *Minnesota* Laws 1885, c. 174, § 2, the State Agricultural Society is required to hold an annual fair upon the state grounds, at such times and for such periods as the society may direct. When, in accordance with

4. Gaming.—In some of the states agricultural societies are expressly forbidden by statute to rent, lease, let, or donate any portion of the grounds or building owned or occupied by them, to be used for the purpose of carrying on games of chance or skill, or any scheme, lottery, or drawing with dice, cards, wheels, or other device, for the purpose of wagering money on the result.¹

5. Sale of Intoxicants—Sale Prohibited.—The statutes generally prohibit the sale of intoxicating liquor of any kind, either inside the inclosure or within a specified distance from the grounds where an agricultural fair is being held.²

this provision, the society has fixed the dates and advertised the same, exhibitors cannot be required to keep their stock and wares on exhibition for a longer period, although the executive officers assume to extend the time and continue the fair beyond the dates originally named. But where persons have made entries for an exhibition of the speed of horses under the rules allowing such exhibitions, at the option of the society, to be postponed on account of rain, these exhibitions being no regular part of the fair, persons making such entries are bound by the regulations of the society, and cannot recover their entrance fees for races that have been so postponed and in which they refuse to participate. *Farrier v. State Agricultural Soc.*, 36 Minn. 478.

Protest of Horses — Rights of Parties.—A had charge of a trotting mare owned by B, and entered the same for a race in which she won second place. The winner of the race was from another county, and so was not entitled to contest for the premium offered. A entered a protest with the officers of the society against the payment of the award to the owner of the winning horse, but without preventing the payment. It was held in an action brought by A to recover the award, that the notice and protest brought by him as to the disqualification of the winning horse were sufficient to estop the society from paying the money to the owner, and that A, having paid the entry fee and entered the mare for the race, was entitled to the premium offered, although he was not the owner of the animal. *Delier v. Plymouth County Agricultural Soc.*, 57 Iowa 481.

The owner of two race horses, through one P., entered them in races held by the defendant, an agricultural society, the races to be conducted "under the rules of the American Trotting Association," which provided that members could withhold the premium of any horse if the entry was fraudulent or ineligible, and submit the case to the decision of the association. The defendant was a member of the association, and withheld the prizes won by the said horses on the ground that the horses belonged to P., and that he was barred by some rule of the society from participating in the races. It was held that, unless for the purpose of the races the horses were under the control or management of P. for his own advantage, the owner was entitled to the prize money, and was not bound by the agreement to submit to the decision of the association, the advertisement that the races would be held under their rules not being notifica-

tion to him that the defendant was a member thereof. *Moshier v. LaCrosse County Agricultural Soc.* (Wis. 1895), 62 N. W. Rep. 932.

1. *Cope v. Flora Dist. Fair Assoc.*, 99 Ill. 489; *West v. Carter*, 129 Ill. 249; *State v. Johnson*, 115 Ind. 467; *State v. Darroch* (Ind. App. 1895), 40 N. E. Rep. 639; *Delier v. Plymouth County Agricultural Soc.*, 57 Iowa 481.

What Constitutes Gambling.—The acting superintendent of a county fair was indicted for leasing a portion of the grounds "to be used and occupied with apparatus, books, and other devices for the purpose of recording, registering bets and wagers, and selling pools, upon the results of races." It was held that such a purpose constituted a gambling scheme, and came within the provisions of the *Indiana* statute (Rev. Stat. 1894, § 2174) which forbids the officers and managers of agricultural societies to rent, lease, or donate their grounds to be used for gambling purposes. *State v. Howard* (Ind. App. 1894), 37 N. E. Rep. 27. See also *People v. Weithoff*, 51 Mich. 203, 47 Am. Rep. 557.

Officers Responsible when Acting Ultra Vires.

—The licensing of gambling tables is foreign to the purposes of a fair association, and if done by the officers of the company without the authority of the stockholders, it cannot be regarded as the act of the company, but is *ultra vires*, and the officers alone are responsible. *Cope v. Flora Dist. Fair Assoc.*, 99 Ill. 489.

Who Are Officers.—The words "officer" and "officers," used in the *Indiana* statute (Rev. Stat. 1894, § 2174) making it unlawful for any officer or officers of an agricultural society to rent any portion of its grounds for gambling purposes, are not employed in a strictly technical sense, but are intended to designate any person or persons duly authorized by the society to grant to other persons privileges upon its grounds or premises. *State v. Johnson*, 115 Ind. 467.

Injunction at Suit of Stockholder.—An injunction to restrain an agricultural society or its officers from permitting gamblers to congregate and ply their vocation upon the grounds of the society during its annual exhibitions, will not lie at the suit of a stockholder unless it appears that the complainant or the company has sustained some pecuniary loss thereby. *Cope v. Flora Dist. Fair Assoc.*, 99 Ill. 489.

2. *Heck v. State*, 44 Ohio St. 536; *State v. Long*, 48 Ohio St. 509. See *Delier v. Plymouth County Agricultural Soc.*, 57 Iowa 481; *State v. Stovall*, 103 N. Car. 416.

Qualification of This Rule.—In some states an exception is made in favor of liquor dealers exercising their calling at their usual places of business within the prohibited districts.¹

6. Duty and Liability to the Public—In Regard to Buildings and Grounds.—Agricultural societies holding public exhibitions, and inviting visitors thereto, must render their grounds and buildings reasonably safe for all persons who may lawfully be there in attendance.²

In Regard to Machinery.—They must exercise reasonable care in setting up and managing machinery, etc., on the grounds, and will be liable in their corporate capacity for injuries resulting from their negligence therein.³

Acts of Employees.—They will also be liable for the wrongful acts of their agents while acting in the course of their employment.⁴

1. This is not the case in *Ohio*. It was held in that state that the prohibition was general, and included the case of sales made by a saloon keeper whose business was permanently located within two miles of the fair grounds. *Heck v. State*, 44 Ohio St. 536. See *State v. Long*, 48 Ohio St. 509.

2. **Must Render Buildings and Grounds Safe.**—1 Spelling on Priv. Corp., § 24; *Selinas v. State Agricultural Soc.*, 60 Vt. 249, 6 Am. St. Rep. 114.

Where a visitor to a fair was injured by the fall of a portion of a building owned and used by an agricultural society, on its grounds, the society was held liable for want of ordinary care in the construction of the building, and the property of the corporation had to respond in damages, but the liability did not extend to the individual incorporators. *Brown v. South Kennebec Agricultural Soc.*, 47 Me. 275, 74 Am. Dec. 484.

In an action against an agricultural society to recover damages for injuries received by one of its patrons, in consequence of the fall of seats erected on the fair grounds for the use of visitors, the society was held liable in its corporate capacity, it having been shown to be guilty of negligence in the construction of the seats. *Dunn v. Brown County Agricultural Soc.*, 46 Ohio St. 93, 25 Am. & Eng. Corp. Cas. 467, 15 Am. St. Rep. 556.

As to the duty of the owner or occupant to maintain in a safe condition grounds or premises to which he has invited others to come, see *Nichols v. Washington, etc., R. Co.*, 83 Va. 99, 5 Am. St. Rep. 257; *Lax v. Darlington*, 31 Moaks Rep. 543, and note in which the cases are collected.

Injuries Proximately Caused by Another.—But the society would not be responsible if the injury complained of was proximately caused by another person. Thus, where a fair association allowed private teams to drive over the race course after the races were over, and the driver of a team whipped his horses so that they ran away and left the track and injured a visitor to the fair, it was held that the society was not liable. *Barton v. Pepin County Agricultural Soc.*, 83 Wis. 19, 46 Alb. L. J. 371.

Injury to Employee.—Where an agricultural society employed the plaintiff to ride in a running race of horses, which was promoted and controlled by the society, and negligently permitted a horse, known to it to be danger-

ous, to run in the race without warning the plaintiff of the dangerous character of the horse, of which she was ignorant, and the horse bolted the track during the race, and the plaintiff was thereby injured, it was held, in an action for personal injuries, that the plaintiff's complaint showed a cause of action against the society. *Lane v. State Agricultural Society* (Minn. 1895), 64 N. W. Rep. 382.

3. **Machinery, etc.**—A, being rightfully on the grounds of B, an agricultural society, was struck and seriously injured by a mallet in the hands of a person using a "striking machine" placed on the grounds near where A was passing. It was held that B was negligent in permitting such a machine to be used on the grounds without having a guard around it. *Selinas v. State Agricultural Soc.*, 60 Vt. 249, 6 Am. St. Rep. 114.

A visitor to a fair was injured while stepping over a revolving line of shafting used for transmitting power to machinery. It appeared that his clothing had been caught in an uncovered coupling in the shaft. In an action brought to recover damages for the injury, it was held that the society was required to use only ordinary care in setting up and managing its machinery, and in the absence of special negligence on its part the plaintiff could not recover. *Phillips v. State Agricultural Soc.*, 60 Wis. 401.

4. *Dunn v. Brown County Agricultural Soc.*, 46 Ohio St. 93, 25 Am. & Eng. Corp. Cas. 467, 15 Am. St. Rep. 556; *Selinas v. State Agricultural Soc.*, 60 Vt. 249, 6 Am. St. Rep. 114.

Where a gate-keeper employed by an agricultural society to preserve good order at its fair, having authority to exclude persons not entitled to admission and to eject such as were disorderly, wrongfully ejected a visitor, and in so doing inflicted malicious injury on him, it was held that while the act might have been ill-advised, malicious, or even against express orders, it was within the general scope of the gate-keeper's employment, and the society was liable. *Oakland City Agricultural, etc., Soc. v. Bingham*, 4 Ind. App. 545. Compare *A'Hern v. State Agricultural Soc.* (Iowa 1894), 58 N. W. Rep. 1092, 24 L. R. A. 655.

For a collection of authorities on the liability of corporations for the acts of their agents, see note to *Ford v. Kendall Borough School Dist.*, 121 Pa. St. 543, and the titles

AGRICULTURE.—Agriculture is the art or science of cultivating the ground, especially in fields or in large quantities, including the preservation of the soil, the planting of seeds, the raising and harvesting of crops, and the rearing, feeding, and management of live-stock; tillage; husbandry; farming.¹

CORPORATIONS (PRIVATE); OFFICERS AND AGENTS (OF PRIVATE CORPORATIONS); ULTRA VIRES.

Acts of Agents Employed without Authority.—Where the officers of an agricultural society, acting without any express or implied authority in the articles of incorporation, employ hackmen to convey visitors to and from its fair grounds, such action is *ultra vires*, and a person injured by the careless driving of one of the hackmen cannot recover from the society. *Bathe v. Decatur County Agricultural Soc.*, 73 Iowa 11, 5 Am. St. Rep. 651.

As to the liability of municipal corporations for the unauthorized acts of their officers, see *Hilsdorf v. St. Louis*, 45 Mo. 94, 100 Am. Dec. 352, and extensive note. Also the titles **MUNICIPAL CORPORATIONS; PUBLIC OFFICERS.**

1. Webster's Dictionary, quoted in *Dillard v. Webb*, 55 Ala. 474; *Binzel v. Grogan*, 67 Wis. 150. But in the latter case the court held that the phrase "used for *agricultural* purposes," in an exemption statute, was not to receive a literal construction where the constitution had imperatively required the enactment of such a statute by the legislature.

A holding of twenty-five acres, ten of which were occupied by a villa, offices, gardens, and ornamental grounds, and the remainder used for pasture, is not "*agricultural* or pastoral." *Doyle v. Campbell*, 1 R. C. L. 95.

Work in a Gristmill—Agricultural Employment.—Work in a gristmill is not "*agricultural* employment" within a statute regulating laborers' hours of work. *Bachelor v. Bickford*, 62 Me. 526.

Agricultural Products—Flour.—In *Getty v. Barnes Milling Co.*, 40 Kan. 284, it was held that flour was not within the meaning of the term "*agricultural* products" as used in the charter of a company specifying the purposes of its incorporation to be for the conversion and disposal of *agricultural* products. The court said: "The purposes for which this corporation is formed are for the conversion and disposal of *agricultural* products by means of mills, elevators, stores, or otherwise.' The first question is, under this charter, Had the president or general manager of the company, without special direction from his company, the right to go upon the market and purchase flour? In our judgment this question must be decided by determining whether flour is an *agricultural* product. In one sense it may be said that flour is a product of *agriculture*, but in the common application of the term we think this is not true. The product of *agriculture* is that which is the direct result of husbandry and culture of the soil. It embraces the product in its natural, unmanufactured condition. As cotton is a product of *agriculture*, yet cotton-cloth, or other fabrics made from cotton, can hardly be termed *agricultural* products. If

the products resulting from the manufacture of *agricultural* products are not to be determined by the common acceptance of the phrase '*agricultural* products,' then this charter would embrace an innumerable variety of manufactures and their products. Flour, being the product of manufacture, is not strictly within the purview of this charter."

Agricultural Products—Meat.—In *Davis v. Macon*, 64 Ga. 128, 37 Am. Rep. 60, it was held that a city, authorized to tax all persons exercising within its bounds any profession or trade, might impose a license-tax upon persons selling butcher's meat therein, although municipal corporations were prohibited by general statute from imposing taxation upon *agricultural* products. The court said: "The cattle were bought from farmers, but there is no express allegation that they were '*agricultural* products.' And when it is thought of closely, would it not be rather an unusual application of the phrase '*agricultural* products' to make it comprehend beef-cattle? In ordinary usage, is not that phrase confined to the yield of the soil, as corn, wheat, rye, oats, hay, etc., in its primary form? When there has been conversion of the fruits of the soil into animal tissues, are we still to apply the phrase? And suppose we are to disregard the change in its first stage, and call a cow or a steer *agricultural* product, must we carry the name forward to the steak or roast which the butcher sells us from the slaughtered animal? If cattle fall under the denomination, so do hogs; and if beef, so does bacon. Passing from this verbal difficulty and turning to an argument of altogether another class, it is to be noted that the tax we are considering is not laid upon the beef sold, nor upon the sale thereof, nor is the amount of the tax measured by the amount of sales. The tax is upon business and upon the vehicle used therein, and to conduct such business by such means has no necessary relation to '*agricultural* products raised in this state,' granting that fresh beef is to be classed as an *agricultural* product. It would be possible to conduct a like business by like means with beef raised elsewhere, and if the complainants chose to deal in Georgia-raised beef as a business, are they to be therefore exempted from all business tax?"

Agricultural Purposes.—A locomotive which is sometimes let out by its owner to farmers for the purpose of carrying straw and manure for use in farming operations, and which is sometimes used by the owner himself for the purpose of carrying for hire straw and manure to be used exclusively on farms, and is not used for any other purpose, is within the exemption in section 32 of the *English Highways and Locomotives (Amendment) Act*, 1878, as being "a locomotive used solely for *agricultural* purposes," and may be so used without a license from the county authority. *Ellis v. Hulse*, 23 Q. B. Div. 24.

AID. (See also the titles, AIDER AND ABETTOR; MUNICIPAL AID.)—To aid is defined as, to support, either by furnishing strength, or means to help to success.¹

Engaged in Agriculture—Exemption. (See also the title EXEMPTION LAWS.)—The *Tennessee* statutes exempt in the hands of the head of a family “engaged in *agriculture*” certain property. One who owned within a town a lot of ground of one acre, and was engaged in the business of butchering, working as a day laborer, and cultivating his garden for the support of his family, claimed the exemption. He was held not to be an *agriculturist* in the sense of the exemption laws, the court saying: “The word ‘*agriculture*,’ as used in the exemption laws, has its peculiar legal sense, and relates to the vocation. It is true that two or more vocations may be combined, but we are not accustomed to think of an artisan, a merchant, or a lawyer, who, living within a crowded town or city and following his avocation, happens to cultivate a little patch of earth in vegetables for his table, as an *agriculturist*, even in its most general sense. If he produced them on any extended scale for market, or ‘for man and beast’ in the sense of husbandry, then he might be regarded as an *agriculturist* in the sense of the law.” *Simons v. Lovell*, 7 Heisk. (Tenn.) 510.

But in *Springer v. Lewis*, 22 Pa. St. 193, the exemption was held to extend to a person engaged in several occupations. The court said: “A person is ‘actually engaged in the science of *agriculture*’ when he derives the support of himself and family, in whole or in part, from the tillage and cultivation of fields. He must cultivate something more than a garden, though it may be much less than a farm. If the area cultivated can be called a field, it is *agriculture*, as well in contemplation of law as in the etymology of the word. And if this condition be fulfilled, the uniting of any other business, not inconsistent with the pursuit of *agriculture*, does not take away the protection of the act. The keeping tavern and boarding-house, and the working at his trade as a tailor in the intervals of the seasons for farming, did not divest Lewis of the benefits which the statute was intended to secure to him.”

Cultivated Lands.—“An *agricultural* holding, I take it, refers only to land cultivated for profit in some way, and not the natural grass land.” *Morley v. Jones*, 32 S. J. 630.

1. Webster’s Dictionary, quoted in *Synod of Dakota v. State*, 2 S. Dak. 374.

The terms “*aid* and relief,” imply want, need, or necessity on the part of the applicant. *Russell v. Providence*, 7 R. I. 574.

Abandoning Debtor—Advice.—Simply advising a debtor to run away, though the advice be given to delay, hinder, or defraud his creditors, is not equivalent to “*aiding* and assisting,” and will not sustain an action under the statute against the fraudulent removing of debtors. “Most persons are willing to give advice; some do it officiously; but if called on to give *aid* or assistance, the subject is looked at in a different point of view. Ad-

vice costs nothing; it is but words. *Aid* or assistance is the doing of some act whereby the party is enabled, or it is made easier for him, to do the principal act, or effect some primary purpose.” *Pearson, J.*, in *Wiley v. McRee*, 2 Jones (N. Car.) 349.

But going with the debtor to the station and returning with his horse renders the party liable under the statute, where he knew of the fraudulent intent. *Moss v. Peoples*, 6 Jones (N. Car.) 142, citing *Godsey v. Bason*, 8 Ired. (N. Car.) 260; *Wiley v. McRee*, 2 Jones (N. Car.) 349; *Moore v. Rogers*, 3 Jones (N. Car.) 90.

Aid or Comfort.—The words “*aid* or comfort” used in the Act of March 12, 1863 (12 Stat. 820), allowing any person claiming to be the owner of property captured by the United States during the rebellion to bring suit therefor in the Court of Claims, on proof that “he has never given *aid* or comfort to the present rebellion,” have the same meaning as they have in the clause of the constitution defining treason (art. 3, § 3). *Young v. U. S.*, 97 U. S. 39.

See also *U. S. v. Greathouse*, 4 Sawy. (U. S.) 464; and the titles ADHERE, vol. I, p. 633; TREASON.

Provisions against Furnishing Aid to Sectarian Schools. (See also the titles RELIGIOUS LIBERTY; SCHOOLS.)—The constitutions of a number of the states provide that no money or property of the state shall be appropriated to *aid* any sectarian school, society, etc. It has been held that this prohibition applies to all appropriations to such schools, whether made as a donation or in payment for services rendered the state by such schools. *Synod of Dakota v. State*, 2 S. Dak. 366. And in *Cook County v. Chicago Industrial School*, 125 Ill. 540, it is said: “It cannot be said that a contribution is no *aid* to an institution, because such contribution is made in return for services or work done. A school is *aided* by the patronage of its pupils, even if they do pay for their tuition.” It was contended in that case, that as these institutions furnish tuition, clothing, care, etc., in return for the money received by them, and as they earn what they receive and are not the recipients of any gift or donation, nothing was paid in *aid* of or to help to support or sustain them. This contention was not allowed. And to the same effect is *Synod of Dakota v. State*, 2 S. Dak. 376. Compare *Millard v. Board of Education*, 121 Ill. 297, commented upon in *Cook County v. Chicago Industrial School*, 125 Ill. 540.

Public Works.—See also the title MUNICIPAL AID.

The legislature of *Nebraska*, by several acts, authorized any county or city in the State to issue bonds to *aid* in the construction of any railroad or work of internal improvement. Such bonds were issued to pay for work constructed by the county itself. On an application

Information conveyed, either verbally or by a writing, to a prisoner, that he has a friend and can be released from confinement, is not a violation of a statute forbidding the conveying to any person lawfully imprisoned any instrument, arms, or other thing calculated to aid his escape.¹

for an injunction to restrain the collection of certain taxes levied for the payment of the interest due on said bonds, on the ground that they were illegal and void, the bonds were declared valid and the injunction refused, the court saying: "It is evident that the word *aid*, as used in this connection by the legislature, has a much broader meaning than that contended for by the plaintiff's counsel, and is not necessarily restricted to works of internal improvement in which the county has no interest. * * * The word *aid*, as used, evidently means that the county may contribute toward the cost of the improvement by issuing its bonds, a portion of the fund necessary to make the improvement to be contributed in some other manner, as by grant from the state, donations, by two counties bordering on the river uniting in the enterprise, etc., but does not necessarily repel the conclusion that the county may construct the desired improvement for the benefit of the public." *Union Pac. R. Co. v. Colfax County*, 4 Neb. 450, 3 Cent. L. J. 287.

Same—Donations.—In *State v. Babcock*, 19 Neb. 230, it was held that the word *aid* might include donations. The court said: "Objection is made that the power to vote bonds is to *aid* in the construction of railroads or other works of internal improvement. This question was very fully considered in *U. P. R. R. v. Commissioners of Colfax Co.*, 4 Neb. 450. The evident object of the statute was to enable a county or city to avail itself of some proffered benefit of the character named in the statute by aiding or assisting the enterprise. From the nature of the case no narrow technical construction can or should be placed upon the word. In *U. P. R. R. v. Commissioners*, *supra*, it was contended with great force that it was to be restricted to donations alone; but this court refused to give it such a narrow construction, but held that the statute applied where the funds were to be expended in a work of internal improvement constructed by the county. It may include donations and also works of internal improvement constructed by the municipality in part from bonds voted to *aid* the enterprise. This was the evident intention of the legislature, and the statute

should be so construed as to carry such intent into effect."

Aid and Comfort.—Where a testator stated that he desired to render some *aid* and comfort to his sister in her decline of life, it was held that these words indicated that the provision he made in her favor was to take effect at once, and not, as contended by the executors, that it was not to take effect until ten years after the death of the testator. The court said: "There is nothing in the will to warrant the notion of the executors, that the provision for the plaintiff did not commence until ten years after the death of the testator. It would be preposterous to suppose it, when this legacy, in the nature of an annuity, was given, as the will recites, with the view of rendering 'some *aid* and comfort' to the plaintiff, 'in her decline of years,' the chance being that ten years would outlast her. The will, speaking from the death of the testator (*Houghton v. Franklin*, 1 Sim. & Stu. 392), directs the executors and trustees to pay over to the plaintiff 'the dividends, interest, or income' of the investment, 'semi-annually during her natural life.' These words, in conformity too with the spirit and purpose of the bequest, require that the payment should commence at the expiration of a half year from the death of the testator. And the cases of *Gibson v. Bott*, 7 Ves. 96, 97, and *Eyre v. Golding*, 5 Binn. 474, 475, distinguishing between the gift of the principal sum for life, without more, and a direction like this to trustees, to pay to one, annually or semi-annually for life, the interest or income of that sum, as well as the above case of *Houghton v. Franklin*, support us in this construction." *Trott v. Wheaton*, 5 R. I. 353.

1. Escape. (See also the title *ESCAPE*.)—The design of the act was to prohibit the conveying to prisoners in confinement any substantial, tangible thing which might be used or handled by them in facilitating or effecting their escape; but conveying information to a prisoner by which he is led to expect *aid* or release, or conveying to him any substance which could in itself be in nowise useful or of advantage to him in making his escape, does not come within the prohibition. *Hughes v. State*, 6 Ark. 131.

AIDER AND ABETTOR.

BY L. P. MCGEEHEE.

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CROSS-REFERENCES.

As to matters of PROCEDURE, see the following titles in the ENCYCLOPÆDIA OF PLEADING AND PRACTICE: *ACCESSORIES AND THE LIKE*, vol. 1, p. 66; *INDICTMENT*; and *titles treating of particular offenses.*

As to other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles: ACCESSORY, vol. 1, p. 257; *ACCOMPLICES*, vol. 1, p. 389; *CONFESSIONS*; *CONSPIRACY*; *CRIMINAL LAW*; *EVIDENCE*; *RES GESTÆ*; *WITNESSES*; and *the titles where particular crimes are treated.*

I. DEFINITION AND GENERAL PRINCIPLES—**Definition.**—An aider and abettor is one who, although not the actual perpetrator of a felonious offense, is yet present, either actually or constructively, at the commission thereof, and does some act to render aid to the actual perpetrator.¹ The term aider and abettor

1. *Reg. v. Young*, 8 C. & P. 644, 34 E. C. L. 564; *State v. Tally* (Ala. 1894), 15 So. Rep. 722; *Hill v. State*, 28 Ga. 608; *Williams v. State*, 47 Ind. 568; *Adams v. State*, 65 Ind. 574; *State v. Farr*, 33 Iowa 553; *Mulligan v. Com.*, 84 Ky. 229; *State v. Ellis*, 12 La. Ann. 390; *State v. Davis*, 29 Mo. 396; *Warden v. State*, 24 Ohio St. 146.

A Principal in the Second Degree is one who is present, aiding and abetting the fact to be done. 4 Bl. Com. 34.

A person may be a principal in an offense in two degrees. A principal in the first degree is he or she who is the actor or absolute perpetrator of the crime. A principal in the second degree is he or she who is present, aiding and abetting the act to be done. *Georgia Code*, § 4305; *Collins v. State*, 88 Ga. 347.

Aid and Abet.—The words “aid and abet,” in legal phrase, are pretty much synonyms of each other, as they comprehend all the assistance rendered by acts or words of encouragement or support, or presence, actual or constructive, to render assistance, should it become necessary. No particular acts are necessary. *Per Stone, C. J.*, in *Raiford v. State*, 59 Ala. 106.

“Abetting [in a crime], I understand to mean giving some assistance.” *Per Bramwell, B.*, in *Reg. v. Taylor*, 2 Cent. L. J. 458.

In the Criminal Code of Iowa, the word

“abet,” in relation to the commission of a crime, indicates the act of an accessory before the fact, while the word “aid” indicates the act of an accessory after the fact. *State v. Empey*, 79 Iowa 460.

The terms “aid and abet, though not present,” as used in the *Michigan Comp. Laws*, § 6065, are employed in an enlarged sense, including all which go to constitute an accessory before the fact at common law. *Shannon v. People*, 5 Mich. 71.

Where a statute defines an offense, and provides that every person who “aids or abets” in the violation of the statute shall be punished, one who procures and counsels the act to be done may be indicted under the statute, for such acts are included within the term “abet.” *U. S. v. French*, 57 Fed. Rep. 382.

Encourage, Aid, or Abet.—The words “encourage, aid, or abet,” mean or imply that the will of a person has contributed to the act committed by another, and fully and accurately describe an accessory before the fact if such person is too far away to aid in the felonious act, or a principal in it if near enough to aid. *True v. Com.*, 90 Ky. 651; *Omer v. Com.*, 95 Ky. 360.

Aid and Consent.—The words “aid and consent” in the commission of an offense, used in a statute wherein the offense is not called a felony, include all thus aiding and consenting,

is equivalent to principal in the second degree.¹

Accessories at the Fact—Historical.—The most ancient authorities of the law considered such a person as an accessory at the fact. But to avoid the technicalities of the law regarding accessories, aiders and abettors were early held to be principals, and were called principals in the second degree.²

What Offenses Admit Aiders and Abettors.—Aiders and abettors, as successors to accessories at the fact, are an incident of felonies;³ but all practical distinction between principals in the first and second degree having long since exploded, the like participants in misdemeanors are often spoken of as aiders and abettors.⁴

Relation of Aider and Abettor to Principal in the First Degree.—The distinction between principals in the first degree and principals in the second degree, or aiders and abettors, has, since an early period,⁵ been formal merely, and by many modern statutes it is entirely ignored;⁶ consequently, the guilt of the aider and abettor is not considered as dependent upon that of the principal in the

whether present or absent, and do not necessarily extend to accessories before the fact. *Com. v. Macomber*, 3 Mass. 257.

1. 1 Russ. on Cr. (9th Am. ed.) 49.

2. **Aiders and Abettors Anciently Accessories.**—1 Russ. on Cr. (9th Am. ed.) *49; 1 Chitty's Cr. L. 256; 1 Hale 437-438; Hawk. b. 2, c. 20, § 7; *Rex v. Royce*, 4 Burr. 2074; *Boyd v. State*, 17 Ga. 194; *Com. v. Knapp*, 9 Pick. (Mass.) 514, 20 Am. Dec. 491.

The law as to principals in the second degree was thus settled in the reign of Henry IV. *Com. v. Knapp*, 9 Pick. (Mass.) 514, 20 Am. Dec. 491.

This law was by no means settled till after the time of Edward III., and so late as the first Queen Mary a chief justice of England strongly doubted of it (see Griffith Ap David's Case, Plowd. 98a), though indeed it had been sufficiently settled before that time. 1 Russ. on Cr. (9th Am. ed.) *49, note.

3. See the title ACCESSORY, IV. *Offenses Which Admit of Accessories*, vol. 1, p. 260.

Aiders and Abettors in Statutory Felonies.—Statutory felonies "possess, in England, all the incidents which appertain to felony by the rules and principles of the common law, one of which is, that all those who are present, aiding and abetting when a felony is committed, are principals. This has never been questioned there; the principle has been adopted here, and has become one of universal application. *Rex v. Royce*, 4 Burr. 2083; *U. S. v. Gooding*, 12 Wheat. (U. S.) 469." *Per Baldwin, J.*, in *U. S. v. Wilson*, Baldw. (U. S.) 78.

When an offense is punishable by a statute which makes no mention of principals in the second degree, such principals are within the meaning of the statute, as much as the parties who actually commit the offense. *U. S. v. Snyder*, 14 Fed. Rep. 554; *Com. v. Carter*, 94 Ky. 527, *limiting Stamper v. Com.*, 7 Bush (Ky.) 612; *State v. Littell*, 45 La. Ann. 655; *State v. Ellis*, 12 La. Ann. 390, *overruling State v. Hendry*, 10 La. Ann. 207.

It is otherwise where the statute applies only to the person actually committing the offense. *Frey v. Com.*, 83 Ky. 190; *Com. v. Carter*, 94 Ky. 527. See also the remarks of

Lord Mansfield in *Rex v. Royce*, 4 Burr. 2076.

Manslaughter.—In *State v. Coleman*, 5 Port. (Ala.) 32, Collier, J., said: "Upon authority, it seems unquestionable that there may be aiders and abettors in manslaughter, and Russell, vol. 1, p. 456, lays it down that 'in order to make an abettor to a manslaughter a principal in the felony, he must be present, aiding and abetting the fact committed.'" This learned author is sustained by Hale (vol. 1, pp. 438, 439, 443 *et post.*) So in *Hawkins* (vol. 1, p. 102) it is said to be clear that if a master, maliciously intending to kill another, take with him his servants, without acquainting them with his purpose, and meet and fight his adversary, and his servants then take part with him, and kill his adversary, they are guilty of manslaughter only; but the master, of murder. This distinction is doubtless founded upon the fact that there was a mere participation in the act, without a felonious participation in the design—a distinction founded in principle and recognized by authority. *Plummer's Case*, Kel. 109, 1 East P. C. 258."

To the same effect are *Hagan v. State*, 10 Ohio St. 459; *Goff v. Prime*, 26 Ind. 196; *Sloan v. Com.* (Ky. 1893), 23 S. W. Rep. 676; *Polly v. Com.* (Ky. 1893), 24 S. W. Rep. 7.

Contra, of involuntary manslaughter, *Adams v. State*, 65 Ind. 565.

4. *Reg. v. Coney*, 8 Q. B. Div. 534; *Brown v. Perkins*, 1 Allen (Mass.) 98; *McMannus v. Lee*, 43 Mo. 208, 97 Am. Dec. 386; *Cooper v. Johnson*, 81 Mo. 489; *Hilmes v. Stroebe*, 59 Wis. 74.

Aiders and Abettors in Misdemeanors are principals in the first degree. *U. S. v. Gooding*, 12 Wheat. (U. S.) 460; *U. S. v. Sykes*, 58 Fed. Rep. 1000; *Stevens v. People*, 67 Ill. 587; *Com. v. Macomber*, 3 Mass. 257; *People v. Erwin*, 4 Den. (N. Y.) 129; *Lowenstein v. People*, 54 Barb. (N. Y.) 299; *Dunman v. State*, 1 Tex. App. 593.

See the title ACCESSORY, vol. 1, p. 261.

5. See *supra*, this section, *Accessories at the Fact—Historical*.

6. *Collins v. State*, 88 Ga. 349; *State v. Littell*, 45 La. Ann. 656; *Warden v. State*, 24 Ohio St. 143. See also the title ACCESSORY, vol. 1, pp. 262-263.

first degree,¹ and the technical rules which at common law regulate the indictment and trial of accessories as distinguished from principals have no application to aiders and abettors.²

II. WHO MAY BE AN AIDER AND ABETTOR.—One may be an aider and abettor,

1. Aider and Abettor Convicted—Principal Acquitted.—Thus, the aider and abettor may be convicted, although the person charged as principal in the first degree is acquitted. *Rex v. Taylor*, 1 Leach C. C. 360; *Reg. v. Wallis*, 1 Salk. 334; *Rex v. Towle*, Russ. & Ry. 314; *State v. Phillips*, 24 Mo. 475; *State v. Anderson*, 89 Mo. 312; *State v. Whitt*, 113 N. Car. 716; *Searles v. State*, 6 Ohio Cir. Ct. Rep. 331.

In *Reg. v. Wallis*, 1 Salk. 334, A was indicted for murder, and B and C as persons present aiding and abetting A. A was acquitted. It was held that B and C might be convicted. Lord Holt said: "Though the indictment be against the prisoner for aiding, assisting, and abetting A, who was acquitted, yet the indictment and trial of this prisoner is well enough, for who actually did the murder is not material; the matter is that a murder was committed, and the other is but a circumstance, and all are principals in this case; therefore, if a murder be proved, it is well enough."

Where it was claimed by the prosecution that the defendant, who was indicted for murder, had agreed with one F that they would make the deceased retract a statement which he had made, or, if he failed to so retract, would inflict serious bodily injury upon him or kill him, and that the deceased was afterwards killed by F, it was necessary for the prosecution to prove the guilt of F, and then to connect the defendant with that guilt by showing an agreement and conspiracy and presence, or that, by his presence, the defendant aided and abetted F in the killing; and evidence of the flight of F, after having inflicted the fatal injury upon the deceased, was held admissible to prove his guilt so as to warrant a conviction against the defendant. *McIntyre v. State* (Texas Crim. App. 1895), 33 S. W. Rep. 347.

Effect of Principal's Guilt or Innocence.—One charged as principal in the first degree, if properly indicted himself, cannot take advantage of defective averments, if any, against those indicted as principals in the second degree. *State v. Davis*, 29 Mo. 391.

The record of the acquittal of the principal in the first degree is not admissible in favor of one tried as principal in the second degree. *State v. Phillips*, 24 Mo. 475; *State v. Ross*, 29 Mo. 32.

But in *Georgia* it has been held that one cannot be convicted as a principal in the second degree, where there is no evidence of the guilt of the principal in the first degree. *Jones v. State*, 64 Ga. 697.

And in that state the record of the conviction of the principal in the first degree may be introduced on the trial of the principal in the second degree, and is conclusive evidence of the conviction of the former, and *prima facie* evidence of his guilt. *Studstill v. State*, 7 Ga. 2; *Coxwell v. State*, 66 Ga. 309.

2. See the title ACCESSORIES AND THE LIKE, 1 ENCYC. PL. AND PR., p. 66, for the rules regulating the trials of accessories. See also the title ACCESSORY in the present work, vol. 1, pp. 263-264.

One against whom there is evidence that he was present, aiding and abetting, should be indicted as a principal, and not as an accessory before the fact. *State v. Maxent*, 10 La. Ann. 743.

Order of Trial.—The aider and abettor may be arraigned and tried before the principal in the first degree has been found guilty. 2 Hale P. C. 223; 1 Chitty Crim. L. 256, 259; *Boyd v. State*, 17 Ga. 194; *Williams v. State*, 69 Ga. 11.

Indictment as against Principal in the First Degree.—An aider and abettor may be indicted as a principal in the first degree, and the indictment will be sustained by proof that he was present, aiding and abetting.

Alabama.—*Griffith v. State*, 90 Ala. 583.

Florida.—*Albritton v. State*, 32 Fla. 358.

Georgia.—*Hill v. State*, 28 Ga. 604; *Leonard v. State*, 77 Ga. 764; *Collins v. State*, 88 Ga. 347.

Illinois.—*Smith v. People*, 74 Ill. 144.

Indiana.—*Doan v. State*, 26 Ind. 495; *Williams v. State*, 47 Ind. 568.

Iowa.—*State v. Pugsley*, 75 Iowa 742; *State v. Munchrath*, 78 Iowa 268.

Kansas.—*State v. Shenkle*, 36 Kan. 43.

Louisiana.—*State v. Littell*, 45 La. Ann. 656.

Massachusetts.—*Com. v. Chapman*, 11 Cush. (Mass.) 422.

Michigan.—*Strang v. People*, 24 Mich. 1.

Missouri.—*State v. Phillips*, 24 Mo. 475; *State v. Davis*, 29 Mo. 391; *State v. Ross*, 29 Mo. 32; *State v. Orrick*, 106 Mo. 111.

Ohio.—*Warden v. State*, 24 Ohio St. 143; *Hanoff v. State*, 37 Ohio St. 178, 41 Am. Rep. 496.

Oregon.—*State v. Kirk*, 10 Oregon 505. See also vol. 1, title ACCESSORY, p. 263.

In *Georgia*, however, if one is indicted as the principal in the first degree, a verdict against him as guilty in the second degree is not warranted, and cannot be sustained. *Washington v. State*, 36 Ga. 222; *Shaw v. State*, 40 Ga. 120; *Collins v. State*, 88 Ga. 347.

In *Kentucky*, where two are indicted as principals in the first degree, one may be convicted as charged, and the other as aider and abettor. *Thompson v. Com.*, 1 Metc. (Ky.) 13; *Young v. Com.*, 8 Bush (Ky.) 366.

But where one is indicted alone as the actual perpetrator of the crime, he cannot be convicted upon proof that he was an aider and abettor. *Mulligan v. Com.*, 84 Ky. 229.

Indictment as Aider and Abettor.—One indicted as principal in the second degree may be convicted on proof that he actually committed the crime. *State v. Littell*, 45 La.

who by reason of age, sex, condition, or status, is himself incapable of being a principal in the first degree.¹

III. ESSENTIALS—1. Generally.—To constitute one an aider and abettor, it is essential that there should be: *first*, presence, actual or constructive; *second*, participation in the crime.²

2. Presence—*a*. GENERALLY.—Presence may be either actual or constructive.³

***b*. CONSTRUCTIVE PRESENCE.**—Constructive presence consists in being, in accordance with a concerted plan,⁴ near enough to the place of the crime to render aid to the main design, should the need arise.⁵

Ann. 656. See *Benge v. Com.*, 92 Ky. 1, and compare *Kessler v. Com.*, 12 Bush (Ky.) 18.

Joint Indictment.—The indictment of the principal in the second degree, with the principal in the first degree, may allege the matter according to the fact, or charge them both as principals in the first degree. *State v. Anderson*, 89 Mo. 312.

Where several are present, aiding and abetting a felony, they may be joined with the principal in the first degree, and charged either as actual perpetrators or as aiders and abettors. When a person is charged as aider and abettor, the manner in which he was so need not be set forth. It is sufficient to describe him generally as being present, aiding and abetting in the felony committed in manner and form as aforesaid. *State v. White*, 7 La. Ann. 531.

Conviction of Lower Degree of Offense.—Where there is a joint indictment against one as the actual perpetrator and another as the aider and abettor in a murder, both may be convicted of manslaughter. *State v. Putman*, 18 S. Car. 175, 44 Am. Rep. 569.

1. Aiders and Abettors, although Incapable of Being Actors.—Lord Audley's Case, 3 How. St. Tr. 413; *U. S. v. Bayer*, 4 Dill. (U. S.) 407; *U. S. v. Snyder*, 14 Fed. Rep. 554; *Boggus v. State*, 34 Ga. 276; *State v. Comstock*, 46 Iowa 265; *People v. Chapman*, 62 Mich. 280, 4 Am. St. Rep. 857; *People v. McKane*, 143 N. Y. 455; *State v. Love*, 83 N. Car. 605; *State v. Dowell*, 106 N. Car. 722, 19 Am. St. Rep. 568; *State v. Sprague*, 4 R. I. 257.

In such case the indictment should set out the aiding and abetting in which alone the crime consists, and which, under these conditions, is the principal offense under a statute, abolishing all distinctions between accessories before the fact and principals in the first or second degree, and making all indictable, triable, and punishable as principals. *Shannon v. People*, 5 Mich. 71. But compare *State v. Comstock*, 46 Iowa 265.

2. *Plummer v. Com.*, 1 Bush (Ky.) 76.

"To make an abettor to a murder or homicide principal to the felony, there are regularly two things requisite: *first*, he must be present; *second*, he must be aiding and abetting." 1 Hale P. C. 439.

3. *Foster* 350; 1 Hawk. P. C., c. 32, § 7; 4 Bl. Com. 34; 1 Russ. on Cr. (9th Am. ed.) 50; U. S. v. Boyd, 45 Fed. Rep. 851; *State v. Douglass*, 34 La. Ann. 523.

One who is not present at the commission

of a felony cannot be convicted as principal. *U. S. v. Holland*, 3 Cranch (C. C.) 254; *U. S. v. Wilson, Baldw.* (U. S.) 78.

4. As to need of preconcert, see the next section, *infra*.

5. Constructive Presence.—*Rex v. Borthwick*, Doug. 207; *Rex v. Stewart*, R. & R. C. C. 363; *U. S. v. Boyd*, 45 Fed. Rep. 851; *State v. Wisdom*, 8 Port. (Ala.) 520; *McCarney v. People*, 83 N. Y. 408, 38 Am. Rep. 456; *People v. McElroy* (Supreme Ct.), 37 N. Y. St. Rep. 650; *State v. Chastain*, 104 N. Car. 900; *State v. Prater*, 26 S. Car. 198. See the title ACCESSORY, vol. 1, p. 258.

In *Com. v. Knapp*, 9 Pick. (Mass.) 517, 20 Am. Dec. 491, Putnam, J., for the court, said: "The person charged as a principal in the second degree must be present; and he must be aiding and abetting the murder. But if the abettor, at the time of the commission of the crime, were assenting to the murder, and in a situation where he might render some aid to the perpetrator, ready to give it if necessary, according to an appointment or agreement with him for that purpose, he would, in the judgment of the law, be present and aiding in the commission of the crime. It must, therefore, be proved that the abettor was in a situation in which he might render his assistance, in some manner, to the commission of the offense. It must be proved, that he was in such a situation, by agreement with the perpetrator of the crime, or with his previous knowledge, consenting to the crime, and for the purpose of rendering aid and encouragement in the commission of it. It must also be proved, that he was actually aiding and abetting the perpetrator at the time of the murder. But if the abettor were consenting to the murder, and in a situation in which he might render any aid, by arrangement with the perpetrator, for the purpose of aiding and assisting him in the murder, then it would follow as a necessary legal inference that he was actually aiding and abetting at the commission of the crime. For the presence of the abettor, under such circumstances, must encourage and embolden the perpetrator to do the deed, by giving him hopes of immediate assistance; and this would in law be considered as actually aiding and abetting him, although no further assistance should be given. For it is clear, that if a person is present, aiding and consenting to a murder or other felony, that alone is sufficient to charge him as a principal in the crime. And we have seen that the presence, by construction

c. MERE PRESENCE.—Mere presence is not sufficient to render one an aider and abettor,¹ but presence, companionship, and conduct, before and after the offense, are circumstances from which his participation in the criminal intention may be inferred.² Yet, if special circumstances or relations create a duty to interfere, mere inactive presence may amount to a criminal participation.³

3. Participation in the Crime—Necessity for Participation.—To constitute a principal in the second degree there must be, not only presence, but a participation,

or judgment of the law, is in this respect equivalent to actual presence."

A person cannot be convicted as a principal for aiding the person who actually committed the crime, unless he was in a position to render, if necessary, some personal assistance, and desired to have the crime committed. *State v. Valwell*, 66 Vt. 558.

Common Criminal Design, with Distribution of Parts.—In general, if several unite in one common design to do some unlawful act, and each takes the part assigned him, though all are not actually present, yet all are present in the eye of the law. *Hess v. State*, 5 Ohio 12, 22 Am. Dec. 767. See also the title ACCESSORY, vol. 1, p. 259.

Illustrations of Constructive Presence.—One who watches for his companions in order to prevent surprise, or remains at a convenient distance in order to favor their escape if necessary, or is in such a situation to be able readily to come to their assistance, the knowledge of which is calculated to give additional confidence to his companions, is, in contemplation of law, an aider and abettor. *State v. Walker*, 98 Mo. 95. See *Bell v. State*, 1 Tex. App. 598.

Where A waits under a window while B steals articles in the house, which he throws out of the window to A, the latter is a principal in the offense. *Rex v. Owen*, 1 M. C. C. 96.

A person without being actually present at the unlawful disinterment of a dead body, may be found guilty of the offense, if, with the intention of giving assistance, he is near enough to afford it should it be needed. *Tate v. State*, 6 Blackf. (Ind.) 110.

1. 1 Hale P. C. 439; Foster 350.

England.—*Reg. v. Coney*, 8 Q. B. Div. 534.

Alabama.—*State v. Tally* (Ala. 1894), 15 So. Rep. 722.

California.—*People v. Ah Ping*, 27 Cal. 490; *People v. Woodward*, 45 Cal. 293, 13 Am. Rep. 176.

Georgia.—*Lowery v. State*, 72 Ga. 649.

Iowa.—*State v. Farr*, 33 Iowa 553; *State v. Maloy*, 44 Iowa 104.

Kansas.—*State v. Douglass*, 44 Kan. 618, citing and approving 1 AM. AND ENG. ENCYC. OF LAW, 1st ed., 63-64.

Kentucky.—*Plummer v. Com.*, 1 Bush (Ky.) 76; *True v. Com.*, 90 Ky. 651.

Missouri.—*State v. Cox*, 65 Mo. 29; *Cooper v. Johnson*, 81 Mo. 483; *State v. Orrick*, 106 Mo. 111.

North Carolina.—*State v. Hildreth*, 9 Ired. (N. Car.) 440, 51 Am. Dec. 369.

Texas.—*Burrell v. State*, 18 Tex. 713; *Jackson v. State*, 20 Tex. App. 190; *Watson v. State*, 28 Tex. App. 34.

Virginia.—*Kemp v. Com.*, 80 Va. 448.

Approving or Consenting to Criminal Act.—

The words "approve of," "consent to," or "assent to" do not properly express the idea of aiding and abetting, since one may be present approving, etc., without becoming an aider and abettor. *Omer v. Com.*, 95 Ky. 360; *True v. Com.*, 90 Ky. 651. See *State v. Douglass*, 44 Kan. 618.

Mere Presence as a Spectator at a Prize Fight, in itself illegal, does not impose responsibility therefor. *Reg. v. Coney*, 8 Q. B. Div. 534. Here *Cave, J.*, said: "Where presence may be entirely accidental, it is not even evidence of aiding and abetting. Where presence is *prima facie* not accidental, it is evidence, but no more than evidence, for the jury." *Hawkins, J.*, said: "In my opinion, to constitute an aider and abettor, some active steps must be taken by word or action, with the intent to instigate the principal or principals. * * * It is no criminal offense to stand by, a mere passive spectator of a crime, even of a murder. Non-interference to prevent a crime, is not itself a crime."

All the English authorities as to participating in prize fights are reviewed at length in this case, and *overruled* so far as they conflict with the doctrine announced. See the title PRIZE FIGHT.

Presence at Fight or Riot.—"If," says Lord Hale (1 P. C. 439), "A and B be fighting, and C, a man of full age, comes by chance and is a looker-on only, and assists neither, he is not guilty of murder or homicide as principal in the second degree."

One standing by at a riot, though he can stop it and does not, is not a principal therein. *Reg. v. Atkinson*, 11 Cox C. C. 330. Compare *Reg. v. Sharpe*, 3 Cox C. C. 228; *Williams v. State*, 9 Mo. 270; *State v. Blair*, 13 Rich. (S. Car.) 93.

Knowledge of Falsity of Representations.—Mere knowledge on the part of C that certain representations made by A to defraud B are false, without aiding and abetting therein, will not render C criminally liable. *Clarke v. State*, 32 Ind. 67.

2. *Reg. v. Coney*, 8 Q. B. Div. 543; *Burrell v. State*, 18 Tex. 713; *Mason v. State*, 31 Tex. Crim. Rep. 306, Foster 350.

3. **Passive when Duty to Interfere.**—Where A, desirous of getting a divorce from his wife, conceals himself to see B, with whom he is in concert, commit adultery with her in order to obtain evidence for his divorce, and B, not being able to persuade her, uses force, and A does not interfere, he is guilty of rape as a principal. *People v. Chapman*, 62 Mich. 280. 4 Am. St. Rep. 857. See 20 Cent. L. J. 3.

an aiding and abetting, in the crime committed.¹

Criminal Intent.—It is essential that the aider and abettor share the criminal intent of the principal in the first degree.²

How Participation Shown.—This participation may be by acts or words, or by mere presence lending confidence to the principal criminal.³

1. *State v. Farr*, 33 Iowa 553; *State v. Hildreth*, 9 Ired. (N. Car.) 440, 51 Am. Dec. 369; *Bean v. State*, 17 Tex. App. 60; *Smith v. State*, 21 Tex. App. 123.

As to the meaning of the terms "aid and abet," see *supra*, this title, *Definition and General Principles*, and notes thereto.

2. **Common Criminal Intent is Essential.**—*Reg. v. Cruse*, 8 C. & P. 541, 34 E. C. L. 522; *Reg. v. Skeet*, 4 F. & F. 931; *Rex v. Collison*, 4 C. & P. 565, 19 E. C. L. 529; *Martin v. State*, 89 Ala. 115; *People v. Leith*, 52 Cal. 251; *Savage v. State*, 18 Fla. 909; *White v. People*, 139 Ill. 143; *Adams v. State*, 65 Ind. 565; *Com. v. Ryan*, 154 Mass. 422; *Woolweaver v. State*, 50 Ohio St. 277; *Mason v. State*, 31 Tex. Crim. Rep. 306; *Quinn v. State* (Tex. Crim. App. 1893), 20 S. W. Rep. 1108; *Wilson v. State* (Tex. Crim. App. 1893), 24 S. W. Rep. 409.

To be an aider and abettor, a person must be aware of his companion's criminal design, and must participate in it. *Burrell v. State*, 18 Tex. 713; *Watson v. State*, 28 Tex. App. 34.

To hold one liable with others as a principal in the commission of an offense, there must be a combination of act and intent. *Rountree v. State*, 10 Tex. App. 110; *Walker v. State*, 29 Tex. App. 621.

Where A comes up, just after a fight between B, C, and D, and while their blood is still hot, and A beats B, he is not a principal in the riot. *Sloan v. State*, 9 Ind. 565.

Reasonable Doubt as to Intent.—Wherever a reasonable doubt exists as to a person's intention in interfering in a struggle between two other persons, he cannot be held to aid and abet. *Guilford v. State*, 24 Ga. 315.

3. **What Amounts to Participation.**—Presence and intention to aid in a crime amount to participation. *Singleton v. State* (Ala. 1895), 17 So. Rep. 327; *McCarty v. State*, 26 Miss. 299; *Rex v. Borthwick*, Doug. 207.

Where one is present, aiding and abetting, personal participation in the crime is not necessary. *Jolly v. State*, 94 Ala. 19; *Wright v. State*, 42 Ark. 94; *State v. O'Neal*, 1 Houst. Cr. Cas. (Del.) 58; *State v. Nash*, 7 Iowa 347; *Mitchell v. Com.* (Ky. 1890), 14 S. W. Rep. 489; *Green v. State*, 13 Mo. 382; *State v. Nelson*, 98 Mo. 414; *State v. Crab*, 121 Mo. 554; *State v. Squaires*, 2 Nev. 226; *Sharp v. State*, 6 Tex. App. 650; *Bell v. State*, 1 Tex. App. 598.

Illustrations of Acts of Participation.—The friends of duellists who go out with them, are present when the shots are fired, and return with them, though not acting as seconds, are principals in the second degree. *Reg. v. Young*, 8 C. & P. 644, 34 E. C. L. 564. See also the title DUELLING.

One may aid and abet another in passing counterfeit coin, though he stands by without even doing an act or saying a word while

the other is passing such coin. *Leitensdorfer v. Delphy*, 15 Mo. 160, 55 Am. Dec. 137.

So, where one, present and consenting to an offense, does some act which is an ingredient of the crime, or immediately connected with or leading to its commission. *U. S. v. Wilson*, Baldw. (U. S.) 103; *Roney v. State*, 76 Ga. 731.

As where the defendants kept watch while their associates committed a crime. *Thomas v. State*, 43 Ark. 149; *Doan v. State*, 26 Ind. 495; *Com. v. Knapp*, 9 Pick. (Mass.) 517, 20 Am. Dec. 491; *Selvidge v. State*, 30 Tex. 60; *Earp v. State* (Tex. App. 1890), 13 S. W. Rep. 888; *Mitchell v. Com.*, 33 Gratt. (Va.) 845. See *Bell v. State*, 1 Tex. App. 598.

Where A took goods, in pursuance of an agreement with B, in the latter's presence, and both carried the goods away, both were principals. *Atterberry v. State*, 56 Ark. 515. See *Thom v. State* (Tex. Crim. App. 1893), 22 S. W. Rep. 877.

A person is guilty of aiding and abetting a larceny, if, in accordance with an agreement therefor, he takes care of the family of the felon while the latter is disposing of the stolen property. *State v. Stanley*, 48 Iowa 221.

If two act in concert to steal a man's goods, and he is induced by fraud to trust one of them with the possession of such goods, and the other entices him away in order that the man who has the goods may carry them off, both are guilty of the felony. *Rex v. Standley*, R. & R. C. C. 305.

Where A enticed the owner of a store a mile therefrom, in order that B, A's confederate, might break into the store and remove the goods, A was constructively present at the burglary, and was indictable as principal. *Breese v. State*, 12 Ohio St. 146, 80 Am. Dec. 340.

Where A told B, who was going to a house fifty yards distant, to get a pistol in a certain place in the house and shoot C, who was in the house, and A promised B a reward for so doing, and B did as A directed, A was a principal in the second degree. *Collins v. State*, 88 Ga. 347.

Where A handed B a knife and told him to stab C, and B did stab C therewith, A was principal in the second degree. *Washington v. State*, 68 Ga. 570; *State v. Noeninger*, 108 Mo. 166.

If one knows that a crime is contemplated, and absents himself in order to facilitate its commission, he is guilty as principal. *State v. Poynier*, 36 La. Ann. 572.

One may be convicted of concealing stolen property, where the evidence, which was unexplained, showed that he was present where the stolen property was concealed, knew it to be stolen, and kept watch and refused to give information to officers searching for the same, notwithstanding that the accused was not

By Acts—Causal Connection.—Where the participation is by act, it need not have a causal connection with the deed done; if the assistance given merely facilitates a result which, in all probability, would have happened without it, it is sufficient.¹

By Words—What Proof Necessary.—Where the assistance is rendered by words of encouragement and incitement, it must be proved that they were addressed to or heard by the actual criminal.²

When Preconcert Necessary.—Where the participation is by act or word, in neither of these cases is there need of preconcert; it is sufficient that the same criminal intent existed in the minds of both, and that the aider and abettor gave assistance by word or deed to the actual perpetrator at the time of the commission of the offense.³ But where the aid given consists in presence, actual or constructive, on the part of the aider and abettor, inspiring confidence in the actual criminal, there must be preconcert, or at least a knowledge on the part of the latter of the presence and readiness to assist of the former.⁴

shown to be in physical possession of the property stolen. *State v. St. Clair*, 17 Iowa 149.

1. In *State v. Tally* (Ala. 1894), 15 So. Rep. 722, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 62, it appeared that R., fearing danger from A. and others, fled from the town of S. A. went in pursuit of R. to take his life. T., knowing of A.'s intention, watched at the telegraph office in S., to prevent a warning being sent to R. This watching was not by preconcert with A., or known to him. T., by means of a telegram sent to M., the town to which R. had fled, prevented the delivery of a message of warning sent to R. A. overtook R. in the town of M., and killed him. It was held that T. was guilty of such an act of actual aiding in A.'s criminal design as made him a principal in the murder. The court said that when aid is given by some act—not by presence lending confidence to the perpetrator of the crime—"the assistance given need not contribute to the criminal result in the sense that, but for it, the result would not have ensued. It is quite sufficient if it facilitates a result that would have transpired without it. It is quite enough if the aid merely rendered it easier for the principal actor to accomplish the end intended by him, and the aider and abettor, though in all human probability the end would have been attained without it."

2. Where it is sought to convict the defendant by showing that he encouraged, aided, and abetted a mob to commit an assault, by words uttered by him, it must be proved that the words were addressed to, or at least heard by, the persons composing the mob, or some of them. *Cabell v. State*, 46 Ala. 195. And see *Quinn v. State* (Tex. Crim. App. 1893), 20 S. W. Rep. 1108.

3. **When Preconcert is Not Necessary.**—If, without previous concert, several persons form a common illegal purpose at the time of the crime, it is sufficient. *Amos v. State*, 83 Ala. 1, 3 Am. St. Rep. 682; *People v. Wilson*, 145 N. Y. 632. See *Stephens v. State*, 42 Ohio St. 150.

Where one is accused of aiding and encouraging another in the commission of a crime, it need not be shown that the crime was committed in pursuance of an understanding between them. *Howard v. Com.* (Ky. 1894),

27 S. W. Rep. 854. In this case the court said: "It was not necessary to the conviction of the parties indicted that the crime should have been committed in pursuance of a common understanding or intent. The statute authorizes the conviction of one who shall have 'aided, counseled, advised, or encouraged' another in such shooting. The indictment did not charge, and need not have charged, that the one aiding, etc., must have done so in pursuance of an understanding or intent common to any or all of the participants."

See also *State v. Tally* (Ala. 1894), 15 So. Rep. 722, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 62.

Where it appeared that the defendant and his brother were arrested for burglary, while walking upon the street, by the deceased, a peace officer; that they walked with the deceased quietly towards the police station until they came to an obstruction in the street caused by the erection of a new building; that the defendant then exclaimed: "Let her go," caught the deceased by the coat, and dealt him a severe blow with the butt of a revolver which dazed him, and that at that moment his brother shot the deceased dead, it was held, *Andrews, C. J., Gray and O'Brien, J. J., dissenting*, that there was abundant evidence to sustain a conclusion that there was a deliberate and premeditated design by the defendant and his brother, acting in concert, to slay the deceased, and that the defendant was properly convicted of murder in the first degree. *People v. Wilson*, 145 N. Y. 628. In this case the court, by Bartlett, J., said: "It matters not whether that understanding or agreement [of the defendant and his brother to slay the deceased] was formed as part of a general policy, adopted by these desperate men while following a life of crime, or an instantaneous compact born of the exigency of the occasion, when James Harvey [the deceased] had each by the arm, and was within one hundred and sixty feet of the police station whose cell doors were about to close upon them. The deliberation and premeditation essential to constitute the crime may have existed in either case."

4. **When Preconcert Essential.**—In *State v. Tally* (Ala. 1894), 15 So. Rep. 722, it was

Combination for Crime—Act of One, Act of All.—If two or more persons combine for some unlawful purpose, and a crime is committed in an attempt to carry this purpose out, provided such crime be in any way in furtherance of the common intention, all are principals therein.¹

AIDER BY VERDICT.—See the title VERDICT.

AID SOCIETIES.—See the title BENEFICIAL OR BENEVOLENT ASSOCIATIONS.

AIR.—As to easement in, see the titles LIGHT AND AIR; STREET RAILWAYS. As to pollution of, see the titles ABATEMENT OF NUISANCES, vol. 1, p. 63; NUISANCES.

AIR GUNS.—See note 2.

AIR-TIGHT.—See note 3.

said: "Mere presence for the purpose of rendering aid obviously is not aid * * * unless presence with the purpose of giving aid, if necessary, was preconcerted, or in accordance with the general plan conceived by the principal and the person charged as an aider and abettor, or, at the very least, unless the principal knew of the presence, with intent to aid, of such person; for, manifestly in such case, there being no actual substantive assistance, and no encouragement by words, the only aid possible would be the incitement and encouragement of the fact that another was present for the purpose of assistance, and with the intent to assist if necessary; and, in the nature of things, the fact of presence and purpose to aid could not incite, or encourage, or embolden the principal, unless he knew of the existence of that fact. That kind of aid operates solely on the mentality of the actual perpetrator."

Even if one was present at the commission of a crime, and mentally approved or consented to the same, yet, if that consent was unknown to the person committing the crime, the one so mentally approving could not be held guilty as principal. *Clem v. State*, 33 Ind. 418; *State v. Cox*, 65 Mo. 29.

1. *England.*—*Reg. v. Skeet*, 4 F. & F. 931.

United States.—*Mussel Slough Case*, 5 Fed. Rep. 680.

Alabama.—*Thompson v. State*, 25 Ala. 41; *State v. Tally* (Ala. 1894), 15 So. Rep. 722.

Arkansas.—*Carr v. State*, 43 Ark. 99.

Colorado.—*Smith v. People*, 1 Colo. 121; *Roberts v. People*, 11 Colo. 213.

Connecticut.—*State v. Allen*, 47 Conn. 121.

Georgia.—*Leonard v. State*, 77 Ga. 764; *Ferguson v. State*, 32 Ga. 658; *Plain v. State*, 60 Ga. 284; *Dumas v. State*, 62 Ga. 58; *McGinnis v. State*, 31 Ga. 263.

Illinois.—*Brennan v. People*, 15 Ill. 511; *Lamb v. People*, 96 Ill. 73.

Indiana.—*Stipp v. State*, 11 Ind. 62.

Kentucky.—*Delaney v. Com.* (Ky. 1894), 25 S. W. Rep. 830; *Omer v. Com.*, 95 Ky. 353.

Michigan.—*People v. Knapp*, 26 Mich. 112; *People v. Sligh*, 48 Mich. 54; *People v. Foley*, 59 Mich. 553.

Minnesota.—*State v. Barrett*, 40 Minn. 77.

New York.—*People v. Wilson*, 145 N. Y. 633.

Oregon.—*State v. Johnson*, 7 Oregon 210.

Tennessee.—*Moody v. State*, 6 Coldw. (Tenn.) 299.

Virginia.—*Brown v. Com.* (Va. 1894), 19 S. E. Rep. 447.

Act in Furtherance of Common Criminal Purpose.—If several persons agree together to rob another, and for that purpose arm themselves with deadly weapons, and meet at the house of the person to be robbed, and, to carry out their unlawful design, one is left outside, ready to aid and assist, while the others enter to commit the crime, all are principals, and if those who have entered in furtherance of their crime purposely kill the person whom they are robbing, the person outside, who is aiding and assisting, is equally guilty with him who strikes the fatal blow, though he did not, previous to such attempted robbery, agree or assent to such killing. *Stephens v. State*, 42 Ohio St. 150; *Mitchell v. Com.*, 33 Gratt. (Va.) 845.

Where several are in company engaged in a common purpose, and one, without the knowledge or consent of the others, commits an offense, the others will not be involved in his guilt, unless the act was in some way in furtherance of the common intention. *Roscoe v. State*, 8 Tex. App. 211. See *People v. Knapp*, 26 Mich. 112.

Where several are engaged in an unlawful design, and one commits, of his own individual malice, or even to further the escape of all, but without their knowledge or consent, a felony, he alone is responsible. *Mercersmith v. State*, 8 Tex. App. 211. See *People v. Wilson*, 145 N. Y. 628.

See also the titles, CONSPIRACY; HOMICIDE.

2. A statute prohibited toy pistols, toy revolvers or other fire-arms. It was held that the prohibition did not include an *air-gun*. The court said: "These prohibited pistols or revolvers must be fire-arms, that is, 'weapons which act by the force of gunpowder.' The *air-gun* or pistol is not prohibited. This *air-gun* is not a gun or a weapon in the above signification of the words; but called a 'gun,' imitative only of a real gun, to give it dignity to a boy, or to play soldier with." *Harris v. Cameron*, 81 Wis. 244.

3. **Patent.**—The term *air-tight*, as applied to the floor of an ice reservoir, means substantially "water-tight," or such a construction of the floor that the water will not run down upon the articles stored below, nor the air

ALARM.—This word, as used in reference to the methods employed to summon firemen to a fire, denotes the actual means used, without regard to the effect produced on the firemen.¹

ALCALDE.—An *alcalde* (sometimes spelled *alcade* and *alcaid*) is a juridical officer, known in Spain and in those parts of America which were settled under Spanish authority and adopted Spanish institutions. His functions somewhat resembled those of mayor in small municipalities on the continent, or justice of the peace in England and most of the United States; yet *juaces de paz*, or justices of the peace, seem to have been known as a distinct class of officers, and there were *alcaldes ordinarios*, besides the grade of *alcalde mayor*.²

ALCOHOL. (See also the title INTOXICATING LIQUORS.)—Alcohol is a volatile organic body constantly formed during the fermentation of the vegetable juices, containing sugar in solution. In popular language, it is the intoxicating principle of fermented liquor. It is exclusively produced by the process of fermentation.³

ALCOHOLIC LIQUORS.—See the title INTOXICATING LIQUORS.

escape to melt the ice above. A patent for such a floor cannot be evaded by constructing a leaky floor. A person cannot use a patented device by constructing it in an imperfect manner. *Chicago Fruit House Co. v. Busch*, 2 Biss. (U. S.) 472.

1. **Giving a False Alarm.**—Where one knowingly meddled with the wires, or other parts of the telegraph apparatus, with the intention to cause a "false *alarm*" of fire, he may be convicted of "giving or causing to be given a false *alarm* by the fire-alarm telegraph, knowing the same to be such," although, in consequence of the irregular manner in which the bells were rung, the firemen were not deceived and induced to turn out with their engines. *Koppersmith v. State*, 51 Ala. 6.

2. Abb. Law Dict; *Strother v. Lucas*, 12 Pet. (U. S.) 442; *U. S. v. Castillero*, 2 Black. (U. S.) 194.

3. *Eureka Vinegar Co. v. Gazette Printing Co.*, 35 Fed. Rep. 571.

Alcohol.—This essential element in all spirituous liquors is a limpid, colorless liquid. To the taste it is hot and pungent, and it has a slight and not disagreeable scent. It has but one source, the fermentation of sugar and saccharine matter. It comes through fermentation of substances that contain sugar proper, or that contain starch which may be turned into sugar. All substances that contain either sugar or starch, or both, will produce *alcohol* by fermentation. It is a mistake to suppose, as many persons do, that it is really produced by distillation. It is produced only by fermentation, and the process of distillation simply serves to separate the spirit—the *alcohol*—from the mixture, whatever it may be, in which it exists. *State v. Giersch*, 37 Alb. L. J. 201.

ALCOHOLISM, INTEMPERANCE, AND NARCOTICS (IN INSURANCE).

BY CHARLES SUMNER LOBINGIER, M.A., LL.M.

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CROSS-REFERENCES.

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As to rights, etc., of beneficiaries, see the title BENEFICIARIES (IN INSURANCE).

As to other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the titles: ACCIDENT INSURANCE, vol. 1, p. 284; BENEVOLENT OR BENEFICIAL ASSOCIATIONS; BY-LAWS; INSURANCE; LIFE INSURANCE.

I. FIRST STAGE—INTOXICANTS AND NARCOTICS NOT EXPRESSLY MENTIONED.—

The earliest policies of insurance upon lives were phrased in most general terms, and instead of specifying certain risks against which insurance would be withheld, reliance was placed upon conditions thought to be implied in the policy, and hence to need no specification. The clause forbidding the use of intoxicants and narcotics existed for a time in this form. It was not expressed in the policy, but was supposed to be implied from the nature of the contract, and this implication was invoked by insurers as a defense to actions upon their policies. But, so far as reported cases disclose, this defense has never been urged with great success.¹

1. In a case tried at *nisi prius*, in the English Queen's Bench, in 1840, it was urged that the policy was void because there had been no communication of the fact that the insured was addicted to habits of intemperance in liquor, but Lord Denman charged the jury that the mere non-communication of his habits of life by the party whose life was in-

sured would not in itself vitiate the insurance, even though those habits were, in the opinion of the jury, such as tended to shorten life. *Rawlins v. Desborough*, 2 M. & Rob. 328, 2 Bigelow L. & Acc. Ins. Rep. 271. And see to the same effect *Rawls v. American Mut. L. Ins. Co.*, 27 N. Y. 282, 84 Am. Dec. 280, 1 Bigelow L. & Acc. Rep. 558.

II. SECOND STAGE—STATEMENTS REQUIRED AS TO HABITS WITH RESPECT TO INTOXICANTS AND NARCOTICS—1. In General.—Litigation concerning the effect of intemperate habits upon the contract of life insurance does not appear to have become frequent until the efforts of insurers to relieve themselves from this risk had passed into the second stage of their development. Instead of, as previously, relying upon the implication that the insured was and would remain temperate, insurers now began to require him to state expressly in his application what his habits were in regard to the use of intoxicants and narcotics.

2. Warranties and Representations.—In determining the legal effect of these answers and statements in the application, much depends upon whether they constitute “warranties” or mere “representations.” The distinction between these two classes of statements forms an important chapter in the law of insurance, and runs through all its branches. The treatment of the subject in detail should be sought under other titles,¹ but its basic principle needs to be stated here in order to reach a clearer understanding of the subject now under discussion.

Lord Mansfield’s Distinction.—The distinction seems to have been first authoritatively announced in a case² decided by Lord Mansfield in 1778, when insurance law was in its chrysalis. That eminent judge there declared “that there cannot be a clearer distinction than that which exists between a warranty which makes part of the written policy, and a collateral representation;” and then proceeded to show that while the former must be literally true, and strictly performed, or the policy would be void, falsity in the latter would be fatal only when material.³ The doctrine of this early authority has ever since ostensibly remained the law of the subject, but the courts have differed considerably in applying the tests of a warranty.

Statements Considered as Representations Merely.—Where the statements in the application, regarding the use of intoxicants and narcotics, are in no way alluded to in the certificate or policy subsequently issued, they are held to be mere representations.⁴ And even where the answers were declared in the application to be the basis of the contract, and the policy recited that the insurance was “in consideration of the representations made,” a similar decision was reached in regard to declarations of the insured’s temperate habits.⁵ So where the applicant “warranted” his answers and statements to be true, and the policy declared that prior statements, if untrue, should avoid it, still the court declined to treat as warranties answers relating to the applicant’s use of alcoholic stimulants.⁶

As will appear later on, the doctrine of the case of *Rawlins v. Desborough*, 2 M. & Rob. 328, has become practically settled law, although there have been *dicta* to the contrary in other quarters. Thus, in *Mutual Ben. L. Ins. Co. v. Holterhoff*, 2 Cin. Sup. Ct. Rep. 379, 4 Bigelow L. & Acc. Ins. Rep. 375, the court said: “Even when no question is asked the applicant for insurance as to his habits as to drunkenness, and he is intemperate, that fact, if there be no subsequent waiver, will render the policy void on the ground of concealment.” *Bunyon* 45, *Bliss* 167. See also *Forbes v. Edinburgh L. Assur. Co.*, 10 Sc. Sess. Cas. (1st series) 451.

The question was raised in another form in a case decided by the *New York* Court of Appeals in 1863, and it was there held that the insurer under such a policy could not even introduce evidence of experts that a person who was in the habitual use of intoxicating drinks would not be considered an insurable

subject, a healthy life, or a good risk. *Rawls v. American Mut. L. Ins. Co.*, 27 N. Y. 282, 84 Am. Dec. 280, 1 Bigelow L. & Acc. Ins. Rep. 558.

1. See the titles ACCIDENT INSURANCE; INSURANCE; LIFE INSURANCE.

2. *Pawson v. Watson*, Cowp. 785.

3. **Tests of Warranty.**—*Pawson v. Watson*, Cowp. 785. And see *De Hahn v. Hartley*, 1 T. R. 343 (where an opinion was written by the same judge); *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Daniels v. Hudson River F. Ins. Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192; *Campbell v. New England Mut. L. Ins. Co.*, 98 Mass. 389; *Higbee v. Guardian Mut. L. Ins. Co.*, 66 Barb. (N. Y.) 462.

4. *McVey v. Grand Lodge*, 53 N. J. L. 17.

5. *American Popular L. Ins. Co. v. Day*, 39 N. J. L. 89. But see, *contra*, *Standard L.*, etc., *Ins. Co. v. Lauderdale*, 94 Tenn. 635.

6. **Statements Warranted to Be True.**—*Conover v. Massachusetts Mut. L. Ins. Co.*,

Statements Considered as Warranties.—Where the policy itself refers to the statements in the application regarding habits of drinking, and provides that it shall be void if they are not true, it would seem to be clear, both upon principle and authority, that such statements are warranties, and that upon their correctness the validity of the insurance depends.¹ Yet the decisions are not entirely harmonious even here.² In *Tennessee* it was recently held that a statement to the effect that the applicant's habits were "correct and temperate," made in an application upon which the policy was based, and in consideration of the warranties in which the latter was issued, was a warranty; the court further observing that the statement "was most material to the risk, whether it be called a representation or a warranty, and if untrue, it avoided the policy."³

3. Statements as to Past and Present Habits.—Whether the insured is "temperate" or "of temperate habits," is a question generally inserted in the printed application blanks, and required to be answered. The courts have been somewhat chary of efforts to define these phrases.

The Terms "Temperate" or "of Temperate Habits" Considered.—"I believe it to be useless," says Lord Watson, in a celebrated English case,⁴ "to attempt a precise definition of what constitutes 'temperate habits' or 'temperance' in the sense in which these expressions are ordinarily employed. Men differ so much in their capacity for imbibing strong drinks that quantity affords no test."

Total Abstinence.—It seems to be agreed, however, that these words do "not imply total abstinence from intoxicating liquors."⁵ An occasional⁶ or isolated⁷ use of such liquors would not, and their use even to excess⁸ might not, render answers to such questions untrue.

The Use must have Become a Habit.—The use must have, "by frequent repetitions, become a habit."⁹

4 Bigelow L. & Acc. Ins. Rep. 187. Here Dillon, J., says: "Inasmuch as the policy itself does not distinctly identify and refer to the written application, and make it part of the policy, I am inclined, in view of the established and reasonable rule, to think that warranties are not to be created or extended by construction, and the doctrines of the later and best considered cases to hold that the statements in the application are representations and not warranties."

1. Warranty Rule Enforced.—*Knudson v. Grand Council* (S. Dak. 1895), 63 N. W. Rep. 911; *Horton v. Equitable L. Assur. Soc.*, 2 Bigelow L. & Acc. Ins. Rep. 108, 2 Alb. L. J. 255; *Miller v. Mutual Ben. Ins. Co.*, 31 Iowa 216, 2 Bigelow L. & Acc. Ins. Rep. 693, 1 Ins. L. J. 34; *Thompson v. Weems, L. R.*, 9 App. Cas. 671, citing the following Scotch cases in support of the same view: *Scottish L. Assur. Soc. v. Buist*, 4 Ct. Sess. Cas. (4th series) 1078; *Life Assoc. v. Foster*, 11 Sc. Sess. Cas. (3d series) 351.

2. Continental L. Ins. Co. v. Thoena, 26 Ill. App. 495. The effect of the decision is to controvert the rule stated in the text, but there is no discussion of the principle involved.

3. Standard L., etc., Ins. Co. v. Lauderdale, 94 Tenn. 635.

4. Thomson v. Weems, L. R. 9 App. Cas. 671. So in *United Brethren Mut. Aid Soc. v. O'Hara*, 120 Pa. St. 256, Paxson, J., observes: "Men may differ widely as to what constitutes intemperate habits. Some persons of extreme views may regard the slightest indulgence as intemperance; others, perhaps, would regard

a man as sober as long as he can walk. The provision in the policy has no reference to extreme views on either side."

5. Terms "Temperate" or "of Temperate Habits" do Not Mean Total Abstinence.—*Brockway v. Mutual Ben. L. Ins. Co.*, 9 Fed. Rep. 249; *Thomson v. Weems, L. R.* 9 App. Cas. 671; *McGinley v. U. S. Life Ins. Co.*, 8 Daly (N. Y.) 390, 7 Ins. L. J. 791; *Fox v. Penn Mut. L. Ins. Co.*, 4 Bigelow L. & Acc. Ins. Rep. 458.

The word "temperate" suggests moderation, not abstinence. *Meacham v. New York State Mut. Ben. Assoc.*, 120 N. Y. 237.

6. Occasional Use of Intoxicants.—*Van Valkenburgh v. American Popular L. Ins. Co.*, 70 N. Y. 605 (where the applicant had answered that he did not "use any intoxicating liquors or substances," and the court held that "this did not direct the mind to a single or incidental use, but to a customary or habitual use"); *Meacham v. New York State Mut. Ben. Assoc.*, 120 N. Y. 237; *Swick v. Home L. Ins. Co.*, 2 Dill. (U. S.) 160, 4 Bigelow L. & Acc. Ins. Rep. 176; *Union Mut. L. Ins. Co. v. Reif*, 36 Ohio St. 596, 38 Am. Rep. 613; *New York Mut. L. Ins. Co. v. Simpson* (Tex. Civ. App. 1894), 28 S. W. Rep. 837; *Grand Lodge, etc., of United Workmen v. Belcham*, 145 Ill. 308.

7. Horton v. Equitable L. Ins. Soc., 2 Bigelow L. & Acc. Ins. Rep. 108, 2 Alb. L. J. 255.

8. Knickerbocker L. Ins. Co. v. Foley, 105 U. S. 350; *Fox v. Penn Mut. L. Ins. Co.*, 4 Bigelow L. & Acc. Ins. Rep. 458; *DeCamp v. N. J. Mut. L. Ins. Co.*, 3 Ins. L. J. 89.

9. Knickerbocker L. Ins. Co. v. Foley, 105 U. S. 355; *Northwestern L. Ins. Co. v. Muskegon*

The Term "Habit" Defined.—And the word "habit" as used in a similar connection has been defined as the "ordinary course of conduct—the general rule or custom," not necessarily the "uniform or unvarying rule."¹

Disqualified to Attend to Business.—So it has been declared that drinking "to such a degree as to disqualify a person from attending to his business during the principal portion of the time usually devoted to business" is habitual intemperance.²

Exceptional Over-Indulgence.—The Supreme Court of the *United States* has held that a representation of "temperate habits" is not untrue although the applicant may have suffered from an attack of delirium tremens as the result of an exceptional over-indulgence.³ This ruling has been criticised in *England*.⁴ In *Texas* it was recently decided that a beneficiary could recover upon a

Bank, 122 U. S. 501; *Van Valkenburgh v. American Popular L. Ins. Co.*, 70 N. Y. 605; *Mutual L. Ins. Co. v. Simpson* (Tex. Civ. App. 1894), 28 S. W. Rep. 837.

1. *Tatum v. State*, 63 Ala. 147 (construing a statute prohibiting the sale of intoxicants to persons of such habits). Compare *Knickerbocker L. Ins. Co. v. Foley*, 105 U. S. 354.

2. *Mahone v. Mahone*, 19 Cal. 627, 81 Am. Dec. 91. But see *Wheeler v. Wheeler*, 53 Iowa 511, 36 Am. Rep. 240.

3. **Delirium Tremens as Consequence of Exceptional Excessive Indulgence.**—*Knickerbocker L. Ins. Co. v. Foley*, 105 U. S. 350. In this case one Foley took out a policy on the life of his debtor, *Badenhop*. The application contained the questions: "Is the party of temperate habits? Has he always been so?" which were answered affirmatively. In a suit by Foley on the policy after the death of *Badenhop*, three witnesses on behalf of the company testified to intemperance on the part of the insured. One of them, *Badenhop's* family physician at one time, stated that the deceased had been a hard drinker, and that witness had attended him for delirium tremens and for indispositions produced, "as he thought," by intoxicants. Plaintiff's witnesses did not, it seems, controvert these specific instances, but testified generally that the deceased had been a man of temperate habits. Mr. Justice Field, who delivered the opinion of the court, seems to have assumed the correctness of the physician's testimony, but he says: "An attack of delirium tremens may sometimes follow a single excessive indulgence. Ray, in his treatise on Medical Jurisprudence, says that though it most commonly occurs in habitual drinkers, after a few days of total abstinence from spirituous liquors, it may be the immediate effect of an excess, or series of excesses, in those who are not habitually intemperate as well as in those who are. § 545. In the *American Encyclopædia*, under the head of 'Delirium Tremens,' it is stated that it 'sometimes makes its appearance in consequence of a single debauch,' though commonly it is the result of protracted or long-continued intemperance. Vol. 5, p. 782. When we speak of the habits of a person, we refer to his customary conduct, to pursue which he has acquired a tendency from frequent repetition of the same acts. It would be incorrect to say that a man has a habit of anything from a single act. A habit of early rising,

for example, could not be affirmed of one because he was once seen on the streets in the morning before the sun had risen; nor could intemperate habits be imputed to him because his appearance and actions on that occasion might indicate a night of excessive indulgence. The court did not, therefore, err in instructing the jury that if the habits of the insured 'in the usual, ordinary, and everyday routine of his life were temperate,' the representations made are not untrue, within the meaning of the policy, although he may have had an attack of delirium tremens from an exceptional over-indulgence." Compare *Bickford v. N. Y. State L. Ins. Co.* (N. Y. Sup. Ct. Erie Co. 1869), not officially reported, but quoted from in *Bliss on Insurance* (2d ed.), § 366. The insured there warranted his habits to be correct and temperate, and it was admitted that he had had a fit of delirium tremens previous to the issue of the policy. The court held that this fact was not sufficient to justify a nonsuit, saying: "It is cogent and convincing evidence, and, with proper instructions from the court, a fair and impartial jury cannot fail to give it proper weight and effect in their verdict. Intemperate habits in an individual are to be established by proving general and specific use of spirituous liquors. Proving delirium tremens is in effect like proving immoderate use of liquor prior to the fit of delirium tremens for a longer or shorter period. I cannot see that it proves more than that." See also *DeCamp v. N. J. Mut. L. Ins. Co.*, 3 Ins. L. J. 89.

4. *Thomson v. Weems*, L. R. 9 App. Cas. 671, where Lord Watson, speaking of *Knickerbocker L. Ins. Co. v. Foley*, 105 U. S. 350, says: "As I read the rubric and report there was no law laid down in that case. An American jury had found that a man was of temperate habits, although it had been proved at the trial that he had an attack of delirium tremens, and the court refused to disturb the verdict; the main reason assigned for that decision being a statement occurring in some treatise on medical jurisprudence to the effect that in the case of an intemperate man delirium tremens is occasioned by abstinence from drink, and in the case of a temperate man by indulgence in liquor. Even if it had been laid down as matter of law, I should hesitate very much to adopt such a standard as that. A man suffering from delirium tremens occasioned by recent drinking may possibly be more temperate than

policy issued to an applicant who answered in substance that he never drank or had habits of drinking, there being evidence, however, that he "drank freely and even excessively."¹

Statements Relating to Time of Application or Prior Thereto.—If the statements of the insured relate entirely to his habits at the time he applies for the policy,² or prior thereto,³ evidence of subsequent drinking is inadmissible.

Waiver by Company of Specific Answer to Part of Question.—And where, to the double question, "What are your habits in respect to the use of intoxicating liquors? Have you ever used intoxicating liquors to excess?" the applicant answers merely "Temperate," a specific answer to the second part of the question is waived by issuing the policy, and the company will be restricted in its proofs to the insured's habits at the time of the application.⁴

Insured Intemperate after Issuance of Policy—Presumption.—If the insured is merely shown to have been intemperate after the policy was issued, the presumption is that he did not become so before.⁵ But where it was stated in the application that the insured's habits were temperate, it was held permissible to ask a witness if he had ever seen the insured under the influence of liquor. "It was," says the court, "a link in the chain, which might, or might not, have been followed up by sufficient other evidence to establish a habit of intemperance."⁶

Frequent Intoxication.—Nevertheless it has been declared that "if a man use spirituous liquors to such an extent as to produce frequent intoxication, he is not sober and temperate within the meaning of this contract."⁷

False Answers as to Habits.—And if an affirmative answer to the usual inquiry whether the insured's habits are "sober and temperate," is in fact untrue, it will avoid the policy, though made in good faith and with no intent to deceive.⁸

Death Resulting from Habits of Intemperance Formed after Policy Issued.—Nor is it material, where the clause consists merely of such questions and answers regarding

another man who is similarly afflicted in consequence of his having abstained from his usual potations; but I should not like to affirm that either of them was, in the ordinary sense of the term, a man of temperate habits." Compare New York L. Ins. Co. v. Parent, 3 Quebec L. R. 163. And see also the earlier English *nisi prius* case of Hutton v. Waterloo L. Assur. Co., 1 F. & F. 735, 3 Bigelow L. & Acc. Ins. Rep. 199, where in an action upon a policy issued to one who answered that he was "temperate," but who was found to have previously had delirium tremens, judgment was entered for the company, although the jury found that the representation was *bona fide*.

1. New York Mut. L. Ins. Co. v. Simpson (Tex. Civ. App. 1894), 28 S. W. Rep. 837. From the opinion of the court it appears that "the questions and answers, so far as material, were as follows: 'Do you ever drink wine, spirits, or malt liquors?' *Ans.* No. 2. To what extent? *Ans.* Not at all. 3. Former habits of drinking wine, spirits, or malt liquors? *Ans.* Not at all.' " And the court, in its discussion, observes: "The evidence does not show that Simpson ever habitually drank liquors. Taking the testimony of appellant at its strongest, it would only show that at some time during his residence at Bryan, Simpson was considered a drinking man, and at that time that he drank freely and even excessively. But for how long a time this continued, and whether or not it had ever acquired the force of habit,

is left uncertain by this testimony. The fact that after he moved to Eagle Pass he was not addicted to any such habit, though he occasionally would take a drink, tends strongly to show that the use of the intoxicants had never become habitual."

2. American Popular L. Ins. Co. v. Day, 39 N. J. L. 89.

3. Horton v. Equitable L. Assur. Soc., 2 Bigelow L. & Acc. Ins. Rep. 108.

4. John Hancock Mut. L. Ins. Co. v. Daly, 65 Ind. 6. The purport of the decision is as given in the text; the discussion in the opinion is very meagre.

5. Gartside v. Connecticut Mut. L. Ins. Co., 8 Mo. App. 593.

6. *Per* Paxson, J., in United Brethren Mut. Aid Soc. v. O'Hara, 120 Pa. St. 256.

7. Brockway v. Mutual Ben. L. Ins. Co., 9 Fed. Rep. 249. And see Thomson v. Weems, L. R., 9 App. Cas. 671.

8. Hartwell v. Alabama Gold L. Ins. Co., 33 La. Ann. 1353, 39 Am. Rep. 294, 11 Ins. L. J. 897. Here the court said: "Habits of intemperance generally grow upon the victim gradually, and to him insensibly, and he is aroused to an appreciation of his true condition, if at all, long after the habit has become fixed and has attracted, if not public attention, at least that of those who are thrown into daily or constant social or business intercourse with him; and with self-sufficiency and egotistical faith in himself he denies and

present habits, what may have been the cause of death. If the insured was temperate when he took out his policy, the latter is not, it seems, avoided by the fact that he died from subsequent excessive drinking.¹

Death from Intemperance—False Statements as to Habits.—Nor is death from that cause, or promoted by it, necessary to effect a forfeiture where the statements in regard to temperate habits were untrue when made.²

Willfully False Answers.—Where the insured answers that he has never had delirium tremens, and it is proved that he had a well-marked case of it only a short time before, the policy is avoided on the ground of fraud, even though the statement be not a warranty.³

Statements as to Connection with the Liquor Traffic.—So where an applicant states that he is not now, and has not been, "engaged in or connected with the manufacture or sale of any beer, wine, or other intoxicating liquors," his policy becomes forfeited if it appears that he was formerly a hotel keeper, and as such sold bottled liquors to his guests, though not to outsiders, and though he kept no bar, it appearing also from his answers to other applications that he did not misconceive the import of the question.⁴ But a clause requiring an applicant to state his connection with the liquor business was held to apply to subsequent connection, and not to render void *ab initio* a policy taken out by one who kept a grocery with a "saloon attachment" and failed to mention the latter.⁵

4. Promises Regarding Future Habits.—The next step in the development of

resents as inapplicable to him what is apparent to others. But this denial on his part, or disbelief as to his condition, does not affect its real existence, and while from misconception of the truth, growing out of a perverted or distorted view taken by himself, he may be acquitted of any dishonest attempt at deception or misrepresentation, his solemn declaration, although made without fraudulent or untruthful intent, which induces another to bind himself in a manner [in] which he would not have in the absence of such declaration, cannot be invoked to the detriment of that other who binds himself on the faith of its correctness." *Compare Hutton v. Waterloo L. Assur. Co.*, 1 F. & F. 735. 3 *Bigelow L. & Acc. Ins. Rep.* 199, where, though the jury found that the insured's answer that he was temperate was *bona fide*, judgment was rendered against the executrix because the insured was found to have had delirium tremens previously. And see *Higbee v. Guardian Mut. L. Ins. Co.*, 66 Barb. (N. Y.) 480, where the court says of a warranty, that if it be "false in substance, and material to the risk, there can be no liability upon the policy, however innocently the misrepresentation may have been made."

1. *Reichard v. Manhattan L. Ins. Co.*, 31 Mo. 518, 1 *Bigelow L. & Acc. Ins. Rep.* 309. "The risk," says the court, "was taken upon the statement made at the time of issuing the policy, and had no reference to any future change in the habits of the insured. If Reichard became intemperate subsequent to the issuing and renewal of the policy, and this fact could be set up in bar to recovery, we see no reason why intemperance in eating, the undue exposure of the person to the inclemency of the weather, or any other act tending to shorten life, might not with equal propriety be pleaded in bar."⁷

2. *Swick v. Home L. Ins. Co.*, 2 Dill. (U. S.) 160, 4 *Bigelow L. & Acc. Ins. Rep.* 176, 179; *Southcombe v. Merriman*, 1 C. & M. 286, 41 E. C. L. 159; *Fox v. Penn Mut. L. Ins. Co.*, 4 *Bigelow L. & Acc. Ins. Rep.* 458; *Horton v. Equitable L. Assur. Soc.*, 2 Alb. L. J. 255. In this last case the court, *per* Daly, J., said: "The warranty set up in this case by the defendant is affirmative and not promissory, and the only fact to be ascertained is whether, at the time of making that warranty, the insured was then or had ever been addicted to the excessive or intemperate use of alcoholic stimulants, or did then use intoxicating drinks habitually as a beverage."

3. *McVey v. Grand Lodge*, 53 N. J. L. 17. *Beasley, C. J.*, delivering the opinion, said: "No one can doubt that if the truth had been told with respect to the particulars in question the medical examiner would not have accredited the application, and that the society would have rejected so exceptionable a candidate."

4. *Dwight v. Germania L. Ins. Co.*, 103 N. Y. 341, 57 Am. Rep. 729. The policy also provided for forfeiture "if the representations made in the application * * * shall be found in any respect untrue."

5. *McGurk v. Metropolitan L. Ins. Co.*, 56 Conn. 528. The answer was made in the applicant's barroom, and the policy containing the requirement mentioned in the text was delivered subsequently. The court observed: "Nothing whatever appears in the case tending to show any want of sincerity [in the answer of McGurk that his occupation was that of a grocer], much less that by it he committed a fraud on the defendants which made void the contract of insurance in its inception. He doubtless believed at that time that the word 'grocer' covered his entire occupation. * * * It is true that after

the clause intended to withdraw insurance from those addicted to the excessive use of liquors, was made by requiring from the applicant a promise that he would not "practice any pernicious habit that tends to shorten life." This promise was also usually fortified by a clause in the policy providing for its avoidance if statements in the application should be found untrue.

Prevailing Rule—Considered a Warranty.—In a majority of the cases where this promise has been in controversy, the courts have treated it as a warranty,¹ though it has also been construed as a mere expression of intent, the failure to carry out which would not result in forfeiture.²

The Phrase "Pernicious Habits" Includes Alcoholism.—There seems to be no question in any of the cases but that the words "pernicious habits" include alcoholism.³

Admissibility of Evidence.—The presence of this phrase in the policy has been held sufficient to justify the admission of evidence that the insured became intemperate after its issuance.⁴

Effect of Violation of Promise.—And if this fact is established, it will prevent a recovery.⁵

McGurk knew what the contract required, he should have conformed to it or rejected it altogether; but to say that the contract was void in its inception before he knew or had any opportunity to know what it required, was incorrect."

1. Promise Treated as Warranty.—*Holterhoff v. Mutual Ben. L. Ins. Co.*, 4 Bigelow L. & Acc. Ins. Rep. 395, 3 Am. L. Rec. 272; *Knight v. Mutual L. Ins. Co.*, 14 Phila. (Pa.) 187, 9 W. N. C. (Pa.) 501, where the word "guarantee" was used in expressing the promise; *Schultz v. Mutual L. Ins. Co.*, 6 Fed. Rep. 672, 14 Ins. L. J. 171; *Boyle v. Phoenix Mut. L. Ins. Co.*, Ramsay's App. Cas. (Low. Can.) 379, where the insured promised in effect not to acquire habits which would "increase the risk" on his life; *Meacham v. New York State Mut. Ben. Assoc.*, 120 N. Y. 237, where the statements were expressly made warranties.

In *Holterhoff v. Mutual Ben. L. Ins. Co.*, 4 Bigelow L. & Acc. Ins. Rep. 395, 3 Am. L. Rec. 272, the court said: "We concede that no particular form of words will make a statement or stipulation a warranty where it is apparent that it is not the intention of the parties to make the validity of the contract depend upon the literal truth or fulfilment of the statement or stipulation. *Wheelton v. Hardisty*, 8 El. & Bl. 232, 92 E. C. L. 232; *Kingsley v. New England Mut. F. Ins. Co.*, 8 Cush. (Mass.) 393. The policy here, however, expressly stipulates that if this 'declaration shall be found in any respect untrue, it shall be void.'"

In *Schultz v. Mutual L. Ins. Co.*, 6 Fed. Rep. 672, 14 Ins. L. J. 171, it was observed: "The language in regard to future pernicious habits is far more than a declaration of intention. It is a positive representation of a future fact, and is not to be regarded as an expression of the expectation or belief of the insured." See also *Standard L., etc., Ins. Co. v. Lauderdale*, 94 Tenn. 635.

2. Promise Held to Be a Mere Expression of Intention.—*Knecht v. Mutual L. Ins. Co.*, 90 Pa. St. 118, 35 Am. Rep. 641, 8 Ins. L. J. 639. Here the court said: "The assured declared

as a matter of intention that he would not practice any pernicious habit. Was this declaration of future intention false? There is no allegation, much less proof, that it was so. The assured might well have intended to adhere to his declaration in the most perfect good faith, yet in a moment of temptation have been overcome by this insidious enemy. In the absence of any clause in the policy avoiding it in case the assured should practice any such habit, and of any covenant or warranty on his part that he would not do so, we do not think his mere declaration to that effect in the application sufficient to avoid the policy."

3. The Term "Habit" Defined.—The word "habit" as used in this phrase was explained in the charge to the jury, afterwards approved on appeal, to mean that if "the deceased had an appetite for intoxicating drinks to such an extent that a single indulgence necessarily instigated him to a repetition of it, and led him into what have been called sprees, and these sprees were frequent and rendered him incapable of controlling his appetite while they continued, then, although there were intervals during which he remained entirely sober, there was such a repetition of acts of drinking as amounts to a habit." *Holterhoff v. Mutual Ben. L. Ins. Co.*, 4 Bigelow L. & Acc. Ins. Rep. 395, 3 Am. L. Rec. 272.

Of the same word, in an analogous connection, it was elsewhere said: "Habit is defined to be 'fixed or established custom, ordinary course of conduct.' * * * It need not be the uniform or unvarying rule, but to be a habit it must be the ordinary course of conduct, the general rule or custom. It may have exceptions. Exceptions do not destroy a rule. But unless, when occasion offers, there is a disposition or probable inclination to drink to excess, intemperate habits cannot be predicated." *Tatum v. State*, 63 Ala. 147.

4. *Schultz v. Mutual L. Ins. Co.*, 6 Fed. Rep. 672, 14 Ins. L. J. 171.

5. *Holterhoff v. Mutual Ben. L. Ins. Co.*, 4 Bigelow L. & Acc. Ins. Rep. 395, 3 Am. L. Rec. 272; *Knight v. Mutual L. Ins. Co.*, 14 Phila. (Pa.) 187, 9 W. N. C. (Pa.) 501; *Boyle*

Promises of total abstinence by applicants for membership in mutual insurance organizations are enforceable, and a violation of them forfeits the certificate without formal suspension or expulsion.¹

5. Statutory Provisions.—In several of the states, statutes have been enacted, the object of which is to limit the legal effect of statements by the insured in his application.²

Construction of Word "Misrepresentations."—Under a statute providing that no misrepresentations made in the negotiation of the policy shall avoid the same unless they were fraudulently made, or increased the risk, the term "misrepresentations" has been held not to be used in its technical legal sense, but so as to include warranties incorporated in the policy by reference to the application.³

When False Statements as to Habits Not Material.—Under a statute providing that no statement in the application, unless fraudulent or material, shall prevent a recovery, it is held that false statements by the insured as to his use of intoxicants are not material unless his habits in that regard are such as to impair his health.⁴

III. THIRD STAGE—EXPRESS CLAUSE IN POLICY—1. Validity and Enforceability.—In later policies, insurers have introduced an express clause for the purpose of withdrawing their protection from those addicted to the use of alcohol.

Insurer's Right to Thus Limit His Liability.—Such a clause is, of course, valid and enforceable. Insurers have the right, generally speaking, to limit their liability so long as they impose no terms which contravene the law or public policy. The clause now under consideration is so strongly in promotion of general morality that the courts have rather gone out of their way to commend it.⁵

By-Law Withholding Benefits in Case of Disease or Death Caused by Intemperance.—Upon this principle, a by-law of a mutual benefit society, which provides for withholding benefits in cases of disease or death occasioned by intemperance, is valid.⁶

Expulsion of Members of Benefit Society for Misrepresentation as to Habits.—Where the directors of such a society are empowered to expel members for representations of temperate habits, afterwards proven false, the action of the directors is judicial, "in the absence of fraud conclusive, and cannot be assailed collaterally."⁷

Violation of Pledge of Total Abstinence.—Generally, where total abstinence is the fundamental rule of the order, as expressed in its laws, the use of intoxicants will prevent recovery on a membership certificate, though the holder was not formally suspended or expelled.⁸

v. Phoenix Mut. L. Ins. Co., Ramsay's App. Cas. (Low. Can.) 379.

1. Promises of Total Abstinence.—Supreme Council *v. Curd*, 111 Ill. 284; *Hogins v. Supreme Council*, 76 Cal. 109, 9 Am. St. Rep. 173; *Smith v. Knights of Father Mathew*, 36 Mo. App. 184.

2. Statutes.—Thus, in 1874, an act was passed by the *Missouri* Legislature which provided that "no misrepresentation made in obtaining or securing a policy of insurance in the life or lives of any person or persons, shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contributed in any case shall be a question for the jury." See this act quoted in full in *Conover v. Massachusetts Mut. L. Ins. Co., (N. S.) C. C., 4 Bigelow L. & Acc. Ins. Rep. 189, 1 Cent. L. J. 597*, where its provisions were held not to apply to the case in judgment.

Massachusetts has a similar statute. See *Mass. Stat. 1894, c. 522, § 21.*

A statute also exists in *Kentucky*. See *Ky. Gen. Stat., c. 22, § 23.*

3. *White v. Provident Sav. L. Assur. Soc., 163 Mass. 108.*

4. *Mutual L. Ins. Co. v. Thomson, 94 Ky. 253.*

5. Clause Valid and Enforceable.—*Shader v. Railway Passenger Assur. Co., 5 Thomp & C. (N. Y.) 643, 5 Bigelow L. & Acc. Ins. Rep. 335, affirmed in 66 N. Y. 441; 23 Am. Rep. 65; Standard L., etc., Ins. Co. v. Jones, 94 Ala. 434; St. Mary's Ben. Soc. v. Burford, 70 Pa. St. 321; Southcombe v. Merriman, 1 C. & M. 286, 41 E. C. L. 159.*

6. *St. Mary's Ben. Soc. v. Burford, 70 Pa. St. 321.*

7. *Jones v. National Mut. Ben. Assoc. (Ky. 1887), 2 S. W. Rep. 447.*

8. *Hogins Supreme Council, 76 Cal. 109, 9 Am. St. Rep. 173; Smith v. Knights of Father Mathew, 36 Mo. App. 184. See also St. Mary's Ben. Soc. v. Burford, 70 Pa. St. 321.*

Alcoholism as Ground for Cancellation of Policy.—Whether the efforts of the insurers to relieve themselves from liability to those addicted to alcoholism will be so far promoted by the courts as to make that habit a ground for canceling the policy during the insured's lifetime, has been the subject of some consideration.

Fraudulent Misrepresentations as to Habits—Cancellation.—Such relief seems to have been granted where, though the insured warranted his habits to be sober and temperate when the application was taken, it was shown that he had previously had the delirium tremens, and been frequently arrested for drunkenness.¹

Subsequent Habits of Intemperance Impairing Health—Cancellation.—But a showing that the insured's health had been impaired by habits of drunkenness acquired entirely since the issuance of the policy, has been held insufficient to justify the court in canceling a policy during the life of the insured.²

Express Reservation of Right of Cancellation.—Where the insurer expressly stipulates for the right to cancel the policy in case of intemperate habits acquired by the insured, such a stipulation supersedes a general clause providing for an *ipso facto* forfeiture on the same ground.³

Delay as Waiver of Option to Cancel.—The option to cancel the policy has been held not to be waived by a delay of not more than thirty-five days in order to investigate a report that the insured's habits were intemperate.⁴

2. Phraseology and Construction—*a.* "DEATH CAUSED BY INTEMPERANCE," ETC.—The clause having for its purpose protection against alcoholism, though in the policies for a comparatively short time, has already appeared in several forms, each later one of which has been slightly more stringent, and less favorable to the insured, than that which preceded it.

"Death Caused by Intoxicants and Narcotics."—A phraseology, common at first, was that which excepted "death caused by intoxicants and narcotics." Such a clause could not, of course, be invoked as a ground of forfeiture unless death was shown to have resulted from the forbidden habit. It was held also that the intemperance must be the direct and not merely a remote cause.⁵

Death "by Reason of Intemperance from the Use of Intoxicating Liquors."—But where the insured, while in a fit of delirium tremens, escaped from his watchers, ran out

In *Supreme Council v. Curd*, 111 Ill. 284, in the application, the insured stated: "I further agree, that should I, at any time, violate my pledge of total abstinence, or be suspended or expelled, * * * then all rights * * * shall be forfeited," and this was construed to mean that forfeiture followed a violation of the pledge alone, and did not require either suspension or expulsion, though there was other language in the constitution of the order which made the latter a ground of forfeiture.

1. *New York L. Ins. Co. v. Parent*, 3 Quebec L. R. 163; *New York L. Ins. Co. v. Talbot*, 3 Quebec, L. R. 168. See also *Andreveno v. Mutual Reserve Fund L. Assoc.*, 19 Ins. L. J. 668.

2. *Connecticut Mut. L. Ins. Co. v. Bear*, 26 Fed. Rep. 582.

3. **Express Stipulation as to Cancellation.**—*Northwestern Mut. L. Ins. Co. v. Hazelett*, 105 Ind. 212, 55 Am. Rep. 192. Here the court said: "The policy before us having been presumably prepared by the company, and containing on its face inconsistent or ambiguous stipulations as to the consequences which should result from intemperance, the meaning most favorable to the assured must be attributed to it. This rule is particularly applicable in a case like this, where a forfeiture is

insisted upon. To hold otherwise, would be to give a construction to the contract which would enable the insurance company to exercise its option, after having collected premiums, to insist upon a forfeiture or not, according to its pleasure. The consequence of intemperance was made the subject of a particular specific and separate stipulation in which no other subject is mentioned; and, according to well-established rules of construction, when such is the case the separate specific stipulation is to be preferred over a general stipulation inconsistent therewith."

Compare Newman v. Covenant Mut. Ins. Assoc., 76 Iowa 56, 14 Am. St. Rep. 196, where the general clause was held to have been waived by issuing the policy with knowledge of the facts which would avoid it.

4. *Adreveno v. Mutual Reserve Fund L. Assoc.*, 19 Ins. L. J. 668.

5. *Holterhoff v. Mutual Ben. L. Ins. Co.*, 3 Am. L. Rec. 272, 4 Bigelow L. & Acc. Ins. Rep. 395; *Mutual L. Ins. Co. v. Stibbe*, 46 Md. 302; *New York L. Ins. Co. v. La-Boiteaux*, 5 Bigelow L. & Acc. Ins. Rep. 437, 4 Am. L. Rec. 1 (where a charge to this effect is approved); *Miller v. Mutual Ben. L. Ins. Co.*, 31 Iowa 216, 7 Am. Rep. 122, 5 Bigelow L. & Acc. Ins. Co. 693, 4 Am. L. T. Rep. 218

and exposed himself to the cold, and brought on congestion of the lungs and death, recovery was held to be prevented by a clause excepting death "by reason of intemperance from the use of intoxicating liquors."¹

"Habitual Use" Construed—Province of Jury.—Where the policy is to be avoided "if the insured shall die from the habitual use" of such liquors, the word "habitual" is important; intemperance, excessive and even fatal, but not habitual, would lack an essential of a ground of forfeiture; and it is entirely for the jury to say whether the use is "habitual."²

Voluntary Use as Stimulants is Intended.—The phrase "death caused by the use of intoxicants and narcotics" has reference to their voluntary use as stimulants, and the policy is not avoided by taking them as medicine upon the advice of a physician.³ So an answer that the insured has never used opium will not be regarded as sufficiently false to avoid the policy because he has, as a medical remedy, taken morphine, laudanum, and other forms of opium.⁴

δ. "INTEMPERANCE IMPAIRING HEALTH," ETC.—Under another and later form of the clause, intemperance, in order to constitute a ground of forfeiture, need not cause death, but must be such as to impair health.

Intemperance Remote Cause of Death.—Under this clause, a beneficiary who, in the proofs furnished the company, has made affidavit that the remote cause of the insured's death was alcoholism, cannot recover, although such proofs contain the further statement that the immediate cause was alcoholism and extreme prostration.⁵

Habitual Intemperance Unnecessary.—Under this clause, moreover, the insured, if he has actually impaired his health, need not have "indulged in strong drink for such a long period of time, or so frequently, as to become habitually intemperate."⁶

Serious and Permanent Impairment of Health.—Sometimes the clause reads, "or in case he shall become so far intemperate as to impair his health seriously and permanently."⁷ Full force must be given to both of these modifying words. It is not sufficient to prove a serious impairment if this is not more than temporary.⁸

Question for Jury.—The question whether the insured's health was thus impaired, is one of fact for the jury.⁹

Expert Testimony.—And the testimony of experts that the quantity of liquor consumed by him was sufficient to cause such impairment, is inadmissible.¹⁰

(although the opinion on rehearing of this case, as will be seen from the next note, somewhat modifies the doctrine).

1. *Miller v. Mutual Ben. Ins. Co.*, 34 Iowa 222, 39 Iowa 304.

2. *DeCamp v. New Jersey L. Ins. Co.*, 4 Bigelow L. & Acc. Ins. Rep. 287.

3. **Medicinal Use Not Intended.**—*Ranney v. Mutual Ben. L. Ins. Co.* (U. S. D. C. Mass. 1873), reviewed in *May on Insurance* (3d ed.), § 302. Shepley, J., there instructed the jury that: "If the death of the assured was caused by any drug administered to him in the course of medical practice for the purpose of cure, in sufficient quantity to produce death, and death was the effect of the drug, and not of the disease, then in such case the death could not properly be considered as resulting from intemperance in the use of intoxicating liquors, and the plaintiff, upon that branch of the case, would be entitled to recover." See also, as announcing or recognizing this doctrine, *New York L. Ins. Co. v. La Boiteaux*, 4 Am. L. Rec. 1, 5 Bigelow L. & Acc. Ins. Rep. 437; *Higbee v. Guardian Mut. L. Ins. Co.*, 66 Barb. (N. Y.) 462; *Ætna L. Ins. Co. v.*

Davey, 123 U. S. 739; *Ætna L. Ins. Co. v. Ward*, 140 U. S. 76.

4. *Higbee v. Guardian Mut. L. Ins. Co.*, 66 Barb. (N. Y.) 462.

5. *Hanna v. Connecticut Mut. L. Ins. Co.* (Super. Ct.), 28 N. Y. Supp. 661.

6. *Ætna L. Ins. Co. v. Davey*, 123 U. S. 739; *Davey v. Ætna L. Ins. Co.*, 38 Fed. Rep. 650.

7. *Ætna L. Ins. Co. v. Deming*, 123 Ind. 384; *Odd Fellows Mut. L. Ins. Co. v. Rohkopp*, 94 Pa. St. 59, 9 Ins. L. J. 787.

8. *Ætna L. Ins. Co. v. Deming*, 123 Ind. 384.

9. *Jarvis v. Connecticut Mut. L. Ins. Co.*, 5 Ins. L. J. 507.

10. **Testimony of Experts as to Probability of Impairment on Account of Quantity of Liquors Consumed.**—*Odd Fellows Mut. L. Ins. Co. v. Rohkopp*, 94 Pa. St. 59, 9 Ins. L. J. 787, where the court, *per* Mercur, J., said: "The capacity of persons to drink liquor is so unequal, and the effect is so different on different individuals, it by no means follows that a quantity sufficient to affect some other man's health, had the same effect on the health of

c. "DEATH OR INJURY WHILE UNDER THE INFLUENCE OF INTOXICATING LIQUORS."—The clause in this form is of comparatively recent origin, and the cases construing it are therefore not numerous.

Causal Relation Unnecessary.—But it is well settled that with this language in the policy, the latter is avoided, if, when death or injury occurs, the insured was actually intoxicated, regardless of whether or not that condition caused or contributed to the occurrence.¹

In some instances the courts have undertaken to define this phrase.²

In several of the cases in this country the courts have apparently not attempted to define intoxication or drunkenness, but have regarded the question whether the insured was in that state as peculiarly one for the jury, and have refused to disturb findings which, to say the least, appear to have been contrary to the weight of evidence.³

Rohkopp. The question in issue was, did his intemperance so affect him? The court opened the door wide, and permitted the plaintiff in error to give all the evidence offered of Rohkopp's intemperate habits, and of the effect on him. That he was habitually intemperate, was not denied or controverted. It was clearly proved. The contention was, whether its effect was such as to bring him within the clause of the policy which would prevent a recovery. Possessing a constitution and health which habitual intemperance for so many years had been unable to seriously injure, showed a capacity to withstand its action that justly confined the evidence to the effect the liquor had on him, and not what effect it might have on some other person."

1. **No Causal Relation Necessary.**—*Shader v. Railway Passengers Assur. Co.*, 3 Hun (N. Y.) 424, 5 Thomp. & C. (N. Y.) 643, 5 Bigelow L. & Acc. Ins. Rep. 335, 66 N. Y. 441, 23 Am. Rep. 65, 5 Ins. L. J. 749. In this case the trial court had instructed the jury that "the question is, was the injury the natural and reasonable cause of his [the insured's] being in that condition [*i. e.* intoxicated]." The Supreme Court reversed the judgment because of this charge, declaring "that it was not the intention to require the company to prove that death or injury occurred while the insured was under the influence of liquor, or was in consequence of his being in that condition." This case was subsequently carried to the Court of Appeals and there *affirmed*. Miller, J., in delivering the ultimate opinion in the case, says: "The limitation in the policy related to the condition of the insured, not to the cause which might produce his death. And here lies the distinction which is to be drawn in its construction, for by any other or different interpretation the words used would not only be unnecessary, but meaningless and without point. As the policy was rendered void if the assured was injured or killed while under the influence of intoxicating drinks, it was not essential, to work a forfeiture, that injury or death should occur in consequence of the use of the same." See to the same effect *Standard L., etc., Ins. Co. v. Jones*, 94 Ala. 434; *Mair v. Railway Passengers Assur. Co.*, 37 L. T. 356; *Macrobbe v. Accident Ins. Co.*, 13 Sc. L. Rep. 391.

2. **The Phrase "under the Influence of Intoxicating Liquors" Defined.**—Thus the Supreme

Court of *New York*, in one of the earlier cases involving this clause, said: "To be under the influence of intoxicating liquors, within the meaning of this policy, the insured must have drunk enough to disturb the action of the physical or mental faculties, so that they are no longer in their natural or normal condition. When, therefore, the defendant imposed upon persons insured by it the condition that it would not be liable when death or injury should happen while the insured was under the influence of liquor, the intention manifestly was to require the insured to limit its use in such a degree as that he would retain full control over his faculties of mind and body." *Shader v. Railway Passengers Assur. Co.*, 3 Hun (N. Y.) 424, 5 Thomp. & C. (N. Y.) 643, 5 Bigelow L. & Acc. Ins. Rep. 335.

In *England* it was held that "the influence of intoxicating liquors" in this connection meant such influence as "disturbs the balance of one's mind." *Mair v. Railway Passengers Assur. Co.*, 37 L. T. 356.

It has also been declared that while this phrase in its popular sense falls far short of meaning intoxication, yet that in its legal import it is equivalent to the latter term, which is also said to be "the synonym of 'inebriety,' 'drunkenness,' implying or evidenced by undue and abnormal excitation of the passions or feelings, or the impairment of the capacity to think and act correctly and efficiently." *Standard L., etc., Ins. Co. v. Jones*, 94 Ala. 434.

In a *Scotch* case, the fact that the court found the insured to have been the worse for liquor at the time of an injury, seems to have been thought a sufficient ground for denying the right to recover upon a policy which did not "extend to any injury happening while the assured was under the influence of intoxicating liquor." *Macrobbe v. Accident Ins. Co.*, 13 Sc. L. Rep. 391.

3. **Question of Drunkenness Left to the Jury.**—*Newman v. Covenant Mut. Ins. Assoc.*, 76 Iowa 56, 14 Am. St. Rep. 196; *Jones v. U. S. Mutual Acc. Assoc.* (Iowa 1894), 61 N. W. Rep. 485; *Prader v. National Masonic Acc. Assoc.* (Iowa 1895), 63 N. W. Rep. 601; *Travelers Ins. Co. v. Harvey*, 82 Va. 949; *Sutherland v. Standard L., etc., Ins. Co.*, 87 Iowa 505. In the case last cited the question came again before that court, the policy excepting "death or disablement happening to the insured while intoxicated." The effect of this clause is

IV. ENFORCEMENT OF THE CLAUSE—1. Province of Court and Jury.—It is a question of fact whether the insured's habits were temperate,¹ or so intemperate as to impair his health,² or whether he had been addicted to the use of intoxicating liquors,³ or whether death was caused by intoxication⁴ or took place while he was intoxicated.⁵

Verdict Contrary to the Evidence.—But this rule is not so rigid as to prevent a reviewing court from disturbing a verdict wherein the jury has passed upon such a question, if the finding is regarded as contrary to the evidence.⁶

Trial Court Ignoring in Its Charge Stipulation as to Intemperance.—And where the trial court in its charge ignored entirely the stipulation in the policy which relieved the insurer from liability for injuries caused by intoxication, the judgment was reversed, although the jury had returned special findings to the effect that the insured was not intoxicated when injured, and that no intoxicating liquor drunk by him did "in any manner cause him to be more liable to the accidental injury."⁷

Meaning of Language of Application—Question for Court.—The meaning and intent of an inquiry contained in the application presents a question for the court and not for the jury to pass upon.⁸

2. Burden of Proof.—The burden of proving intemperance to such a degree as will effect a forfeiture, devolves upon the insurer.⁹ And this burden, it seems, never shifts during the progress of the trial. It cannot, for example,

thus disposed of by the court in its opinion: "As to the intoxication of Miller, the evidence is plainly conflicting, and this is not denied; but it is said that it overwhelmingly preponderates in favor of the appellant. The evidence consists entirely of the observations of witnesses who saw him before and after the accident; and, without expressing our views as to a mere preponderance, we have no hesitancy in saying that a disinterested person who reads the testimony will have doubts as to the fact, and under such a state of the evidence the question is clearly one for the jury. The witnesses for the defense on the question of intoxication stated particular facts as indicating such a condition, as that he spit or slobbered on his clothes; that he was 'fooling' with an employee of the motor company on the train, in an unusual manner, etc. It is in evidence that he was a very lively person, and 'a great one to be cutting up.' One witness for the defendant says: 'It was from his cutting up that I concluded that he probably had a drink or something of that kind.' Those who were near him after the injury testify that they saw nothing to indicate that he was intoxicated; that they were close over him, and did not smell liquor on his breath, as they likely would have done if he had been as drunk as by some he was represented to be. It is enough to say that the evidence is too conflicting on this point for us to interfere."

1. *Northwestern L. Ins. Co. v. Muskegon Bank*, 122 U. S. 501, 22 Ins. L. J. 353; *McGinley v. U. S. Life Ins. Co.*, 8 Daly (N. Y.) 390, 7 Ins. L. J. 791, *affirmed* 77 N. Y. 495; *Bickford v. N. Y. State L. Ins. Co.* (1869), unreported, but discussed in *Bliss on Life Ins.* (2d ed.), § 366; *De Camp v. N. J. L. Ins. Co.*, 4 Bigelow L. & Acc. Ins. Rep. 287. *Compare* *Promoter Ins. Co. v. Barrie's Rep.*, 5 Murray (Scotch) 135; *Scotland L. Assoc. v. M'Blane*, 9 Ir. R. Eq. 176.

2 C. of L.—4

2. *Ætna L. Ins. Co. v. Hanna*, 81 Tex. 487; *Mutual L. Ins. Co. v. Thomson*, 94 Ky. 253.

3. *Van Valkenburgh v. American Popular L. Ins. Co.*, 70 N. Y. 605.

4. *Ætna L. Ins. Co. v. Davey*, 123 U. S. 739; *Ætna L. Ins. Co. v. Ward*, 140 U. S. 76; *Meacham v. New York State Mut. Ben. Assoc.*, 120 N. Y. 237; *Maier v. Massachusetts Ben. Assoc.* (Mich. 1895), 65 N. W. Rep. 552.

5. *Sutherland v. Standard L., etc., Ins. Co.*, 87 Iowa 505; *Follis v. U. S. Mutual Acc. Assoc.* (Iowa 1895), 62 N. W. Rep. 807.

6. See *Miller v. Mutual Ben. Ins. Co.*, 34 Iowa 222, 3 Bigelow L. & Acc. Ins. Rep. 581, 39 Iowa 304. In this case judgments for the insured were twice reversed by the Supreme Court, where, though the attending physician testified at the trial that the deceased died of congestion of the lungs and brain, caused by intoxicants, the same physician had previously made affidavit that the death was caused by intemperance and exposure, and there was other evidence that the insured had been intemperate and even had delirium tremens. *Compare* *Dwight v. Germania L. Ins. Co.*, 103 N. Y. 341, 57 Am. Rep. 729; *Mutual Ben. L. Ins. Co. v. Holterhoff*, 2 Cin. Sup. Ct. Rep. 379, 4 Bigelow L. & Acc. Ins. Rep. 375.

7. *Cook v. Standard L., etc., Ins. Co.*, 84 Mich. 12.

8. *Dwight v. Germania L. Ins. Co.*, 103 N. Y. 341, 57 Am. Rep. 729.

9. **Burden of Proof.**—*Boisblanc v. Louisiana Equitable L. Ins. Co.*, 34 La. Ann. 1167; *Shader v. Railway Passengers Assur. Co.*, 5 Thomp. & C. (N. Y.) 643, 23 Am. Rep. 65, 5 Bigelow L. & Acc. Ins. Rep. 331, *affirmed* 66 N. Y. 441; *Van Valkenburgh v. American Popular L. Ins. Co.*, 70 N. Y. 605; *Newman v. Covenant Mut. Ins. Assoc.*, 76 Iowa 56, 14 Am. St. Rep. 196; *Sutherland v. Standard L., etc., Ins. Co.*, 87 Iowa 505. *Compare* *New*

be imposed upon the plaintiff to show that a prohibited drug which proved fatal was taken as a medicine; though the jury is not at liberty to find, without evidence to that effect, that it was so taken.¹ In an early *English* case, where the defendant alleged that the insured's habits were immoderate and intemperate, and the plaintiff in his replication averred that they were not so, it was held that the latter should begin, as there was an affirmative on both sides.²

3. Evidence—Physician's Ex Parte Certificate as to Cause of Death—It has been held to be erroneous to permit proofs of death, containing a physician's *ex parte* certificate as to the cause thereof, to be read to the jury, where the contested point in the case was whether or not such cause was the insured's intoxication.³ But where the physician who prepared the certificate explains and confirms it as a witness at the trial, it may be considered by the jury as a part of the evidence.⁴

Witness Testifying as to Insured's Appearance.—A witness may state whether or not a person had the appearance of being intoxicated, and such statement of appearance would be the statement of a fact.⁵

Evidence of Symptoms of Hard Drinking on the Part of the Insured.—But where the policy merely forbids the insured to become "so far intemperate as to seriously or permanently impair his health," evidence that he had the symptoms of hard drinking, without an offer to prove that it affected his health, is inadmissible.⁶

Asking Witness if He Ever Saw Insured Intoxicated.—As a link in the chain of evidence tending to prove intemperate habits, it is permissible to ask a witness if he ever saw the insured under the influence of intoxicants.⁷

General Reputation for Temperance.—And where the insurer defends upon the ground of false statements as to the use of intoxicants, and that death was caused by habitual drunkenness, it is competent to prove the insured's general reputation in the community as to temperate habits.⁸

Evidence to Repel Theory of Accident.—Where the defense was that the injury from which the insured died was caused by his fall from a window while intoxicated, it was held proper to exclude proffered evidence that on a previous occasion deceased, while drunk, had attempted to jump from the window.⁹

Petition of Wife in Divorce Suit Alleging Husband's Intemperance—When Evidence against Her.—A petition filed and verified by a wife in a suit for divorce, alleging her husband's excessive use of intoxicants ever since their marriage, is admissible in evidence against the same party in an action by her upon a life insurance policy taken out by her husband for her benefit, and as her agent, with the warranty that his habits were temperate; and if such allegations are unexplained, this is sufficient to prevent a recovery on the policy.¹⁰

York L. Ins. Co. v. Graham, 2 Duv. (Ky.) 506; Miller v. Mutual Ben. L. Ins. Co., 34 Iowa 222, 1 Ins. L. J. 747.

1. New York L. Ins. Co. v. La Boiteaux, 5 Bigelow L. & Acc. Ins. Rep. 437, 4 Am. L. Rec. 1.

2. Craig v. Fenn, 1 C. & M. 43, 41 E. C. L. 29.

3. Cook v. Standard L., etc., Ins. Co., 84 Mich. 12.

4. Davey v. Ætna L. Ins. Co., 38 Fed. Rep. 650.

5. Cook v. Standard L., etc., Ins. Co., 84 Mich. 12 (citing People v. Eastwood, 14 N. Y. 562; State v. Pike, 49 N. H. 407, 6 Am. Rep. 533).

6. Odd Fellows Mut. L. Ins. Co. v. Rohkopp, 94 Pa. St. 59.

7. United Brethren Mut. Aid Soc. v. O'Hara,

120 Pa. St. 256. Compare Cook v. Standard L., etc., Ins. Co., 84 Mich. 12.

8. Neudeck v. Grand Lodge, 1 Mo. App. Rep. 330.

9. Travelers Ins. Co. v. Harvey, 82 Va. 949. Here the court said: "As a general rule it is inadmissible, even where the issue is whether a person did a particular thing, to put in evidence the fact that he did a similar thing at some other time. 1 Whart. Ev., § 529. In this case, however, there is no pretense that the deceased committed self-destruction, and it could not, therefore, be competent testimony to repel the theory of accident, or to establish that his habits were intemperate at the time of the taking out of the policy."

10. Furniss v. Mutual L. Ins. Co., 46 N. Y. Super. Ct. 467.

Rebuttal Evidence as to Insured's Habits.—Where defendant introduced evidence that the insured died from intoxication, thus avoiding the policy, it was held discretionary with the trial court to receive rebuttal evidence of the insured's habits.¹

V. WAIVER—Acceptance of Premiums with Knowledge of Matters Constituting Breach of the Contract.—Provisions in life insurance policies forbidding the use and sale of liquors may, of course, be waived, and that result has frequently been held to follow from the issuance of policies and the acceptance of premiums with knowledge, on the part of the insurer and his agents, of facts which would constitute a breach of such provision.² So a mutual benefit association which collected dues from a member without objecting to intemperate habits until shortly before his death, was held to have waived the right to set up that defense.³

Revival of Policy with President's Knowledge of Insured's Intemperate Habits.—In *Colorado* it was held by a divided court that, after forfeiture for non-payment, the revival of a policy issued by a mutual company, with knowledge on the part of its president that the insured was "so far intemperate as to impair his health," constituted a waiver of the clause forbidding such intemperance.⁴

Effect of Knowledge on Part of Local Agent, of Insured's Intemperate Habits.—But it has been held that such knowledge on the part of a local agent is not a waiver where the policy expressly provides that agents cannot waive its printed conditions.⁵

Delay to Exercise Option to Cancel Policy.—A delay of not more than thirty-five days, in order to investigate the case, has been held not to constitute a waiver of the insurer's reserved option to cancel the policy for intemperate habits.⁶

ALDERMAN. (See the title MUNICIPAL CORPORATIONS.)—The term "alderman" does not import legislative more than judicial power. According to ancient authorities, *comes*, *aldorman*, and *earl* are equivalent words in the Latin, Saxon, and Danish-Saxon languages. In England this officer sat with the bishop at the trial of causes, and, while the latter expounded the ecclesiastical, it was the duty of the former to declare the common, law.⁷

ALE. (See also the title INTOXICATING LIQUORS.)—Ale is a liquor made from an infusion of malt by fermentation. It chiefly differs from beer in having a smaller proportion of hops, and both are intoxicating liquors.⁸

ALEATORY. (See also the titles CONTRACTS; IMPOSSIBLE CONTRACTS; TONTINE INSURANCE; GAMBLING CONTRACTS.)—Dependent on some uncertain event.⁹

1. *Maier v. Massachusetts Ben. Assoc.* (Mich. 1895), 65 N. W. Rep. 552.

2. *Ætna L. Ins. Co. v. Hanna*, 81 Tex. 487; *McGurk v. Metropolitan L. Ins. Co.*, 56 Conn. 528; *Continental L. Ins. Co. v. Thoen*, 26 Ill. App. 495; *Newman v. Covenant Mut. Ins. Assoc.*, 76 Iowa 56 14 Am. St. Rep. 196.

3. *Grand Lodge v. Brand*, 29 Neb. 644. Here the court, *per* Maxwell, J., said: "In other words, facts which are well known or might have been known upon due inquiry, and which, had action been taken thereon by the order, might have resulted in the suspension or expulsion of a member and cancellation of his certificate of life insurance, cannot be ignored until after his death, and then be urged to defeat the provision made for his widow or other beneficiary."

4. *Pomeroy v. Rocky Mountain Ins., etc.*, Inst., 9 Colo. 295, 59 Am. Rep. 144.

5. *Cook v. Standard L., etc., Ins. Co.*, 84 Mich. 12.

6. *Andreveno v. Mutual Reserve Fund L. Assoc.*, 19 Ins. L. J. 668.

7. *Purdy v. People*, 4 Hill (N. Y.) 409. In that case it was held that an act excluding *aldermen* from sitting as judges, was an act altering the charter of the city of New York.

In the United States, members of the legislative body of a city are sometimes called *aldermen* and sometimes city councilmen. They also in some states have judicial power corresponding with that of a justice of the peace. See the titles MUNICIPAL CORPORATIONS; JUSTICES OF THE PEACE.

8. *Nevin v. Ladue*, 3 Den. (N. Y.) 44.

Ale Distinguished from Whiskey.—An indictment for selling whiskey is not supported by proof that the defendant sold *ale*. *Lindsay v. State*, 19 Ala. 560.

Whether a Spirituous or Intoxicating Liquor, etc.—See the title INTOXICATING LIQUORS.

9. **Aleatory Contracts.**—"It is of the essence of *aleatory* contracts that there should be risk

ALIAS. (See also ENCYC. OF PL. AND PR., title INDICTMENT.)—This term is equivalent to “otherwise called” or “otherwise known as.”¹

ALIAS WRIT.—An alias writ is a second or further writ, which is issued after the first writ has expired.²

on one side or both, and that all risks appertaining to the contract and not excepted were assumed by the parties.” *Moore v. Johnston*, 8 La. Ann. 488.

Accidental or overpowering force does not excuse the performance of an *aleatory* contract. *Henderson v. Stone*, 1 Martin N. S. (La.) 639.

1. *Kennedy v. People*, 39 N. Y. 251. In that case it is said by Woodruff, J.: “It was objected on the trial in the present case that the indictment is bad, because it charges the prisoner with the killing of Thomas Hand, *alias* Thomas Jackson. There is nothing in the suggestion that this created any duplicity; the charge in no sense of the word *alias* imported the killing of two persons. To give it such an effect, would be to construe it as meaning Thomas Hand and Thomas Jackson, which neither its proper Latin signification nor its English use would allow. A more plausible suggestion would have been, that it was bad for uncertainty, because it left it doubtful whether the killing of Thomas Hand or the killing of Thomas Jackson was charged. But in order to create this doubt it is necessary to read the word as meaning ‘or,’ after the word ‘either,’ and so make the indictment charge the killing of one of two persons, that is to say, with the killing of either Thomas Hand or Thomas Jackson. But this, again, is not according to its well-understood meaning as a term in the law long used to avoid a variance or misnomer in pleadings. It does not indicate that different persons are intended, but in pleading, both in civil and criminal actions, that the names mentioned are different descriptions of the same person. Counsel for the plaintiff in error is right in claiming that it was formerly employed in pleading in connection with *dictus*, and in that connection the charge would import a

killing of Thomas Hand, otherwise called Thomas Jackson. And the argument is in substance a concession that, had the pleader used the full expression, *alias dictus*, or ‘otherwise called,’ the supposed defect would not exist. I apprehend that the use of the single word *alias* to express the whole meaning has so long obtained, that it is not uncertain what is the true meaning of the charge; and if not, then there is no just ground for the exception. Unless there is such uncertainty, the objection, even if technically sound, is not of substance, but of mere form, and could in no wise prejudice the prisoner, and therefore neither renders the indictment invalid nor affects the proceeding. 2 Rev. Stat. 728 (52). The term has become familiar as equivalent to ‘otherwise called,’ or ‘otherwise known as,’ and may properly be treated as having in use in pleadings in English acquired that import, as a technical term constantly employed in that sense without its former Latin companion.”

2. *Glenn v. Brush*, 3 Colo. 34.

And see the ENCYCLOPÆDIA OF PLEADING AND PRACTICE, under the titles of the various writs; for example, as to alias execution, see the title EXECUTION.

“An *alias writ* is one which is issued when a former writ has not produced its effect. The writ is so called from the words, ‘as we have formerly commanded you,’ being inserted after the usual commencement, ‘We command you.’” *Farris v. Walter*, 2 Colo. App. 453.

“It was not a variance between the allegations and the proof, that in the declaration the *fieri facias* received by the sheriff is described as an ‘execution,’ and the proof showed it to be an *alias pluries fi. fa.*; the former is a generic term which embraced the latter.” *Hill v. Fitzpatrick*, 6 Ala. 318.

ALIBI.

BY JOSEPH R. LONG.

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CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles: BURDEN OF PROOF; CIRCUMSTANTIAL EVIDENCE; CRIMINAL LAW; CUMULATIVE EVIDENCE; EVIDENCE; and the various criminal titles.

I. DEFINITION AND NATURE—Definition.—The word “alibi” means, literally, “elsewhere,” and a prisoner or accused person is said to set up an alibi when he alleges that, at the time when the offense with which he is charged was committed, he was “elsewhere;” that is, in a place different from that in which it was committed.¹

Nature.—Alibi is regarded by some courts as a special affirmative defense,² but the better doctrine seems to be that it is not a defense in the accurate meaning of the term, but a mere fact shown in rebuttal of the state’s evidence;³ and, consequently, the evidence introduced to support it should be

1. **The Term Defined.**—Sweet L. Dict.; State v. Fry, 67 Iowa 475. See Wisdom v. People, 11 Colo. 170; State v. Maher, 74 Iowa 77; McLain v. State, 18 Neb. 159.

An Alibi, as a defense against the accusation of crime, consists in the fact that at the time when the crime was committed, the accused was at a place different from that where it was committed, so different as to preclude the idea that he was the perpetrator. *Per* Jenkins, J., in Wright v. State, 34 Ga. 114. See also People v. Lee Sare Bo, 72 Cal. 623; People v. Levine, 85 Cal. 39; People v. Tarm Poi, 86 Cal. 225; Creed v. People, 81 Ill. 565; State v. Hardin, 46 Iowa 623, 26 Am. Rep. 174; Com. v. Webster, 5 Cush. (Mass.) 295, 52 Am. Dec. 711; State v. Starnes, 94 N. Car. 973; State v. Freeman, 100 N. Car. 429.

An alibi is, in criminal evidence, a defendant’s showing under his plea of not guilty, and without special averment, that when the crime was done he was at some place where he could not be the doer. 1 Bishop Crim. Proc., § 1061.

The Theory of an Alibi is, that the prisoner was so far removed from the scene of the crime, at the time of its commission, as to make it impossible that he could have committed it.

Miller v. People, 39 Ill. 457; Ackerson v. People, 124 Ill. 563.

2. **Alibi Considered as an Affirmative Defense.**—Sater v. State, 56 Ind. 378.

Alibi is as much a defense as insanity, or any other exculpatory matter. Gallaher v. State, 28 Tex. App. 247 (Hurt, J., *dissenting*). See also State v. Nance, 25 S. Car. 168.

Alibi is an independent defense. People v. Lee Sare Bo, 72 Cal. 623. See also Provo v. State, 55 Ala. 222; State v. Krewsen, 57 Iowa 588; State v. Fry, 67 Iowa 475.

3. **Alibi Not Technically a Defense.**—Albritton v. State, 94 Ala. 76; State v. Reed, 62 Iowa, 40. Evidence of alibi is merely ordinary evidence in rebuttal. 1 Bishop Crim. Proc. 1062; State v. Rockett, 87 Mo. 666.

A defense of alibi is not an independent affirmative defense in the nature of a plea of confession and avoidance, but merely a species of evidence tending directly and necessarily to rebut the case made by the state. State v. Kelly, 16 Mo. App. 213. But proof of an alibi is as much a traverse of the crime charged as any other defense. People v. Fong Ah Sing, 64 Cal. 253; Turner v. Com., 86 Pa. St. 54, 27 Am. Rep. 683; Watson v. Com., 95 Pa. St. 418; Rudy v. Com.,

left to the jury uninfluenced by any charge from the court tending to place it upon a different footing from other evidence in the case, or calculated to disparage and excite prejudice against it.¹

Duty of the Court.—But where there is testimony tending to establish an alibi, it is proper for the court to instruct the jury as to the law on the subject,²

128 Pa. St. 500; *Gallaher v. State*, 28 Tex. App. 247 (*citing*, AM. AND ENG. ENCYC. OF LAW, 1st ed., 454-455).

Alibi is not a plea, but a defense under the plea of not guilty. *Toler v. State*, 16 Ohio St. 583.

Such a defense is not a special one, nor is it, in its nature, an independent exculpatory fact. *Ayres v. State*, 21 Tex. App. 399.

The evidence of an alibi is not a defense, except so far as it controverts the testimony upon the part of the state that the accused was present and participated in the offense. *State v. Chee Gong*, 16 Oregon 534.

An alibi is not an affirmative proposition made by the defendant with the burden of proof resting on him, but evidence in its support is a direct attack upon guilt, and if of sufficient strength and cogency, may affirmatively disprove it. *Humphries v. State*, 18 Tex. App. 302; *Johnson v. State*, 21 Tex. App. 368. See also *Long v. State*, 11 Tex. App. 381.

It is to be noted that the courts freely speak of alibi as a defense, without specifically raising the question of its nature.

1. Evidence of Alibi to be Treated like Other Evidence—Alabama.—*Williams v. State*, 47 Ala. 659; *Spencer v. State*, 50 Ala. 124; *Pate v. State*, 94 Ala. 14.

California.—*People v. Levine*, 85 Cal. 39; *People v. Lattimore*, 86 Cal. 403.

Illinois.—*Miller v. People*, 39 Ill. 457.

Michigan.—*People v. Hare*, 57 Mich. 505.

Mississippi.—*Nelms v. State*, 58 Miss. 362; *Simmons v. State*, 61 Miss. 243; *Dawson v. State*, 62 Miss. 241.

Missouri.—*State v. Rockett*, 87 Mo. 668.

Pennsylvania.—*Com. v. Fisher*, 15 Phila. (Pa.) 386.

Tennessee.—*Chappel v. State*, 7 Coldw. (Tenn.) 92.

Texas.—*Walker v. State*, 37 Tex. 366.

See also *Porter v. State*, 55 Ala. 95; *People v. Wong Ah Foo*, 69 Cal. 180; *Crisson v. State*, 51 Ga. 597; *Goldsmith v. State*, 63 Ga. 85; *State v. Red*, 53 Iowa 69; and *infra*, this title, *Failure to Establish Alibi—Presumptions*.

Instructions to Jury on Question of Alibi.—A charge to the jury that alibi is a defense on which the law looks with suspicion, is erroneous. *Spencer v. State*, 50 Ala. 124; *Line v. State*, 51 Ind. 172; *Sater v. State*, 56 Ind. 378; *Albin v. State*, 63 Ind. 598; *Simmons v. State*, 61 Miss. 243 (*qualifying* *Nelms v. State*, 58 Miss. 362); *People v. Kelly*, 35 Hun (N.Y.) 295.

So is a charge that the law regards evidence to prove an alibi among the weakest and most unsatisfactory of all kinds of evidence. *Williams v. State*, 47 Ala. 659.

Or a charge that the jury need pay no attention to evidence of an alibi. *State v. Sidney*, 74 Mo. 390.

It is error to instruct the jury to weigh the

evidence of an alibi with great caution. *Dawson v. State*, 62 Miss. 241. See also *Murphy v. State*, 31 Fla. 166.

But *compare* *Nelms v. State*, 58 Miss. 362; *State v. Drawdy*, 14 Rich. (S. Car.) 87. And see *French v. State*, 12 Ind. 670, 74 Am. Dec. 229.

An instruction to scan the evidence of alibi with care and caution, because it is a defense easily fabricated, was held correct. *State v. Blunt*, 59 Iowa 468; *State v. Rowland*, 72 Iowa 327. To same effect, see *Provo v. State*, 55 Ala. 222; *Albritton v. State*, 94 Ala. 76; *Chappel v. State*, 7 Coldw. (Tenn.) 92.

The defense of alibi demands a patient, careful, but scrutinizing examination by both court and jury. *Walker v. State*, 37 Tex. 366. See also *People v. Lee Gam*, 69 Cal. 552.

It is the Exclusive Province of the Jury to judge of the weight of testimony introduced in support of alibi as much as of any other testimony in the case. *State v. Chee Gong*, 16 Oregon 534.

When evidence of an alibi has been subjected to severe scrutiny, and it is ascertained to have been, in a given case, honestly and truthfully given, there is no reason why it should not have equal weight and influence with the same amount of evidence upon any other subject. *French v. State*, 12 Ind. 670, 74 Am. Dec. 229.

2. Duty of Court to Instruct.—*People v. Wong Ah Foo*, 69 Cal. 180; *People v. Lee Gam*, 69 Cal. 552; *State v. Johnson*, 40 Kan. 266; *State v. Kelly*, 16 Mo. App. 213; *State v. Drawdy*, 14 Rich. (S. Car.) 87; *Wiley v. State*, 5 Baxt. (Tenn.) 662. See also *State v. Sutton*, 70 Iowa 268; *State v. Ward*, 61 Vt. 153.

Texas Law as to Instructions.—Unless requested to do so, the trial judge is not required to instruct the jury specially upon the evidence of alibi. It is sufficiently embraced in the general charge that the defendant is presumed to be innocent until his guilt is established by competent evidence beyond a reasonable doubt. *Davis v. State*, 14 Tex. App. 645; *Ayres v. State*, 21 Tex. App. 399; *Quintana v. State*, 29 Tex. App. 401.

Hence the omission to charge the jury on the subject of alibi, although it was raised by the evidence, is no ground for reversal where the charge was not excepted to and there was no request for instructions. *Davis v. State*, 14 Tex. App. 645; *Clark v. State*, 18 Tex. App. 467; *Rider v. State*, 26 Tex. App. 334; *Quintana v. State*, 29 Tex. App. 401.

It is otherwise, if the omission is excepted to, or instructions were asked for. See *Texas* cases cited in note immediately following.

Where Alibi is the Sole Defense, the trial court should instruct the jury as to the law relating thereto. *Deggs v. State*, 7 Tex. App. 359; *McGrew v. State*, 10 Tex. App. 539; *Granger v. State*, 11 Tex. App. 456; *Ayres v.*

and a refusal to give such instruction, when requested to do so, is a ground for reversal.¹

Harmless Error in Instructions.—Where, on a question of *alibi*, the charge of the court contains an objectionable statement of the law, this is no ground for reversal, if the remainder of the charge, or the charge taken as a whole, contains a full and fair exposition of the law.²

II. EVIDENCE AND ITS EFFECT—1. Burden of Proof—Decisions Not Harmonious.—There is some confusion in the decisions of the courts as to whether the burden of proof remains throughout the trial upon the prosecution in seeking to establish the guilt of the accused beyond a reasonable doubt, or devolves upon the defendant who sets up *alibi* as a defense. It is held by some courts that the burden of proof remains with the prosecution throughout, and does not, when it has made a *prima facie* case, shift to the defendant relying upon the defense of *alibi*.³ In some states, however, where the courts apparently regard the question of *alibi* as an affirmative issue advanced by the defendant, distinct from the leading question of the trial, it is held that the burden is upon him to establish an *alibi* by a preponderance of the evidence.⁴

State, 21 Tex. App. 399. See also Rider v. State, 26 Tex. App. 334; Jones v. State, 30 Tex. App. 345.

1. Refusal to Instruct, Reversible Error.—Wiley v. State, 5 Baxt. (Tenn.) 662; McGrew v. State, 10 Tex. App. 539; Long v. State, 11 Tex. App. 381; Granger v. State, 11 Tex. App. 454; McAfee v. State, 17 Tex. App. 131; Ninnon v. State, 17 Tex. App. 650; Hunnicutt v. State, 18 Tex. App. 498, 51 Am. Rep. 330; Ayres v. State, 21 Tex. App. 399; Jones v. State, 30 Tex. App. 345. See also People v. Hare, 57 Mich. 505.

2. Harmless Error in Instructions.—People v. Levine, 85 Cal. 39; People v. Tarm Poi, 86 Cal. 225; People v. Chun Heong, 86 Cal. 329; People v. Lattimore, 86 Cal. 403; Sheehan v. People, 131 Ill. 22; Sullivan v. People, 31 Mich. 1; People v. Pearsall, 50 Mich. 233; People v. Stone, 117 N. Y. 480; State v. Jaynes, 78 N. Car. 504. See also Com. v. Choate, 105 Mass. 451; State v. Johnson, 91 Mo. 439; State v. Freeman, 100 N. Car. 429. But see Howard v. State, 50 Ind. 190; Snell v. State, 50 Ind. 516.

3. The Rule that the Burden of Proof Remains upon Prosecution—Alabama.—Williams v. State, 47 Ala. 659; Albritton v. State, 94 Ala. 76.

California.—People v. Lee Sare Bo, 72 Cal. 623.

Illinois.—Hoge v. People, 117 Ill. 35. See also Mullins v. People, 110 Ill. 42.

Kansas.—State v. Child, 40 Kan. 482.

Michigan.—People v. McWhorter, 93 Mich. 641.

Missouri.—State v. Lewis, 69 Mo. 92; State v. Rockett, 87 Mo. 668; State v. Woolard, 111 Mo. 248.

Nebraska.—McLain v. State, 18 Neb. 154.

North Carolina.—State v. Josey, 64 N. Car. 56; State v. Jaynes, 78 N. Car. 504.

Ohio.—Toler v. State, 16 Ohio St. 583; Walters v. State, 39 Ohio St. 215.

Pennsylvania.—Turner v. Com., 86 Pa. St. 54, 27 Am. Rep. 683; Watson v. Com., 95 Pa. St. 418.

South Carolina.—State v. Watson, 7 S. Car. 63.

Texas.—Humphries v. State, 18 Tex. App. 302; Johnson v. State, 21 Tex. App. 368; Ayres v. State, 21 Tex. App. 399; Gallaher v. State, 28 Tex. App. 247; Bennett v. State, 30 Tex. App. 341.

Burden of Proof Not Shifted.—The establishment by the prosecution of a *prima facie* case does not shift the burden of proof to the defendant. People v. McWhorter, 93 Mich. 641; McLain v. State, 18 Neb. 154; State v. Josey, 64 N. Car. 56; Walters v. State, 39 Ohio St. 215; State v. Chee Gong, 16 Oregon 534. See also Pollard v. State, 53 Miss. 410, 24 Am. Rep. 703; State v. Freeman, 100 N. Car. 429. But see Walker v. State, 37 Tex. 366.

A charge that an *alibi* is a good defense, if proved to the satisfaction of the jury, is not error, and does not convey an intimation that the burden of proving it rests upon the accused. State v. Starnes, 94 N. Car. 973, 51 Am. Rep. 236.

An instruction that the burden rests on the accused to establish an *alibi* to the satisfaction of the jury, is erroneous. State v. Howell, 100 Mo. 628, overruling State v. Jennings, 81 Mo. 185.

4. The Rule that the Accused must Show Alibi by Preponderance of Evidence.—State v. Northrup, 48 Iowa 583, 30 Am. Rep. 408; State v. Red, 53 Iowa 69; State v. Krewsen, 57 Iowa 588; State v. Hamilton, 57 Iowa 596 (Adams, C. J., and Day, J., dissenting); State v. Fry, 67 Iowa 475; State v. Beasley, 84 Iowa 83; State v. Ward, 61 Vt. 153. See also State v. Vincent, 24 Iowa 570, 95 Am. Dec. 753; State v. Hemrick, 62 Iowa 414; State v. Sutton, 70 Iowa 268; State v. Child, 40 Kan. 482.

"This defense [*alibi*] is more easily and more frequently fabricated than any other. The burden of proving it is upon the accused, because the knowledge of the truth of it, and of the means of proving it, is peculiarly with him. A preponderance of the evidence is the lowest degree of proof upon which issues of fact are determined. * * * The burden being upon the defendant, he must establish

The Correct Doctrine Stated.—The true doctrine seems to be that where the state has established a *prima facie* case, and the defendant relies upon the defense of alibi, the burden is upon him to prove it, not beyond a reasonable doubt, nor by a preponderance of the evidence, but by such evidence, and to such a degree of certainty, as will, when the whole evidence is considered, create and leave in the mind of the jury a reasonable doubt of the guilt of the accused.¹

2. Sufficiency of Evidence—Jury must Acquit on Reasonable Doubt.—The distinctions which the courts have attempted to make with reference to the burden of proof are apparently of little practical value, as it is universally held that if the evidence introduced to prove an alibi, when considered by itself or in connection with all the evidence in the case, raises a reasonable doubt in the minds of the jury as to the guilt of the accused, he must be acquitted.²

the fact by at least the lowest degree of evidence, before he is entitled to have it considered, even as the basis of a reasonable doubt." *Per* Given, J., in *State v. Beasley*, 84 Iowa 83.

For the Purpose of the Particular Defense of Alibi, the burden of proof is on the defendant to show an alibi to the satisfaction of the jury, and if he fails to do so, the alleged alibi, as a substantive defense, is valueless; but that does not change the burden of proof on the other questions in the case, or deprive the defendant of the benefit of his evidence on that subject, so far as it, in connection with the other testimony, may have a tendency to create a reasonable doubt of his guilt. *Ledford v. State*, 75 Ga. 856; *Fife v. Com.*, 29 Pa. St. 429; *Rudy v. Com.*, 128 Pa. St. 500. See also *People v. Lee Sare Bo*, 72 Cal. 623; *Ware v. State*, 67 Ga. 349; *Com. v. Choate*, 105 Mass. 451.

The Burden of Proving Alibi is on the accused. *Pellum v. State*, 89 Ala. 28; *Pate v. State*, 94 Ala. 14; *Carlton v. People*, 150 Ill. 181, 41 Am. St. Rep. 346; *State v. Rivers*, 68 Iowa 611 (*Reed, J.*, and *Adams, C. J.*, *not concurring*); *State v. Waterman*, 1 Nev. 543. See also *Murphy v. State*, 31 Fla. 166.

Alibi must be Established by a Preponderance of the Evidence.—*State v. Kline*, 54 Iowa 183; *State v. Reed*, 62 Iowa 40 (*Adams, J.*, and *Day, C. J.*, *dissenting*); *State v. Rowland*, 72 Iowa 327; *State v. Maher*, 74 Iowa 77; *State v. Nance*, 25 S. Car. 168; *State v. Jackson*, 36 S. Car. 487. See also *State v. Cruise*, 19 Iowa 312; *State v. McCracken*, 66 Iowa 569; *State v. Johnson*, 72 Iowa 393. Compare *Walters v. State*, 39 Ohio St. 215.

In the ordinary case of an alibi, when a party charged with a crime attempts to prove that he was in another place at the time, all the evidence tending to prove that he committed the offense tends in the same degree to prove that he was at the place when it was committed. If, therefore, the proof of the alibi does not outweigh the proof that he was at the place when the offense was committed, it is not sufficient. *Per* Shaw, C. J., in *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711. See *State v. Cruise*, 19 Iowa 312.

It is not necessary for the jury to be fully satisfied of the truth of the alibi. *State v. Hardin*, 46 Iowa 623, 26 Am. Rep. 174; *State v. Henry*, 48 Iowa 403. But see *Spencer v. State*, 50 Ala. 124; *Pellum v. State*, 89 Ala.

28 (*citing* 1 AM. AND ENG. ENCYC. OF LAW, 1st ed., pp. 454-455).

Nor need the defendant prove the alibi beyond a reasonable doubt. *Landis v. State*, 70 Ga. 652, 48 Am. Rep. 588; *State v. Kline*, 54 Iowa 183; *State v. Fry*, 67 Iowa 475; *State v. Fenlason*, 78 Me. 495. The defendant is only required to prove it by a preponderance of the evidence. *State v. Hardin*, 46 Iowa 623, 26 Am. Rep. 174; *State v. Northrup*, 48 Iowa 583, 30 Am. Rep. 408.

1. *Per* Shope, J., in *Ackerson v. People*, 124 Ill. 563.

To Overcome Proof of Guilt, Strong Enough to Exclude All Reasonable Doubt, the burden is on the accused to establish his alibi to the satisfaction of the jury. But if, when the whole evidence is considered, there remains a reasonable doubt of guilt, the jury must acquit. *Harrison v. State*, 83 Ga. 129; *Garrity v. People*, 107 Ill. 162; *State v. Howell*, 100 Mo. 628; *State v. Woolard*, 111 Mo. 248; *State v. Reitz*, 83 N. Car. 634; *Watson v. Com.*, 95 Pa. St. 418; *State v. Jackson*, 36 S. Car. 487 (*citing* 1 AM. AND ENG. ENCYC. OF LAW, 1st ed., p. 456). See also *Klein v. People*, 113 Ill. 596.

The burden is on the accused to reasonably satisfy the jury that he was elsewhere at the time the crime was committed, but if, on consideration of the whole evidence, there is reasonable doubt of guilt, the jury must acquit. *Pellum v. State*, 89 Ala. 28; *Pate v. State*, 94 Ala. 18; *State v. Freeman*, 100 N. Car. 429. See *infra*, this title. *Sufficiency of Evidence; Presumptions.*

2. Jury must Acquit on Reasonable Doubt of Guilt—Alabama.—*Burger v. State*, 83 Ala. 36; *Pate v. State*, 94 Ala. 14 (*citing* 1 AM. AND ENG. ENCYC. OF LAW, 1st ed., p. 454-455); *Albritton v. State*, 94 Ala. 76.

Arkansas.—*Blankenship v. State*, 55 Ark. 244.

California.—*People v. Fong Ah Sing*, 64 Cal. 253; *People v. Lee Gam*, 69 Cal. 552; *People v. Lee Sare Bo*, 72 Cal. 623; *People v. Nelson*, 85 Cal. 421; *People v. Tarm Poi*, 86 Cal. 225; *People v. Chun Heong*, 86 Cal. 329.

Florida.—*Bacon v. State*, 22 Fla. 51; *Adams v. State*, 28 Fla. 511; *Murphy v. State*, 31 Fla. 166.

Georgia.—*Landis v. State*, 70 Ga. 652, 48 Am. Rep. 588; *Ware v. State*, 67 Ga. 349; *Bryan v. State*, 74 Ga. 393; *Ledford v. State*, 75 Ga. 856; *Harrison v. State*, 83 Ga. 129.

Evidence of Alibi need Not Be Conclusive.—Hence, the evidence in support of an alibi, in order to warrant an acquittal, need not be so perfectly clear and conclusive as to absolutely preclude the possibility of the presence of the accused at the scene of the crime at the time it was committed.¹ The courts appar-

Illinois.—*Creed v. People*, 81 Ill. 565; *Garrity v. People*, 107 Ill. 162; *Mullins v. People*, 110 Ill. 42; *Hoge v. People*, 117 Ill. 35; *Ackerson v. People*, 124 Ill. 563; *Sheehan v. People*, 131 Ill. 22; *Aneals v. State*, 134 Ill. 401; *Hornish v. People*, 142 Ill. 620; *Carlton v. People*, 150 Ill. 181, 41 Am. St. Rep. 346. See also *Hopps v. People*, 31 Ill. 385, 83 Am. Dec. 231; *Miller v. People*, 39 Ill. 457.

Indiana.—*French v. State*, 12 Ind. 670, 74 Am. Dec. 229; *Adams v. State*, 42 Ind. 373; *Binns v. State*, 46 Ind. 311; *West v. State*, 48 Ind. 483; *Howard v. State*, 50 Ind. 190. See also *Line v. State*, 51 Ind. 172.

Iowa.—*State v. Red*, 53 Iowa 69; *State v. Kline*, 54 Iowa 183; *State v. Fry*, 67 Iowa 475; *State v. Sutton*, 70 Iowa 268; *State v. Maher*, 74 Iowa 77.

Kansas.—*State v. Child*, 40 Kan. 482.

Massachusetts.—*Com. v. Choate*, 105 Mass. 451.

Michigan.—*Sullivan v. People*, 31 Mich. 1; *People v. Pearsall*, 50 Mich. 233. See *People v. Hare*, 57 Mich. 505.

Mississippi.—*Pollard v. State*, 53 Miss. 410, 24 Am. Rep. 703; *Dawson v. State*, 62 Miss. 241; *Cole v. State* (Miss. 1888), 4 So. Rep. 577. See also *Nelms v. State*, 58 Miss. 368.

Missouri.—*State v. Lewis*, 69 Mo. 92; *State v. Jennings*, 81 Mo. 185, 51 Am. Rep. 236; *State v. Rockett*, 87 Mo. 668; *State v. Johnson*, 91 Mo. 439; *State v. Howell*, 100 Mo. 628; *State v. Shroyer*, 104 Mo. 441, 24 Am. St. Rep. 344; *State v. Woolard*, 111 Mo. 248; *State v. Kelly*, 16 Mo. App. 213; *State v. Taylor*, 118 Mo. 153.

Nevada.—*State v. Waterman*, 1 Nev. 543.

New York.—*People v. Larned*, 7 N. Y. 448; *People v. Stone*, 117 N. Y. 480.

North Carolina.—*State v. Josey*, 64 N. Car. 56; *State v. Jaynes*, 78 N. Car. 504; *State v. Reitz*, 83 N. Car. 634; *State v. Freeman*, 100 N. Car. 429.

Ohio.—*Walters v. State*, 39 Ohio St. 215.

Pennsylvania.—*Fife v. Com.*, 29 Pa. St. 429; *Briceland v. Com.*, 74 Pa. St. 463; *Turner v. Com.*, 86 Pa. St. 54, 27 Am. Rep. 683; *Watson v. Com.*, 95 Pa. St. 418; *Rudy v. Com.*, 128 Pa. St. 500.

South Carolina.—*State v. Watson*, 7 S. Car. 65; *State v. Jackson*, 36 S. Car. 487. See also *State v. Paulk*, 18 S. Car. 514.

Tennessee.—*Davis v. State*, 5 Baxt. (Tenn.) 612; *Wiley v. State*, 5 Baxt. (Tenn.) 662; *Chappel v. State*, 7 Coldw. (Tenn.) 92.

Texas.—*Walker v. State*, 42 Tex. 360; *Gibbs v. State*, 1 Tex. App. 12; *Walker v. State*, 6 Tex. App. 576; *Humphries v. State*, 18 Tex. App. 302; *Thornton v. State*, 20 Tex. App. 519; *Gallagher v. State*, 28 Tex. App. 247; *Bennett v. State*, 30 Tex. App. 341.

Vermont.—*State v. Cameron*, 40 Vt. 555; *State v. Ward*, 61 Vt. 153.

See also *Wisdom v. People*, 11 Colo. 170; *McLain v. State*, 18 Neb. 154; and the title REASONABLE DOUBT.

Doubt must Be Reasonable.—An instruction that the jury must acquit if they entertain a doubt of the defendant's guilt, is properly refused. To justify an acquittal, there must be a reasonable doubt. *Gibbs v. State*, 1 Tex. App. 12.

Erroneous Instruction.—An instruction proceeding upon the theory that the established fact of alibi (if it were established) should be considered in connection with other facts and circumstances, was held to be confusing and misleading. *State v. McCracken*, 66 Iowa 569.

Instructions Not in Conflict.—It has been held that an instruction that the accused must establish alibi by a preponderance of the evidence, is not in conflict with an instruction that the jury must acquit if, upon the whole evidence, they entertain a reasonable doubt of the defendant's guilt. *State v. Red*, 53 Iowa 69; *State v. Maher*, 74 Iowa 77; *State v. Ward*, 61 Vt. 153. See also *Aneals v. People*, 134 Ill. 401. Compare *Johnson v. State*, 21 Tex. App. 368; and the dissenting opinion of *Adams, C. J.*, and *Day, J.*, in *State v. Hamilton*, 57 Iowa 596.

Evidence to Rebut Alibi, tending to show the presence of the accused at the time and place of the crime, is admissible in support of the evidence given in chief. *State v. Maher*, 74 Iowa 77; *Com. v. Moulton*, 4 Gray (Mass.) 39. See also *Brown v. People*, 17 Mich. 429, 97 Am. Dec. 195; *State v. Phair*, 48 Vt. 366. But see *Rex v. Hilditch*, 5 C. & P. 299, 24 E. C. L. 330.

Where the accused setting up an alibi had testified in his own behalf as to what he saw of a procession in the place where he claimed to be, it was held that it was competent for the prosecution to introduce testimony as to the nature of the procession as bearing upon the truth of his testimony. *People v. Gibson*, 58 Mich. 368.

1. Evidence need Not Be Conclusive.—*McAnally v. State*, 74 Ala. 9; *Albritton v. State*, 94 Ala. 76; *Adams v. State*, 28 Fla. 511; *Galloway v. State*, 29 Ind. 442; *Kaufman v. State*, 49 Ind. 248; *Stuart v. People*, 42 Mich. 255; *State v. Jaynes*, 78 N. Car. 504. See cases cited in note immediately preceding.

To prove an alibi it is not necessary for the accused to show that he was absent from the place where the crime was committed, at the very time the evidence of the state tends to fix its commission upon him, nor is the proof of alibi valueless if it was possible for him to be in both places. *Stuart v. People*, 42 Mich. 255. Compare, as to the second proposition just stated, *Briceland v. Com.*, 74 Pa. St. 463.

It is error to charge the jury that the evidence of alibi must be carefully considered, and must be such as to satisfy the jury that it was impossible for the accused to commit the

ently holding otherwise have generally limited their decisions to the question of the establishment of alibi as such, and have not denied that evidence tending to show an alibi, though not conclusive, ought to be considered by the jury, and, if sufficient to raise in their minds a reasonable doubt of guilt, should effect an acquittal.¹

Established Alibi Conclusive of Innocence.—Of course, when fully established, an alibi is, in the nature of things, most conclusive proof of innocence,² unless the presence of the accused is not essential to his being implicated in the crime.³

crime. *Adams v. State*, 28 Fla. 511; *Murphy v. State*, 31 Fla. 166, *overruling*, on this point, *Bacon v. State*, 22 Fla. 51.

It Is Not Necessary that Proof of Alibi should Cover the Entire Time during which the offense might have been committed. The accused is only required to prove such a state of facts or circumstances as will raise a reasonable doubt of his guilt, in order to warrant an acquittal. *Pate v. State*, 94 Ala. 14 (*citing* 1 AM. AND ENG. ENCYC. OF LAW, 1st ed., pp. 454-455); *Pollard v. State*, 53 Miss. 410, 24 Am. Rep. 703.

The courts holding otherwise confound the definition of alibi with the opinion which the jury must entertain. *Pollard v. State*, 53 Miss. 410, 24 Am. Rep. 703.

When the Exact Time of the Commission of the Alleged Offense is Not Shown, but the offense is shown to have been committed during a night, or a part of a night, the evidence of the alibi ought to cover the whole of such time. *West v. State*, 48 Ind. 483.

Consistent Evidence of Presence in Two Places.—Where the evidence that the accused was at a different place from the scene of the crime is not necessarily inconsistent with his being present at the commission of the crime, it is insufficient to establish the defense of alibi. *Aneals v. People*, 134 Ill. 401. See also *Stuart v. People*, 42 Mich. 255.

Standard of Time—Erroneous Instructions.—An instruction, in effect, that to give the defense its highest character, the required identity of time "must be made to appear by some definite and certain standard of time or time-piece," and unless it was so ascertained, instead of being proved by other modes, the defense would be "greatly weakened," was held to be misleading. *Young v. Com.*, 8 Bush (Ky.) 366.

Cumulative Evidence.—That the evidence introduced to prove an alibi is cumulative, is no reason for its exclusion. On the contrary, the greater the number of witnesses to the facts establishing it, the stronger will be the reliance upon, and the conviction of, its truth. *Pinckord v. State*, 13 Tex. App. 468; *Smythe v. State*, 17 Tex. App. 244. See also *Lawson v. State*, 13 Tex. App. 264.

Declarations of Accused.—Where the defendant, for the purpose of proving an alibi, offered to prove by a witness what he, on his return home, had said as to where he had been, it was held that the evidence was properly excluded as hearsay. *State v. McCracken*, 66 Iowa 569. See also *Com. v. Williams*, 105 Mass. 62.

1. The Evidence to Establish an Alibi must

Cover the Whole Time Occupied by the Offense, so as to render it impossible, or very improbable, that the accused is guilty. This is not meant to exclude the doctrine of reasonable doubt, but only to define what will amount to an alibi. *Creed v. People*, 81 Ill. 565.

"It is obviously essential to the proof of an alibi that it should cover and account for the whole of the time, * * * or, at least, for so much of it as to render it impossible that the prisoner could have committed the imputed act." *Wills on Circum. Ev.* 167; *State v. Maher*, 74 Iowa 77.

The evidence of alibi must cover the whole time, to be conclusive. *Albritton v. State*, 94 Ala. 76. See also *Bacon v. State*, 22 Fla. 51.

Since the defense of alibi rests upon the proposition that it was impossible for the accused to have been at the scene of the crime, because he was elsewhere, the range of the evidence as to time and place must be such as to reasonably exclude the possibility of the prisoner's presence at the scene of the offense at the time of its commission. *Johnson v. State*, 59 Ga. 142; *Goldsmith v. State*, 63 Ga. 85; *Jackson v. State*, 64 Ga. 344; *Wade v. State*, 65 Ga. 756; *Bryan v. State*, 74 Ga. 393. Otherwise, the alibi, as a defense *per se*, fails. *Ware v. State*, 67 Ga. 349. To the same effect see *Klein v. People*, 113 Ill. 596; *State v. Maher*, 74 Iowa 77. See also *Briceland v. Com.*, 74 Pa. St. 463; *Wisdom v. People*, 11 Colo. 170; *Fife v. Com.*, 29 Pa. St. 429. *Compare West v. State*, 48 Ind. 483; *Snell v. State*, 50 Ind. 516. See also *Adams v. State*, 42 Ind. 373.

To Make Mere Distance a Conclusive Answer, as an alibi, the distance must be shown to be so great as to render it impossible for the respondent to have participated. *State v. Fenlason*, 78 Me. 495. See also *Klein v. People*, 113 Ill. 596.

2. **Alibi Conclusive of Innocence.**—*Wills on Circum. Ev.* 167; *Bacon v. State*, 22 Fla. 51; *People v. Pearsall*, 50 Mich. 233; *State v. Truman*, 100 N. Car. 429; *State v. Drawdy*, 14 Rich. (S. Car.) 87; *Chappel v. State*, 7 Coldw. (Tenn.) 92; *State v. Ward*, 61 Vt. 153. See also *People v. Lee Gam*, 69 Cal. 552; *Sheehan v. People*, 131 Ill. 22; *State v. Reitz*, 83 N. Car. 634; *Thompson v. State*, 5 Humph. (Tenn.) 138.

The defense of alibi is as legitimate as any other defense, and, if the jury believe it to have been established, they are bound to acquit. *People v. Hare*, 57 Mich. 505.

3. *State v. Johnson*, 40 Kan. 266; *Cole v. State* (Miss. 1888), 4 So. Rep. 577; *Pilger v. Com.*, 112 Pa. St. 220.

3. Failure to Establish Alibi—Presumptions.—It has been asserted that an unsuccessful attempt to establish an alibi is always a circumstance of the greatest weight against the prisoner, because the resort to that kind of defense implies an admission of the truth and relevancy of the facts alleged, and the correctness of the inference drawn from them if they remain uncontradicted.¹ This doctrine has been generally repudiated by the courts, and it is held that an attempt to prove an alibi, followed by failure, is no more unfavorable to the accused than a failure to prove any other material fact in the defense,² unless such attempt be fraudulent, when, if detected, it will be a circumstance of great weight against the prisoner.³

Omission of Evidence.—The omission to produce evidence of an alibi is not conclusive against the accused; but the absence of such evidence, especially when it appears to be in his power to furnish it, creates a strong presumption of his guilt, and is a circumstance greatly corroborative of the evidence against him.⁴

III. ALIBI OF THE ALLEGED DECEASED.—A ground of defense similar to that just considered, is found where, in the case of murder, the accused has defended on the ground that the supposed deceased was seen alive after the time of the alleged murder. This has been termed an alibi, or, perhaps more properly, an "alibi of the alleged deceased." As in the case of an alibi strictly so called, it is proposed by this means to rebut the evidence of guilt by proving a fact inconsistent therewith.

1. Wills on Circum. Ev. 92.

2. **Failure to Establish Alibi—Its Weight against Accused.**—1 Bishop on Crim. Proc., § 1063; Porter v. State, 55 Ala. 95; Kilgore v. State, 74 Ala. 1; Albritton v. State, 94 Ala. 76; Miller v. People, 39 Ill. 457; White v. State, 31 Ind. 262; State v. Collins, 20 Iowa 85; Toler v. State, 16 Ohio St. 583; Com. v. Fisher, 15 Phila. (Pa.) 387; Turner v. Com., 86 Pa. St. 54, 27 Am. Rep. 683. See also Adams v. State, 28 Fla. 511; Landis v. State, 70 Ga. 651, 48 Am. Rep. 588; Sawyers v. State, 15 Lea (Tenn.) 694.

It cannot be said as a matter of law that an unsuccessful attempt to prove an alibi is a circumstance of "great weight" against the prisoner, Albritton v. State, 94 Ala. 76; People v. Malaspina, 57 Cal. 628; although this may be true as a fact, State v. Josey, 64 N. Car. 56. See also Adams v. State, 28 Fla. 511.

The Prisoner Makes No Admission of Guilt by Setting Up an Alibi, and failure to prove alibi does not relieve the commonwealth from the duty of proving the prisoner's guilt. Brice-land v. Com., 74 Pa. St. 463. See also Blaker v. State, 130 Ind. 203; State v. Starnes, 94 N. Car. 973.

For the purposes of the defense of alibi alone, the allegations of the prosecution are admitted to be true. Fife v. Com., 29 Pa. St. 429.

Failure to Prove Alibi a Matter to be Considered by Jury.—The fact that the accused undertakes to establish an alibi, which is a fact resting in his own knowledge, and of which he has peculiar means of proof, and that he fails to do so, must be weighed in determining his guilt; its value, and the importance to be attached to it, depend upon the character of the criminating evidence, and are for the determination of the jury. Kilgore v. State, 74 Ala. 1.

3. **Fraudulent Attempt to Show Alibi Unfavorable to Accused.**—Bishop on Crim. Proc., § 1064; Porter v. State, 55 Ala. 95; Albritton v. State, 94 Ala. 76; Pilger v. Com., 112 Pa. St. 220. See also Adams v. State, 28 Fla. 511; State v. Collins, 20 Iowa 85; Com. v. McMahon, 145 Pa. St. 413.

The defendant's case is often much weakened by failure, not from any admission, but on account of fraud or perjury. Toler v. State, 16 Ohio St. 583.

That the evidence of alibi was fabricated does not warrant the presumption that the evidence introduced by the state is true. Sawyers v. State, 15 Lea (Tenn.) 694.

A fraudulent attempt to prove an alibi is indicative of defendant's guilt. Pilger v. Com., 112 Pa. St. 220.

The introduction of fabricated evidence of an alibi is an inferential admission of guilt, but not conclusive. State v. Ward, 61 Vt. 153.

The fabrication of an alibi is a circumstance against the accused, to be weighed by the jury in connection with all the other evidence in the case. White v. State, 31 Ind. 262.

Falsehood—Erroneous Instructions.—Where the only instruction on the subject of alibi was that if the jury found the defendant guilty of falsehood in his allegation of alibi, such falsehood should be considered as additional evidence of guilt, it was held that the charge was prejudicial to the defendant, and a new trial was granted. State v. Byers, 80 N. Car. 426.

4. Gordon v. People, 33 N. Y. 501.

Delay in Putting in Defense of Alibi.—It is error to comment before the jury on the defendant's not putting in the defense of alibi at the earliest moment. Sullivan v. People, 31 Mich. 1.

Newly Discovered Evidence.—In Georgia the rule is that cumulative evidence to prove an

The law governing the two cases is essentially the same.¹

ALIENATE, ALIENATION, ETC.—See also the title SPENDTHRIFT AND SPENDTHRIFT TRUST.

Alienation is the act whereby one man voluntarily transfers the property and possession of lands, tenements, or other things, to another person.²

alibi, even if newly discovered, is not cause for a new trial. *Harrison v. State*, 83 Ga. 129.

But in *Washington* the contrary is held. *State v. Stowe*, 3 Wash. 206.

A new trial will not be granted on the ground of newly discovered evidence of an alibi which the accused could have established, but negligently did not. *Wright v. State*, 34 Ga. 110. But see *Tyler v. State*, 13 Tex. App. 205.

New Trial.—Where a misdemeanor has been positively proved against an individual, the court should be slow in granting a new trial to let in the defense of alibi, as it is subject to great abuse. *Thompson v. State*, 5 Humph. (Tenn.) 138.

1. *State v. Vincent*, 24 Iowa 570, 95 Am. Dec. 753; *Com. v. Webster*, 5 Cush. (Mass.) 295, 52 Am. Dec. 711.

2. *Boyd v. Cudderback*, 31 Ill. 119; *Coughlin v. Coughlin*, 26 Kan. 118; *Masters v. Madison County Mut. Ins. Co.*, 11 Barb. (N. Y.) 629.

The primary meaning of the word *alienate* is, to convey or transfer to another a title, property, or right. *Gould v. Head*, 41 Fed. Rep. 245.

To *alienate* is to divest one's self of property or title; to transfer property from one's self to another. *Harty v. Doyle*, 49 Hun (N. Y.) 413.

Alienation is said by Blackstone to comprise any method whereby estates are voluntarily resigned by one and accepted by another, whether that be effected by sale, gift, marriage settlement, devise, or other transmission of property by the mutual consent of the parties. 2 Bl. Com. 287; *Muldoon v. Moore*, 55 N. J. L. 417.

Mortgage.—In *Aultman v. Rush*, 26 S. Car. 517, a mortgage was held not to be an *alienation* within the meaning of the *South Carolina* Constitution, removing the disabilities of married women to *alienate* their separate estates.

Mortgage—Insurance Policy. (See also the title FIRE INSURANCE.)—So, within the provision of an insurance policy against *alienation* a mortgage is not included. *Virginia F.*, etc., *Ins. Co. v. Feagin*, 62 Ga. 519; *Pollard v. Somerset Mut. F. Ins. Co.*, 42 Me. 221; *Smith v. Monmouth Mut. F. Ins. Co.*, 50 Me. 96; *Com. v. McCafferty*, 145 Mass. 384; *Rice v. Tower*, 1 Gray (Mass.) 426; *Judge v. Connecticut F. Ins. Co.*, 132 Mass. 521; *Union Ins. Co. v. Barwick*, 36 Neb. 223; *Rollins v. Columbian Mut. F. Ins. Co.*, 25 N. H. 200; *Folsom v. Belknap County Mut. F. Ins. Co.*, 30 N. H. 231; *Shepherd v. Union Mut. F. Ins. Co.*, 38 N. H. 232; *Marts v. Cumberland Mut. F. Ins. Co.*, 44 N. J. L. 481; *Conover v. Albany Mut. Ins. Co.*, 3 Den. (N. Y.) 254, 1 N. Y. 292; *Allen v. Hudson River Mut. Ins. Co.*, 19 Barb. (N. Y.) 442; *Simons v. Bryce*, 10 S. Car. 354; *Smith v.*

Grant, 15 S. Car. 151; *Warren v. Raymond*, 17 S. Car. 178; *Hammel v. Queens Ins. Co.*, 54 Wis. 85, 41 Am. Rep. 1.

Where, however, the by-laws of a mutual insurance company provided that "all *alienation* and alterations in the ownership, situation, or state of the property insured by this company in any material particular shall make void any policy," etc., it was held that the policy was avoided by a mortgage. *Edmonds v. Mutual Safety F. Ins. Co.*, 1 Allen (Mass.) 311, 79 Am. Dec. 746; *Edes v. Hamilton Mut. Ins. Co.*, 3 Allen (Mass.) 362.

Mortgage—Tax Statute.—Gen. Stat. *Rhode Island*, c. 41, § 7, provides: "If any person is taxed for several parcels of real estate, or for personal and real estate in the same tax, the whole of such person's tax may be collected, either out of the real or personal estate, or any part thereof; *provided*, that no land *aliened* shall be sold, if the person taxed have other sufficient property." It was held that a mortgage is not an *alienation* within the meaning of this section, so long as the mortgagor remains in possession. *People's Sav. Bank v. Tripp*, 13 R. I. 621. The court said: "The complainant contends that the levy was not authorized by the statute. The statute, Gen. Stat. R. I., c. 41, § 7, however, provides that if any person is taxed in the same tax for several parcels of land, or for land and personalty, the whole tax may be collected either out of the real or personal estate, or any part thereof; provided that no land *aliened* shall be sold, if the person taxed have other sufficient property; and we are of the opinion that an estate which is merely mortgaged is not, so long as the mortgagor remains in possession, *aliened* within the meaning of the word as used in the statute. The same word is used in section 3 of the same chapter, where it very clearly means more than mortgaged; and in Gen. Stat. R. I., c. 39, § 5, it is expressly enacted that 'the mortgagor shall be deemed to be the owner of mortgaged real estate, so long as the same is in his possession.' We think, therefore, that the complainant's first point is not tenable."

Mortgage—Entry to Foreclose.—An entry to foreclose a mortgage does not amount to an *alienation*, whatever might be the effect of a completed foreclosure. *Market Nat. Bank v. Belmont*, 137 Mass. 407. See also *Kane v. Hibernia Mut. F. Ins. Co.*, 38 N. J. L. 441, 20 Am. Rep. 409.

Mortgage—Statute of Descent.—But where a statute of descent provided "that if a widow shall marry a second or any subsequent time, holding real estate in virtue of any previous marriage, such widow may not, during such marriage, with or without the assent of her husband, *alienate* such real estate," it was

held that a mortgage was in some sense an *alienation*, and fairly within the prohibition of the statute. *Vinnedge v. Shaffer*, 35 Ind. 341.

Mortgage—Defeasance.—It has been held in *Maine* that the instrument of defeasance must be recorded, or the transaction will be an *alienation*. *Tomlinson v. Monmouth Mut. F. Ins. Co.*, 47 Me. 232. See also *Smith v. Monmouth Mut. F. Ins. Co.*, 50 Me. 96.

Mortgage—Party to an Action.—In *Behn v. Phillips*, 18 Ga. 466, it was held that a mortgage executed by a defendant against whom a verdict has been rendered, upon which an appeal has been taken, is an *alienation*, within the sense of the *Georgia Act* of December 19, 1822, passed for the purpose of preventing "an *alienation* by the party of his, her, or their property, between the signing of the first judgment and the judgment on the appeal." The court said: "It is true that the common-law definition of *alienation* was different. That was a parting with property, the direct object of which was to deprive the heirs of the substantial interest in the estate. And it has been correctly argued by our brother Lyon, that a conveyance by mortgage, being in *Georgia* a mere security for the debt—a mere lien—is not an *alienation* in this sense. But if we are right in what we have already shown, the legislature did not contemplate an *alienation* in this sense—was not looking to a parting with the property with reference to the interest of the heirs, but to that of the judgment creditor. Inasmuch, then, as a mortgage, unless it be held to be an *alienation* within the terms of the act, as thus construed, could be easily and readily resorted to by the defendant, instead of a direct conveyance, and thus the mischief which the act was intended to correct be left entirely unremedied, we think it becomes very plain that a mortgage is such an *alienation*, in our state, as was contemplated by the legislature which passed this statute."

Mortgage—Homestead.—See also the title **HOMESTEAD**.

Where the legislature prescribed certain formalities to accompany the alienation of a homestead, it was held that a mortgage unaccompanied by such formalities did not confer upon the mortgagee the right to sell the property. The court said: "The legislature, no doubt, used the term *alienation* in its ordinary and legal sense. The word is defined by lexicographers to be, an act whereby one man transfers the property and possession of lands, tenements, or other things, to another person. Then the *alienation* of the homestead is the transfer of the title and the possession, and can only be made in the mode prescribed by the statute. Any failure to comply with the conditions there imposed fails to affect the right to the homestead. Nor can it become any more operative as a deed of trust, a mortgage with a power of sale, or conveyance of the land, to relinquish the right to insist upon the benefits of the statute, than a want of compliance with the act in simply releasing the right, without attempting to incumber or convey the property.

* * * Whatever rights, if any, the mortgagee may have acquired by this instrument, it confers no power to sell the homestead during the lifetime of the wife, if she shall occupy it as a residence. In the event of her death, or if the family shall cease to occupy it as a residence, it will then be time to determine what rights the mortgagee has acquired." *Boyd v. Cuddeback*, 31 Ill. 119. Compare *Dunker v. Chedic*, 4 Nev. 378.

The words in the homestead laws avoiding any "grant or conveyance" without a *bona fide* entry on the lands are as broad as *alienation*, and consequently a mortgage would be avoided, for at the time of passing the act in question (about 1841) a mortgage was an *alienation*. *Brewster v. Madden*, 15 Kan. 250.

Mortgage—within an Act Rendering Property Subject to Judgment on Appeal.—In *Phillips v. Behn*, 19 Ga. 302, it was held that a mortgage was an *alienation* in the sense of the word *alienation* as used in a statute which made property, *alienated* between the signing of the judgment on the appeal and the signing of the judgment below, subject to the judgment on appeal.

Foreclosure Sale.—A foreclosure sale is an *alienation*. *Mount Vernon Mfg. Co. v. Summit County Mut. F. Ins. Co.*, 10 Ohio St. 348.

Homestead—Deed of Trust.—A deed of an undivided three-fourths of the grantor's homestead, in 1851, to A as trustee for grantor's wife, and X and Y, his two children, and their heirs and assigns, without any duty charged upon the trustee in relation thereto, was not void for want of the wife's signature, not being an *alienation* of the homestead within the meaning of the statute. *Riehl v. Bingenheimer*, 28 Wis. 84.

Transfer of Title.—The term *alienate* has a technical, legal meaning, and any transfer of real estate short of a conveyance of the title is not an *alienation* of the estate. No matter in what form the sale may be made, unless the title is conveyed to the purchaser the estate is not *alienated*. *Masters v. Madison County Mut. Ins. Co.*, 11 Barb. (N. Y.) 629; *Union Ins. Co. v. Barwick*, 36 Neb. 235; *Hammel v. Queens Ins. Co.*, 54 Wis. 85, 41 Am. Rep. 1; *Pollard v. Somerset Mut. F. Ins. Co.*, 42 Me. 221.

Voluntary—Bankruptcy.—The term *alienation* extends only to a disposition by the act of the party, and not to a transfer by operation of law, as bankruptcy. *Lear v. Leggett*, 2 Sim. 479; *Whitfield v. Prickett*, 2 Keen 608; *Wilkinson v. Wilkinson*, Coop. 259.

But as to a voluntary bankruptcy on the debtor's own petition, see *In re Amherst's Trusts*, L. R. 13 Eq. 464; *Stroud's Law Dict.*, title *Alienation*; *Lewin on Trusts*, p. 102. Compare *Ex p. Dawes*, 17 Q. B. Div. 279.

Voluntary—Descent.—The term *alienation* cannot in any proper sense apply to the case of a descent of land to heirs under the law of descent. *Turner v. Bennett*, 70 Ill. 267.

Alienation differs from descent in this, that *alienation* is effected by the voluntary act of the owner of the property, while descent is the legal consequence of the decease of the owner, and is not changed by any previous

act or volition of the owner. A sale and conveyance is an *alienation* that takes effect from the time of the transfer, while a devise is an *alienation* that takes effect on the decease of the testator, according to the terms of the will. But property not transferred or devised is not *alienated*, according to the principles of the common law. There is, however, a species of involuntary *alienation*, so made by the statutes of 13 Edward I. and 27 Edward III., by which the land becomes answerable by attachment and extent for the debts of the owner. *Burbank v. Rockingham Mut. F. Ins. Co.*, 24 N. H. 558, 57 Am. Dec. 300.

Voluntary—Wills.—Disposition of property by will is not an *alienation*. *Vining v. Willis*, 40 Kan. 613. In that case the court said: "The word *alienated* as used in the constitution does not mean what the plaintiff below claims that it does. The word as used in the constitution, we think, means a voluntary parting with, or surrendering of, some interest in the homestead; and as a person never parts with or surrenders anything by virtue of a will, but only by reason of his or her subsequent death, and as it can never be supposed, without proof, that any person will voluntarily bring about his or her own death, it necessarily follows that the aforesaid constitutional provision can have no application to wills. Nor does the word as generally used mean what the plaintiff below claims that it means. The word as generally used means the passing of a thing from another, or the separation of two things, and not the conjoining or uniting of things. The passing of an estate or title from a person is an *alienation*, but the passing of an estate or title to a person is not an *alienation*. To say that a thing may be *alienated* to a person, if intended as a complete phrase, is a solecism." But compare *Burbank v. Rockingham Mut. F. Ins. Co.*, 24 N. H. 558, 57 Am. Dec. 300, 2 Bl. Com. 287.

"It is true that, speaking in general terms, a disposition by will may be embraced in the word *alienation*, used in a generic sense, as being one of the many ways in which it may be effected. But it seems to us that the accurate and specific meaning of the word is to pass an estate from one to another, involving the idea of a perfected conveyance of title *inter vivos*. *Alienation* has been defined to be 'the act by which the title to an estate is voluntarily resigned by one person and accepted by another in the forms prescribed by law.' 2 Bouv. L. Dict." *Hendrix v. Seaborn*, 25 S. Car. 481, 60 Am. Rep. 523.

Voluntary—Judicial Sale.—Where personal property, insured against loss by fire in a mutual fire insurance company, was sold by a master in chancery, but before the fire the decree under which the sale was made had had been vacated, there was such an *alienation* as avoided the policy. *Mount Vernon Mfg. Co. v. Summit County Mut. F. Ins. Co.*, 10 Ohio St. 348.

Execution Sale—Voluntary.—An execution sale of the realty will not avoid the insurance policy. See *Hammel v. Queens Ins. Co.*, 54 Wis. 72, 41 Am. Rep. 1.

Voluntary—Levy of Execution.—A *New Jersey* statute for the relief of creditors against heirs and devisees provides, that where the land has been *aliened* before action brought, the heir or devisee shall be liable for the value of the land so *aliened*. It was held that a judgment against an heir or devisee upon his individual debt, and levy of an execution issued thereon upon lands descended or devised prior to the commencement of an action against the heir or devisee upon a debt of the ancestor or testator, was not an *alienation* within the meaning of that act. *Muldoon v. Moore*, 55 N. J. L. 410.

Alienation in Mortmain.—(See also the title MORTMAIN).—Alienation in mortmain, in its primary signification, is an *alienation* of lands or tenements to any corporation, aggregate, ecclesiastical, or temporal, the consequence of which in former times was, that by allowing lands to become vested in objects endued with perpetuity of duration, the lords were deprived of escheats and other feudal profits, and the general policy of the common law, which favored the free circulation of property, was frustrated, although it is true that at the common law the power of purchasing lands was incident to every corporation. *Perin v. Carey*, 24 How. (U. S.) 495; *Downing v. Marshall*, 23 How. Pr. (N. Y. Ct. App.) 4.

Tenants in Common.—The charter of an insurance company provided that whenever any building insured by the company should be *alienated*, by sale or otherwise, the policy should become *ipso facto* void. The policy was issued to R. and W., who were tenants in common. While the policy was in force, W sold and transferred his interest in the property to R. This was held not to be such an *alienation* as was intended by the charter. *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 553.

A Void Deed of Trust.—The sale of property under a power in a deed of trust, which is voidable and is afterwards set aside, is not an *alienation*. *Commercial Union Assur. Co. v. Scammon*, 126 Ill. 355, 9 Am. St. Rep. 607.

Lease—Homestead.—Within the prohibition against *alienating* a homestead without the consent of the wife, a lease has been held an *alienation*. *Coughlin v. Coughlin*, 26 Kan. 119.

Lease—Insurance.—But in *Lane v. Maine Mut. F. Ins. Co.*, 12 Me. 44, 28 Am. Dec. 150, a lease was held not to be an *alienation* within the clause of an insurance policy against *alienation*. See also *Lockwood v. Middlesex Mut. Assur. Co.*, 47 Conn. 553.

Confession of Judgment.—Confession of judgment, and sale by the sheriff in pursuance of that judgment, is an *alienation*. *Stansbury v. Patent Cloth Mfg. Co.*, 5 N. J. L. 505. The court said: "The confession of judgment, and a sale by the sheriff in pursuance of that judgment, is in the strictest sense an *alienation* by the corporation, and therefore, as against these plaintiffs, is inoperative, and leaves the land liable to be sold upon their executions in the same manner as if no such conveyance had ever been made. I say it is in the strictest sense an *alienation* by the corporation, for it is wholly immaterial whether

ALIENATING AFFECTIONS.—See the titles ABDUCTION; CRIMINAL CONVERSATION; DIVORCE; HUSBAND AND WIFE; SEDUCTION.

one actually make the conveyance himself, or constitute an agent or trustee to make it for him, or, in order to render the transaction still more solemn, go into a court of justice, and by certain forms of proceeding, procure it to be made by the officer of the law; still it is his own act.”

Statute to Protect Creditors.—A conveyance of real estate, before suit commenced, by a mother who inherited it from her child, to whom it descended from the father, is not an *alienation* under a statute making an heir or a devisee liable for his ancestor’s debts to the value of the land *alienated*, if he *alien* before action brought or process sued out. *Maydwell v. Maydwell*, 9 Heisk. (Tenn.) 571. The court said: “To allow the voluntary conveyance, made in this case by the widow to a trustee for her own and her children’s benefit, to defeat the just claims of creditors of the intestate who owned the land at the time of his death, would be to sanction manifest injustice by means of a misinterpretation of the statute. The widow is not the heir or devisee of intestate, and cannot, under the section referred to, be held as such, answerable for his debts to the value of the lands aliened upon the principle that her *alienation* is valid, and the lands rightfully disposed of. She might be held liable upon other grounds, but her voluntary conveyance cannot be held to have placed the land beyond the reach of the creditors of intestate. His lands are assets for the payment of his debts, and not having been aliened after his death by his heir or devisee, they are still answerable in the hands of a voluntary grantee for his debts. What effect upon the rights of creditors a conveyance before suit commenced by the heir of the intestate would have had, it is unnecessary to determine in the present case.”

Modes of Alienation.—Blackstone describes four modes of *alienation* or transfer of title to real estate, which he calls common assurance: the first of which is by matter *in pais* or deed; the second, by matter of record, or an assurance transacted only in the king’s public courts of record; the third, by special custom; and the fourth, by devise in a last will or testament. *U. S. v. Schurz*, 102 U. S. 397.

“We are next, but principally, to inquire, how a man may alien or convey; which will lead us to consider the several modes of conveyance. “In consequence of the admission of property, or the giving a separate right by

the law of society to those things which by the law of nature were in common, there were necessarily some means to be devised, whereby that separate right or exclusive property should be originally acquired, which we have more than once observed was that of occupancy or first possession. But this possession, when once gained, was also necessarily to be continued; or else, upon one man’s dereliction of the thing he had seised, it would again become common, and all those mischiefs and contentions would ensue, which property was introduced to prevent. For this purpose, therefore, of continuing the possession, the municipal law has established descents and *alienations*, the former to continue the possession in the heirs of the proprietor, after his involuntary dereliction of it by his death; the latter to continue it in those persons to whom the proprietor, by his own voluntary act, shall choose to relinquish it in his lifetime. A translation, or transfer of property being thus admitted by law, it became necessary that this transfer should be properly evidenced, in order to prevent disputes, either about the fact, as whether there was any transfer at all; or concerning the persons, by whom and to whom it was transferred; or with regard to the subject-matter, as what the thing transferred consisted of; or lastly, with relation to the mode and quality of the transfer, as for what period of time (or, in other words, for what estate and interest) the conveyance was made. The legal evidences of this translation of property are called the common assurances of the kingdom; whereby every man’s estate is assured to him, and all controversies, doubts, and difficulties are either prevented or removed. These common assurances are of four kinds: 1. By matter *in pais*, or deed; which is an assurance transacted between two or more private persons *in pais*, in the country, that is (according to the old common law), upon the very spot to be transferred. 2. By matter of record, or an assurance transacted only in the king’s public courts of record. 3. By special custom, obtaining in some particular places, and relating only to some particular species of property. Which three are such as take effect during the life of the party conveying or assuring. 4. The fourth takes no effect till after his death; and that is by devise contained in his last will and testament.” 2 Bl. Com. 293.

ALIENS.

BY JOSEPH R. LONG.

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I. DEFINITION.—An alien is a foreigner, a person resident in one country, but owing allegiance to another; in *England*, one born out of the dominions or allegiance of the king;¹ in the *United States*, one born out of the jurisdiction and allegiance of the United States and who has not been naturalized under the constitution and laws of the United States or of any one of them.²

1. **Alien Defined.**—Black's Law Dict.; 1 Bl. Com. 366, 373; Calvin's Case, 7 Coke 1; Daubigny v. Davallon, 2 Anstr. 462; Jacksons v. Sanders, 2 Leigh (Va.) 109.

2. **Alien in United States.**—2 Kent Com. (13th ed.) 50; 1 Bouv. Inst., § 163; *In re Guilford's Estate*, 67 Cal. 380; *Buffington v. Grosvenor*, 46 Kan. 730; *McGregor v. McGregor*, 3 Abb. App. Dec. (N. Y.) 92, 33 How. Pr. (N. Y.) 456; *Read v. Read*, 5 Call (Va.) 160.

An alien is a citizen or subject of a foreign state. *Milne v. Huber*, 3 McLean (U. S.) 212. See also, as to who are aliens, *Dawson v. Godfrey*, 4 Cranch (U. S.) 321; *Terry v. Imperial F. Ins. Co.*, 3 Dill. (U. S.) 409; *Jones v. McMasters*, 20 How. (U. S.) 8; *McKinney v. Saviego*, 8 How. (U. S.) 235; *Minneapolis v.*

Reum, 56 Fed. Rep. 576, 12 U. S. App. 446; *McDonel v. State*, 90 Ind. 324; *Ainslie v. Martin*, 9 Mass. 454; *Ex p. Dawson*, 3 Bradf. (N. Y.) 130; *Jackson v. Wright*, 4 Johns. (N. Y.) 75; *Lynch v. Clarke*, 1 Sandf. Ch. (N. Y.) 583.

There must be a union of birth abroad and subjection to some other power to make one an alien, for one may be born abroad and still be a citizen. 1 Bouv. Inst. (Gleason's ed.), § 163; *Den v. Brown*, 7 N. J. L. 305. See generally, the titles *CITIZENSHIP*; *INDIANS*; *NATURALIZATION*.

Presumption.—The original status of an alien is presumed to continue until the contrary is shown. *Hauenstein v. Lynham*, 100 U. S. 483; *Charles Green's Son v. Salas*, 31 Fed. Rep. 106; *White v. White*, 2 Metc. (Ky.) 185.

Aliens are distinguished as alien friends (*alien amys*), and alien enemies, according to whether the country to which they owe their allegiance is at peace or at war with the country of their residence.¹

One may become an alien either by birth, in which case he is called an alien *né*,² or by his own election, as by expatriation,³ or by a division of the country of which he is a citizen.⁴

II. ALIEN FRIEND—1. **Definition.**—An alien friend, as already stated, is one whose country is at peace with the country where he resides.⁵

2. **Rights, Privileges, and Liabilities**—*a.* **THOSE PERTAINING TO THE PERSON**—(1) *Political and Miscellaneous Rights.*—An alien, while domiciled in a country, is entitled to the protection of its laws,⁶ and owes to it in return for this protection a temporary and local allegiance, which continues during the period of his residence.⁷ He is, therefore, subject to the laws of the land,

1. Rap. & Lawr. L. Dict.; Calvin's Case, 7 Coke 1.

2. Rap. & Lawr. L. Dict.; Black's Law Dict.

3. See the titles CITIZENSHIP and EXPATRIATION. See also 2 Kent Com. (13th ed.) 39-50; *Comitis v. Parkerson*, 56 Fed. Rep. 556.

4. See the title CITIZENSHIP; also 2 Kent Com. (13th ed.) 56-60.

Antenati.—Under what circumstances a person born before the American Revolution, and continuing to live in American or British territory after July 4, 1776, should be deemed an alien or a citizen of the United States, and the effect thereof, see:

England.—*Ritson v. Stordy*, 2 Jur. N. S. 410, 3 S. M. & G. 230, 1 Jur. N. S. 771. See also *Doe v. Ackeam*, 2 B. & C. 779, 9 E. C. L. 238.

United States.—*Contee v. Godfrey*, 1 Cranch (C. C.) 479; *M'Ilvaine v. Cox*, 2 Cranch (U. S.) 280, 4 Cranch (U. S.) 209; *Lambert v. Paine*, 3 Cranch (U. S.) 97; *Dawson v. Godfrey*, 4 Cranch (U. S.) 321; *Kempe v. Kennedy*, 5 Cranch (U. S.) 173; *Fairfax v. Hunter*, 7 Cranch (U. S.) 603; *Inglis v. Sailor's Snug Harbour*, 3 Pet. (U. S.) 126, 1 Lead. Cas. Real Prop. 412; *Blight v. Rochester*, 7 Wheat. (U. S.) 535; *Jones v. McMasters*, 20 How. (U. S.) 8; *Hollingsworth v. Duane*, Wall. (C. C.) 51. See also *Shanks v. Dupont*, 3 Pet. (U. S.) 242; *Society, etc., v. Wheeler*, 2 Gall. (U. S.) 105.

Connecticut.—*Apthorp v. Backus*, Kirby (Conn.) 407, 1 Am. Dec. 26; *Hebron v. Colchester*, 5 Day (Conn.) 169.

Kentucky.—*Elmondorff v. Carmichael*, 3 Litt. (Ky.) 475, 14 Am. Dec. 86; *Trimbles v. Harrison*, 1 B. Mon. (Ky.) 140.

Maryland.—*Owings v. Norwood*, 2 Har. & J. (Md.) 104.

Massachusetts.—*Palmer v. Downer*, 2 Mass. 180; *Kilham v. Ward*, 2 Mass. 236; *Gardner v. Ward*, 2 Mass. 244, note; *Martin v. Woods*, 9 Mass. 377; *Ainslie v. Martin*, 9 Mass. 454; *Cummington v. Springfield*, 2 Pick. (Mass.) 394.

Michigan.—*Crane v. Reeder*, 25 Mich. 303.

New Jersey.—*Den v. Brown*, 7 N. J. L. 305; *Coxe v. Gulick*, 10 N. J. L. 328.

New York.—*Kelly v. Harrison*, 2 Johns. Cas. (N. Y.) 29, 1 Am. Dec. 154; *Jackson v. Lunn*, 3 Johns. Cas. (N. Y.) 109; *Jackson v. White*, 20 Johns. (N. Y.) 313; *Munro v.*

Merchant, 28 N. Y. 9; *Orser v. Hoag*, 3 Hill (N. Y.) 79.

North Carolina.—*Marshall v. Lovelass*, Cam. & N. (N. Car.) 217.

Pennsylvania.—*Jackson v. Burns*, 3 Binn. (Pa.) 75.

South Carolina.—*Ex p. Dupont*, 1 Harp. Eq. (S. Car.) 5, reversed in *Shanks v. Dupont*, 3 Pet. (U. S.) 242 (see *Sasportas v. De la Motta*, 10 Rich. Eq. (S. Car.) 38); *Clifton v. Haig*, 4 Desaus. (S. Car.) 330.

Tennessee.—*Moore v. Wilson*, 10 Yerg. 406.

Virginia.—*Day v. Murdoch*, 1 Munf. (Va.) 460; *King v. Hanson*, 4 Call (Va.) 259; *Read v. Read*, 5 Call (Va.) 160; *Com. v. Bristow*, 6 Call (Va.) 60.

A subject of Great Britain who emigrated to the United States after the Declaration of Independence is an alien. *Jackson v. Wright*, 4 Johns. (N. Y.) 75.

As to the effect of the cession of *Louisiana* upon the status of its inhabitants as to citizenship in the United States, see *State v. Primrose*, 3 Ala. 546; and of *Texas*, see *McKinney v. Saviego*, 18 How. (U. S.) 235; *Jones v. McMasters*, 20 How. (U. S.) 8.

Children born in the United States, since the recognition of their independence, of parents who resided there before, but who were natural born British subjects at the time of the separation of the two countries and adhered to the British government, are not aliens to England, and are capable of inheriting lands in England. *Auchmuty v. Mulcaster*, 5 B. & C. 771.

5. Rap. & Lawr. Dict.; 1 Cooley's Blackstone (3d ed.) 371.

6. **Entitled to Protection of the Laws.**—Aliens may invoke the criminal jurisdiction of the law against persons injuring them. 3 Op. Atty.-Gen. 253; *Sidgreaves v. Myatt*, 22 Ala. 617; *Luke v. Calhoun County*, 52 Ala. 115; *Foster's Crown Law*, Discourse 1, § 2; 1 Stimson's Am. Stat. Law, § 6012.

Fourteenth Amendment to Federal Constitution.—Aliens are entitled to the benefit of the Fourteenth Amendment to the Constitution of the United States. *In re Ah Fong*, 3 Sawy. (U. S.) 144; *Ah Kow v. Nunan*, 5 Sawy. (U. S.) 562; *In re Ah Chong*, 2 Fed. Rep. 733.

7. **Nature of Alien's Allegiance to Country of His Residence.**—1 East P. C., c. 2, § 4; 1 Hale P. C., c. 10; *Foster's Crown Law*, Discourse

and may be tried for crime;¹ and may be guilty of treason in giving aid and comfort to the enemies of the country.²

Liability to Military Service.—He is not, however, liable to military service, but if he voluntarily waives this exemption and enlists, he cannot escape the liabilities thus incurred, on the ground that he is an alien.³

Right to Pursue Trade.—An alien has a right to labor or engage in trade, that right being implied in the right to reside in a country.⁴

May Sue or Be Sued.—An alien may sue and be sued in the proper courts to

1, § 2; 2 Kent Com. 63, 64; *Carlisle v. U. S.*, 15 Wall. (U. S.) 147; *Thrasher's Case*, 6 Webster's Works 526; *The Homestead Case*, 1 Pa. Dist. Rep. 785. See also *The Schooner Exchange v. M'Faddon*, 7 Cranch (U. S.) 116; *Ex p. Reynolds*, 5 Dill. (U. S.) 394; *Ex p. Thompson*, 3 Hawks (N. Car.) 355; and the title ALLEGIANCE.

1. **Subject to the Laws of the Land.**—*Thrasher's Case*, 6 Webster's Works 526; *Wildenhus's Case*, 120 U. S. 1; *People v. McLeod*, 1 Hill (N. Y.) 377, 25 Wend. (N. Y.) 483, 37 Am. Dec. 328; *Reg. v. McMahon*, 26 U. C. Q. B. 195; *Reg. v. Lynch*, 26 U. C. Q. B. 208. See also *U. S. v. Diekelman*, 92 U. S. 520; *Reg. v. School*, 26 U. C. Q. B. 212.

A Vessel of War belonging to a foreign power with whom the United States is at peace, entering a port of this country and demeaning herself in a friendly manner, is exempt from the jurisdiction of the United States. *The Schooner Exchange v. M'Faddon*, 7 Cranch (U. S.) 116.

Contracts Concerning Real Estate.—An alien resident making a contract relative to real estate is subject to the same laws in respect thereto as citizens are. *Milliken v. Barrow*, 55 Fed. Rep. 148.

Revenue Laws.—A foreigner trading to the United States is bound to know its revenue laws, and his ignorance of them will not exempt him from their influence. *Cambioso v. Moffett*, 2 Wash. (U. S.) 98.

The United States may Pass Special Acts to protect alien subjects of a treaty nation. *Baldwin v. Franks*, 120 U. S. 678.

Jury de Medietate Linguae.—Aliens accused of crime are not, however, entitled to be tried by a jury composed one-half of aliens. *People v. Chin Mook Sow*, 51 Cal. 597; *Reg. v. Burdell*, 5 Nova Scotia 126. Compare *Reg. v. Vonhoff*, 10 L. C. J., 292 Q. B. (1866). See *infra*, this title, *Disabilities of Aliens*.

As to Early Confiscation Acts, see *Kilham v. Ward*, 2 Mass. 236; *Gardner v. Ward*, 2 Mass. 244, note; *Com. v. Bristow*, 6 Call (Va.) 60.

Habeas Corpus.—The United States Circuit Court has jurisdiction to issue a writ of habeas corpus to determine whether one of the crew of a foreign vessel in a port of the United States, who is in the custody of the state authorities for a crime committed within the port, is exempt from local jurisdiction under a treaty; unless so exempt, local courts may punish the offender. *Wildenhus's Case*, 120 U. S. 1.

As to the right of Chinese and other aliens prevented from landing, to sue out writs of habeas corpus, see *In re Ah Fong*, 3 Sawy.

(U. S.) 144; U. S. Rev. Stat., § 755; *Chew Heong v. U. S.*, 112 U. S. 536; *U. S. v. Jung Ah Lung*, 124 U. S. 621; *Chae Chan Ping v. U. S.*, 130 U. S. 581; *Wan Shing v. U. S.*, 140 U. S. 424; *Lau Ow Bew, Petitioner*, 141 U. S. 583; *Nishimura Ekiu v. U. S.*, 142 U. S. 651; *Fong Yue Ting v. U. S.*, 149 U. S. 698; *In re Jung Ah Lung*, 25 Fed. Rep. 141; *In re Chow Goo Pooi*, 25 Fed. Rep. 77; *In re Ah Yuk*, 53 Fed. Rep. 781; *In re Ng. Loy Hoe*, 53 Fed. Rep. 914; *In re Sing Lee*, 54 Fed. Rep. 334; *In re Tom Yum*, 64 Fed. Rep. 485; and the title IMMIGRATION.

2. **Treason.**—*Carlisle v. U. S.*, 16 Wall. (U. S.) 147; *Foster's Crown Law, Discourse 1*, § 2; 1 East P. C., c. 2, § 4; *The Homestead Case*, 1 Pa. Dist. Rep. 785. Compare *U. S. v. Villato*, 2 Dall. (U. S.) 370. See the title TREASON.

3. **Military Duty.**—3 Op. Atty.-Gen. 670; 4 Op. Atty.-Gen. 350; *Slade v. Minor*, 2 Cranch (C. C.) 139; *U. S. v. Wyngall*, 5 Hill (N. Y.) 16; *Matter of Scheel*, 54 How. Pr. (N. Y. Supreme Ct.) 478; *U. S. v. Cottingham*, 1 Rob. (Va.) 649, 40 Am. Dec. 710. See also *Matter of Ross*, 1 N. Y. Leg. Obs. 340.

In Ansley v. Timmons, 3 McCord (S. Car.) 329, it was held that the *South Carolina Act of 1794*, requiring aliens to do militia and patrol duty, was against neither the Constitution of the United States nor the law of nations.

One Who has Declared His Intention to Become a Citizen of the United States, and is an elector of the state, is liable to be drafted into the service of the United States. *In re Wehlitz*, 16 Wis. 443, 84 Am. Dec. 700; and also of the state, *In re Conway*, 17 Wis. 526.

A member of the National Guard who is not a resident or citizen of the state, and is only temporarily within the jurisdiction of its courts, is not entitled to a mandamus to compel the restoration of his name to the rolls after it has been dropped. *People v. Clark*, 54 How. Pr. (N. Y. Supreme Ct.) 488. See the title MILITARY LAW.

4. **Rights as to Labor and Trades.**—*Chapman v. Toy Long*, 4 Sawy. (U. S.) 36; *Baker v. Portland*, 5 Sawy. (U. S.) 566.

In these cases a statute of *Oregon* providing that no Chinese persons should be employed on public works, although other aliens might be so employed, was held void as in conflict with the treaty with China. Such provisions are, however, common. See *Idaho Constitution*, art. 13, § 3; *Stat. March 14, 1891* (Acts 1890-91, p. 233); and 1 *Stimson Am. Statute Law*, §§ 5286, 6056; also the title CONTRACT LABOR LAW.

the same extent as a citizen,¹ and he is also entitled to appear by attorney

1. Right to Sue and be Sued.—*England.*—*Ramkissenseat v. Barker*, 1 Atk. 51; *Openheimer v. Levy*, 2 Stra. 1082; *Pisani v. Lawson*, 6 Bing. N. C. 90, 37 E. C. L. 293.

United States.—U. S. Rev. Stat., §§ 563, 629, par. 16, 639, par. 1, 1068; *Hepburn v. Dunlop*, 1 Wheat. (U. S.) 179; *Hughes v. Edwards*, 9 Wheat. (U. S.) 489; *Breedlove v. Nicolet*, 7 Pet. (U. S.) 413; *Ewing v. St. Louis*, 5 Wall. (U. S.) 413; *U. S. v. O'Keefe*, 11 Wall. (U. S.) 178; *Carlisle v. U. S.*, 16 Wall. (U. S.) 147; *Airhart v. Massieu*, 98 U. S. 491; *St. Luke's Hospital v. Barclay*, 3 Blatchf. (U. S.) 259; *Bonaparte v. Camden*, etc., R. Co., 1 Baldw. (U. S.) 216; *Society*, etc., v. *Wheeler*, 2 Gall. (U. S.) 127; *The Jerusalem*, 2 Gall. (U. S.) 191; *Lorway v. Lousada*, 1 Lowell (U. S.) 77; *De Laveaga v. Williams*, 5 Sawy. (U. S.) 573; *Taylor v. Carpenter*, 2 Woodb. & M. (U. S.) 1, 3 Story (U. S.) 458; *Coffeen v. Brunton*, 4 McLean (U. S.) 516; *De Franca v. Howard*, 21 Fed. Rep. 774; *Brown's Case*, 5 Ct. of Cl. 571.

California.—*Pugh v. Gillam*, 1 Cal. 485. *Connecticut.*—*Apthorp v. Backus*, Kirby (Conn.) 413, 1 Am. Dec. 26.

District of Columbia.—*Johnson v. Elkins*, 1 App. Cas. (D. C.) 430.

Massachusetts.—*Rea v. Hayden*, 3 Mass. 24; *Levine v. Taylor*, 12 Mass. 8; *Barrell v. Benjamin*, 15 Mass. 354; *Waugh v. Riley*, 8 Met. (Mass.) 290; *Roberts v. Knights*, 7 Allen (Mass.) 449; *Peabody v. Hamilton*, 106 Mass. 217.

Minnesota.—*Stees v. Leonard*, 20 Minn. 494.

New Hampshire.—*Emerson v. Shaw*, 57 N. H. 223.

New Jersey.—*Den v. Brown*, 7 N. J. L. 305.

New York.—*Johnson v. Dalton*, 1 Cow. (N. Y.) 543, 13 Am. Dec. 564.

North Carolina.—*Cruden v. Neale*, 1 Hayw. (N. Car.) 338; *Barges v. Hogg*, 1 Hayw. (N. Car.) 485; *Rooker v. Crinkley*, 113 N. Car. 73.

Texas.—*Franco-Texan Land Co. v. Bousselet*, 70 Tex. 422. See also *Montalet v. Murray*, 4 Cranch (U. S.) 46; *Mitchell v. Wells*, 37 Miss. 235; *State v. Burnett*, 9 Tex. 48; *Rose v. Governor*, 24 Tex. 496; *Wood v. Campbell*, 3 U. C. Q. B. 269.

See also the title ADMIRALTY JURISDICTION.

Suits against United States in Court of Claims.

As to suits against the United States in the Court of Claims, see U. S. Rev. Stat., § 1068; *Brown's Case*, 5 Ct. of Cl. 571; *Carlisle v. U. S.*, 16 Wall. (U. S.) 147; *Young v. U. S.*, 97 U. S. 39; *Lobsiger's Case*, 5 Ct. of Cl. 687; *La Plante's Case*, 6 Ct. of Cl. 311; *De Give's Case*, 7 Ct. of Cl. 517; *Hill's Case*, 8 Ct. of Cl. 470; *Fichera's Case*, 9 Ct. of Cl. 254; *Collie's Case*, 9 Ct. of Cl. 431.

Resident Aliens—Security for Costs.—A resident alien is not within the statute requiring non-residents to give security for costs, unless such residence is merely temporary. *Norton v. Mackie*, 8 Hun (N. Y.) 520. See also *Clarke v. Wells*, 2 Murph. (N. Car.) 1.

Property Transferred to Alien in Fraud of Bankrupt Law.—An alien is liable to account for property transferred to him by a bankrupt

in fraud of the bankrupt law. *Olcott v. Maclean*, 73 N. Y. 223.

Control of Court over Property of Alien within Jurisdiction.—The property of an alien situated within the jurisdiction of the court is subject to its control though his person is abroad. *Anonymous*, 1 Atk. 19. See also *Buffalo*, etc., R. Co. v. *Hemmingway*, 22 U. C. Q. B. 562.

Foreign Sovereigns and Representatives.—Foreign sovereigns may sue in the courts of the United States. *King of Spain v. Oliver*, Pet. (C. C.) 276; *Republic of Mexico v. DeArrangvis*, 11 How. Pr. (N. Y. Super. Ct.) 1; *King of Prussia v. Kuepper*, 22 Mo. 550. See *Tagart v. Indiana*, 15 Mo. 209.

The jurisdiction of the circuit courts of the United States, of suits by citizens against aliens, is not defeated by the fact that the defendant is the consul of a foreign government. *Börs v. Preston*, 111 U. S. 252. See also *U. S. v. Ravara*, 2 Dall. (U. S.) 297; *U. S. v. Ortega*, 11 Wheat. (U. S.) 467; *St. Luke's Hospital v. Barclay*, 3 Blatchf. (U. S.) 259; *Graham v. Stucken*, 4 Blatchf. (U. S.) 50; *Gittings v. Crawford*, Taney's Dec. (U. S.) 1.

As to the right of an alien friend to sue in American consular courts in China, see *Forbes v. Scannell*, 13 Cal. 242.

Married Women.—An alien married woman who is abandoned by an alien husband in a foreign country, and who comes to the United States, is competent to contract for her support, and to sue and be sued like a *feme sole*. *Blumenberg v. Adams*, 49 Cal. 308; *Gregory v. Paul*, 15 Mass. 31; *Abbot v. Bayley*, 6 Pick. (Mass.) 90; *M'Arthur v. Bloom*, 2 Duer (N. Y.) 151; *Wagg v. Gibbons*, 5 Ohio St. 580. See *Robinson v. Reynolds*, 1 Aik. (Vt.) 174, 15 Am. Rep. 673.

Suits between Aliens.—One alien may sue another in the state courts, upon a contract made abroad, if the parties are transiently in the state. *Rea v. Hayden*, 3 Mass. 24; *Barrell v. Benjamin*, 15 Mass. 354; *Roberts v. Knights*, 7 Allen (Mass.) 449; *Johnston v. Trade Ins. Co.*, 132 Mass. 432; *Dewitt v. Buchanan*, 54 Barb. (N. Y.) 31. See also *Brinley v. Avery*, Kirby (Conn.) 25. But see *Ventini v. Ward*, 2 L. N. 133, 23 L. C. J. 267, S. C. 1879.

The courts of a state have jurisdiction of an action by one alien against another for a tort committed in a foreign country. *Johnson v. Dalton*, 1 Cow. (N. Y.) 548, 13 Am. Dec. 564; *Dewitt v. Buchanan*, 54 Barb. (N. Y.) 31. See also *Glen v. Hodges*, 9 Johns. (N. Y.) 67; *Smith v. Bull*, 17 Wend. (N. Y.) 323; *Lister v. Wright*, 2 Hill (N. Y.) 320. See as to jurisdiction of United States courts, *Montalet v. Murray*, 4 Cranch (U. S.) 46; *Gassies v. Ballon*, 6 Pet. (U. S.) 761.

See generally as to suits between aliens, 7 Am. L. Rev. 417 (1872).

Suits between Aliens and Citizens—Jurisdiction of Court.—As to jurisdiction of United States or state courts where only one of the parties is an alien, see *Lanz v. Randall*, 4 Dill. (U. S.) 425; *McHenry v. New York*, etc., R. Co., 25 Fed. Rep. 65; *Maloy v. Duden*, 25 Fed. Rep. 673; *Stinson v. St. Paul*, etc., R.

for the purpose of claiming and defending his rights.¹

Rights in Regard to Insolvent Laws, Poor Laws, Patents, Trade-Marks and Copyrights.—He may, by statute, have the benefit of the insolvent law,² and of the poor law when so provided by statute.³ He may obtain a patent or file a caveat,⁴ may register a trade-mark, and protect it by suit,⁵ and, to a certain extent, may enjoy the benefit of the copyright laws.⁶

As Executor, Administrator, Trustee, and Corporator.—An alien may serve as executor or administrator, unless prohibited by statute,⁷ and may be a corporator and a trustee of a corporation.⁸

(2) **Disabilities of Aliens.**—An alien cannot vote,⁹ nor hold any political

Co., 20 Minn. 492; *Byam v. Stevens*, 4 Edw. Ch. (N. Y.) 119; *Rooker v. Crinkley*, 113 N. Car. 73.

See *ENCYCLOPEDIA OF PLEADING AND PRACTICE*, title *REMOVAL OF CAUSES*, generally, for matters of practice in suits by, against, or between aliens. See, as to the right of aliens to maintain real actions, *infra*, this title, *Rights and Liabilities Incidental to the Ownership of Property*.

Proof of Alienage.—Alienage must be proved by him who asserts it, *Moore v. Wilson*, 10 Yerg. (Tenn.) 406; and the evidence must be clear and conclusive, and not left to implication or inference, *Jones v. McCoy*, 3 Tex. 349.

A recital in a deed that the vendees were residents of one of the states of the Union is admissible but not conclusive evidence that they were aliens to the Republic of Mexico. *Lacoste v. Odam*, 26 Tex. 458.

1. **Appearance by Attorney.**—*In re Guilford's Estate*, 67 Cal. 380; *In re Leopold's Estate*, 67 Cal. 385.

2. **Entitled to Benefit of Insolvent Laws.**—*Judd v. Lawrence*, 1 Cush. (Mass.) 531. See also *Hobbblethwaite v. Batturs*, 1 Miles (Pa.) 82.

An alien is also bound by the insolvent laws. *Von Glahn v. Varrenne*, 1 Dill. (U. S.) 515; *Letchford v. Convillon*, 20 Fed. Rep. 608; *Olcott v. Maclean*, 73 N. Y. 223.

3. **Poor Laws.**—*Knox v. Waldoborough*, 3 Me. 455; *People v. McClay*, 2 Neb. 7. See also *Grim v. Haycock Tp.*, 1 Pa. Dist. Rep. 815. But an alien has no such privilege in the absence of statute. *Jefferson v. Litchfield*, 1 Me. 196. See the title *POOR AND POOR LAWS*.

4. **Patents.**—1 Robinson on Patents, § 363; *Shaw v. Cooper*, 7 Pet. (U. S.) 292, 1 Rob. Pat. Cas. 643; *Tonduer v. Chambers*, 37 Fed. Rep. 333. See also *Henry v. Providence Tool Co.*, 14 Pat. Off. Gaz. 855; *Tatham v. Lowber*, 2 Blatchf. (U. S.) 49; and the title *PATENTS*.

5. **Trade-Marks.**—*Browne on Trade-Marks*, (2d ed.) 21; *Taylor v. Carpenter*, 2 Woodb. & M. (U. S.) 1, 3 Story (U. S.) 458; *Coffeen v. Brunton*, 4 McLean (U. S.) 516; *La Croix v. May*, 15 Fed. Rep. 236; *Coats v. Holbrook*, 2 Sandf. Ch. (N. Y.) 586; *Taylor v. Carpenter*, 2 Sandf. Ch. (N. Y.) 603, 11 Paige (N. Y.) 292, 42 Am. Dec. 114; *Lemoine v. Gaulton*, 2 E. D. Smith (N. Y.) 343. See also *Collins Co. v. Brown*, 3 Kay & J. 423; *Collins Co. v. Reeves*, 28 L. J. Ch. 56; *Beard v. Turner*, 13 L. T. N. S. 746, and the title *TRADE-MARKS*.

6. See the title *COPYRIGHT*.

7. **Right to Act as Executor or Administrator.**—1 Williams on Executors (7th Am. ed.) 271, 537, 538 (note), 581. See also *Berney v. Drexel*, 12 Fed. Rep. 393; *Bradley v. Harden*, 73 Ala. 70; *Headman v. Rose*, 63 Ga. 458; *McGregor v. McGregor*, 33 How. Pr. (N. Y. Ct. App.) 456, 1 Keyes (N. Y.) 133; *In re Thorpe*, 15 Grant's Ch. (U. C.) 76; *Cutler v. Howard*, 9 Wis. 309; and the title *EXECUTORS AND ADMINISTRATORS*.

8. *Cammeyer v. United German Lutheran Church*, 2 Sandf. Ch. (N. Y.) 186. See also *Johnson v. Elkins*, 1 App. Cas. (D. C.) 430; *Com. v. Woelper*, 3 S. & R. (Pa.) 29, 8 Am. Dec. 628.

9. **As an Elector.**—*Cooley's Constitutional Limitation* (6th ed.) 752; 1 Stimson Am. Statute Law, § 22; *State v. Deshr*, 25 N. J. L. 177; *Brockville Election*, *Hodg. El. Cas. (Ont)*. 129.

In many states, however, it is provided by statute that an alien who has declared his intention to become a citizen of the United States may vote before his naturalization is completed. *State v. Fowler*, 41 La. Ann. 380; *People v. Scott*, 56 Mich. 154; *Lanz v. Randall*, 4 Dill. (U. S.) 425, construing the constitution of *Minnesota*. See also *Settegast v. Schrimpf*, 35 Tex. 323.

An alien may register his name on the voting list, provided he can become qualified by naturalization to vote during the ensuing year. *Ward v. Joslin*, 16 R. I. 661.

In the absence of statute, an alien may vote at a school district or borough meeting. *Woodcock v. Bolster*, 35 Vt. 632; *Stewart v. Foster*, 2 Binn. (Pa.) 120. It was held in *New Jersey* that an alien had no right to vote at an election held in a school district to alter the district. *State v. Deshr*, 25 N. J. L. 177.

An alien may vote for parish officers. *Com. v. Woelper*, 3 S. & R. (Pa.) 29, 8 Am. Dec. 628.

Where minors come to this country with their parents and subsequently vote, such voting raises a presumption of citizenship. *Behrensmeier v. Kreitz*, 135 Ill. 591.

As to persons held to be not entitled to vote under *New Mexico Compiled Laws* (1884), § 1141, and U. S. Rev. Stat., §§ 2004, 2165, 2166, see *Berry v. Hull* (N. Mex. 1892), 30 Pac. Rep. 936.

Evidence of Alienage.—The fact that a voter before election applied for and received naturalization papers is evidence that he was an alien, and the fact that persons bear foreign

office,¹ as state representative,² nor be an officer of a county, as treasurer,³ nor of a city, as chief of police,⁴ nor of a court, as sheriff⁵ or clerk,⁶ nor can he serve as a juror.⁷ And the rule is that alienage also constitutes a

names and were born out of the United States is *prima facie* evidence that they were alien born. *Behrensmeyer v. Kreitz*, 135 Ill. 591. See also *Walther v. Rabolt*, 30 Cal. 185; *Ackerman v. Haenck*, 147 Ill. 514.

For a full treatment of this branch of the subject, see the titles CITIZENSHIP; NATURALIZATION; ELECTIONS.

1. Rights and Disabilities in Regard to Holding Office.—Mechem on Public Officers, § 74; Throop on Public Officers, § 72; *Walther v. Rabolt*, 30 Cal. 185. See also Aliens and Denizens, 5 Hawaii 167; and the title PUBLIC OFFICERS.

Declaration of Intention to Become a Citizen.—Persons who have declared their intention to become citizens of the United States are eligible to elective offices in some states. *Lanz v. Randall*, 4 Dill. (U. S.) 425; *State v. Fowler*, 41 La. Ann. 380; *Taylor v. Sullivan*, 45 Minn. 309, 22 Am. St. Rep. 729; *State v. Streukens* (Minn. 1895), 62 N. W. Rep. 259. See also *McCarthy v. Froelke*, 63 Ind. 507; *McDonel v. State*, 90 Ind. 320. But see Examining Board's Authority, 3 Pa. Dist. Rep. 840, 1 Lack. L. News 49, 15 Pa. Co. Ct. Rep. 585.

When Highest Vote Cast is Received by an Alien.—Where the one having the highest number of votes in an election is an alien, no one is elected. *Dryden v. Swinburne*, 20 W. Va. 89; *State v. Smith*, 14 Wis. 497. See also *Barnum v. Gilman*, 27 Minn. 466, 38 Am. Rep. 304; *Scott County v. Ring*, 29 Minn. 398.

Removal of Disability of Alienage before Term Begins.—An alien may be elected to a public office, and may hold the same if the disability is removed before the term of office begins. *State v. Van Beek*, 87 Iowa 569; *State v. Murray*, 28 Wis. 96, 9 Am. Rep. 489; *State v. Trumpf*, 50 Wis. 103. *Contra*, that he must be qualified at the time of his election, *Territory v. Smith*, 3 Minn. 240, 74 Am. Dec. 749; *Taylor v. Sullivan*, 45 Minn. 309, 22 Am. St. Rep. 729.

Fire Boss—Pennsylvania.—An unnaturalized foreigner is not qualified under the Pennsylvania Bituminous Coal Mining Act for the position of fire boss, notwithstanding he has declared his intention to become a citizen. Examining Board's Authority, 3 Pa. Dist. Rep. 840, 1 Lack. L. News 49, 15 Pa. Co. Ct. Rep. 585.

2. As State Representative.—Opinion of Justices, 122 Mass. 594.

3. As County Officer.—*Walther v. Rabolt*, 30 Cal. 185.

4. As Municipal Officer.—*Drew v. Rogers* (Cal. 1893), 34 Pac. Rep. 1081.

5. As Court Officer.—*Scott v. Strobach*, 49 Ala. 477; *State v. Smith*, 14 Wis. 497. See also *State v. Van Beek*, 87 Iowa 569.

6. Dryden v. Swinburne, 20 W. Va. 89.

7. Cannot Serve as Juror.—5 Bac. Abr. 312; 3 Bl. Com. 362; 1 Chitty on Crim. Law (5th Am. ed.) 307.

Alabama.—*Judson v. Eslava*, Minor (Ala.) 2; *State v. Primrose*, 3 Ala. 546. See also *Boyington v. State*, 2 Port. (Ala.) 100; *State v. Middleton*, 5 Port. (Ala.) 484.

Florida.—*Keech v. State*, 15 Fla. 591.

Georgia.—*Reich v. State*, 53 Ga. 73, 21 Am. Rep. 265.

Kentucky.—*Drye v. Cook*, 14 Bush (Ky.) 459. See also *Siller v. Cooper*, 4 Bibb (Ky.) 90.

Michigan.—*People v. Barker*, 60 Mich. 277, 1 Am. St. Rep. 501.

Nevada.—*State v. Ah Chew*, 16 Nev. 50, 40 Am. Rep. 488.

New York.—*Borst v. Beecker*, 6 Johns. (N. Y.) 332.

Texas.—*State v. Foster*, 9 Tex. 65.

Vermont.—*Quinn v. Halbert*, 52 Vt. 353; *Richards v. Moore*, 60 Vt. 449.

Virginia.—*Com. v. Cherry*, 2 Va. Cas. 20.

Wisconsin.—*Schumaker v. State*, 5 Wis. 324; *Keenan v. State*, 8 Wis. 132; *State v. Cole*, 17 Wis. 674.

See also as to effect of alienage of juror, *Rex v. Sutton*, 8 B. & C. 417, 15 E. C. L. 252; *Hollingsworth v. Duane*, Wall. (C. C.) 147, 4 Dall. (U. S.) 353; *Penalty v. State*, 12 Ark. 630; *State v. Gibbs*, 39 Iowa 318; *Foreman v. Hunter*, 59 Iowa 559; *State v. Hardin*, 25 La. Ann. 369; *State v. McGee*, 36 La. Ann. 206 (*overruling State v. Parks*, 21 La. Ann. 251); *State v. Griffin*, 38 La. Ann. 502; *State v. Causey*, 43 La. Ann. 897; *Johr v. People*, 26 Mich. 427; *State v. Quarrel*, 2 Bay (S. Car.) 150, 1 Am. Dec. 637; *Byrne v. State*, 12 Wis. 519; *Brown v. La Crosse City Gas Light, etc., Co.*, 21 Wis. 51; *State v. Vogel*, 22 Wis. 471; *Bonneville v. State*, 53 Wis. 680; *Stephenson v. Fraser*, 24 New Bruns. 482; *Reg. v. Burdell*, 5 Nova Scotia 126. *Compare Queen v. Hepburn*, 2 Cranch (C. C.) 3.

In *Indiana* it was held under Rev. Stat. 1843, p. 951, that an indictment could not be objected to because one of the grand jurors was an alien. *State v. Taylor*, 8 Blackf. (Ind.) 178.

In many states the rule as to an alien serving as juror is the same as in the case of an alien holding political offices in those states, viz.: that an alien who has declared his intention to become a citizen of the United States, and who is therefore a citizen of the state, and an elector, may be a juror. *McDonel v. State*, 90 Ind. 320; *People v. Scott*, 56 Mich. 154; *People v. Rosevear*, 56 Mich. 158; *State v. Barrett*, 40 Minn. 65; *Territory v. Harding*, 6 Mont. 323; *Abrigo v. State*, 29 Tex. App. 143. See also *Territory v. Clayton*, 8 Mont. 1; *Grubb v. State*, 14 Wis. 434.

Under the *Indiana* statutes, with reference to the qualification of jurors (Rev. Stat. 1881, §§ 1393, 1793), the term "alien" relates to one who is not a citizen, or a voter of the state. *McDonel v. State*, 90 Ind. 32.

In *Illinois*, Alienage Is Not an Absolute Disqualification, but merely an exemption from duty or a ground of challenge. *Chase v.*

disqualification to one's practising as an attorney-at-law.¹ Nor can an alien be the master of an American vessel.²

b. THOSE PERTAINING TO PROPERTY—(1) Real Property—(a) At Common Law—Alien may Take by Act of Parties.—It is well settled that at common law an alien may take real estate by act of the parties, as by deed or grant,³

People, 40 Ill. 352, *overruling* Guykowski v. People, 2 Ill. 476. See also Greenup v. Stoker, 8 Ill. 202.

Criminal Cases.—The general rule that an alien cannot be a juror is more strictly applied in criminal, and especially in capital, than in civil cases. Greenup v. Stoker, 8 Ill. 202; Hill v. People, 16 Mich. 351; State v. Foster, 9 Tex. 65. But see Chase v. People, 40 Ill. 352.

The Burden of Proving the Alienage of a juror is on the party challenging him. State v. Haynes, 54 Iowa 109; Schuster v. State, 80 Wis. 107. And the best evidence the nature of the case admits must be produced. Keenan v. State, 8 Wis. 132.

Jury de Medietate Linguae.—Where aliens are prohibited by statute from serving on juries generally, an alien accused of crime is not entitled to be tried by a jury composed one-half of aliens. People v. Chin Mook Sow, 51 Cal. 597; State v. Antonio, 4 Hawks (N. Car.) 200. See note, *supra*, this title, *Right to Sue and Be Sued*. See generally the titles **GRAND JURIES**; **JURY AND JURY TRIAL**.

1. As Attorneys-at-Law.—*In re Hong Yen Chang*, 84 Cal. 163; Caines' Case, 3 Johns. Cas. (N. Y.) 2d ed. 499; In the Matter of O'Neill, 90 N. Y. 584. See the title **ATTORNEY AND CLIENT**.

In *Ex p. Thompson*, 3 Hawks (N. Car.) 355, it was held that aliens could not be licensed as attorneys in *North Carolina*, notwithstanding they had signified their intention to become naturalized citizens.

Attorneys of Other States.—The rule of the Court of Appeals of *New York* authorizing the admission of persons who have practiced three years in the highest courts of law of another country, applies only to a citizen of the United States who has thus practiced. It seems that the legislature has power under the constitution to authorize the admission of persons not citizens of the state. In the Matter of O'Neill, 90 N. Y. 584.

An alien Chinaman is not entitled to practice in *California*, although he may have a license, issued by the Supreme Court of New York, to practice in all the courts of the state of New York. *In re Hong Yen Chang*, 84 Cal. 163.

2. As Master of a Vessel.—The Dubuque, 2 Abb. (U. S.) 20. See the title **MASTERS OF VESSELS**.

3. Alien may Take by Deed or Grant—England.—Burk v. Brown, 2 Atk. 397; Dumoncel v. Dumoncel, 13 Ir. Eq. Rep. 92.

Canada.—Doe v. Dickinson, 2 U. C. Jur. (O. S.) 326; Irwin v. McBride, 23 U. C. Q. B. 570.

United States.—Fairfax v. Hunter, 7 Cranch (U. S.) 603; Craig v. Radford, 3 Wheat. (U. S.) 594; Orr v. Hodgson, 4 Wheat. (U. S.) 453; Gouverneur v. Robertson, 11 Wheat. (U. S.) 332; Jones v. McMasters, 20

How. (U. S.) 8; Cross v. Del Valle, 1 Wall. (U. S.) 5; Osterman v. Baldwin, 6 Wall. (U. S.) 116; Manuel v. Wulff, 152 U. S. 505; Hammekin v. Clayton, 2 Woods (U. S.) 336. See also Farmers Loan, etc., Co. v. McKinney, 6 McLean (U. S.) 1.

Alabama.—Jenkins v. Noel, 3 Stew. (Ala.) 60; Smith v. Zaner, 4 Ala. 99; Harley v. State, 40 Ala. 689; Donovan v. Pitcher, 53 Ala. 411, 25 Am. Rep. 634.

California.—People v. Folsom, 5 Cal. 373; Norris v. Hoyt, 18 Cal. 217; De Merle v. Mathews, 26 Cal. 455; Ferguson v. Neville, 61 Cal. 356; Billings v. Hauver, 65 Cal. 593.

Georgia.—Kerr v. White, 52 Ga. 369.

Illinois.—Wunderle v. Wunderle, 144 Ill. 40 (citing 1 AM. & ENG. ENCYC. OF LAW (1st ed.) 458-460).

Indiana.—Halstead v. Lake County, 56 Ind. 363.

Iowa.—Purcell v. Smidt, 21 Iowa 540.

Kentucky.—Louisville v. Gray, 1 Litt. (Ky.) 149; Elmondorff v. Carmichael, 3 Litt. (Ky.) 474, 14 Am. Dec. 86; Dudley v. Grayson, 6 T. B. Mon. (Ky.) 259.

Maryland.—Cunningham v. Browning, 1 Bland (Md.) 308; Buchanan v. Deshon, 1 Har. & G. (Md.) 289; M'Creery v. Allender, 4 Har. & M. (Md.) 409; M'Creery v. Wilson, 4 Har. & M. (Md.) 412; Guyer v. Smith, 22 Md. 239, 85 Am. Dec. 650.

Massachusetts.—Sheaffe v. O'Neil, 1 Mass. 256; Fox v. Southack, 12 Mass. 143; Scanlan v. Wright, 13 Pick. (Mass.) 523, 25 Am. Dec. 344; Foss v. Crisp, 20 Pick. (Mass.) 121; Waugh v. Riley, 8 Met. (Mass.) 290; Piper v. Richardson, 9 Met. (Mass.) 155. See also Wilbur v. Tobey, 16 Pick. (Mass.) 179.

Michigan.—Crane v. Reeder, 21 Mich. 24, 4 Am. Rep. 430.

Montana.—Territory v. Lee, 2 Mont. 124; Tibbits v. Ah Tong, 4 Mont. 536; Quigly v. Birdseye, 11 Mont. 439.

New Hampshire.—Montgomery v. Dorion, 7 N. H. 475.

New York.—Jackson v. Beach, 1 Johns. Cas. (N. Y.) 399; Jackson v. Lunn, 3 Johns. Cas. (N. Y.) 109; Jackson v. Adams, 7 Wend. (N. Y.) 367; Bradstreet v. Oneida County, 13 Wend. (N. Y.) 546; Matter of Leefe, 4 Edw. Ch. (N. Y.) 395; Wadsworth v. Wadsworth, 12 N. Y. 376; Munro v. Merchant, 28 N. Y. 9; People v. Snyder, 41 N. Y. 397; Goodrich v. Russell, 42 N. Y. 179; Hall v. Hall, 81 N. Y. 130; Marx v. McGlynn, 88 N. Y. 376; Stamm v. Bostwick, 122 N. Y. 48; Heeney v. Brooklyn Ben. Soc. 33 Barb. (N. Y.) 360; Larreau v. Davignon, 5 Abb. Pr. N. S. (Buffalo Super. Ct.) 367, 1 Sheld. (N. Y.) 128.

North Carolina.—Bayard v. Singleton, Mart. (N. Car.) 48; University v. Miller, 3 Dev. (N. Car.) 188; Barges v. Hogg, 1 Hayw. (N. Car.) 485; Blount v. Horniblea, 2 Hayw. (N. Car.) 36.

South Carolina.—*Jenney v. Laurens*, 1 Spears (S. Car.) 356; *M'Clenaghan v. M'Clenaghan*, 1 Strobb. Eq. (S. Car.) 299, 47 Am. Dec. 532; *Vaux v. Nesbit*, 1 M'Cord Eq. (S. Car.) 352; *Groves v. Gordon*, 3 Brev. (S. Car.) 245; *McCaw v. Galbraith*, 7 Rich. (S. Car.) 74.

Tennessee.—*Baker v. Shy*, 9 Heisk. (Tenn.) 85; *Williams v. Wilson*, 1 Mart. & Y. (Tenn.) 248.

Texas.—*Barrett v. Kelly*, 31 Tex. 476; *Williams v. Bennett*, 1 Tex. Civ. App. 498.

Virginia.—*Marshall v. Conrad*, 5 Call (Va.) 365.

See also *State v. Boston*, etc., R. Co., 25 Vt. 438; *Hubbard v. Goodwin*, 3 Leigh (Va.) 492.

This applies in equity as well as at law. *Cross v. Del Valle*, 1 Wall. (U. S.) 5, 1 Cliff. (U. S.) 282.

An alien may purchase lands, and acquires by his purchase a defeasible estate, subject to be defeated by office found; and if he becomes a naturalized citizen before an information is filed for the forfeiture of the lands, his title becomes perfect, and cannot be divested by proceedings afterwards instituted. *Harley v. State*, 40 Ala. 689.

If an alien purchases of the state, or the state releases its right to him, he gets an indefeasible title. *Wright v. Saddler*, 20 N. Y. 320. See *Gouverneur v. Robertson*, 11 Wheat. (U. S.) 332; *Com. v. André*, 3 Pick. (Mass.) 224; *Jackson v. Beach*, 1 Johns. Cas. (N. Y.) 399; *Goodell v. Jackson*, 20 Johns. (N. Y.) 707, 11 Am. Dec. 351.

An alien may secure a debt by taking a mortgage on real estate. *Hughes v. Edwards*, 9 Wheat. (U. S.) 489.

Where an alien has made a homestead entry and subsequently files his intention to become a citizen, alienage at the time of entry does not, in the absence of adverse claim, defeat the right of purchase. *Matter of Krogstad*, 4 Land Dec. (U. S.) 564.

The fact that the vendee of lands is an alien does not entitle the vendor to rescind the contract. *Hepburn v. Dunlap*, 1 Wheat. (U. S.) 198.

Purchasers of Real Estate cannot Suggest Their Own Alienage as a bar to specific performance. *Scott v. Thorp*, 1 Edw. Ch. (N. Y.) 512. To the same effect, see *Williams v. Myers*, 8 Nova Scotia 157.

Where the plaintiff in ejectment relied upon the presumption of a lost grant from the government to his ancestor, who was an alien, it was held that he must show affirmatively that his ancestor had license to purchase and hold. *Sulphen v. Norris*, 44 Tex. 204.

J., an alien, took land in the territory of Michigan by deed, the title to which was afterwards confirmed to him by an act of Congress, and conveyed the same to his only child, M., also an alien, by a deed, void for want of attestation. It was held, in ejectment by one claiming under a grant from the state of Michigan dated a year prior to the death of M.'s husband who survived her, that the disability of alienage of M. was not removed by the act giving her father title in fee to the land. *Crane v. Reeder*, 21 Mich. 24, 4 Am. Rep. 430.

Right of Alien Husband to Property of Wife.—

If land is conveyed to the wife of an alien, the husband is jointly seised with her until office found. *Scanlan v. Wright*, 13 Pick. (Mass.) 523, 25 Am. Dec. 344. But see *Fitzgerald v. Garvin*, T. U. P. Charlt. (Ga.) 285.

An alien acquires no life estate in the lands of his wife by virtue of his marriage; and a levy thereupon, as the estate of the husband, gives no title to the creditor. *Mussey v. Pierre*, 24 Me. 559. See also *Burk v. Brown*, 2 Atk. 397; *Theobalds v. Duffoy*, 9 Mod. 104.

Foreign Corporation.—Where a foreign corporation purchased land in Nebraska at a judicial sale, it was held, under the *Nebraska Act of 1887* (repealed by Act of 1889 of the Consolidated Stat. 1895, §§ 4396-4399) that its title was valid against every one but the state, and could be divested only by proceedings instituted by the state for that purpose. *Carlow v. Aultman*, 28 Neb. 676.

A foreign corporation stands on the same footing as to civil rights as an alien natural person. *Society, etc., v. New Haven*, 8 Wheat. (U. S.) 464; *Society, etc., v. Wheeler*, 2 Gall. (U. S.) 105. See also *Farmers' Loan, etc., Co. v. McKinney*, 6 McLean (U. S.) 1.

Adverse Possession by Alien.—Under *Massachusetts Public Stat.*, 1882, c. 196, § 11, limiting the time within which the state may bring suit for the recovery of land, it was held that an alien might acquire an indefeasible title to land by possession sufficiently long-continued. *Piper v. Richardson*, 9 Met. (Mass.) 155. See also *Crane v. Reeder*, 21 Mich. 24, 4 Am. Rep. 430. Although an alien may not acquire title to land, as against the true owner, by adverse possession for the period of limitations, the statute of limitations will furnish a perfect defense to an action of ejectment against him by the true owner. *Overing v. Russell*, 32 Barb. (N. Y.) 263.

Water Rights.—An alien may take a grant of a water right and ditch, and hold the same until office found, against collateral attacks by third persons, other than the state, and, in the absence of forfeiture by office found, may convey title to his grantee. *Quigley v. Birdseye*, 11 Mont. 439 (*distinguishing* *Tibbitts v. Ah Tong*, 4 Mont. 536, and *Wulf v. Manuel*, 9 Mont. 279).

Public Lands.—An alien will be protected in the possession of public lands, the same as a citizen, against mere naked trespassers upon the possession who do not hold under title from the government. *Courtney v. Turner*, 12 Nev. 345.

Administration of Alien's Estate—Right of Consul.—Where a subject of the King of Sweden died leaving property in Louisiana, though he was not domiciled there, and an administrator was appointed, whom the Swedish vice-consul undertook to supersede, it was held that the vice-consul had no such right, either by any law or treaty; the right claimed being incompatible with the jurisdiction of the state over the property of all persons, citizens or foreigners, found within its limits. *Thompson's Succession*, 9 La. Ann. 96.

As to the right of a delegate of a foreign consul to represent alien heirs, see *Rabasse's Succession*, 47 La. Ann. 1452.

or devise,¹ or by other act of purchase, but he cannot hold against the state. Under this rule an alien therefore takes a defeasible estate, good against all excepting the state, and good against it until it institutes proceedings and obtains a judgment by inquest of office or office found, or some legislative act equivalent thereto.²

1. Alien may Take by Devise.—1 Jarman on Wills 67.

United States.—Fairfax v. Hunter, 7 Cranch (U. S.) 603; Taylor v. Benham, 5 How. (U. S.) 233; Cross v. Del Valle, 1 Wall. (U. S.) 5, 1 Cliff. (U. S.) 282; Osterman v. Baldwin, 6 Wall. (U. S.) 116.

Alabama.—Harley v. State, 40 Ala. 689. See also Jinkins v. Noel, 3 Stew. (Ala.) 60.

Arkansas.—Jones v. Minogue, 29 Ark. 637.

Massachusetts.—Sheaffe v. O'Neil, 1 Mass. 257; Fox v. Southack, 12 Mass. 143; Scanlan v. Wright, 13 Pick. (Mass.) 523, 25 Am. Dec. 344. See also Wilbur v. Tobey, 16 Pick. (Mass.) 179; Foss v. Crisp, 20 Pick. (Mass.) 121.

New York.—Jackson v. Lunn, 3 Johns. Cas. (N. Y.) 109; Mooers v. White, 6 Johns. Ch. (N. Y.) 360; People v. Conklin, 2 Hill (N. Y.) 67; Jackson v. Adams, 7 Wend. (N. Y.) 367; Wadsworth v. Wadsworth, 12 N. Y. 376; Marx v. McGlynn, 88 N. Y. 357.

North Carolina.—Miller v. Harwell, 3 Murph. (N. Car.) 194. See also Atkins v. Kron, 2 Ired. Eq. (N. Car.) 58; Kay v. Webb, 1 Murph. (N. Car.) 134. *Compare* University v. —, 2 Hayw. (N. Car.) 104; Gilmour v. Kay, 2 Hayw. (N. Car.) 108.

South Carolina.—Vaux v. Nesbit, 1 McCord Eq. (S. Car.) 352. See also Clifton v. Haig, 4 Desaus. (S. Car.) 330.

Virginia.—Marshall v. Conrad, 5 Call (Va.) 364. See also Knight v. Duplessis, 2 Ves. 360; Ferguson v. Neville, 61 Cal. 357; Wunderle v. Wunderle, 144 Ill. 40; Baker v. Shy, 9 Heisk. (Tenn.) 85.

A nonresident alien devisee can hold only by becoming a resident. Krogan v. Kinney, 15 Iowa 242. See also Purcell v. Smidt, 21 Iowa 540; Scott v. Cohen, 2 Nott. & M. (S. Car.) 293.

Where a devise of land is valid, a devise of the proceeds is also valid. Com. v. Selden, 5 Munf. (Va.) 160. *Aliter* where the right to take by devise is restricted by statute. Beckman v. Bonsor, 23 N. Y. 298, 80 Am. Dec. 269.

A devise to A. "when he shall become a citizen of the United States" is not too remote. Beard v. Rowan, 9 Pet. (U. S.) 301; McCaw v. Galbraith, 7 Rich. (S. Car.) 74.

Illegitimate children of a citizen of the United States domiciled abroad, who were born and are residing abroad, and are devisees under the will of their father, are in law purchasers, and hold not for their own benefit but for the state, subject to be divested by inquest of office or other equivalent act. Guyer v. Smith, 22 Md. 239, 85 Am. Dec. 650.

2. See cases cited in the two notes immediately preceding, and also the following: Craig v. Leslie, 3 Wheat. (U. S.) 563; Gouverneur v. Robertson, 11 Wheat. (U. S.) 332; Hammekin v. Clayton, 2 Woods (U. S.) 336; Airhart v. Massieu, 98 U. S. 497; Phillips v. Moore, 100

U. S. 208; Billings v. Aspen Min., etc., Co., 10 U. S. App. 1322; People v. Folsom, 5 Cal. 373; Halstead v. Lake County, 56 Ind. 363; Dudley v. Grayson, 6 T. B. Mon. (Ky.) 259; Crane v. Reeder, 21 Mich. 24, 4 Am. Rep. 430. See also Atty.-Gen. v. Duplessis, 1 Bro. P. C. 415, 2 Ves. 286; Robertson v. Miller, 1 Brock. (U. S.) 466; Perry v. Clinton, etc., R. Co., 11 Rob. (La.) 412; Com. v. Selden, 5 Munf. (Va.) 160.

Even an Officer of a Court Holding the Title in Trust cannot raise the question of alienage. Matter of Leefe, 4 Edw. Ch. (N. Y.) 395.

Title may Not be Questioned in Collateral Proceeding.—The question as to the right of a non-resident alien to hold property at common law, and under the civil law, was a matter between the alien and the government, and could not be questioned in a collateral proceeding between individuals. The proceeding at common law to divest an alien of property purchased is by inquest of office, and under the civil law there was some analogous proceeding, and until such proceeding an alien may hold real estate. Racouillat v. Sansevain, 32 Cal. 376; Ramires v. Kent, 2 Cal. 558; Williams v. Wilson, 1 Mart. & Y. (Tenn.) 248; Lenehan v. Spaulding, 57 Vt. 115. See also Gilman v. Thompson, 11 Vt. 643, 34 Am. Dec. 714.

A Grant by the State before Office Found conveys no title. Jackson v. Adams, 7 Wend. (N. Y.) 367. See also Fairfax v. Hunter, 7 Cranch (U. S.) 603.

Interest of Creditors.—By statute the title may be considered as having devolved upon the state without office found, when the interests of creditors so require. Cunningham v. Browning, 1 Bland (Md.) 308.

Profits Are Not Recoverable by the State which accrue before office found, either at law or in equity. Hubbard v. Goodwin, 3 Leigh (Va.) 492.

Inquest of Office as Evidence of Title.—An inquest of office is evidence of title in all cases, but not conclusive against any one not a tenant at the time of the inquest nor party or privy thereto. Stokes v. Dawes, 4 Mason (U. S.) 268.

Naturalization Has a Retroactive Effect, and operates as a waiver of all liability to a forfeiture and as a confirmation of title. Gouverneur v. Robertson, 11 Wheat. (U. S.) 332; Osterman v. Baldwin, 6 Wall. (U. S.) 116; Manuel v. Wulff, 152 U. S. 505; Man v. Huk, 3 Land Dec. (U. S.) 452; Lord v. Perrin, 8 Land Dec. (U. S.) 536; Harley v. State, 40 Ala. 689; Jackson v. Beach, 1 Johns. Cas. (N. Y.) 399. *Compare* Heney v. Brooklyn Ben. Soc., 39 N. Y. 333, *affirming* 33 Barb. (N. Y.) 360; Smith v. Smith, 33 Barb. (N. Y.) 371, note.

But this cannot divest a title already vested in the state by escheat, White v. White, 2 Metc. (Ky.) 185; or in an individual, as by

Alien may Not Take by Operation of Law.—But an alien cannot take by operation of law, as by descent; for the law, since it will be deemed to do nothing in vain, will not cast descent upon one who cannot by law hold the estate.¹

descent, *Keenan v. Keenan*, 7 Rich. (S. Car.) 345.

1. Alien cannot Take by Descent.—1 Bl. Com. 372; 2 Bl. Com. 249; Williams on Real Property (17th ed.) 346; 1 Kerr on Real Prop., § 241; 1 Washb. on Real Prop. (5th ed.) 79; Tiedeman on Real Prop., § 675.

England.—*Doe v. Acklam*, 2 B. & C. 779, 9 E. C. L. 238; *Doe v. Jones*, 4 T. R. 300.

Canada.—*Doe v. Clarke*, 1 U. C. Q. B. 37; *Iler v. Elliott*, 32 U. C. Q. B. 434.

United States.—*Dawson v. Godfrey*, 4 Cranch (U. S.) 321; *Contee v. Godfrey*, 1 Cranch (C. C.) 479; *Orr v. Hodgson*, 4 Wheat. (U. S.) 453. See also *Lambert v. Paine*, 3 Cranch (U. S.) 97; *Fairfax v. Hunter*, 7 Cranch (U. S.) 603; *Taylor v. Benham*, 5 How. (U. S.) 233; *Manuel v. Wulff*, 152 U. S. 505.

Alabama.—*Smith v. Zaner*, 4 Ala. 99. See also *Jinkins v. Noel*, 3 Stew. (Ala.) 60; *Donovan v. Pitcher*, 53 Ala. 411, 25 Am. Rep. 634.

California.—*Farrell v. Enright*, 12 Cal. 450. See also *Siemssen v. Bofer*, 6 Cal. 250; *Norris v. Hoyt*, 18 Cal. 217.

District of Columbia.—*Walker v. Potomac Ferry Co.*, 3 McArthur (D. C.) 440.

Indiana.—*Eldon v. Doe*, 6 Blackf. (Ind.) 341. See also *Murray v. Kelly*, 27 Ind. 42.

Iowa.—*Stemple v. Herminghouse*, 3 Greene (Iowa) 408; *Krogan v. Kinney*, 15 Iowa 242.

Kentucky.—*Hunt v. Warnicke*, Hard. (Ky.) 66; *Trimbles v. Harrison*, 1 B. Mon. (Ky.) 140; *White v. White*, 2 Metc. (Ky.) 185; *Yeaker v. Yeaker*, 4 Metc. (Ky.) 33, 81 Am. Dec. 530; *Stevenson v. Dunlap*, 7 T. B. Mon. (Ky.) 140. See also *Murray v. Fishback*, 5 B. Mon. (Ky.) 403.

Louisiana.—See as to law in this state, *Phillips v. Rogers*, 5 Martin (La.) 745; *Duke of Richmond v. Milne*, 17 La. 312.

New Hampshire.—*Montgomery v. Dorion*, 7 N. H. 475.

New York.—*Parish v. Ward*, 28 Barb. (N. Y.) 328; *People v. Conklin*, 2 Hill (N. Y.) 67; *Orser v. Hoag*, 3 Hill (N. Y.) 79; *Leary v. Leary*, 50 How. Pr. (N. Y. Supreme Ct.) 122; *Renner v. Muller*, 44 N. Y. Super. Ct. 535, 57 How. Pr. (N. Y.) 229; *Moors v. White*, 6 Johns. Ch. (N. Y.) 360; *Jackson v. Fitz Simmons*, 10 Wend. (N. Y.) 9, 24 Am. Dec. 198. See also *Jackson v. Lunn*, 3 Johns. Cas. (N. Y.) 109; *McCarthy v. Marsh*, 5 N. Y. 263.

Pennsylvania.—*Jackson v. Burns*, 3 Binn. (Pa.) 75.

South Carolina.—*Ennas v. Franklin*, 2 Brev. (S. Car.) 398; *Trezevant v. Osborn*, 3 Brev. (S. Car.) 29; *Halyburton v. Kershaw*, 3 Desaus. (S. Car.) 105; *McClenaghan v. McClenaghan*, 1 Strobb. Eq. (S. Car.) 295, 47 Am. Dec. 532; *Jenney v. Laurens*, 1 Spears (S. Car.) 356; *Keenan v. Keenan*, 7 Rich. (S. Car.) 345. See also *Vaux v. Nesbit*, 1 Mc-

Cord Eq. (S. Car.) 352; *Groves v. Gordon*, 3 Brev. (S. Car.) 245.

Virginia.—*Barzizas v. Hopkins*, 2 Rand. (Va.) 276; *Hauensteins v. Lynham*, 28 Gratt. (Va.) 62, 100 U. S. 483. See also *Hubbard v. Goodwin*, 3 Leigh (Va.) 492.

See also *Buchanan v. Deshon*, 1 Har. & G. (Md.) 280; *Piper v. Richardson*, 9 Met. (Mass.) 155; *Foss v. Crisp*, 20 Pick. (Mass.) 121; *Wacker v. Wacker*, 26 Mo. 426; *De Wolf v. Middleton* (R. I. 1895), 31 Atl. Rep. 271; *Barclay v. Cameron*, 25 Tex. 232.

Estate of Alien Goes to Next of Kin Having Inheritable Blood.—Where a person dies leaving issue who are aliens, the latter are not deemed his heirs in law, for they have no inheritable blood, and the estate descends to the next of kin who have inheritable blood, in the same manner as if no such alien issue were in existence. *Orr v. Hodgson*, 4 Wheat. (U. S.) 453; *Smith v. Zaner*, 4 Ala. 99; *Walker v. Potomac Ferry Co.*, 3 McArthur (D. C.) 440; *Wunderle v. Wunderle*, 144 Ill. 40; *Orser v. Hoag*, 3 Hill (N. Y.) 79; *Jackson v. Jackson*, 7 Johns. (N. Y.) 214; *Larreau v. Davignon*, 5 Abb. Pr. N. S. (Buffalo Super. Ct.) 367, 1 Sheld. (N. Y.) 128; *Scott v. Cohen*, 2 Nott. & M. (S. Car.) 293; *Halyburton v. Kershaw*, 3 Desaus. (S. Car.) 105; *Hardy v. De Leon*, 5 Tex. 211.

A State may by Law Make Aliens Capable of Taking by Descent lands within its territory. *Montgomery v. Dorion*, 7 N. H. 475.

An Alien Who has Taken the Preparatory Oath to become a citizen of the United States is not thereby rendered capable to take lands by descent, and his subsequent naturalization cannot operate to invest him with the title, which in the meantime has vested in the commonwealth. *White v. White*, 2 Metc. (Ky.) 185.

A husband cannot inherit through an alien wife, who had declared her intention to become a citizen, but who died before completing naturalization. *McDaniel v. Richards*, 1 McCord. (S. Car.) 187.

The Law Existing at the Time of Descent Cast governs the right to inherit. *Pilla v. German School Assoc.*, 23 Fed. Rep. 700; *Donovan v. Pitcher*, 53 Ala. 411, 25 Am. Rep. 634; *People v. Conklin*, 2 Hill (N. Y.) 67; *Orser v. Hoag*, 3 Hill (N. Y.) 79; *Renner v. Müller*, 44 N. Y. Super. Ct. 535, 57 How. Pr. (N. Y.) 229; *Hauensteins v. Lynham*, 28 Gratt. (Va.) 62. See also *Jackson v. Burns*, 3 Binn. (Pa.) 75.

Subsequent acts enlarging the rights do not act retrospectively. *Donovan v. Pitcher*, 53 Ala. 411, 25 Am. Rep. 634.

Aliens could inherit in all the Territories in the absence of legislation. *People v. Folsom*, 5 Cal. 373.

An alien claiming by inheritance through a Mexican citizen may sue for lands in *Texas*. *Jones v. McMasters*, 20 How. (U. S.) 20; *Sabriego v. White*, 30 Tex. 576; *Andrews v. Spear*, 48 Tex. 580; *Ortiz v. De Benavides*, 61 Tex. 60.

When an alien, seised of real estate, dies intestate, as he has no inheritable blood he can have no legal heirs, and so cannot transmit the estate by descent, and as the law will not deem it to be in abeyance, except in case of absolute necessity, it vests immediately in the state without office found.¹

Married Women Who have Become Citizens by Their Marriage may take and hold property by purchase or descent to the same extent as other citizens. *Kelly v. Owen*, 7 Wall. (U. S.) 496; *Ware v. Wisner*, 4 McCrary (U. S.) 66; *Luhrs v. Eimer*, 80 N. Y. 171. See also *Renner v. Müller*, 44 N. Y. Super. Ct. 535, 57 How. Pr. (N. Y.) 229.

Rents.—In *Wise v. Resler*, 2 Cranch (C. C.) 182, it was held that the plaintiff in an action of covenant, brought for the use of an alien heir of a citizen, was entitled to recover.

1. **Alien cannot Transmit by Descent.**—2 Bl. Com. 244; 1 Washburne on Real Property (5th ed.) 79; 1 Kerr on Real Property, § 241; Tiedeman on Real Property, § 675; *Levy v. M'Cartee*, 6 Pet. (U. S.) 102; *Blight v. Rochester*, 7 Wheat. (U. S.) 535; *Doe v. Lazenby*, 1 Ind. 234; *People v. Conklin*, 2 Hill (N. Y.) 67; *Irwin v. McBride*, 23 U. C. Q. B. 570; *Montgomery v. Graham*, 31 U. C. Q. B. 57. See also note immediately following.

An alien who is entitled to hold lands by having declared his intention to become a citizen of the United States can transmit lands though he die before becoming naturalized. *Settegast v. Schrimpf*, 35 Tex. 325, 38 Tex. 96.

Escheat.—In the death of an alien intestate, without heirs capable of inheriting, his estate vests immediately in the state without office found. *Fairfax v. Hunter*, 7 Cranch (U. S.) 603; *Contee v. Godfrey*, 1 Cranch (C. C.) 479; *Bartlett v. Morris*, 9 Port. (Ala.) 270; *Wunderle v. Wunderle*, 144 Ill. 40; *Purzell v. Smidt*, 21 Iowa 540; *Louisville v. Gray*, 1 Litt. (Ky.) 147; *Trimbles v. Harrison*, 1 B. Mon. (Ky.) 140; *Fry v. Smith*, 2 Dana (Ky.) 38; *White v. White*, 2 Metc. (Ky.) 189; *Fox v. Southack*, 12 Mass. 143; *Slater v. Nason*, 15 Pick. (Mass.) 345; *Wilbur v. Tobey*, 16 Pick. (Mass.) 177; *Crane v. Reeder*, 21 Mich. 24, 4 Am. Rep. 430; *Farrar v. Dean*, 24 Mo. 16; *Montgomery v. Dorion*, 7 N. H. 475; *O'Hanlin v. Den*, 20 N. J. L. 36, 21 N. J. L. 593; *Colgan v. McKeon*, 24 N. J. L. 566; *Wright v. Methodist Episcopal Church*, *Hoffm. Ch.* (N. Y.) 202; *Jackson v. Adams*, 7 Wend. (N. Y.) 367; *Heeney v. Brooklyn Ben. Soc.*, 33 Barb. (N. Y.) 360; *Ettenheimer v. Hefferman*, 66 Barb. (N. Y.) 374; *Larreau v. Davignon*, 5 Abb. Pr. N. S. (Buffalo Super. Ct.) 367; *Rubeck v. Gardner*, 7 Watts (Pa.) 455; *Scott v. Cohen*, 2 Nott & M. (S. Car.) 293; *Hinkle v. Shadden*, 2 Swan (Tenn.) 46; *Barrett v. Kelly*, 31 Tex. 476; *Sands v. Lynham*, 27 Gratt. (Va.) 291, 21 Am. Rep. 348. See also *McCaw v. Galbraith*, 7 Rich. (S. Car.) 74; *State v. Boston*, etc., R. Co., 25 Vt. 433; and the title **ESCHEAT**.

If an alien holding lands under statutes authorizing such holding, dies without heirs, the lands escheat, but the state cannot enter or convey until office found. *Jackson v. Adams*, 7 Wend. (N. Y.) 367.

The court will not let real estate subject to

escheat be sold to pay debts in order to let the personal property go to aliens. *Trezevant v. Howard*, 3 Desaus. (S. Car.) 87.

A sale of escheated lands to satisfy a debt against an alien in a proceeding to which the state is not a party is void as to the state, but the purchaser at such a sale is to be substituted to the rights of the creditor, and if the claim is just, to have the lands subjected to its payment. *Sands v. Lynham*, 27 Gratt. (Va.) 291, 21 Am. Rep. 348.

A junior patentee does not get a good title by the escheat from a senior alien patentee. *Gouverneur v. Robertson*, 11 Wheat. (U. S.) 332.

As the law governing the succession to property emanates from the state, and the state has the power when there are no heirs to determine who shall take, it follows that land which has been patented by the United States to an alien will, on his death without leaving heritable blood, escheat to the state and not to the United States. *Etheridge v. Mal-empre*, 18 Ala. 565.

Land over which an alien has no control except to compel its lease or conversion into personal property, does not escheat; as far as escheat is concerned, it is already converted when the right arises. *Ludlow v. Van Ness*, 8 Bosw. (N. Y.) 178. See also *Anstice v. Brown*, 6 Paige (N. Y.) 448; *Meakings v. Cromwell*, 5 N. Y. 136.

Where a citizen died leaving no heirs capable of inheriting, and his alien relatives filed a bill against the escheator and A, to compel the performance of a contract of sale made between the deceased and A, which was admitted by A, but was not evidenced by writing, neither had anything been done in part performance of the agreement, it was held that the title vested in the escheator, who might plead the statute of frauds. *Sebben v. Trezevant*, 3 Desaus. (S. Car.) 213.

Where an alien lawfully exercises a power of appointment the property will not escheat upon his death. *Escheator v. Smith*, 4 McCord (S. Car.) 452.

Where lands escheat, the state takes only the estate the alien had, subject to all trusts. 1 Perry on Trusts (4th ed.), § 55.

The Mexican Law of Escheats in California was abrogated by annexation. *People v. Folsom*, 5 Cal. 373.

Nova Scotia.—Where there is a failure of inheritable blood by reason of alienage, the lands do not escheat, but go to the next heir. *Salter v. Hughes*, 5 Nova Scotia 409.

If the Ancestor Had a Defeasible Title, and died before office found, the heirs may hold. *Williams v. Bennett*, 1 Tex. Civ. App. 498.

Warranty Deed from State.—If an alien derives his title by a warranty deed from the commonwealth, it will descend to his alien heirs. *Com. v. André*, 3 Pick. (Mass.) 224; *Goodell v. Jackson*, 20 Johns. (N. Y.) 707, 11 Am. Dec. 351.

Descent Interrupted by Alienage of Any Mediate Ancestor.—So also alienage in any mediate ancestor will interrupt the descent between persons who are capable of taking and transmitting real estate by descent.¹

Curtsey—Dower.—Similarly, an alien is not entitled to curtesy,² and alienage on the part of husband or wife is a bar to the latter in claiming dower.³

Legislative Act Confirming Title of Heirs of Alien.—An act of the legislature confirming the title of the heirs of an alien is valid as against a junior patentee. *Gouverneur v. Robertson*, 11 Wheat. (U. S.) 332.

Effect of Removal of Citizen to Foreign Country.—Land belonging to a citizen does not escheat on his removal to a foreign country. *Murray v. Fishback*, 5 B. Mon. (Ky.) 403. But see *Holliman v. Peebles*, 1 Tex. 673; *Yates v. Iams*, 10 Tex. 168.

A Purchase-Money Mortgage given by an alien is not invalidated by the subsequent escheat of the lands purchased. *Farmers L. & T. Co. v. People*, 1 Sandf. Ch. (N. Y.) 139.

Liability of Proceeds of Escheated Lands to Debts of Former Holder.—Where lands escheat on account of the alienage of the holder, the land, or its proceeds remaining in a court of equity, will continue liable for the debts of the previous holder. *Mooers v. White*, 6 Johns. Ch. (N. Y.) 360.

1. Descent through Aliens.—By the common law no one can acquire title to property by descent where it is necessary for him to trace title through an alien who was himself incapable of holding title. *Levy v. McCartee*, 6 Pet. (U. S.) 102; *Walker v. Potomac Ferry Co.*, 3 McArthur (D. C.) 440; *Eldon v. Doe*, 6 Blackf. (Ind.) 341; *Murray v. Kelly*, 27 Ind. 42; *Furenes v. Mickelson*, 86 Iowa 508; *Wright v. Methodist Episcopal Church*, Hoffm. Ch. (N. Y.) 202; *Redpath v. Rich*, 3 Sandf. (N. Y.) 79; *McCarthy v. Marsh*, 5 N. Y. 263; *Jackson v. Green*, 7 Wend. (N. Y.) 333; *Jackson v. Fitz Simmons*, 10 Wend. (N. Y.) 9, 24 Am. Dec. 198. See also *McDaniel v. Richards*, 1 McCord (S. Car.) 187; *Jackson v. Sanders*, 2 Leigh (Va.) 109.

It was so held in *Illinois*, under the act of 1887, by which the common-law disabilities of aliens are in the main restored. *Beavan v. Went*, 155 Ill. 592.

Connecticut.—The common-law rule of the exclusion from inheritance of all tracing their descent through uninheritable blood has never been in force in *Connecticut*. *Campbell's Appeal*, 64 Conn. 292.

Alienage of Parent No Bar to Descent between Children.—But where the descent is immediate between the decedent and the heir the alienage of the common ancestor is immaterial. Thus it has been held that the alienage of the father does not impede the inheritance between brothers who are citizens, descent in this case being considered immediate. *Collingwood v. Pace*, 1 Keble 65, 1 Vent. 413, 1 Sid. 193, 1 Lev. 59, Hardr. 224, *Bannister* 410; *Smith v. Mulligan*, 11 Abb. Pr. N. S. (N. Y. Supreme Ct.) 438; *Parish v. Ward*, 28 Barb. (N. Y.) 328. See also *Renner v. Müller*, 57 How. Pr. (N. Y. Super. Ct.) 229; *Bradley v. Dwight*, 62 How. Pr. (N. Y. Supreme Ct.) 300;

Luhrs v. Eimer, 15 Hun (N. Y.) 400, 80 N. Y. 171.

Similarly, alienage of the common grandfather does not impede descent between cousins whose fathers were brothers and capable of transmitting by descent. *McGregor v. Comstock*, 3 N. Y. 408.

Lineal descent from father to son is immediate; from grandfather to grandson is mediate, the father being the medium of the descent. Collateral descent from brother to brother is immediate, taking no notice of the father; but from uncle to nephew, or nephew to uncle, the descent is mediate, the father being the medium through which the descent must pass. Hence one brother may inherit from another though the father be an alien, or attainted; but a grandson cannot inherit from his grandfather, the father having died in the life of the grandfather, provided that the father was an alien or attainted, but the land shall escheat. The reason is, the father, the medium through whom the title must pass, being incapable of receiving, is incapable of transmitting it. *Per Savage*, Ch. J., in *Jackson v. Green*, 7 Wend. (N. Y.) 335.

The case of *Collingwood v. Pace*, 1 Keble 65, 1 Vent. 413, is a celebrated one on the question of the right of one brother to inherit from another, the father being an alien. It was finally decided by a divided court, after an elaborate discussion, that descent between brothers is immediate, and therefore one brother can inherit from another, notwithstanding the alienage of the father. This case is reviewed at length in *Levy v. McCartee*, 6 Pet. (U. S.) 102, and *McGregor v. Comstock*, 3 N. Y. 408. See also *Slater v. Nason*, 15 Pick. (Mass.) 345; *Beavan v. Went*, 155 Ill. 592.

The Rule that Descent between Brothers Is Immediate, and not impeded by the alienage of their father, holds also between one of the brothers and the representatives of the other, and also between the representatives of both of them. *McGregor v. Comstock*, 3 N. Y. 408.

2. Curtesy.—1 Washb. on Real Property (5th ed.) 189, 190; 1 Kerr on Real Prop., §§ 813, 834; *Foss v. Crisp*, 20 Pick. (Mass.) 121; *Reese v. Waters*, 4 W. & S. (Pa.) 145; *Copeland v. Sauls*, 1 Jones (N. Car.) 70. See also *Mussey v. Pierre*, 24 Me. 559; *Paul v. Ward*, 4 Dev. (N. Car.) 247.

An alien husband who has declared his intention to become a citizen before the death of his wife, but does not complete his naturalization until after her death, is not entitled to curtesy. *Foss v. Crisp*, 20 Pick. (Mass.) 121.

3. Dower.—1 Cooley's Blackstone (3d ed.) 399; 4 Kent Com. (13th ed.) 36; Washb. on Real Property (5th ed.); 2 Kerr on Real Property, §§ 942, 943; *Cameron on Dower*, 229,

(b) **By Statute.**—The common-law doctrine as to the property rights of aliens has been greatly modified by statute. In most or all of the United States, statutes have been enacted by which these rights are determined, and in many instances resident aliens are placed on the same footing as natural born citizens, as to the right to acquire, hold, and transmit property, both real and personal. In some states, the same liberal policy has been pursued towards non-resident aliens, while in others these privileges are accorded with restrictions, and in some cases denied altogether.

Some of the statutes confer property rights on those aliens only who have declared their intention to become citizens, or who have resided for a certain time in the state. For the individual peculiarities of the acts passed by the several states, the respective statutes must be consulted. The leading statutes upon which there have been adjudications are given below.¹

251; DeWall's Cas., 6 Moo. P. C. C. 216, 12 Jur. 145; Congregational Church v. Morris, 8 Ala. 182; Alsberry v. Hawkins, 9 Dana (Ky.) 177, 33 Am. Dec. 546; Buchanan v. Deshon, 1 Har. & G. (Md.) 280; Coxe v. Gulick, 10 N. J. L. 328; Sutliff v. Forgey, 1 Cow. (N. Y.) 89, 5 Cow. (N. Y.) 713; Kelly v. Harrison, 2 Johns. Cas. (N. Y.) 29, 1 Am. Dec. 154; Currin v. Finn, 3 Den. (N. Y.) 229; Burton v. Burton, 1 Keyes (N. Y.) 359; Mick v. Mick, 10 Wend. (N. Y.) 379; Priest v. Cummings, 20 Wend. (N. Y.) 338; Connolly v. Smith, 21 Wend. (N. Y.) 59; Greer v. Sankston, 26 How. Pr. (N. Y. Supreme Ct.) 471; Paul v. Ward, 4 Dev. (N. Car.) 247. See also White v. White, 2 Metc. (Ky.) 185; Moore v. Tisdale, 5 B. Mon. (Ky.) 352; Sewall v. Lee, 9 Mass. 363; Stokes v. O'Fallon, 2 Mo. 32; Davis v. Darrow, 12 Wend. (N. Y.) 65; Wells v. Martin, 2 Bay (S. Car.) 20; Emmett v. Emmett, 14 Lea (Tenn.) 369.

An assignment of dower to an alien widow, whether made voluntarily by the heir, or by the law itself, is void. Paul v. Ward, 4 Dev. (N. Car.) 247.

The widow of an alien may recover dower against one deriving title from the husband, although the latter was not permitted by law to take and hold real estate. Davis v. Darrow, 12 Wend. (N. Y.) 65.

1. Statutes Modifying Common-Law Rule as to Property Rights of Aliens.—Statutes appearing in this note by citation merely are those removing generally the disabilities of alien friends. See generally 1 Stimson Am. Stat. Law, §§ 102, 1104, 2623, 6013-6018; 1 Washburn on Real Property (5th ed.) 79-80.

United States.—The Act of Congress, March 3, 1887 (24 U. S. Stat. at Large 476), prohibits aliens from acquiring, holding or owning any interest in the lands in the territories or the District of Columbia, except when such interest is acquired by inheritance or in the *bona fide* collection of debts theretofore created, and except where the act is in conflict with existing treaties. 1 Supp. to U. S. Rev. Stat. (2d ed.) 556; Geofroy v. Riggs, 133 U. S. 258. See also People v. Folsom, 5 Cal. 373.

This act applies only to titles acquired after its passage, and then only in a direct proceeding by the attorney-general to enforce the forfeiture to the government, as provided in

the act. Johnson v. Elkins, 1 App. Cas. (D. C.) 430.

Legations Excepted.—This act does not apply to, nor operate in, the *District of Columbia*, so far as relates to the ownership of legations, or the ownership of residences by representatives of foreign governments or attachés thereof (Act of March 9, 1888, 25 U. S. Stat. at Large 45), 1 Supplement to U. S. Rev. Stat. (2d ed.) 582.

Alabama.—An alien, resident or non-resident, may take and hold property, real and personal, in this state, either by purchase, descent, or devise, and may dispose of and transmit the same by sale, descent, or devise, as a native citizen. Ala. Code (1886) 1914; Nicrosi v. Phillipi, 91 Ala. 299.

Arkansas.—Ark. Dig. of Stat. 1894, §§ 246, 248; Jones v. Minogue, 29 Ark. 637.

California.—Cal. Civil Code §§ 671, 672, 1404. Art. I, § 17 of the constitution provides that "Foreigners who are, or may hereafter become, *bona fide* residents of the state, shall enjoy the same rights in respect to the possession, enjoyment and inheritance of property as native born citizens." Griffith v. Godey, 113 U. S. 89; Ferguson v. Neville, 61 Cal. 356.

This provision does not apply to non-resident aliens, who could not inherit lands in this state prior to the Act of 1856. Siemssen v. Bofer, 6 Cal. 250; Farrell v. Enright, 12 Cal. 450. See also Norris v. Hoyt, 18 Cal. 217.

The subsequent removal of a non-resident alien into the state does not change the descent of property so as to vest in him the estate of a deceased relative which has already vested in a resident. Farrell v. Enright, 12 Cal. 450.

By the Act of 1856, non-resident aliens may inherit, provided they appear and claim the property within five years from the time of succession, §§ 672, 1404. See People v. Roach, 76 Cal. 294.

This act is constitutional. The legislature has power to enlarge, though not to abridge, the provision of the constitution above cited. State v. Rogers, 13 Cal. 159; Billings v. Hauver, 65 Cal. 593; State v. Smith, 70 Cal. 153.

It is not necessary, in order to claim the property, that the non-resident alien should appear in person; he may appear by attorney. *In re Guilford's Estate*, 67 Cal. 380.

Or a nonresident alien may assign property

Mining Claims.—Under the *United States* statutes, all mining lands in terri-

inherited by him, and the assignee may appear and claim it. *In re Leopold's Estate*, 67 Cal. 385.

"Nonresident aliens," within the meaning of this statute, are those who are neither citizens of the United States nor residents of California. *State v. Smith*, 70 Cal. 153.

Mexican Law.—See as to rights of aliens under Mexican law formerly in force in *California*, *People v. Folsom*, 5 Cal. 373; *De Merle v. Mathews*, 26 Cal. 455; *Racouillat v. Sansevain*, 32 Cal. 376; *McNeil v. Polk*, 57 Cal. 323.

Colorado.—*Mills Annot. Stat. 1891*, §§ 99-103; *McConville v. Howell*, 17 Fed. Rep. 104, 5 *McCrary* (U. S.) 322; *Billings v. Aspen Min.*, etc., Co., 10 U. S. App. 1, 322.

Illinois.—Under the Act of 1845, as amended in 1851, aliens, whether residing in the state or not, had the same property rights as natural born citizens (1 *Starr & Cur. Annot. Stat.*, c. 6, p. 264). This act remained in force until 1887, when it was repealed by an act which provides that nonresident aliens shall not acquire or hold lands by descent or devise, except that the heirs of aliens who have heretofore acquired lands may hold them (3 *Starr & Cur. Annot. Stat.*, c. 6, p. 60). This act does not permit aliens (with certain exceptions) to have even a defeasible title, nor do the exemptions extend to alien heirs of citizens. This act does not contravene the constitutional prohibition of special legislation changing the law of descents. *Wunderle v. Wunderle*, 144 Ill. 40; *Ryan v. Egan*, 156 Ill. 224. See also *Schultze v. Schultze*, 144 Ill. 290.

Under the Act of 1887, a citizen cannot inherit who has to claim title through an alien ancestor. *Beavan v. Went*, 155 Ill. 522.

Personal Property.—Aliens have, however, the same rights as to personal property as citizens. 3 *Starr & Cur. Annot. Stat.* c. 6, p. 60, § 2.

Indiana.—*Annot. Stat. 1894* (Burns), §§ 3328, 3331-3334, 3389; *State v. Witz*, 87 Ind. 190. See also *State v. Beackmo*, 8 Blackf. (Ind.) 246; *Parent v. Walmsly*, 20 Ind. 82.

The Act of 1852 removed the common-law disability of aliens to inherit, in favor of a *bona fide* resident alien. *Murray v. Kelly*, 27 Ind. 42.

Iowa.—Resident aliens have the same property rights as citizens. *Laws 1888*, c. 85, *Annot. Rev. Code 1890*, tit. xiii., c. 1, § 7. As to the restrictions placed upon nonresidents, as to their capacity to hold real estate, see *Laws 1888*, c. 85, *Annot. Rev. Code*, tit. xiii., c. 1, replacing *Code §§ 1908, 1909*.

Under this act a naturalized citizen cannot inherit through a nonresident alien the lands of a naturalized citizen. *Furenes v. Mickelson*, 86 Iowa 508.

Under chapter 85 of the Acts of the Twenty-second General Assembly, nonresident aliens cannot acquire title to, or hold lands, except that the widow and heirs of aliens who have acquired lands may hold the same by devise or descent for ten years, and it is immaterial whether the widow and heirs are nonresident aliens or residents. *Easton v. Huott* (Iowa 1895), 64 N. W. Rep. 408.

Prior to 1868 nonresident aliens could not inherit land situated in this state. *Ware v. Wisner*, 4 *McCrary* (U. S.) 66; *Stemple v. Herminghouser*, 3 *Greene* (Iowa) 408; *Krogan v. Kinney*, 15 *Iowa* 242; *Rheim v. Robbins*, 20 *Iowa* 45; *White v. Rittenmyer*, 30 *Iowa* 268; *Brown v. Pearson*, 41 *Iowa* 481; *King v. Ware*, 53 *Iowa* 97; *Furenes v. Mickelson*, 86 *Iowa* 508. *Compare Purcell v. Smidt*, 21 *Iowa* 540. See also *Greenheld v. Stanforth*, 21 *Iowa* 595.

The constitution, section 22, article 1, provides that "Foreigners who are or who may hereafter become residents of this state, shall enjoy the same rights in respect to the possession, enjoyment, and descent of property, as natural born citizens." But this applies only to resident foreigners, and those who may become resident, and not to nonresident aliens. *Stemple v. Herminghouser*, 3 *Greene* (Iowa) 408; *Easton v. Huott* (Iowa 1895), 64 N. W. Rep. 408.

But it does not restrict the powers of the legislature to confer the same rights on other classes. *Purcell v. Smidt*, 21 *Iowa* 540.

The disability of nonresident aliens to inherit was removed by chapters 56 and 193 of the Acts of the Twelfth General Assembly (*Code*, §§ 1908, 1909), since repealed. *Furenes v. Mickelson*, 86 *Iowa* 508.

The widow of a nonresident alien shall be entitled to the same rights in the property of her husband as a resident, except as against a purchaser from the decedent. *Code*, § 2442.

"Nonresident alien," as here expressed, means an alien not residing in the state. Mortgagees are purchasers within the meaning of this statute. *In re Gill's Estate*, 79 *Iowa* 296.

Kentucky.—An alien friend who has declared his intention to become a citizen of the United States has the same property rights as a citizen. *Kentucky Stat. 1894*, § 334, see also §§ 335-339. *Eustache v. Rodaquest*, 11 *Bush* (Ky.) 42. See also *Elmondorff v. Carmichael*, 3 *Litt. (Ky.)* 472, 14 *Am. Dec.* 86; *Gouverneur v. Robertson*, 11 *Wheat. (U. S.)* 332.

When an alien who has become a citizen of this state dies intestate and childless, an alien relative, resident in a foreign state, may take his real estate by descent under the limitations prescribed by the Act of March 21, 1861, subject to the widow's right to a homestead exemption or dower. *Eustache v. Rodaquest*, 11 *Bush* (Ky.) 42.

Under the Act of 1800, aliens who had resided in the state for two years might receive, hold, and pass any right to land within the state during the continuance of their residence after that period. *Beard v. Rowan*, 9 *Pet. (U. S.)* 301, 1 *McLean* (U. S.) 135; *Louisville v. Gray*, 1 *Litt. (Ky.)* 147; *Yeaker v. Yeaker*, 4 *Metc. (Ky.)* 33, 81 *Am. Dec.* 530. See also *White v. White*, 2 *Metc. (Ky.)* 185; *Dudley v. Grayson*, 6 *T. B. Mon. (Ky.)* 259.

Maryland.—1 *Public General Laws*, art. 111, p. 9. See *Spratt v. Spratt*, 1 *Pet. (U. S.)* 343, 4 *Pet. (U. S.)* 393; *Matthew v. Rae*, 3 *Cranch* (C. C.) 699.

tory belonging to the United States are open, for the purposes of exploration

Massachusetts.—Pub. Stat. 1882, c. 126, § 1. Nonresident aliens may take land by descent. *Lumb v. Jenkins*, 100 Mass. 527.

Missouri.—Rev. Stat. 1889, §§ 342-343. See *Greenia v. Greenia*, 14 Mo. 504; *State v. Killian*, 51 Mo. 80; *Sullivan v. Burnett*, 105 U. S. 334; *De Franca v. Howard*, 21 Fed. Rep. 774.

Under section 342 it was held that an alien might take real estate by descent from an alien. *Burke v. Adams*, 80 Mo. 504, 50 Am. Rep. 510.

In *Wacker v. Wacker*, 26 Mo. 426, decided in 1858, it was held that a nonresident alien could not take land by descent. See also *Harney v. Donohoe*, 97 Mo. 141.

It was held, under the laws in force in 1823, that the widow of an alien resident was entitled to dower. *Stokes v. O'Fallon*, 2 Mo. 32.

Montana.—Resident aliens may take by succession as citizens, but no nonresident foreigner can take by succession unless he appears and claims such succession within thirty-five years after the death of the decedent. Civil Code 1895, § 1867.

The organic Act of Montana Territory of 1864 does not sanction the common-law doctrine prohibiting aliens from holding real estate. Territory v. Lee, 2 Mont. 124. See also *Quigley v. Birdseye*, 11 Mont. 439.

Nevada.—Gen. Stat. 1885, § 2655. By the terms of this statute the Chinese are excepted from the benefit of its provisions.

Under art. 1, § 16, of the Nevada Constitution, which is identical with art. 1, § 17, of the Constitution of California (see *supra*, *California*) it was held that a citizen and subject of the Chinese Empire, who was a *bona fide* resident of the state, might locate and purchase any of the public lands belonging to the state. *State v. Preble*, 18 Nev. 251.

New Jersey.—Revision, title Aliens.

See *Bonaparte v. Camden*, etc., R. Co., 1 Baldw. (U. S.) 205; *Colgan v. McKeon*, 24 N. J. L. 566.

Since the children born in the United States of an alien, who, while an alien enemy, prior to 1817, purchased land, and continued to hold the same after that time and after he became an alien friend, may inherit under the Act of 1817, the widow is entitled to dower under the New Jersey law relative to dower. *Yeo v. Mercereau*, 18 N. J. L. 387.

New York.—By the Act of 1845, c. 115, § 1, any resident alien who had already purchased or might thereafter purchase and take a conveyance of real estate, or to whom real estate had been or might thereafter be devised, might, on filing deposition declaring his intention to become a citizen, hold such real estate in the same manner as a citizen. *Ettenheimer v. Heffernan*, 66 Barb. (N. Y.) 374; *Goodrich v. Russell*, 42 N. Y. 179; *Luhers v. Einer*, 80 N. Y. 171; *Hall v. Hall*, 81 N. Y. 130, 13 Hun (N. Y.) 306.

This act applies to aliens who have become residents after its passage, as well as to those already residents. *Hall v. Hall*, 81 N. Y. 130.

Under section 5 an alien who has purchased real estate may devise the same, and his devisee may take and hold the property upon complying with the conditions of the statute, and this although the testator has not filed the deposition as required by section 6. *Dusenberry v. Dawson*, 9 Hun (N. Y.) 511.

In *Van Cortlandt v. Laidley*, 59 Hun (N. Y.) 161, it was held that the provisions of 2 Rev. Stat. 57, § 4, declaring that every devise of any interest in real property to a person who, at the time of the death of the testator, shall be an alien not authorized to hold real estate, shall be void, and the interest so devised shall pass to the heirs or into the residuary estate, do not apply to alien devisees born after the death of the testator, and that such devisees could take under a will and hold as against the heirs of the testator.

See also, as to the power of aliens to take by devise under former laws, *Beck v. McGillis*, 9 Barb. (N. Y.) 35.

An alien widow of a citizen could not formerly hold land devised to her by him, but now she can do so under the Act of 1845. *Mick v. Mick*, 10 Wend. (N. Y.) 379. See also *Priest v. Cummings*, 20 Wend. (N. Y.) 338; *Connolly v. Smith*, 21 Wend. (N. Y.) 59.

Under Acts of 1845, c. 115, § 4; 1874, c. 261; 1875, c. 38, one taking by devise holds as purchaser, so that his heirs may inherit. *Stamm v. Bostwick*, 122 N. Y. 48.

Section 2 makes the wife of an alien who has acquired title to real estate by grant or devise, dowerable therein, although she be an alien. Under section 3 an alien widow of a citizen is entitled to dower. *Burton v. Burton*, 1 Abb. App. Dec. (N. Y.) 271; *i. Keyes* (N. Y.) 359. See also *Larreau v. Davignon*, 5 Abb. Pr. N. S. (Buffalo Super. Ct.) 367; *Sutliff v. Forgey*, 1 Cow. (N. Y.) 89, 5 Cow. (N. Y.) 713; *Goodrich v. Russell*, 42 N. Y. 179; *Davis v. Darrow*, 12 Wend. (N. Y.) 65; *Priest v. Cummings*, 20 Wend. (N. Y.) 338, reversing 16 Wend. (N. Y.) 617; *Greer v. Sankston*, 26 How. Pr. (N. Y. Supreme Ct.) 471.

See, as to the right of the alien widow and minor children of a decedent to an allowance out of his estate, *Kapp v. Public Administrator*, 2 Bradf. (N. Y.) 258.

Stat. 1845, c. 115, § 4, as amended by Stat. 1874, c. 261, and Stat. 1875, c. 38 (4 Rev. Stat. (8th ed.), p. 2426), provides that where alien residents, or naturalized or native citizens die, leaving persons who, under the laws of descent, would be "heirs" if they were citizens, such persons may take by descent, as if they were citizens, lands purchased by their ancestors, but males over twenty-one take only a defeasible estate until they file a deposition of their intention to become citizens. *Maynard v. Maynard*, 36 Hun (N. Y.) 227.

Under these acts a nonresident alien brother or sister of the intestate decedent may inherit. *Kilfoy v. Powers*, 3 Dem. (N. Y.) 198.

Under these acts nonresident alien children take to the exclusion of collateral kindred who are residents and citizens. *Good-*

and purchase, to citizens of the United States, and to those who have declared

rich *v.* Russell, 42 N. Y. 177; Hall *v.* Hall, 81 N. Y. 130; Kilfoy *v.* Powers, 3 Dem. (N. Y.) 198; Branagh *v.* Smith, 46 Fed. Rep. 517. See also M'Creery *v.* Somerville, 9 Wheat. (U. S.) 354; McCarthy *v.* Marsh, 5 N. Y. 263; McLean *v.* Swanton, 13 N. Y. 535.

These acts do not apply to lands descended to the deceased, though owned and held by him at the time of his death, and such lands descend to those heirs only who are citizens. Callahan *v.* O'Brien, 72 Hun (N. Y.) 216, 55 N. Y. St. Rep. 201.

Under these acts alien heirs have a title good against all, except the state, without making the deposition required. Stamm *v.* Bostwick, 122 N. Y. 48.

The Act of 1845 did not remove the inability of alien heirs to take from a naturalized or native ancestor. Luhrs *v.* Eimer, 80 N. Y. 171; Wieland *v.* Renne, 65 How. Pr. (N. Y. Supreme Ct.) 245; Larreau *v.* Davignon, 5 Abb. Pr. N. S. (Buffalo Super Ct.) 367, 1 Sheld. (N. Y.) 128. See also Branagh *v.* Smith, 46 Fed. Rep. 517. But the Act of 1874 operated as a surrender by the state of title by escheat acquired under the previous act. Luhrs *v.* Eimer, 80 N. Y. 180; Wainwright *v.* Low, 57 Hun (N. Y.) 380.

The Act of 1845, as amended in 1874, enables only resident aliens and naturalized or native citizens to transmit by descent, and attaches only to land acquired by purchase, *i. e.*, by grant or devise, and contemplates only one step of transmission to alien heirs. Branagh *v.* Smith, 46 Fed. Rep. 517.

4 Rev. Stat. (8th ed.), p. 2466, § 22, provides that no person capable of inheriting shall be precluded from doing so by the alienism of his ancestor. The term "ancestor" here is used in its most comprehensive sense, meaning collateral as well as lineal ancestors. People *v.* Irvin, 21 Wend. (N. Y.) 128; McCarthy *v.* Marsh, 5 N. Y. 263, *overruling* Banks *v.* Walker, 3 Barb. Ch. (N. Y.) 438; McLean *v.* Swanton, 13 N. Y. 535; Larreau *v.* Davignon, 5 Abb. Pr. N. S. (Buffalo Super Ct.) 367; 1 Sheld. (N. Y.) 128; Renner *v.* Müller, 44 N. Y. Super. Ct. 535, 57 How. Pr. (N. Y.) 229. See also Cumberland *v.* Graves, 7 N. Y. 305; Colgan *v.* McKeon, 24 N. J. L. 566; M'Creery *v.* Somerville, 9 Wheat. (U. S.) 354.

A citizen can inherit from a great-aunt, also a citizen, though his deceased mother and grandmother, the latter his great-aunt's sister, were aliens. Callahan *v.* O'Brien, 72 Hun (N. Y.) 216, 55 N. Y. St. Rep. 201.

An alien husband has an estate by survivorship in all real estate conveyed to his wife and himself in fee, subject to the right of the state. Wright *v.* Saddler, 20 N. Y. 320.

See, as to the rights of aliens under earlier statutes, Larreau *v.* Davignon, 5 Abb. Pr. N. S. (Buffalo Super. Ct.) 367; Parish *v.* Ward, 28 Barb. (N. Y.) 328; Forgey *v.* Sutliff, 5 Cow. (N. Y.) 713; Currin *v.* Finn, 3 Den. (N. Y.) 229; Brown *v.* Sprague, 5 Den. (N. Y.) 545; Redpath *v.* Rich, 3 Sandf. (N. Y.) 79; Scott *v.* Thorpe, 1 Edw. Ch. (N. Y.) 512; Matter of Leefe, 4

Edw. Ch. (N. Y.) 395; Troup *v.* Mullender, 9 Johns. (N. Y.) 303; Jackson *v.* Decker, 11 Johns. (N. Y.) 418; McCarty *v.* Deming, 4 Lans. (N. Y.) 440; McCarty *v.* Terry, 7 Lans. (N. Y.) 236; Jackson *v.* Britton, 4 Wend. (N. Y.) 507; Jackson *v.* Adams, 7 Wend. (N. Y.) 367; Jackson *v.* Fitz Simmons, 10 Wend. (N. Y.) 9, 24 Am. Dec. 198; Mick *v.* Mick, 10 Wend. (N. Y.) 379; Ellice *v.* Winn, 12 Wend. (N. Y.) 342; Aldrich *v.* Manton, 13 Wend. (N. Y.) 458; Kennedy *v.* Wood, 20 Wend. (N. Y.) 230; Cumberland *v.* Graves, 7 N. Y. 305, 9 Barb. (N. Y.) 595; McLean *v.* Swanton, 13 N. Y. 535; Ludlam *v.* Ludlam, 26 N. Y. 356, 84 Am. Dec. 193; Heney *v.* Brooklyn Ben. Soc., 39 N. Y. 333; Howard *v.* Moot, 64 N. Y. 262; Luhrs *v.* Eimer, 80 N. Y. 171; Renner *v.* Müller, 44 N. Y. Super Ct. 535, 57 How. Pr. (N. Y.) 229.

North Carolina.—Code 1883, tit. Aliens. See Rutherford *v.* Wolfe, 3 Hawks. (N. Car.) 272; Campbell *v.* Campbell, 5 Jones Eq. (N. Car.) 246.

Ohio.—Rev. Stat. 1894, § 4173. See Kay *v.* Watson, 17 Ohio 27.

Pennsylvania.—See Bright. Purd. Dig. 1883, tit. Aliens; Com. *v.* Detwiller, 131 Pa. St. 614.

The Act of 1791, enabling aliens to take, hold, and dispose of property by devise or descent, does not enable an alien to inherit from an alien ancestor who has not complied with the conditions imposed by law, for then the heir would receive a greater estate than the ancestor himself had. Rubeck *v.* Gardner, 7 Watts (Pa.) 455.

The alien widow of a resident alien friend may have dower. Ondis *v.* Banta, 7 Kulp (Pa.) 390.

Rhode Island.—Gen. Laws 1896, c. 201, § 4. See De Wolf *v.* Middleton (R. I. 1895), 31 Atl. Rep. 271.

South Carolina.—Gen. Stat. 1882, §§ 1768, 1847, 1848. See, as to construction of early acts, McClenaghan *v.* McClenaghan, 1 Strobb. Eq. (S. Car.) 295, 47 Am. Dec. 532; Ford *v.* Husman, 7 Rich. (S. Car.) 165; Burnett *v.* Noble, 8 Rich. Eq. (S. Car.) 58.

Under the statute of distributions in this state the child of a deceased brother or sister, who is naturalized at the time of descent cast, may inherit real estate, notwithstanding the alienage of the parent. North *v.* Valk, Dudley Eq. (S. Car.) 212.

Tennessee.—Code 1884, §§ 2204-2807.

For construction of earlier statutes, see Garretson *v.* Brien, 3 Heisk. (Tenn.) 534; Baker *v.* Shy, 9 Heisk. (Tenn.) 85; Polk *v.* Ralston, 2 Humph. (Tenn.) 537; Starks *v.* Traynor, 11 Humph. (Tenn.) 292; Moore *v.* Wilson, 10 Yerg. (Tenn.) 406.

Where an alien, after deserting his wife, settled in the state and died, it was held that his widow, an alien, was entitled to dower in the lands of her deceased husband, but not to homestead. Emmett *v.* Emmett, 14 Lea (Tenn.) 369.

Texas.—An alien shall have and enjoy in the state of Texas such rights as are, or shall be, accorded to citizens of the United States by the laws of the nation to which such alien

their intention to become citizens; and all such persons who have discovered

shall belong, or by the treaties of such nation with the United States. Act of Feb. 13, 1854; 1 Texas Civ. Stat. (Sayles), art. 9; Hanrick v. Hanrick, 54 Tex. 101, 61 Tex. 596, 63 Tex. 618.

This act does not repeal the Act of March 18, 1848, § 9, allowing alien heirs nine years in which to become naturalized or to sell land inherited by them, before they shall forfeit it, except so far as the two acts are inconsistent. Hanrick v. Patrick, 119 U. S. 156; Hanrick v. Hanrick, 54 Tex. 101. See, as to the Act of 1891, Gray v. Kauffman, 82 Tex. 65; Gunter v. Texas Land, etc., Co., 82 Tex. 496; State v. Mallinson, 82 Tex. 504.

An alien who has made the primary declaration of intention to become a citizen may take and hold lands, though he dies before completing naturalization. Settegast v. Schrimpf, 35 Tex. 323, 38 Tex. 96.

Under Rev. Stat. (Sayles), art. 3924, granting preëemption rights to citizens of Texas, an alien cannot claim or become entitled to a homestead. McCarthy v. Gomez, 85 Tex. 10.

Under the Old Mexican Law aliens could not acquire title, inherit, or bring real actions. McKinney v. Saviego, 18 How. (U. S.) 235; Middleton v. McGrew, 23 How. (U. S.) 45; Holliman v. Peebles, 1 Tex. 673; Republic of Texas v. Skidmore, 2 Tex. 261; McIntyre v. Chappell, 4 Tex. 187; Hardy v. De Leon, 5 Tex. 211; Thomerson v. State, 8 Tex. 173; Yates v. Iams, 10 Tex. 168; Blythe v. Easterling, 20 Tex. 565; Clay v. Clay, 26 Tex. 24; Lacoste v. Odam, 26 Tex. 458; McGahan v. Baylor, 32 Tex. 789; Hanrick v. Dodd, 62 Tex. 75. See also Hammekin v. Clayton, 2 Woods (U. S.) 336. But see Jones v. McMasters, 20 How. (U. S.) 8; Airhart v. Massieu, 98 U. S. 491; Phillips v. Moore, 100 U. S. 208.

As to the effect upon the rights of non-residents owning lands in Texas, of the separation of Texas from Mexico, see McKinney v. Saviego, 18 How. (U. S.) 235; Jones v. McMasters, 20 How. (U. S.) 8; Airhart v. Massieu, 98 U. S. 495; Holliman v. Peebles, 1 Tex. 673; Yates v. Iams, 10 Tex. 168; Kilpatrick v. Sisneros, 23 Tex. 113; Sabriego v. White, 30 Tex. 581; Andrews v. Spear, 48 Tex. 567. See also Kelly v. Harrison, 2 Johns. Cas. (N. Y.) 29, 1 Am. Dec. 154; Conrad v. Waples, 96 U. S. 279.

Under the Constitution of the Republic of Texas and the Act of 1840, aliens had substantially the rights of citizens. Cryer v. Andrews, 11 Tex. 170; Barclay v. Cameron, 25 Tex. 232; Portis v. Hill, 30 Tex. 530, 98 Am. Dec. 481; Sabriego v. White, 30 Tex. 576, *overruling* McKinney v. Saviego, 18 How. (U. S.) 235; Ortiz v. De Benavides, 61 Tex. 60; Hanrick v. Hanrick, 61 Tex. 596, 63 Tex. 618; Wiederanders v. State, 64 Tex. 133; Baker v. Westcott, 73 Tex. 129.

As to the Effect of Annexation to the United States, see: Osterman v. Baldwin, 6 Wall. (U. S.) 116; Cryer v. Andrews, 11 Tex. 170; Wardrup v. Jones, 23 Tex. 489; Barclay v. Cameron, 25 Tex. 232; Barrett v. Kelly, 31 Tex. 476; Settegast v. Schrimpf, 35 Tex. 323; Hanrick v. Hanrick, 54 Tex. 101; Pet-

tus v. Dawson, 82 Tex. 18; Williams v. Bennett, 1 Tex. Civ. App. 498.

In 1862 the lands of an alien did not, upon his death, escheat to the state. Settegast v. Schrimpf, 35 Tex. 323; Andrews v. Spear, 48 Tex. 567.

The Constitution of Texas, adopted in 1836, declared generally that no alien should hold lands in Texas, except by titles emanating directly from the government, but that declaration did not of itself divest the titles of the aliens, for it was provided further that aliens should have a reasonable time to take possession and dispose of their lands in the manner thereafter to be pointed out by law, and before the title can be divested proceedings for enforcing forfeiture must be provided by law, and no such proceedings have hitherto been provided for that purpose. Airhart v. Massieu, 98 U. S. 491. See also Pettus v. Dawson, 82 Tex. 18.

This provision of the constitution was prospective merely, and did not operate in favor of alien relatives of persons who had previously died. Warnell v. Finch, 15 Tex. 163; Hornsby v. Bacon, 20 Tex. 556.

Virginia.—Code 1887, § 43; Hannon v. Hounihan, 85 Va. 429. See also Hauensteins v. Lynham, 28 Gratt. (Va.) 62, 100 U. S. 483.

Where a citizen seized of land in Virginia died leaving a citizen brother, an alien sister, citizen children of the alien sister, and citizen grandchildren of the alien sister, their fathers as well as their grandmother being aliens, it was held under the Virginia statute of descents that the descendants of the alien sister took by descent, one moiety to be divided among them *per stirpes*, the other to go to the citizen brother. Jacksons v. Sanders, 2 Leigh (Va.) 109. See as to early statutes Gouverneur v. Robertson, 11 Wheat. (U. S.) 332; Elmondorff v. Carmichael, 3 Litt. (Ky.) 472, 14 Am. Dec. 86.

Wisconsin.—Annot. Stat. 1889, §§ 2200, 2201. See, as to widow's right to dower, § 2160. Bennett v. Harms, 51 Wis. 251.

England.—Act of 11 and 12 William III. —See as to the effect of Stat. 11 and 12, Wm. III., c. 6, in force in some states after the Revolution, providing that citizens might take by descent through alien ancestors, M'Creery v. Somerville, 9 Wheat. (U. S.) 354; Spratt v. Spratt, 4 Pet. (U. S.) 393; Levy v. M'Cartee, 6 Pet. (U. S.) 102; McKinney v. Saviego, 18 How. (U. S.) 235; Bartlett v. Morris, 9 Port. (Ala.) 271; Palmer v. Downer, 2 Mass. 180; Jackson v. Green, 7 Wend. (N. Y.) 333; Renner v. Müller, 57 How. Pr. (N. Y. Super. Ct.) 229, 44 N. Y. Super. Ct. 535. See also People v. Irvin, 21 Wend. (N. Y.) 128; McLean v. Swanton, 13 N. Y. 535.

English Naturalization Act.—By the Act of 1870, 33 and 34 Vict., c. 14, as amended by 33 and 34 Vict., c. 102, aliens may take, hold, and dispose of property, real and personal, like natural-born British subjects. This act is not retrospective. Sharp v. St. Sauveur L. R., 7 Ch. 343.

Canada.—By 12 Vict., c. 197, § 12, aliens

mineral lands, and made a location according to law, have the exclusive right of possession thereto.¹

(2) *Personal Property*—(a) **At Common Law.**—The disability of aliens at common law, in respect to the ownership of real estate, does not extend to the case of personal property, and aliens are capable of acquiring, holding, and transmitting movable property in like manner as citizens, and may bring suits for the recovery and protection of such property.²

are enabled to take, hold, and transmit real estate as fully and effectually as natural-born subjects. *Murray v. Heron*, 7 Grant's Ch. (U. C.) 177; *Leatherman v. Trow*, 15 U. C. C. P. 578; *Rumrell v. Henderson*, 22 U. C. C. P. 180.

This act applies to movable property as well as to real estate. *Corse v. Corse*, 4 L. C. Rep. 310.

But the act does not act retrospectively, so as to divest rights vested before its passage. *Doe v. Maloney*, 9 U. C. Q. B. 251.

See, as to rights of aliens under earlier acts, *Doe v. Clarke*, 1 U. C. Q. B. 37; *Wallace v. Adamson*, 10 U. C. C. P. 338; *Wallace v. Hewitt*, 20 U. C. Q. B. 87; *Montgomery v. Graham*, 31 U. C. Q. B. 57; *Iler v. Elliott*, 32 U. C. Q. B. 434.

Private Acts.—As to private acts passed for the relief of aliens, see *Congregational Church v. Morris*, 8 Ala. 182; *Bartlett v. Morris*, 9 Port. (Ala.) 266; *Etheridge v. Malempre*, 18 Ala. 565; *Doe v. Lazenby*, 1 Ind. 234; *Eldon v. Doe*, 6 Blackf. (Ind.) 341; *Stevenson v. Dunlap* 7 T. B. Mon. (Ky.) 134; *Com. v. André*, 3 Pick. (Mass.) 224; *Montgomery v. Dorion*, 7 N. H. 475; *Parish v. Ward*, 28 Barb. (N. Y.) 328; *Jackson v. Lyon*, 9 Cow. (N. Y.) 664; *Jackson v. Skeels*, 19 Johns. (N. Y.) 198.

If the State Releases to the Heir of an Alien Purchaser, he gets an absolute title. *Wright v. Saddler*, 20 N. Y. 320.

So also when He is Given Title by a Legislative Grant.—*Etheridge v. Malempre*, 18 Ala. 565.

Grants to Aliens by the State for Military Services descend to their alien heirs. *Jackson v. Etz*, 5 Cow. (N. Y.) 314; *Jackson v. Lervay*, 5 Cow. (N. Y.) 397.

1. **Mining Lands.**—U. S. Rev. Stat., §§ 2319, 2322; *O'Reilly v. Campbell*, 116 U. S. 418; 3 *Hammer v. Garfield Min., etc., Co.*, 130 U. S. 291; *Manuel v. Wulff*, 152 U. S. 505; *Billings v. Aspen Min., etc., Co.*, 10 U. S. App. 322, 51 Fed. Rep. 338; *Cresus Min., etc., Co. v. Colorado Land, etc., Co.*, 19 Fed. Rep. 78; *Lee Doon v. Tesh*, 68 Cal. 43; *Anthony v. Jillson*, 83 Cal. 296; *Territory v. Lee*, 2 Mont. 124; *Tibbitts v. Ah Tong*, 4 Mont. 536. See also *Belk v. Meagher*, 3 Mont. 65; *Golden Fleece Gold, etc., Min. Co. v. Cable Consol. Gold, etc., Min. Co.*, 12 Nev. 312.

The Right of a Locator can be Questioned only by the United States, and only by inquest of office or in a proceeding to which the United States is a party. *Billings v. Aspen Min., etc., Co.*, 10 U. S. App. 1, 51 Fed. Rep. 338, 52 Fed. Rep. 250; *Territory v. Lee*, 2 Mont. 124; *Tibbitts v. Ah Tong*, 4 Mont. 536.

But an alien who has never declared his intention to become a citizen, not being quali-

fied to locate a mining claim, cannot hold such claim against one who by compliance with law has connected himself with the title of the government. *Golden Fleece Gold, etc., Min. Co. v. Cable Consol. Gold, etc., Min. Co.*, 12 Nev. 312.

Under *United States Rev. Stat.*, § 2322, locators have full and complete right to convey their interests. *Manuel v. Wulff*, 152 U. S. 505; *Ferguson v. Neville*, 61 Cal. 356; *Tibbitts v. Ah Tong*, 4 Mont. 536. A transfer to an alien confers a title that can be questioned, by reason of alienage, by the government only. *Manuel v. Wulff*, 152 U. S. 505.

If an alien becomes naturalized before judgment in a suit concerning title, his disability is thereby removed. *Manuel v. Wulff*, 152 U. S. 505, *reversing* 9 Mont. 279. See also *Anthony v. Jillson*, 83 Cal. 296; *Cresus Min., etc., Co. v. Colorado Land, etc., Co.*, 19 Fed. Rep. 78.

Prior to these statutes, occupation and working a location conferred no rights upon aliens against the United States or its grantees. *Lee Doon v. Tesh*, 68 Cal. 43.

Under former decisions that an alien could not take even a defeasible title, it was held that an alien could have an interest as *cestui que trust* in the stock of a mining corporation, without affecting the title of the trustees. *Princeton Min. Co. v. Butte First Nat. Bank*, 7 Mont. 530.

State Statutes.—In some states *bona fide* residents who are not citizens of the United States, and who have not declared their intention to become citizens, nevertheless may acquire, hold, and convey the title to a mining claim. *Mitchell v. Hagood*, 6 Cal. 148; *Ferguson v. Neville*, 61 Cal. 356.

In some states nonresidents may hold real estate for the purpose of mining. See 1 *Stinson*, Am. Stat. Law, § 6013.

The title of an alien discoverer of a mine on the public domain of the United States, within the state of Colorado, passes upon his death intestate to those who, at the time of his death, were capable of inheriting by the laws of *Colorado*. *Billings v. Aspen Min., etc., Co.*, 10 U. S. App. 1, 322. See generally the title MINES AND MINING CLAIMS.

2. **Personal Property.**—1 Bl. Com. 372; 2 Kent Com. 62; *Calvin's Case*, 7 Coke 1; *Fourdrin v. Gowdey*, 3 Myl. & K. 383; *Craig v. Leslie*, 3 Wheat. (U. S.) 563; *Evan's Appeal*, 51 Conn. 435; *Greenheld v. Morrison*, 21 Iowa 538; *Richmond v. Milne*, 17 La. 312; *Corrie's Case*, 2 Bland. (Md.) 488; *Greenia v. Greenia*, 14 Mo. 526; *Harney v. Donohoe*, 97 Mo. 141; *Beck v. McGillis*, 9 Barb. (N. Y.) 35; *Megrath v. Robertson*, 1 Desaus. (S. Car.) 445; *Franco-Texan Land Co. v. Chaptive* (Tex. 1886), 3 S. W. Rep. 31. See also

(b) **By Statute.**—The statutes regulating the rights of aliens as to personal property have generally been merely declarative of the common law, placing aliens on the same footing as citizens in this respect.¹

(3) *Rights and Liabilities Incidental to the Ownership of Property.*—**Right to Convey and Maintain Actions.**—It may be stated as a general rule that the right to acquire and hold land carries with it the right to convey before office found;²

Hughes v. Edwards, 9 Wheat. (U. S.) 489; Atkins v. Kron, 2 Ired. Eq. (N. Car.) 423; Polk v. Ralston, 2 Humph. (Tenn.) 537; Franco-Texan Land Co. v. Bousselet, 70 Tex. 422.

An alien may inherit the personal estate of a British subject. Sarony v. Bell, S. R. 345, K. B. 1828, 25, 609 C. C.

"An alien friend may purchase and hold chattels, real, and all kinds of personal property; and may freely transfer to any place, beyond the jurisdiction of the state, his movables, subject however in general to such export duty as the state may think proper to impose, and also subject, in cases of public expediency or on his becoming an alien enemy, to a total prohibition of removing any of his property out of the state, so as thereby to weaken it and strengthen its antagonist. This permission of removal of personal property is, however, granted with a view to the encouragement of commerce and the aggrandizement of the state; and therefore, the exceptions to the rule, as well as the rule itself, are derived from the same source, that of a duty which the state owes to itself as a whole, and as one which it owes to each of its citizens in the protection of his interests by the general operation of its laws." *Per* Bland, C., in *Corrie's Case*, 2 Bland (Md.) 488.

Equitable Conversion.—An alien may have the benefit of the doctrine of equitable conversion. *Dwight on Persons*, 132; *Craig v. Leslie*, 3 Wheat. (U. S.) 563; *Anstice v. Brown*, 6 Paige (N. Y.) 448; *Meakings v. Cromwell*, 5 N. Y. 136; *Ludlow v. Van Ness*, 8 Bosw. (N. Y.) 178. See also *Du-Hourmelin v. Sheldon*, 1 Beav. 79; *Master v. DeCroismar*, 11 Beav. 184, 17 L. J. N. S., Ch. 466, 12 Jur. 762; *Taylor v. Benham*, 5 How. (U. S.) 233; *Atkins v. Kron*, 2 Ired. Eq. (N. Car.) 423; *Trezevant v. Howard*, 3 Desaus. (S. Car.) 87; *Com. v. Martin*, 5 Munf. (Va.) 117; *Com. v. Selden*, 5 Munf. (Va.) 160.

1. See the statutes; and *supra*, this title, *Real Property—By Statute.* See also *Stimson's Amer. Stat. Law*, §§ 6013-6015; *Greenheld v. Morrison*, 21 Iowa 538; *Greenia v. Greenia*, 14 Mo. 526; *Harney v. Donohoe*, 97 Mo. 141.

British Ship.—As to the right of an alien to take a bill of sale or transfer of a British vessel under 17 and 18 Vict., c. 104, see *Cutten v. McFarlane*, 7 Nova Scotia 468. There is nothing in this act to prevent an alien from being a mortgagee of a ship. *Comstock v. Harris*, 13 Ont. Rep. 407.

Conflict of Laws.—Where a married woman, domiciled in Minnesota, inherited property from her father in Norway, which was converted into money and transmitted to Minne-

sota, it was held that the rights of the wife and her husband, who had never been naturalized, in respect to such property, were determined by the laws of *Minnesota*, and not by those of *Norway*. *Muus v. Muus*, 29 Minn. 115. See the title **CONFLICT OF LAWS**.

2. **Right to Convey.**—1 *Washburne on Real Property* (5th ed.) 79; *Phillips v. Moore*, 100 U. S. 208; *Sullivan v. Burnett*, 105 U. S. 334; *Ferguson v. Neville*, 61 Cal. 356; *Kerr v. White*, 52 Ga. 369; *Halstead v. Lake County*, 56 Ind. 363; *Purcell v. Smidt*, 21 Iowa 540; *Sheaffe v. O'Neil*, 1 Mass. 256; *Fox v. Southack*, 12 Mass. 143; *Scanlan v. Wright*, 13 Pick. (Mass.) 523, 25 Am. Dec. 344; *Quigley v. Birdseye*, 11 Mont. 439; *Williams v. Wilson*, 1 Mart. & Y. (Tenn.) 248; *Baker v. Shy*, 9 Heisk. (Tenn.) 85; *Marshall v. Conrad*, 5 Call (Va.) 365; *Doe v. Cleveland*, 6 U. C. Q. B. (O. S.) 117. See also *Aldrich v. Manton*, 13 Wend. (N. Y.) 458; *Groves v. Gordon*, 3 Brev. (S. Car.) 245; *McCaw v. Galbraith*, 7 Rich. (S. Car.) 74; *Franco-Texan Land Co. v. Bousselet*, 70 Tex. 422.

This right may be conferred by statute. *State v. Witz*, 87 Ind. 190.

An alien having only a defeasible title can convey no greater right to a citizen. *Purcell v. Smidt*, 21 Iowa 540; *Scanlan v. Wright*, 13 Pick. (Mass.) 523, 25 Am. Dec. 344; *People v. Conklin*, 2 Hill (N. Y.) 71; *Williams v. Wilson*, 1 Mart. & Y. (Tenn.) 248.

In some states aliens were not allowed to sell lands allotted to them as settlers, before a certain lapse of time and taking actual possession of them. *Holliman v. Peebles*, 1 Tex. 673; *Hunt v. Robinson*, 1 Tex. 759; *Yates v. Iams*, 10 Tex. 168.

An alien may convey by way of mortgage before office found. *Halstead v. Lake County*, 56 Ind. 363; *Farmers L. & T. Co. v. People*, 1 Sandf. Ch. (N. Y.) 139. Or make a lease, *Rouche v. Williamson*, 3 Ired. (N. Car.) 141; *Ellice v. Winn*, 12 Wend. (N. Y.) 342; see also *Troup v. Mullender*, 9 Johns. (N. Y.) 303; or a release, *Cumberland v. Graves*, 9 Barb. (N. Y.) 595. Or exercise a power of appointment. *Escheator v. Smith*, 4 McCord (S. Car.) 452.

A deed of land owned by a married woman, a citizen, executed jointly by her and her alien husband, transfers a valid title. *Whitting v. Stevens*, 4 Conn. 44; *Kottman v. Ayer*, 1 Strobh. (S. Car.) 552.

The purchaser of land from an alien gets title by a deed legally executed and recorded before inquest sealed, though he does not know of the deed until afterwards. *Com. v. Selden*, 5 Munf. (Va.) 160.

Under the *New York Stat.* 1845, c. 115, § 5, any resident alien may grant lands purchased by him, and his grantee may hold upon

it likewise carries with it the right to maintain real actions¹ and actions of trespass.²

Fiduciary Relations.—An alien may create a trust in lands, but such trust, in the absence of statute, is valid only until office found. He may create a trust in personal property absolutely valid.³

He may be a grantee of lands in trust to the extent to which he can hold the legal title,⁴ and he holds lands acquired by grant subject to any trust that

complying with the conditions of the act. *Dusenberry v. Dawson*, 19 Hun (N. Y.) 511.

Power of Aliens to Transmit by Will.—At common law an alien could not by devise pass any more than a voidable estate in lands, such estate being always liable to forfeiture to the government by inquest of office. 1 Jarman on Wills (6th ed.), 58; *Williams v. Wilson*, 1 Mart. & Y. (Tenn.) 248; *Wallace v. Adamson*, 10 U. C. C. P. 338. See also 1 Kerr on Real Property, § 240; *Wallace v. Hewitt*, 20 U. C. Q. B. 87; *Iler v. Elliott*, 32 U. C. Q. B. 434.

Where a use was limited by deed to an alien for life, with a power of appointment, an appointment made by the alien donee by will, before office found, was held good. *Escheator v. Smith*, 4 McCord (S. Car.) 452.

By statute, in most states, an alien may now make a valid will, disposing of real or personal property. 1 Williams on Executors (7th Am. ed.), 12, 13; *Cumberland v. Graves*, 9 Barb. (N. Y.) 595, 7 N. Y. 305; *Dusenberry v. Dawson*, 9 Hun (N. Y.) 511; *Howard v. Moot*, 64 N. Y. 262. See also *Parent v. Walmsly*, 20 Ind. 82.

1. Real Actions.—Where an alien can hold lands he may maintain real actions.

United States.—*Bonaparte v. Camden*, etc., R. Co., 1 Baldw. (U. S.) 205; *Hughes v. Edwards*, 9 Wheat. (U. S.) 489; *Jones v. McMasters*, 20 How. (U. S.) 20.

Alabama.—*Jenkins v. Noel*, 3 Stew. (Ala.) 60.

California.—*Norris v. Hoyt*, 18 Cal. 217.

Maryland.—*M'Creery v. Allender*, 4 Har. & M. (Md.) 409.

New Jersey.—*Den v. Brown*, 7 N. J. L. 305.

New York.—*Jackson v. Lunn*, 3 Johns. Cas. (N. Y.) 109; *Jackson v. Britton*, 4 Wend. (N. Y.) 507; *Bradstreet v. Oneida County*, 13 Wend. (N. Y.) 546; *Young v. Peck*, 21 Wend. (N. Y.) 389, 26 Wend. (N. Y.) 613.

North Carolina.—*Rouche v. Williamson*, 3 Ired. (N. Car.) 141.

Texas.—*Sabriego v. White*, 30 Tex. 576; *Gray v. Kauffman*, 82 Tex. 65.

It is a well-settled doctrine of the common law that an alien cannot maintain a real or mixed action. The plea that the plaintiff is an alien, interposed to a real action, goes in general to defeat the right of action altogether, upon the ground of public policy which denies the right of an alien to inherit or hold lands. The law will not aid him to recover land to which he can acquire only a defeasible title, and which he cannot hold against the government. But this general rule has its exceptions. If the title to land is conferred on an alien by law, or if he is enabled to acquire by descent or purchase, and

hold lands as a citizen, he may maintain any action in respect to it which a citizen may maintain. Where the law recognizes an alien as the rightful owner of the estate, he may convey, lease, and do any other act in relation thereto, and maintain any action, and have the benefit of any remedy which the law gives to secure the enjoyment of the property to those whom the law recognizes as entitled to its enjoyment. *White v. Sabriego*, 23 Tex. 243.

An Alien cannot at Common Law Maintain Ejectment.—*Doe v. Davis*, 5 U. C. Q. B. (O. S.) 494; *Holliman v. Peebles*, 1 Tex. 673. See also *Harley v. State*, 40 Ala. 689; *Ritchie v. Putnam*, 13 Wend. (N. Y.) 524; *Hardy v. De Leon*, 5 Tex. 211; *Barrett v. Kelly*, 31 Tex. 476.

Though He may Defend His Title against All Persons but the State.—*Waugh v. Riley*, 8 Met. (Mass.) 290. See also *Doe v. Dickson*, 2 U. C. Jur. (O. S.) 326.

The Plea of Alienage is not a plea in bar, but only in abatement. *Sewall v. Lee*, 9 Mass. 363; *Martin v. Woods*, 9 Mass. 377. See also *Ainslie v. Martin*, 9 Mass. 454, and *infra*, this title, *Alien Enemy*. See also, as to the rights of aliens to maintain real actions, *Hepburn v. Dunlop*, 1 Wheat. (U. S.) 198; *Guyer v. Smith*, 22 Md. 239, 85 Am. Dec. 650; *Ennas v. Franklin*, 2 Brev. (S. Car.) 398; *Lee v. Salinas*, 15 Tex. 495; *Williams v. Myers*, 8 Nova Scotia 157; *Doe v. Cleveland*, 6 U. C. Q. B. (O. S.) 117.

Alien Heirs may Have Partition.—*Nolan v. Command*, 11 Civ. Pro. Rep. (N. Y. Supreme Ct.) 295.

And They need Not Make the State a Party to proceedings when there has been no actual escheat. *Schultze v. Schultze*, 144 Ill. 290.

When by the *California* law a nonresident alien could not inherit land, it was held that he could not maintain ejectment therefor. *Siemssen v. Bofer*, 6 Cal. 250.

2. Trespass.—*Ramires v. Kent*, 2 Cal. 558; *Courtney v. Turner*, 12 Nev. 345; *Barges v. Hogg*, 1 Hayw. (N. Car.) 485; *Ortiz v. De-Benavides*, 61 Tex. 60.

3. 1 Perry on Trusts (4th ed.), § 30; 1 Lewin on Trusts 26.

4. As Trustee.—1 Perry on Trusts (4th ed.), § 55; 1 Lewin on Trusts 40-41; 2 Kent's Com. (13th ed.) 62-63; *Ferguson v. Franklins*, 6 Munf. (Va.) 305. See also *Paschal v. Acklin*, 27 Tex. 173.

A sale and conveyance of land by a trustee cannot be set aside on the ground that he was an alien at the time the deed was made to him and when he conveyed the land to the purchaser. *Ferguson v. Franklins*, 6 Munf. (Va.) 305.

may be charged upon them.¹ He may be a trustee of personal property.²

An alien may be a *cestui que trust* to the extent to which he can hold the legal title;³ but where he cannot hold title, he will not be allowed to obtain the benefit of laws indirectly by having the title transferred to a trustee.⁴

Taxation.—Since the right to tax an individual results from the general protection afforded to himself and property, and depends on residence and not on citizenship, an alien may be taxed,⁵ and his toll may be counted in appor-

An Alien may Devise Land to an Alien Trustee under the *New York* Act of 1798. *Howard v. Moot*, 64 N. Y. 262. See also *Cumberland v. Graves*, 7 N. Y. 307.

An Alien may Be a Trustee for a Corporation.—*Johnson v. Elkins*, 1 App. Cas. (D. C.) 430; *Cammeyer v. United German Lutheran Churches*, 2 Sandf. Ch. (N. Y.) 186.

An Alien Trustee may Release to Alien Co-trustees.—*Cumberland v. Graves*, 9 Barb. (N. Y.) 595.

A *cestui que trust* may bring a bill in equity against his trustee who is a foreign consul residing in the United States. *St. Luke's Hospital v. Barclay*, 3 Blatchf. (U. S.) 259.

1. 1 Perry on Trusts (4th ed.), § 55. See *Kay v. Webb*, 1 Murph. (N. Car.) 134.

Alienage is no Bar to a Bill for Specific Performance.—*Hepburn v. Dunlop*, 1 Wheat. (U. S.) 179, 3 Wheat. (U. S.) 231; *Waugh v. Riley*, 8 Met. (Mass.) 290; *Scott v. Thorpe*, 1 Edw. Ch. (N. Y.) 512. But see *Merle v. Andrews*, 4 Tex. 200.

2. 1 Lewin on Trusts 40. See also *Kerr v. White*, 52 Ga. 362.

3. **As Cestui que Trust.**—1 Lewin on Trusts, 44; 1 Perry on Trusts (4th ed.), § 64. See *Burney v. Macdonald*, 15 Sim. 6, 9 Jur. 588; *Rittson v. Stordy*, 2 Jur. N. S. 410, 1 Jur. N. S. 771, 38 M. & G. 230; *Taylor v. Benham*, 5 How. (U. S.) 233; *Jenney v. Laurens*, 1 Spears (S. Car.) 356; *Atkins v. Kron*, 5 Ired. Eq. (N. Car.) 207; *Murray v. Heron*, 7 Grant's Ch. (U. C.) 177.

A conveyance of land to a citizen trustee upon express trust to sell and pay the proceeds to an alien creditor is valid, and the *cestui que trust* may have the benefit of the doctrine of equitable conversion. *Anstice v. Brown*, 6 Paige (N. Y.) 448.

Where a devise of lands was made to a citizen in trust to sell and invest the proceeds in trust for aliens, it was held that the state was not entitled to either the land or the proceeds. *Du Hourmelin v. Sheldon*, 1 Beav. 79, 3 Jur. 69, 4 Myl. & C. 525. See also *Fourdrin v. Gowdey*, 3 Myl. & K. 383.

A devise to a citizen in trust to pay the income to an alien is valid, as the beneficiary takes no interest in the land. *Marx v. M'Glynn*, 88 N. Y. 357. See also *Anstice v. Brown*, 6 Paige (N. Y.) 448.

If lands be conveyed in trust for an alien who is naturalized before office found, a release to him by the trustee is valid. *Jackson v. Beach*, 1 Johns. Cas. (N. Y.) 399. See *Whiting v. Stevens*, 4 Conn. 44.

A court of chancery will enforce in favor of the state a trust created for an alien. *Barrow*

v. Wadkin, 24 Beav., 3 Jur. N. S. 679, 27 L. J. Ch. 129; *Sharp v. St. Sauveur*, L. R. 7 Ch. 343, 26 L. T. N. S. 142, 41 L. J. Ch. 576, 20 W. R. 269.

Resulting and Constructive Trusts.—Where an alien purchased land with his own money, but took the conveyance in the name of his wife, and the wife died after the husband became naturalized, the court decreed a conveyance by her heirs. *Matter of Windle*, 2 Edw. Ch. (N. Y.) 585. See also *Mussey v. Pierre*, 24 Me. 559.

Where a citizen purchased lands in Texas, paying for the same partly with funds paid him by aliens through mistake, it was held that the aliens, having failed to show that the money invested in the property was the identical money paid by them, had no lien on the land for the money. It seems that in such case the aliens could not have recovered the land under the doctrine of resulting or constructive trusts. *Zundell v. Gess* (Tex. 1889), 10 S. W. Rep. 693.

4. *Leggett v. Dubois*, 5 Paige (N. Y.) 114, 28 Am. Dec. 413; *McCaw v. Galbraith*, 7 Rich. (S. Car.) 74; *Hubbard v. Goodwin*, 3 Leigh (Va.) 492. See also *Anstice v. Brown*, 6 Paige (N. Y.) 448.

Where A, a naturalized citizen, having collateral kinsmen capable of inheriting, devised lands to B in trust for C, a nonresident alien, B to have the legal title until C should become qualified according to the acts of Congress to take and hold the said real estate, and when C became qualified B was to execute to him a conveyance in fee of said lands, and C, after the death of A, took no steps towards becoming a citizen but conveyed all his interest under the will to D, it was held that B took the legal estate in fee, subject to a trust for C during his life, or until he should become a citizen and receive the conveyance in fee, and if C should die without becoming a citizen, a resulting trust for the heirs of A, and that no legal estate could be conveyed by C to D. *McCaw v. Galbraith*, 7 Rich. (S. Car.) 74.

5. **Liability to Taxation.**—*Cooley on Taxation* (2d ed.) 20; *Opinion of Justices*, 7 Mass. 523; *Opinion of Justices*, 8 N. H. 573; *State v. Collector*, 32 N. J. L. 192; *Kuntz v. Davidson County*, 6 Lea (Tenn.) 65. See also *Scholey v. Rew*, 23 Wall. (U. S.) 331; *Watson v. Haley*, 1 Kerr (New Bruns.) 124; *Brannen v. Dunn*, 6 New Bruns. 218; *Brannen v. Leavitt*, 6 New Bruns. 220; *Brannen v. Williams*, 6 New Bruns. 221.

An alien resident is liable to a tax for military purposes. *State v. Collector*, 32 N. J. L. 192.

tioning representation, though it does not confer on him any political rights.¹

c. **RIGHTS SECURED BY TREATIES.**—The rights of citizens of one country, resident in or traveling through a foreign country, are frequently secured by treaties between the two nations.² And since every treaty made by the authority of the United States is superior to the constitution and laws of any individual state, where the United States has entered into such a treaty

1. Opinion of Justices, 7 Mass. 523; Opinion of Justices, 8 N. H. 573.

2. **Rights Secured to Aliens by Treaty.**—For cases involving the rights of aliens under particular treaties, see the following:

Belgium.—Wildenhus' Case, 120 U. S. 1.

China.—Baker v. Portland, 5 Sawy. (U. S.) 566; *In re Ah Chong*, 2 Fed. Rep. 733; Territory v. Lee, 2 Mont. 124; U. S. v. Ah Fawn, 57 Fed. Rep. 591; Baldwin v. Franks, 120 U. S. 678.

France.—Chirac v. Chirac, 2 Wheat. (U. S.) 260; Carneal v. Banks, 10 Wheat. (U. S.) 182; Geofroy v. Riggs, 133 U. S. 258; Arnat's Succession, 8 La. Ann. 403; Rabasse's Succession, 47 La. Ann. 1452; Baker v. Shy, 9 Heisk. (Tenn.) 85.

German Empire.—Baden, Wunderle v. Wunderle, 144 Ill. 40; Hanover, Ford v. Husman, 7 Rich. (S. Car.) 165; *Hanseatic Towns and Bremen*, Siemssen v. Bofer, 6 Cal. 250; Schultze v. Schultze, 144 Ill. 290; Hesse, Bollermann v. Blake, 94 N. Y. 624; Prussia, The Elwine Kreplin, 9 Blatchf. (U. S.) 438; People v. Gerke, 5 Cal. 381; Stamm v. Bostwick, 40 Hun (N. Y.) 35, 122 N. Y. 48; Matter of Beck (Surrogate Ct.), 11 N. Y. Supp. 199; Wurtemberg, Kull v. Kull, 37 Hun (N. Y.) 476; Wieland v. Renner, 65 How. Pr. (N. Y. Supreme Ct.) 245.

Great Britain.—Ogden v. Blackledge, 2 Cranch (U. S.) 272; Orr v. Hodgson, 4 Wheat. (U. S.) 453; Blight v. Rochester, 7 Wheat. (U. S.) 535; Ware v. Hylton, 3 Dall. (U. S.) 199; Court v. Vanbibber, 3 Har. & M. (Md.) 147; Kelly v. Harrison, 2 Johns. Cas. (N. Y.) 29, 1 Am. Dec. 154; Orser v. Hoag, 3 Hill (N. Y.) 79; Brown v. Sprague, 5 Den. (N. Y.) 545; Munro v. Merchant, 28 N. Y. 9; Watson v. Donnelly, 28 Barb. (N. Y.) 653; Love v. Hadden, 3 Brev. (S. Car.) 1; see also Moore v. Wilson, 10 Yerg. (Tenn.) 406; Duncan v. Beard, 2 Nott & M. (S. Car.) 400; Harden v. Fisher, 1 Wheat. (U. S.) 300; Jackson v. Clarke, 3 Wheat. (U. S.) 1; Craig v. Radford, 3 Wheat. (U. S.) 594; Society, etc., v. New Haven, 8 Wheat. (U. S.) 464; Hughes v. Edwards, 9 Wheat. (U. S.) 489; Shanks v. Dupont, 3 Pet. (U. S.) 242, reversing *Ex p. Dupont*, 1 Harp. Eq. (S. Car.) 5; Society, etc., v. Wheeler, 2 Gall. (U. S.) 105; Hebron v. Colchester, 5 Day (Conn.) 169; Trimbles v. Harrison, 1 B. Mon. (Ky.) 140; Owings v. Norwood, 2 Har. & J. (Md.) 104; Com. v. Sheafe, 6 Mass. 441; Hutchinson v. Brock, 11 Mass. 119; Levine v. Taylor, 12 Mass. 8; Fox v. Southack, 12 Mass. 143; Coolidge v. Ingles, 13 Mass. 36; Crane v. Reeder, 21 Mich. 24, 4 Am. Rep. 430, 25 Mich. 303; Jackson v. Lunn, 3 Johns. Cas. (N. Y.) 109; Jackson v. Wright, 4 Johns. (N. Y.) 75; Clarke v. Morey, 10 Johns. (N. Y.) 69; Jackson v. Decker, 11 Johns. (N. Y.) 418;

People v. Snyder, 41 N. Y. 397; Megrath v. Robertson, 1 Desaus. (S. Car.) 445; Foxwell v. Craddock, 1 Patt. & H. (Va.) 250; Read v. Read, 5 Call (Va.) 160; Com. v. Bristow, 6 Call (Va.) 60; Stephen v. Swann, 9 Leigh (Va.) 404; Fiott v. Com., 12 Gratt. (Va.) 564; Russel v. Skipwith, 6 Binn. (Pa.) 244.

Mexico.—People v. Folsom, 5 Cal. 373; Quintana v. Tomkins, 1 N. Mex. 29; Carter v. Territory, 1 N. Mex. 317; Holliman v. Peebles, 1 Tex. 673.

Netherlands.—University v. Miller, 3 Dev. (N. Car.) 188.

Russia.—Clarke v. Morey, 10 Johns. (N. Y.) 69; Maynard v. Maynard, 36 Hun (N. Y.) 227.

Spain.—Judson v. Eslava, Minor (Ala.) 2; State v. Primrose, 3 Ala. 546; *In re Harrold*, 2 Pa. L. J. 119.

Sweden.—Norberg v. Hillgrew, 5 N. Y. Leg. Obs. 177.

Switzerland.—Hauenstein v. Lynham, 100 U. S. 483, 28 Gratt. (Va.) 62; Jost v. Jost, 1 Mackey (D. C.) 487; Yeaker v. Yeaker, 4 Metc. (Ky.) 33, 81 Am. Dec. 530.

Treaties Wholly or Partially Removing Disabilities in regard to taking, holding, and transmitting by purchase, are valid and within the power given to the Federal Government under the treaty-making clause. Orr v. Hodgson, 4 Wheat. (U. S.) 453; Hauenstein v. Lynham, 100 U. S. 483; Schultze v. Schultze, 144 Ill. 290; Kull v. Kull, 37 Hun (N. Y.) 476.

Removal of Disability to Inherit.—So also are treaties removing the disabilities of aliens to inherit. Ware v. Hylton, 3 Dall. (U. S.) 242; Fairfax v. Hunter, 7 Cranch (U. S.) 627; Hauenstein v. Lynham, 100 U. S. 488, 8 Op. Atty-Gen. 417; People v. Gerke, 5 Cal. 381.

Right to Sue Secured by Treaty.—As to restrictions by treaty on the right of aliens to bring transitory actions against each other in the courts of this country, see 7 Am. Law Review, 417. See also Den v. Brown, 7 N. J. L. 305.

Where the laws of the treaty country allow claims to be prosecuted against the government, the same privilege will be extended to aliens by this country. U. S. v. O'Keefe, 11 Wall. (U. S.) 178; Carlisle v. U. S., 16 Wall. (U. S.) 147; Brown's Case, 5 Ct. of Cl. 571; Lobsiger's Case, 5 Ct. of Cl. 687; Rothschild's Case, 6 Ct. of Cl. 205; Dauphin's Case, 6 Ct. of Cl. 221; De Give's Case, 7 Ct. of Cl. 517; Fichera's Case, 9 Ct. of Cl. 254; Collie's Case, 9 Ct. of Cl. 431.

The Termination of a Treaty by War does not divest property rights already vested under it. Society, etc. v. New Haven, 8 Wheat. (U. S.) 464; Fox v. Southack, 12 Mass. 143; Fiott v. Com., 12 Gratt. (Va.) 564. See the title WAR.

with a foreign power a state law denying to aliens rights thus secured to them is void.¹

III. ALIEN ENEMY—1. Definition.—An alien enemy is one who owes allegiance to the adverse belligerent.²

2. Rights and Liabilities—*a.* GENERAL AND MISCELLANEOUS.—An alien enemy is not *civilitur mortuus*, but he has no political rights.³

Aliens Permissi.—When resident, and not chargeable with actual hostility or crime, alien enemies have an implied license to remain until ordered out of the country, and on leaving the country are allowed to remove their goods and effects, and are protected in their other rights.⁴

Military Service.—Alien enemies who have voluntarily enlisted in the army, and have been accepted by the President, are not entitled to be discharged.⁵

Executor.—It has been held in *Louisiana* that an executor who refused to take the oath of allegiance to the United States, and went over into the Confederate lines beyond the jurisdiction of the proper authorities, became thereby *functus officio*, and lost the right to administer upon the estate.⁶

Guardian.—It has been held that a guardian does not forfeit his office of guardianship by removing into the enemy's territory.⁷

1. State Laws Denying to Aliens Rights Secured by Treaty.—U. S. Const. art. 6; 3 Elliot's Debates, 231; 2 Story on U. S. Constitution (5th ed.), § 1838; Foster v. Neilson, 2 Pet. (U. S.) 253; Shanks v. Dupont, 3 Pet. (U. S.) 242; The Cherokee Tobacco, 11 Wall. (U. S.) 616; Hauenstein v. Lynham, 100 U. S. 483; Baker v. Portland, 5 Sawy. (U. S.) 566; People v. Gerke, 5 Cal. 381; Jost v. Jost, 1 Mackey (D. C.) 487; Wunderle v. Wunderle, 144 Ill. 40; Schultze v. Schultze, 144 Ill. 290; Yeaker v. Yeaker, 4 Metc. (Ky.) 33, 81 Am. Dec. 530; Bollermann v. Blake, 94 N. Y. 624; Kull v. Kull, 37 Hun (N. Y.) 476.

2. Bouvier's Law Dict.; 1 Kent Com. (13th ed.) 73. See also Sparenburgh v. Bannatyne, 1 B. & P. 163; Acklen v. Hickman, 60 Ala. 568; Bayard v. Singleton, Mart. (N. Car.) 48.

Alien enemies are either temporary (*pro tempore*), perpetual (*perpetuus*), or permitted especially (*specialiter permissus*). Calvin's Case, 7 Coke 1; Heirn v. Bridault, 37 Miss. 209.

American Civil War.—That the late war between the states was a public war, and the adverse participants alien enemies, see: The Venice, 2 Wall. (U. S.) 258; Mrs. Alexander's Cotton, 2 Wall. (U. S.) 404; Mauran v. Alliance Ins. Co., 6 Wall. (U. S.) 1; The Ouachita Cotton, 6 Wall. (U. S.) 521; Hanger v. Abbott, 6 Wall. (U. S.) 532; Coppell v. Hall, 7 Wall. (U. S.) 542; McKee v. U. S., 8 Wall. (U. S.) 163; U. S. v. Grossmayer, 9 Wall. (U. S.) 72; Miller v. U. S., 11 Wall. (U. S.) 268; Kanawha Coal Co. v. Kanawha, etc., Coal Co., 7 Blatchf. (U. S.) 391; Rice v. Shook, 27 Ark. 137, 11 Am. Rep. 783; De Jarnette v. De Giverville, 56 Mo. 440; Sanderson v. Morgan, 39 N. Y. 231; Bonneau v. Dinsmore, 23 How. Pr. (N. Y. Supreme Ct.) 397; U. S. v. Steamboat Isaac Hammett, 2 Pittsb. (Pa.) 358.

Contra, that residents in the Confederate States still remained citizens *de jure* of the

United States: Hoskins v. Gentry, 2 Duv. (Ky.) 285; Luter v. Hunter, 30 Tex. 689, 98 Am. Dec. 494. See generally 14 Am. L. Reg. N. S. 129.

Where a person residing in Louisiana at the outbreak of the war, soon after left his home, remaining absent till the termination of hostilities, his family continuing to reside in Louisiana, while his residence was partly in loyal and partly in neutral states, he intending all the while to return to his former home, and remaining loyal to the United States, it was held that he was not an alien enemy of the United States. Zacharie v. Godfrey, 50 Ill. 186, 99 Am. Dec. 506.

3. DeWahl v. Braune, 1 H. & N. 178; Bayard v. Singleton, Mart. (N. Car.) 48. See 1 Bl. Com. 372-373.

Killing Alien Enemy.—It is legal to kill an alien enemy in the heat of war, but to kill such an enemy after he has laid down his arms, and especially when he is confined in prison, is murder. State v. Gut, 13 Minn. 341.

4. Aliens Permissi.—U. S. Rev. Stat., §§ 4067, 4068, 4070; Brown v. U. S., 8 Cranch (U. S.) 110; The Adventure, 8 Cranch (U. S.) 221; Lockington v. Smith, Pet. (C. C.) 466; Heirn v. Bridault, 37 Miss. 229; Clarke v. Morey, 10 Johns. (N. Y.) 69; Bishop v. Jones, 28 Tex. 294. See also Passenger Cases, 7 How. (U. S.) 513; Bagwell v. Babe, 1 Rand. (Va.) 272.

Such implied license is equivalent to an express license or letters of safe conduct. Clarke v. Morey, 10 Johns. (N. Y.) 69.

License is not to be implied from mere residence, unless sanctioned by the government after the commencement of hostilities. Boulton v. Dobree, 2 Campb. 163.

5. Wilson v. Izard, 1 Paine (U. S.) 68.

6. Poindexter's Succession, 19 La. Ann. 22; Vogel's Succession, 20 La. Ann. 81; Hebert v. Jackson, 28 La. Ann. 377. See Cutler v. Howard, 9 Wis. 315.

7. Clement v. Sigur, 29 La. Ann. 798.

Cestui Que Trust.—A trust may be created in favor of an alien enemy, which may be enforced by him after the termination of the war.¹

b. RIGHTS AND POWERS AS TO PROPERTY.—As a rule, in the absence of statutes declaring otherwise, there is no difference between alien friends and alien enemies in respect to their general rights and disabilities as to property.²

c. SUITS BY AND AGAINST ALIEN ENEMIES.—**Right to Sue Suspended during Hostilities.**—An alien enemy is not permitted to prosecute suits in court, and if the plaintiff, at the commencement of a suit, is an alien enemy, it is a

1. *Crutcher v. Hord*, 4 Bush (Ky.) 368; *Roach v. Hudson*, 8 Bush (Ky.) 410; *Buford v. Speed*, 11 Bush (Ky.) 343. See also *Kensington v. Inglis*, 8 East 273.

2. *Fairfax v. Hunter*, 7 Cranch (U. S.) 603; *Yeo v. Mercereau*, 18 N. J. L. 387; *Hardy v. DeLeon*, 5 Tex. 211; *Marshall v. Conrad*, 5 Call (Va.) 364.

The right of the state to lands purchased by an alien is independent of, and does not arise out of, a state of war; it accrues not because the person purchasing it is an enemy, but because he is an alien. *Read v. Read*, 5 Call (Va.) 160.

The purchase of property of a loyal citizen, sold under the Confederate confiscation acts, was void. *Knox v. Lee*, 12 Wall. (U. S.) 457.

An act confiscating the property of an alien enemy by name is as effectual in vesting the property in the state as an inquest of office. *Bayard v. Singleton*, Mart. (N. Car.) 48.

Conveyances by Alien Enemies.—A deed executed in time of war within the United States lines by the attorney of the grantor, while the grantor was within the Confederate lines and an alien enemy, was held to be void as a contract between enemies. *Filor's Case*, 3 Ct. of Cl. 25.

So also a deed executed in New York by a loyal citizen thereof, conveying land in Georgia to a citizen thereof, for the purpose of saving it from confiscation by the Confederate government, was held to be void. *Dillon's Case*, 5 Ct. of Cl. 586.

Similarly, a sale and conveyance of lands lying in Iowa by a citizen of Virginia was held void. *Hill v. Baker*, 32 Iowa 302, 7 Am. Rep. 193. So also of mortgages. *Hyatt v. James*, 2 Bush (Ky.) 463, 92 Am. Dec. 505; *Mims v. Armstrong*, 42 Miss. 429, 97 Am. Dec. 472.

In *Jackson v. Decker*, 11 Johns. (N. Y.) 418, it was held that an alien enemy, residing in the enemy's country, could not make a valid demise so as to maintain ejectment for lands acquired under the *New York Act* of April 2, 1798.

A deed to land in Memphis, executed in Atlanta while the city was within the federal lines, was upheld in *Shaw v. Carlile*, 9 Heisk. (Tenn.) 594. In delivering the opinion of the court, *Freeman, J.*, said: "Upon the authorities, it may well be considered doubtful, whether the rule of non-intercourse, even as between belligerents, has any application to the conveyance and transfer of real estate, situated in one belligerent territory, by a citizen of the other." *Citing with approval*, in

support of this doctrine, *Kershaw v. Kelsey*, 100 Mass. 561, 1 Am. Rep. 142, 97 Am. Dec. 124, in which a lease of lands in Mississippi, made in that state in 1864, between a citizen of that state and a citizen of Massachusetts, was held valid. See also *Conrad v. Waples*, 96 U. S. 279; *Galbraith v. McFarland*, 3 Coldw. (Tenn.) 267, 91 Am. Dec. 281; *Brown v. Gardner*, 4 Lea (Tenn.) 145. See *infra*, this title, *Validity of Commercial Contracts*.

Devise.—An alien enemy may take by devise and hold until office found. *Fairfax v. Hunter*, 7 Cranch (U. S.) 603; *Jackson v. Clarke*, 3 Wheat. (U. S.) 2; *Hoskins v. Gentry*, 2 Duv. (Ky.) 285; *Marshall v. Conrad*, 5 Call (Va.) 364; *Stephen v. Swann*, 9 Leigh (Va.) 404. See also *Corbett v. Nutt*, 10 Wall. (U. S.) 464; *Crutcher v. Hord*, 4 Bush (Ky.) 360; *Smith v. Gaines*, 38 N. J. Eq. 65, 39 N. J. Eq. 545.

Dower.—Under the laws of *New Jersey* it was held that the widow of an alien who had purchased land while an alien enemy, but continued to hold the estate after he became an alien friend, was entitled to dower. *Yeo v. Mercereau*, 18 N. J. L. 387.

Personal Property.—In *Bradwell v. Weeks*, 13 Johns. (N. Y.) 1, reversing 1 Johns. Ch. (N. Y.) 206, it was held that alien enemies residing in the enemy's country were not entitled to distributive shares of personal property left by an alien resident in New York, who died intestate, without issue, but the whole estate went to the next of kin residing in the state. It seems that this case would hardly be followed as a correct statement of the law as to the right of an alien enemy to acquire personal property by descent. It was decided by the casting vote of the president, the remainder of the court being equally divided in opinion as to affirming or reversing the ruling of the court below, where Chancellor Kent had held that alien enemies might take personalty as distributees. See *Crutcher v. Hord*, 4 Bush (Ky.) 360.

A bequest to an alien enemy is valid, and may be enforced after the restoration of peace. *Atty.-Gen. v. Wheeden*, Park. 267. See also *Crutcher v. Hord*, 4 Bush (Ky.) 360. But see *Heirn v. Bridault*, 37 Miss. 209.

As to the right of an alien enemy to compensation for ships captured in war, see *Campbell v. Mullett*, 2 Swanst. 551.

As to effect of treaties on the rights of alien enemies, see *supra*, this title, *Rights Secured by Treaties*; and for their rights and disabilities under statutes, see generally the local statutes, some of which expressly exclude alien enemies from the privileges they confer on alien friends.

cause for abatement; but the right of action is merely suspended, and revives on the cessation of hostilities.¹

1. Alien Enemy cannot Sue.—1 *Daniell's* Chancery Pleading and Practice 45-53; 1 *Kent Com.* 68; *Dwight on Persons*, 137; *Bac. Abr.*, Aliens, D.

England.—*O'Mealey v. Wilson*, 1 *Campb.* 482; *De Luneville v. Phillips*, 2 B. & P. N. R. 97; *Daubigny v. Davallon*, 2 *Anstr.* 462; *Anthon v. Fisher*, 2 *Doug.* 649, note, 3 *Doug.* 166, 26 *E. C. L.* 69; *McConnell v. Hector*, 3 B. & P. 113; *Alcinous v. Nigreu*, 4 *El. & Bl.* 217, 82 *E. C. L.* 217, 1 *Jur. N. S.* 16; *Sylvester's Case*, 7 *Mod.* 150; *Brandon v. Nesbitt*, 6 *T. R.* 23.

United States.—*Kanawha Coal Co. v. Kanawha, etc., Coal Co.*, 7 *Blatchf. (U. S.)* 391; *Elgee v. Lovell*, 1 *Woolw. (U. S.)* 102; *The Adventure*, 8 *Cranch (U. S.)* 221; *Mumford v. Mumford*, 1 *Gall. (U. S.)* 366; *Crawford v. The William Penn, Pet. (C. C.)* 106.

Illinois.—*Connecticut Mut. L. Ins. Co. v. Hall*, 7 *Am. L. Reg. N. S.* 606.

Indiana.—*Knoefel v. Williams*, 30 *Ind.* 1; *Perkins v. Rogers*, 35 *Ind.* 124, 9 *Am. Rep.* 639.

Kentucky.—*Norris v. Doniphan*, 4 *Metc. (Ky.)* 385.

Maryland.—*Whelan v. Cook*, 29 *Md.* 1; *Dorsey v. Kyle*, 30 *Md.* 513, 96 *Am. Dec.* 617.

Massachusetts.—*Hutchinson v. Brock*, 11 *Mass.* 119; *Levine v. Taylor*, 12 *Mass.* 8.

New York.—*Bonneau v. Dinsmore*, 23 *How. Pr. (N. Y. Supreme Ct.)* 397; *Bell v. Chapman*, 10 *Johns. (N. Y.)* 183; *Sanderson v. Morgan*, 39 *N. Y.* 231, 25 *How. Pr. (N. Y.)* 144.

Pennsylvania.—*Russel v. Skipwith*, 6 *Binn. (Pa.)* 241.

Texas.—*Hardy v. De Leon*, 5 *Tex.* 211; *Bishop v. Jones*, 28 *Tex.* 294.

See also *Sparenburgh v. Bannatyne*, 1 B. & P. 163; *De Wahl v. Braune*, 1 H. & N. 178; *Openheimer v. Levy*, 2 *Stra.* 1082; *Derrier v. Arnaud*, 4 *Mod.* 405; *Kensington v. Inglis*, 8 *East* 273; *Flindt v. Waters*, 15 *East* 260; *Casseres v. Bell*, 8 *T. R.* 166; *Ex p. Boussmaker*, 13 *Ves. Jr.* 71; *Wilcox v. Henry*, 1 *Dall. (U. S.)* 69; *Elgee v. Lovell*, 1 *Woolw. (U. S.)* 102; *Baby v. Dubois*, 1 *Blackf. (Ind.)* 255; *Parkinson v. Wentworth*, 11 *Mass.* 26; *Kershaw v. Kelsey*, 100 *Mass.* 561, 1 *Am. Rep.* 142, 97 *Am. Dec.* 124; *McNair v. Toler*, 21 *Minn.* 175; *Hamersley v. Lambert*, 2 *Johns. Ch. (N. Y.)* 508; *Burnside v. Matthews*, 54 *N. Y.* 78; and the titles INTERNATIONAL LAW; WAR.

An alien enemy cannot sue through an agent. *Boulton v. Dobree*, 2 *Campb.* 163.

An alien carrying on trade in an enemy's country, though residing there as a consul of a neutral state, is an alien enemy, and as such disabled to sue, and his property is liable to confiscation. *Albrectht v. Sussmann*, 2 *Ves. & B.* 323.

An alien enemy has no such status as will authorize a suit by him in the courts of the adverse belligerent; but on the restoration of peace his right revives, and he may enforce any legal right which existed anterior to or

was created during the war. *Crutcher v. Hord*, 4 *Bush (Ky.)* 360.

But see, as to plea of alien enemy being merely a plea in abatement, *Howes v. Chester*, 33 *Ga.* 89, where, pending an action by citizens of New York against citizens of Georgia, the civil war came on, and the defendants interposed the plea that the plaintiffs were alien enemies and that the action should therefore be dismissed, and it was held that the action was properly dismissed.

See also, that alien enemy may be pleaded either in bar or abatement: *Le Bret v. Papillon*, 4 *East* 502; *West v. Sutton*, 1 *Salk.* 2; *McConnell v. Hector*, 3 B. & P. 113; *Bell v. Chapman*, 10 *Johns. (N. Y.)* 183; *Jackson v. Decker*, 11 *Johns. (N. Y.)* 418.

The enforced residence of a loyal citizen of the United States in one of the Confederate states did not prevent his suing at any time in the United States courts. *Zacharie v. Godfrey*, 50 *Ill.* 186, 99 *Am. Dec.* 506.

The state of Texas did not cease to be a state by rebellion; but, to enable it to sue, there must have been a state government capable of representing it, and therefore, while the war lasted, it could not sue in the United States courts. *Texas v. White*, 7 *Wall. (U. S.)* 700. See also *U. S. v. Viotor* 16 *Abb. Pr. (N. Y. Supreme Ct.)* 153.

Statutes which allow aliens to hold title do not prevent actions being subject to abatement during war. *Jackson v. Decker*, 11 *Johns. (N. Y.)* 418.

As to a suit by an alien enemy resident in his own country at the time of the breaking out of war, and at the time of bringing suit, see *Clarke v. Morey*, 10 *Johns. (N. Y.)* 69.

See, as to effect of a treaty of peace after suit brought by alien enemy, *Johnson v. Harrison*, *Litt. Sel. Cas. (Ky.)* 226.

When there is no treaty providing that war shall not affect the recovery of debts, although there is no confiscation of property, yet an alien enemy resident in the United States when war breaks out, or coming here afterwards, cannot sue to recover debts unless resident under an implied or expressed license. *Clarke v. Morey*, 10 *Johns. (N. Y.)* 69; *Russel v. Skipwith*, 6 *Binn. (Pa.)* 241; *Hardy v. De Leon*, 5 *Tex.* 211.

The Reason for the Rule prohibiting alien enemies from suing, is that aid would be given to the enemy by allowing the plaintiff to recover. *McConnell v. Hector*, 3 B. & P. 113; *Russ v. Mitchell*, 11 *Fla.* 80; *Zacharie v. Godfrey*, 50 *Ill.* 186, 99 *Am. Dec.* 506; *Hoskins v. Gentry*, 2 *Duv. (Ky.)* 285; *Norris v. Doniphan*, 4 *Metc. (Ky.)* 402; *Kershaw v. Kelsey*, 100 *Mass.* 565, 1 *Am. Rep.* 142, 97 *Am. Dec.* 124; *Bonneau v. Dinsmore*, 23 *How. Pr. (N. Y. Supreme Ct.)* 397; *Griswold v. Waddington*, 15 *Johns. (N. Y.)* 57. See also *Sparenburgh v. Bannatyne*, 1 B. & P. 170; *Dorsey v. Thompson*, 37 *Md.* 25; *Levine v. Taylor*, 12 *Mass.* 8.

The common-law rule prohibiting alien enemies from maintaining actions does not

Subject to Suit.—But while an alien enemy may not sue, he may be sued, and his property within the jurisdiction of the court is subject to legal process.¹

Entitled to Make Defense.—And when an alien enemy is proceeded against in law, he may appear in court in person or by counsel and make defense.²

d. VALIDITY OF COMMERCIAL CONTRACTS.—The law of nations prohibits all intercourse, between citizens of two hostile nations, which is inconsistent with the state of war existing between the two countries. This includes any act or contract which tends to increase the resources of the enemy, and every kind of trading or commercial dealing or intercourse, whether by the transmission of money or goods, or orders for the delivery of either, between the two countries, directly or indirectly, or through the intervention of third persons or partnerships, or by contracts in any form looking to or involving such transmission, or by insurances upon trade with or by the enemy. Beyond the principle just stated, the prohibition of commercial

apply with the same rigor in courts acting under the general law of nations. *Crawford v. The William Penn*, Pet. (C. C.) 106.

Prize Court.—An alien enemy cannot sustain a claim in a prize court. *The Emulous*, 1 Gall. (U. S.) 563; *Johnson v. Thirteen Bales*, etc., 2 Paine (U. S.) 639.

Admiralty Court.—The principle that an alien enemy has no standing in court, and cannot appear and defend his property seized as prize of war on the high seas, does not apply in cases in a court of admiralty. *U. S. v. 1756 Shares of Capital Stock*, 5 Blatchf. (U. S.) 231. See also *Crawford v. The William Penn*, Pet. (C. C.) 106.

Aliens Permissi.—An alien enemy residing in the United States, under express or implied license of the government, may maintain a personal action. *Otteridge v. Thompson*, 2 Cranch (C. C.) 108; *Clarke v. Morey*, 10 Johns. (N. Y.) 69. See also, that an alien enemy remaining in a country under license may sue, *Sylvester's Case*, 7 Mod. 150; *Wells v. Williams*, 1 Ld. Raym. 282, 1 Lutw. 34, 1 Salk. 46.

Action on Ransom Bill.—Where an alien brought an action on a ransom bill for the ransom of a ship captured by him in war, the action being brought after peace was restored, it was held that he might maintain the action and recover on the bill. *Ricord v. Bettengham*, 3 Burr. 1734.

Alienage after Verdict.—Where the plaintiffs in a suit have become alien enemies after verdict, the court will not, on that account, stay the judgment and execution, on motion. *Vanbrynen v. Wilson*, 9 East 321; *Buckley v. Lytle*, 10 Johns. (N. Y.) 117; *Brofield v. Lynd*, 2 Martin (La.) 213. See also *Owens v. Hanney*, 9 Cranch (U. S.) 180.

If execution has been enjoined by the defendants, an application for a dissolution of the injunction by plaintiffs, who have since become alien enemies, will not be heard. *Taylor v. Morgan*, 2 Martin (La.) 263.

Nominal Plaintiff.—Where one of the plaintiffs to a suit is a mere nominal party joined for conformity, the fact that he is an alien enemy is no ground for dismissing the petition of the real plaintiff who is not an enemy. *Hoskins v. Gentry*, 2 Duv. (Ky.) 285.

1. Alien Enemy may be Sued.—*McVeigh v. U. S.*, 11 Wall. (U. S.) 259; *Ludlow v. Ramsey*, 11 Wall. (U. S.) 581; *Masterson v. Howard*, 18 Wall. (U. S.) 99; *Washington University v. Finch*, 18 Wall. (U. S.) 106; *Society, etc. v. Wheeler*, 2 Gall. (U. S.) 105; *Russ v. Mitchell*, 11 Fla. 80; *Mixer v. Sibley*, 53 Ill. 61; *Harper v. Ely*, 56 Ill. 179; *Seymour v. Bailey*, 66 Ill. 288; *Crutcher v. Hord*, 4 Bush (Ky.) 360; *Thomas v. Mahone*, 9 Bush (Ky.) 122; *Buford v. Speed*, 11 Bush (Ky.) 338; *Dorsey v. Thompson*, 37 Md. 25; *McNair v. Toler*, 21 Minn. 175; *DeJarnette v. DeGiverville*, 56 Mo. 440; *Rodgers v. Dibrell*, 6 Lea (Tenn.) 69.

Constructive Service.—The right to proceed on constructive service against alien enemies or debtors living in the seceded states has been settled, but only the property attached is affected, and no personal judgment can be rendered on such service. *McVeigh v. U. S.*, 11 Wall. (U. S.) 259; *Ludlow v. Ramsey*, 11 Wall. (U. S.) 581; *Washington University v. Finch*, 18 Wall. (U. S.) 106; *Lee v. Rogers*, 2 Sawy. (U. S.) 549; *Mixer v. Sibley*, 53 Ill. 61; *Seymour v. Bailey*, 66 Ill. 288; *Willard v. Boggs*, 56 Ill. 163; *Harper v. Ely*, 56 Ill. 179; *Crutcher v. Hord*, 4 Bush (Ky.) 363; *Thomas v. Mahone*, 9 Bush (Ky.) 122; *Selden v. Preston*, 11 Bush (Ky.) 191; *Dorsey v. Kyle*, 30 Md. 512, 96 Am. Dec. 617; *Dorsey v. Dorsey*, 30 Md. 522, 96 Am. Dec. 633; *Dorsey v. Thompson*, 37 Md. 25.

In *Dean v. Nelson*, 10 Wall. (U. S.) 158, an exception was made in the case of one forced to remain in the seceded states. The decision in *Johnson v. Robertson*, 31 Md. 476, 34 Md. 165, contrary to the doctrine above announced, was made on a misapprehension of *Dean v. Nelson*, 10 Wall. (U. S.) 158. See also *Kanawha Coal Co. v. Kanawha, etc., Coal Co.*, 7 Blatchf. (U. S.) 391; *Dorsey v. Thompson*, 37 Md. 25.

2. An Alien Enemy may be Made a Party Defendant, and when made a party by personal service or otherwise, may, by permission of the court, be heard in his defense by attorney, or the court may appoint counsel at its discretion. *Russ v. Mitchell*, 11 Fla. 80.

The liability of an alien enemy to be sued carries with it the right to use all means and

intercourse between adverse belligerents has not been carried by judicial decision. The present tendency of the law of nations is to exempt individuals and private contracts from injury or restraint in consequence of war between the governments of the contracting parties, and hence all contracts between alien enemies, not inconsistent with a state of war, are valid.¹

Effect of War on Agency.—A belligerent cannot have an agent for general purposes during war in the territory of the adverse belligerent,² but he may have an agent in the enemy's country for some purposes, such as to collect or preserve money or property,³ and war does not necessarily revoke an agency established before the war began.⁴

ALIKE.—The word "alike" is the equivalent of "equally."⁵

appliances of defense; he may, therefore, have the benefit of a writ of error, *McVeigh v. U. S.*, 11 Wall. (U. S.) 259; and may employ attorneys to conduct that defense, *McNair v. Toler*, 21 Minn. 175. But see, as to the power of an alien defendant to appear by attorney, *Herbert v. Rowles*, 30 Md. 271.

Confiscation Acts.—The property of a public enemy, when libeled at the suit of the government, is condemned without his being heard, *U. S. v. Steamboat Isaac Hammett*, 2 Pittsb. (Pa.) 358.

1. Contracts between Alien Enemies.—Dwight on Persons 138; *Lockhart v. Horn*, 1 Woods (U. S.) 628, 17 Wall. (U. S.) 570; *Wilmington, etc., R. Co. v. King*, 91 U. S. 3; *Coolidge v. Inglee*, 13 Mass. 26; *Kershaw v. Kelsey*, 100 Mass. 561, 1 Am. Rep. 142, 97 Am. Dec. 124; *Sands v. New York L. Ins. Co.*, 50 N. Y. 626, 10 Am. Rep. 535. See also *Lance v. Hunter*, 72 N. Car. 178, 21 Am. Rep. 454.

For a full discussion of this branch of the subject, see the titles **CONTRACTS**; **INSURANCE**; **INTERNATIONAL LAW**; **WAR**.

Interest.—As to the running of interest on debts between alien enemies, see *Conn v. Penn*, Pet. (C. C.) 496; *Denniston v. Imbrie*, 3 Wash. (U. S.) 396; *Ward v. Smith*, 7 Wall. (U. S.) 447; and the titles **INTEREST** and **WAR**.

2. New York L. Ins. Co. v. Davis, 95 U. S. 425; *Buford v. Speed*, 11 Bush (Ky.) 338. See generally the titles **AGENCY**; **WAR**.

One who at the beginning of the war fled from Georgia to Indiana, but without there-

by changing his domicil, might carry on business in Georgia through an agent appointed before he left his domicil. *Quigley's Case*, 13 Ct. of Cl. 367, 103 U. S. 595.

3. New York L. Ins. Co. v. Davis, 95 U. S. 425; *Ward v. Smith*, 7 Wall. (U. S.) 447; *Buford v. Speed*, 11 Bush (Ky.) 338; *Manhattan L. Ins. Co. v. Warwick*, 20 Gratt. (Va.) 614, 3 Am. Rep. 218; *Hale v. Wall*, 22 Gratt. (Va.) 424; *Small v. Lumpkin*, 28 Gratt. (Va.) 832. See also *Montgomery v. U. S.*, 15 Wall. (U. S.) 395; *Denniston v. Imbrie*, 3 Wash. (U. S.) 396; *King v. Hanson*, 4 Call (Va.) 259.

That the agent may collect debts or preserve property, but cannot transmit to the creditor the money collected, see *Hale v. Wall*, 22 Gratt. (Va.) 424.

An agent in Texas having property of his principal, even after the non-intercourse proclamation, was chargeable with a trust therein; and if he sold such property, the principal, at the end of the war, could enforce the contract of sale against a purchaser with notice. *McCormick v. Arnspiger*, 38 Tex. 569.

4. Monsseaux v. Urquhart, 19 La. Ann. 284.

5. Thus, a testamentary gift to two or more alike, or to be enjoyed alike, is synonymous with its being given equally, and creates a tenancy in common. *Loveacres v. Blight*, 1 Cowp. 352. Lord Mansfield, in that case, said: "If so, it is equally clear upon the second question that this is a tenancy in common. The word *alike* is the same as the word 'equally.'" See also *Bunch v. Hurst*, 3 Desaus. (S. Car.) 288; and the title **WILLS**.

ALIMONY.

BY EDMUND RANDOLPH WILLIAMS.

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7. *Commencement of Payment*, 135.
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 - a. *In General*, 135.
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CROSS-REFERENCES.

For matters of PROCEDURE, see ENCYCLOPÆDIA OF PLEADING AND PRACTICE, vol. 1, p. 407.
For other matters of SUBSTANTIVE LAW and EVIDENCE, related to this subject, see the following titles in this work: DIVORCE; HUSBAND AND WIFE; MARRIAGE; SEPARATION (HUSBAND AND WIFE).

I. DEFINITION.—Alimony is an allowance which, by order of court, the husband, or former husband, is compelled to pay to his wife, or former wife, from whom he has been legally separated or divorced, for her support and maintenance. The allowance, when for the support of the wife during the pendency of the suit, is called alimony *pendente lite*; when allowed after the termination of the suit, it is called permanent alimony.¹ Strictly speaking, alimony is allowed merely as incident to proceedings for legal separation or divorce; but in some jurisdictions, and by statute in many of the states, alimony is allowed as an independent right, proceedings for which are usually had in chancery courts.

Alimony on Behalf of the Husband.—Alimony is allowed the wife in recognition of the husband's common-law liability to support her. Therefore, in the absence of legislation readjusting domestic relations and allowing it, there being no corresponding liability on the wife's part to support her husband, alimony cannot be granted to him.² In several of the states, however, alimony, or an allowance from the wife's estate in the nature of alimony, is allowed the husband by statute.³

1. Alimony Defined.—The definition given in the text is large enough to cover alimony as originally allowed under the jurisdiction of the ecclesiastical courts and as used in modern law, enlarged by statute and the jurisdiction of the chancery courts of the several states. It may be profitable, however, to add here several definitions of alimony from the earliest times until the present. In Godol Abr. 508, alimony is defined as "that legal portion of the husband's estate which, by the sentence of the ecclesiastical court, is allowed to the wife for her maintenance upon account of any separation from him." This definition will be seen to refer exclusively to alimony allowed upon a judicial separation, not including alimony allowed without divorce, or that allowed in case of a divorce *a vinculo*.

In *Wallingsford v. Wallingsford*, 6 Har. & J. (Md.) 485, this definition is given: "Alimony is a maintenance afforded to the wife, where the husband refuses to give it, or where his improper conduct compels her to separate from him. It is not a portion of his real estate to be assigned to her in fee simple, subject to her control, or to be sold at her pleasure, but a provision for her support, to continue during their joint lives or so long as they live separate."

In *Burr v. Burr*, 7 Hill (N. Y.) 207, it was said that alimony is the maintenance or support which a husband is bound to give his wife upon separation from her, or support which either father or mother is bound to give either his or her children, though this is more usually called maintenance. The latter part of this definition will not be considered in this article.

In *Rogers v. Vines*, 6 Ired. (N. Car.) 297, it is said that alimony, in its legal sense, may be defined to be that proportion of the husband's estate which is judicially allowed and allotted to a wife for her subsistence and livelihood during the period of separation.

The word "alimony" commonly used is equally applicable to all allowances, whether annual or in gross, made to a wife pending a decree of divorce. *Burrows v. Purple*, 107 Mass. 428; *Jeter v. Jeter*, 36 Ala. 391; *Sanford v. Sanford*, 5 Day (Conn.) 353; *Lyon v.*

Lyon, 21 Conn. 185; *Hedrick v. Hedrick*, 28 Ind. 291; *Wheeler v. Wheeler*, 18 Ill. 39; *Parsons v. Parsons*, 9 N. H. 309, 32 Am. Dec. 362; *Whittier v. Whittier*, 31 N. H. 452; *Piatt v. Piatt*, 9 Ohio 37.

For Further Authorities, see: *Arkansas*.—*Bowman v. Worthington*, 24 Ark. 522.

California.—*Galland v. Galland*, 38 Cal. 276; *Robinson v. Robinson*, 79 Cal. 516; *Ex p. Spencer*, 83 Cal. 463.

Connecticut.—*Lyon v. Lyon*, 21 Conn. 196. *Florida*.—*Sanchez v. Sanchez*, 21 Fla. 350. *Georgia*.—*Odom v. Odom*, 36 Ga. 319.

Illinois.—*Wheeler v. Wheeler*, 18 Ill. 40; *Newman v. Newman*, 69 Ill. 168; *Stillman v. Stillman*, 99 Ill. 201, 39 Am. Rep. 21; *Adams v. Storey*, 135 Ill. 448.

Indiana.—*Carr v. Carr*, 6 Ind. App. 377.

Iowa.—*O'Hagan v. O'Hagan*, 4 Iowa 515; *Dayton v. Drake*, 64 Iowa 716.

Kentucky.—*Lockridge v. Lockridge*, 3 Dana (Ky.) 29; *Woolridge v. Lucas*, 7 B. Mon. (Ky.) 51.

Maine.—*Chase v. Chase*, 55 Me. 21.

Maryland.—*Keerl v. Keerl*, 34 Md. 25; *Jamison v. Jamison*, 4 Md. Ch. 296; *Crane v. Meginnis*, 1 Gill & J. (Md.) 474.

Massachusetts.—*Holbrook v. Comstock*, 16 Gray (Mass.) 110; *Graves v. Graves*, 108 Mass. 315.

Missouri.—*Dawson v. Dawson*, 37 Mo. App. 212; *Crews v. Mooney*, 74 Mo. 29.

New Jersey.—*Calame v. Calame*, 25 N. J. Eq. 551.

North Carolina.—*Miller v. Miller*, 75 N. Car. 71; *Taylor v. Taylor*, 93 N. Car. 418, 53 Am. Rep. 460.

Ohio.—*Pretzinger v. Pretzinger*, 45 Ohio St. 459.

Tennessee.—*White v. Bates*, 89 Tenn. 572, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) p. 482.

West Virginia.—*Martin v. Martin*, 33 W. Va. 700.

Wisconsin.—*Bacon v. Bacon*, 43 Wis. 203; *Blake v. Blake*, 68 Wis. 303.

2. *Somers v. Somers*, 39 Kan. 132.

3. So in *North Carolina, Iowa, and Washington*.

II. AS AN INDEPENDENT RIGHT—1. In General; without Divorce—Originally an incident to some other proceeding, and as originally allowed had no existence as a separate and independent right. When allowed by the ecclesiastical courts in *England*, it was always incident to proceedings for legal separation or divorce.¹

In the Time of the Commonwealth Allowed Independently.—During the period of the Commonwealth, however, when ecclesiastical courts were abolished, the jurisdiction as to alimony was exercised by the judges of the chancery court, by express provision of the commission creating them, which did not permit the exercise of the jurisdiction in divorce cases.²

Prevailing Rule in United States—Allowed Independently only by Statute.—The jurisdiction of the chancery courts, as organized under the Commonwealth, did not become a part of the law of the colonies, and so could not be exercised by them on this ground. And in the *United States* at present it is maintained, by the apparent weight of authority, that in the absence of legislation to the

In *Rhode Island* alimony may be granted a petitioner, whether husband or wife. *R. I. Pub. Stat.*, c. 167, § 12.

In *Massachusetts* a court may decree a part of the wife's estate in the nature of alimony to the husband. *Mass. Pub. Stat.*, c. 146, § 36.

In *Virginia* it is provided that the court may make such further decree as it shall deem expedient concerning the estate and maintenance of the parties. *Virginia Code* 1887, § 2263.

Whether allowed the husband or wife, the determination of the amount would seem to be governed by the same principles. In *Abel v. Abel* (Iowa 1893), 56 N. W. Rep. 442, where an action of divorce was brought by the wife on account of the husband's adultery, his request in the answer that a part of the property be granted to him was properly denied.

1. Allowed by Ecclesiastical Courts as Incidental to Some Other Matter.—*Cooke v. Cooke*, 2 Ph. 40; *Head v. Head*, 3 Atk. 295; *Ball v. Montgomery*, 2 Ves. Jr. 195; *Winscom v. Winscom*, 3 S. & T. 380; *Duncan v. Duncan*, 19 Ves. Jr. 394; *Vandergucht v. DeBlaquiere*, 8 Sim. 315; *Wilkes v. Wilkes*, 2 Dick. 791; *Williams v. Callow*, 2 Vern. 752.

In *Ball v. Montgomery*, 2 Ves. Jr. 191, it was said that no court, not even the ecclesiastical court, has any original jurisdiction to give a wife separate maintenance. It is always as incidental to some other matter that she becomes entitled to a separate provision. If she applies in equity upon a *supplicavit* for security of the peace against her husband, and it is necessary that she should live apart, as incidental to that, the chancellor will allow her separate maintenance. And in *Duncan v. Duncan*, 19 Ves. Jr. 394, Sir William Grant, denying that a married woman should be the plaintiff in a court of chancery for separate maintenance, instanced a *supplicavit* as a case where separate maintenance could be granted if it should become necessary that the parties live apart.

But the object of the writ of *supplicavit* was not, however, to provide a maintenance for the wife, but was granted on the supposition

that the parties would live together. *Head v. Head*, 3 Atk. 547.

In *Clavering's Case*, 2 P. Wms. 202, a motion for a *supplicavit* was refused, and the party was directed to apply elsewhere, namely, to the justice of the peace. To the same effect was the decision of Chancellor Kent in *Codd v. Codd*, 2 Johns. Ch. (N. Y.) 141.

In *Adams v. Adams*, 100 Mass. 365, 1 Am. Rep. 111, it was expressly held that the equity jurisdiction of the court did not warrant the issue of a writ of *supplicavit* on the petition of the wife against her husband upon grounds justifying a divorce. *Chapman, C. J.*, said: "It never was a direct object of the writ of *supplicavit* to give alimony. Its purpose was to protect the complaining party from personal violence and abuse. Sometimes it was thought necessary to make a temporary provision for a wife who had left her husband because it was not safe to live with him, until he would receive her back. An attempt to use the process for the direct purpose of obtaining alimony to enable her to have a permanent separate maintenance would have been regarded as an abuse."

In 2 *Story's Equity* (8th ed.), § 1423, it is said that no modern instance of a decree for separate maintenance on *supplicavit* can be found.

Agreement for Separate Maintenance.—There have been cases in *England* where the chancellor has interfered in behalf of the wife in an independent proceeding subsequent to the granting of a divorce, but, as has been said, these are cases where there was an express agreement between the parties for a fund in trust for the future benefit of the wife, as in *Oxenden v. Oxenden*, 2 Vern. 493; or where property has been devised or descended to her after divorce, as in *Nicholls v. Danvers*, 2 Vern. 671. See *Fischli v. Fischli*, 1 Blackf. (Ind.) 360, 12 Am. Dec. 251. And a court of equity has sometimes interfered to enforce a contract for separate support and maintenance. *Angier v. Angier*, Gilb. Eq. Rep. 152; *Watkins v. Watkins*, 2 Atk. 96.

2. 1 Bishop on Marriage, Divorce, and Separation, § 1394; 1 *Fonblanque on Equity*, bk. 1, c. 2, § 6; *Russel v. Bodvil*, 1 Ch. Rep.

contrary, alimony should not be allowed in an independent suit in courts of equity.¹

In Some States Jurisdiction Regarded Inherent in Equity.—But in many of the states this jurisdiction has been allowed, and alimony may be decreed independently of any proceeding for separation or divorce where the husband refuses to support his wife, or where she has separated from him, on the ground that in the absence of adequate relief or remedy at law, equity will interfere.²

186; *Whorewood v. Whorewood*, 1 Ch. Rep. 223.

1. In the following states alimony has been declared to be incidental to the divorce and to be obtained only as incident to the suit for divorce, except where the jurisdiction has been expressly conferred upon the courts of equity:

Arkansas.—*Bowman v. Worthington*, 24 Ark. 529.

Georgia.—*McGee v. McGee*, 10 Ga. 477; *Goss v. Goss*, 29 Ga. 109.

Illinois.—*Chestnut v. Chestnut*, 77 Ill. 346.

Indiana.—*Chapman v. Chapman*, 13 Ind. 396; *Muckenbarg v. Holler*, 29 Ind. 139, 92 Am. Dec. 345; *Moon v. Baum*, 58 Ind. 194; *Fischli v. Fischli*, 1 Blackf. (Ind.) 360, 12 Am. Dec. 251.

Louisiana.—*Moore v. Moore*, 18 La. Ann. 613; *Holbrook v. Holbrook*, 32 La. Ann. 15; *Heyob v. Heyob*, 18 La. Ann. 41; *Carroll v. Carroll*, 42 La. Ann. 1071.

Maine.—*Jones v. Jones*, 18 Me. 308, 36 Am. Dec. 723; *Henderson v. Henderson*, 64 Me. 419; *Littlefield v. Paul*, 69 Me. 533.

Massachusetts.—*Shannon v. Shannon*, 2 Gray (Mass.) 285; *Adams v. Adams*, 100 Mass. 365, 1 Am. Rep. 111; *Baldwin v. Baldwin*, 6 Gray (Mass.) 342; *Coffin v. Denham*, 8 Cush. (Mass.) 405, 54 Am. Dec. 769.

Michigan.—*Peltier v. Peltier*, Harr. (Mich.) 19; *Perkins v. Perkins*, 16 Mich. 167; *Wright v. Wright*, 24 Mich. 180.

Missouri.—*Doyle v. Doyle*, 26 Mo. 545; *Simpson v. Simpson*, 31 Mo. 24; *McIntire v. McIntire*, 80 Mo. 470.

New Hampshire.—*Parsons v. Parsons*, 9 N. H. 317, 32 Am. Dec. 362.

New Jersey.—*Kirrigan v. Kirrigan*, 15 N. J. Eq. 146; *Nichols v. Nichols*, 25 N. J. Eq. 60; *Yule v. Yule*, 10 N. J. 138; *Rockwell v. Morgan*, 13 N. J. Eq. 119; *Anshutz v. Anshutz*, 16 N. J. Eq. 162; *Cory v. Cory*, 11 N. J. Eq. 400.

New York.—*Atwater v. Atwater*, 53 Barb. (N. Y.) 621.

Pennsylvania.—*Rees v. Waters*, 9 Watts (Pa.) 90.

Vermont.—*Harrington v. Harrington*, 10 Vt. 505; *Prosser v. Prosser*, 47 Vt. 667.

2. Jurisdictions in Which the Power is Regarded as Inherent in Courts of Equity.—In *Alabama*, in a very early case, *Glover v. Glover*, 16 Ala. 440, it was stated as the rule, "that where a husband abandons his wife without just cause, and casts her upon society destitute of the means of subsistence, the court of chancery, as an original ground of equity, will entertain a bill filed against him for alimony." This has been followed in later cases, and the jurisdiction of courts of

equity in such cases is undoubted in this state. *Kinsey v. Kinsey*, 37 Ala. 397; *Wray v. Wray*, 33 Ala. 187; *Hinds v. Hinds*, 80 Ala. 225; *Golden v. Golden* (Ala. 1894), 14 So. Rep. 638; *Ex p. Smith*, 34 Ala. 455.

In *Murray v. Murray*, 84 Ala. 363, Stone, C. J., although stating that the weight of authority was against this rule, said: "This court, obeying an instinct of humanity and following the lead of several adjudged cases, declared a different doctrine."

In *California* it was held, independently of any statute, that a court of equity, in the exercise of its original and inherent power, could decree alimony to the wife in a proper case in an action which had no reference to a divorce or separation. *Galland v. Galland*, 38 Cal. 265. In this case the court was divided. Any question, however, on this point has been set at rest by express legislation conferring jurisdiction. *Hardy v. Hardy*, 97 Cal. 125.

Colorado.—*Daniels v. Daniels*, 9 Colo. 142; *Hanscom v. Hanscom* (Colo. App. 1895), 39 Pac. Rep. 885.

In *Iowa* the courts are in apparent conflict. In *Harshberger v. Harshberger*, 26 Iowa 503, it was said that "no independent action for alimony can be brought; it must be connected with and follow a divorce." See also *Blythe v. Blythe*, 25 Iowa 266. But in *Graves v. Graves*, 36 Iowa 310, 14 Am. Rep. 525, it was held that a court of equity had jurisdiction to entertain a suit for alimony where no divorce or other relief was sought, and this latter view was maintained in more recent cases. *Platner v. Platner*, 66 Iowa 378; *Whitcomb v. Whitcomb*, 46 Iowa 437; *Farber v. Farber*, 64 Iowa 362; *Finn v. Finn*, 62 Iowa 482.

In *Kentucky* this jurisdiction is allowed. In *Butler v. Butler*, 4 Litt. (Ky.) 202, Mills, J., said: "It is clear that strong moral obligation must lie on every husband who has abandoned his wife, to support her. The marriage contract and every principle binds him to do this. To fail to do it, is a wrong acknowledged at common law, though the law knows no remedy, because there the wife cannot sue the husband. But in equity the wife can sue the husband, and it is the province of a court of equity to afford remedy where conscience and law acknowledge a right, but know no remedy." See also *Logan v. Logan*, 2 B. Mon. (Ky.) 142; *Griffin v. Griffin*, 8 B. Mon. (Ky.) 120; *Gaines v. Gaines*, 9 B. Mon. (Ky.) 295, 48 Am. Dec. 425; *Lockridge v. Lockridge*, 3 Dana (Ky.) 28, 28 Am. Dec. 52; *Bogges v. Bogges*, 4 Dana (Ky.) 307; *Hulett v. Hulett*, 80 Ky. 364.

Montana.—*Edgerton v. Edgerton*, 12 Mont. 122.

Statutory Authorization.—And in other states, where the jurisdiction has been denied upon principle, it has been conferred by statute,¹ so that it may be said that alimony without divorce is now very generally allowed.

2. For What Causes Allowed—When the Jurisdiction Conferred by Statute.—In those states where the jurisdiction to allow alimony as an independent right is conferred by statute upon equity tribunals, the circumstances which will

In *Maryland* the Court of Chancery has exercised this jurisdiction from the earliest time, although it had no authority to grant a divorce; see *Macnamara's Case* and *Scott's Case*, reported in 2 Bland (Md.) 565, note; *Lynthecumb's Case*, 2 Bland (Md.) 568, note; on the ground that, there being no ecclesiastical courts, the cognizance of such matters devolved upon the Court of Chancery, even prior to the Act of Feb. 17, 1777, c. 22, § 14, providing that "the chancellor shall and may hear and determine all causes for alimony in as full and ample manner as such causes could be heard and determined by the laws of England in the ecclesiastical courts." See *Galwith v. Galwith*, 4 Har. & M. (Md.) 477; *Hewitt v. Hewitt*, 1 Bland (Md.) 101; *Helms v. San Francisco*, 2 Bland (Md.) 538, 20 Am. Dec. 402; *Jamison v. Jamison*, 4 Md. Ch. 289.

The term "alimony," as used in this state, is defined as "maintenance for the wife where the husband refuses to give it, or by his improper conduct forces her to separate from him." *Wallingsford v. Wallingsford*, 6 Har. & J. (Md.) 485. See *Keerl v. Keerl*, 34 Md. 25; *Feigley v. Feigley*, 7 Md. 538, 61 Am. Dec. 375.

Mississippi.—In *Garland v. Garland*, 50 Miss. 694, this jurisdiction was asserted as in other states, on the ground that when the complainant was without full, adequate, and complete remedy at law, equity would interfere.

Nebraska.—Following the adjudged cases in the states allowing this jurisdiction, the courts in this state allowed it. *Earle v. Earle*, 27 Neb. 277, 20 Am. St. Rep. 667; *Cochran v. Cochran*, 42 Neb. 612.

North Carolina.—*Knight v. Knight*, Cam. & N. (N. Car.) 120; *Spiller v. Spiller*, 1 Hayw. (N. Car.) 482.

North Dakota.—See *Bauer v. Bauer*, 2 N. Dak. 108, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 469-470.

Ohio.—*Johnston v. Johnston*, Wright (Ohio) 454; *Cox v. Cox*, 19 Ohio St. 502, 2 Am. Rep. 415; *Graves v. Graves*, 50 Ohio 196.

South Carolina.—*Jelineau v. Jelineau*, 2 Desaus. (S. Car.) 45; *Prather v. Prather*, 4 Desaus. (S. Car.) 33; *Threewits v. Threewits*, 4 Desaus. (S. Car.) 560; *Prince v. Prince*, 1 Rich. Eq. (S. Car.) 282; *Rhame v. Rhame*, 1 McCord Eq. (S. Car.) 197, 16 Am. Dec. 597; *Converse v. Converse*, 9 Rich. Eq. (S. Car.) 535; *Hair v. Hair*, 10 Rich. Eq. (S. Car.) 163; *Briggs v. Briggs*, 24 S. Car. 377.

South Dakota.—In *Bueter v. Bueter*, 1 S. Dak. 94, citing a number of the cases adjudged in the states upholding this jurisdiction, the court said: "These cases, while possibly not

strictly in line with the prevailing current of judicial decisions, either in England or this country, commend themselves to our judgment. * * * A denial of such jurisdiction would seem to expose the law and the courts to the just criticism of having squarely asserted the wife's right to support from her husband, yet denying her a remedy when such support is refused."

In *Virginia*, at an early period, this jurisdiction was asserted on the ground that in the absence of a sufficient relief at law, equity could decree a suitable maintenance. *Purcell v. Purcell*, 4 Hen. & M. (Va.) 507; *Almond v. Almond*, 4 Rand. (Va.) 662, 15 Am. Dec. 78.

In the *District of Columbia* the jurisdiction to grant alimony as an independent relief has been fully recognized and enforced by the courts. *Auld v. Auld*, 4 Cranch (C. C.) 84; *Shaw v. Shaw*, 2 App. Cas. (D. C.) 204; *Tolman v. Tolman*, 1 App. Cas. (D. C.) 299.

1. Jurisdiction Conferred by Statute.—In the following states, under statutes, an independent suit for alimony will lie, the statutes usually defining the circumstances under which it will be allowed:

Arkansas.—*Mansfield Dig.*, § 2559; *Wood v. Wood*, 54 Ark. 172.

California.—*Civ. Code*, § 137.

Georgia.—*Code* of 1882, § 1744.

Illinois.—*Rev. Stat.* 1883, c. 68, § 22.

Indiana.—*Rev. Stat.* 1881, §§ 5132, 5139.

Kansas.—*Stat. c.* 8, § 649.

Massachusetts.—*Pub. Stat.* 1882, c. 147, § 43.

Michigan.—*Howell's Ann. Stat.*, § 6291.

New Jersey.—*Rev. Stat.* 318, § 20; *Miller v. Miller*, 1 N. J. Eq. 386; *Melony v. Melony*, cited in 1 N. J. Eq. 389.

New Hampshire.—*Stat. c.* 183, § 3.

New York.—2 *Rev. Stat.*

North Carolina.—*Stat.* § 592.

Tennessee.—*Code.* See *Nicely v. Nicely*, 3 Head (Tenn.) 184.

Wyoming.—*Stat.* 1882, c. 40, § 18.

Wisconsin.—*Ann. Stat.*, § 2366.

In *Canada*, where the jurisdiction to decree alimony that is exercised by the ecclesiastical courts in England is conferred by statute upon the equity tribunal, it is held that alimony may be decreed independently of a divorce, as, the court having no jurisdiction either as to divorce or restitution of conjugal rights, without this jurisdiction to decree alimony the statute would be of no effect. *Soules v. Soules*, 2 Grant's Ch. (U. C.) 299; *Severn v. Severn*, 3 Grant's Ch. (U. C.) 431. Where the husband withdrew himself from his joint residence with his wife, and, notwithstanding her willingness to continue to reside with him, refused to provide her with a fit and proper residence, it was held that she was entitled to receive from him an

justify the granting of alimony are usually defined.¹

Where Jurisdiction Considered Inherent.—But in states where courts of equity have assumed jurisdiction to grant alimony without divorce in the exercise of their ordinary powers, there is some uncertainty in determining exactly when alimony will be allowed. As a general rule, however, it may be said that alimony without divorce will be allowed where the husband has abandoned his wife and separated from her without justifiable cause, leaving her without adequate means of support;² or where the wife has been compelled to leave her husband on account of his improper and cruel treatment of her;³

allowance according to his means. *Conlan v. Clark*, 25 L. C. J. 90.

1. See the statutes of the states as referred to *supra*, this title, *In General; without Divorce*.

Abandonment.—Abandonment or desertion by the husband is usually made a ground for the allowance of alimony. Where on account of the cruel treatment of the husband the wife is compelled to leave home, or he drives her from his home, this constitutes an abandonment. *Starkey v. Starkey*, 21 N. J. Eq. 135.

In *Miller v. Miller*, 1 N. J. Eq. 386, it was held that although the wife voluntarily left her husband's house, and afterwards returned or offered to return, but the husband separated from and refused to support her, the wife was entitled to alimony on the ground of abandonment. The mere allegation that the husband would not support the wife is not sufficient under a statute authorizing alimony upon abandonment or refusal to support. *Davis v. Davis*, 19 N. J. Eq. 180. See also, as to what is abandonment, *Maas v. Maas*, 34 N. J. Eq. 113; *Butler v. Butler*, 38 N. J. Eq. 626; *Anshutz v. Anshutz*, 16 N. J. Eq. 162; *Boyce v. Boyce*, 23 N. J. Eq. 337.

In *O'Brien v. O'Brien*, 49 N. J. Eq. 436, it was held that a husband who, without justifiable cause, left his wife and neglected to provide for her such support and maintenance as the court would adjudge that "the nature of the case and the circumstances of the parties render suitable and proper," was guilty of refusing to maintain and provide for her, in the sense of the statute authorizing separate maintenance.

Cruel Treatment.—In *Glass v. Wynn*, 76 Ga. 319, it was held that cruel treatment might consist in conduct other than blows; that mental anguish, feelings constantly wounded and aggravated by repeated insults and neglect, were as bad as actual bruises of the person, and that treatment which produced the one was not more cruel than that which caused the other.

Voluntary Separation.—In *Georgia*, where alimony is allowed when there has been a voluntary separation, it is held that such a separation exists where the husband and wife have agreed that she shall live at her sister's, he living at a different place, and that he will support her. *Hawes v. Hawes*, 66 Ga. 142; *Gray v. Gray*, 65 Ga. 193.

Both Parties at Fault.—Alimony will be decreed where the parties are both at fault and cannot live together. *Bascom v. Bascom*, *Wright* (Ohio) 633.

2. Husband Leaving Wife Unjustifiably and without Means of Support.—*Glover v. Glover*, 16 Ala. 440; *Hinds v. Hinds*, 40 Ala. 225; *McMullen v. McMullen*, 10 Iowa 412; *Jamison v. Jamison*, 4 Md. 289; *Simpson v. Simpson*, 31 Mo. 24; *Prather v. Prather*, 4 Desaus. (S. Car.) 33; *Severn v. Severn*, 3 Grant's Ch. (U. C.) 431.

It is the right of a wife to reside with her husband in his home, or in the joint home of both. Where, therefore, it appeared that the husband resided with his children by a former wife, and compelled his wife to live at lodgings, the court, although no violence or other ill-treatment was shown, made a decree for alimony; and that although it was shown that during such time the husband had been in the habit of visiting and remaining with his wife. *Weir v. Weir*, 10 Grant's Ch. (U. C.) 565.

In *Steele v. Steele* (Ky. 1895), 29 S. W. Rep. 17, a husband who had abandoned his wife for one year was held liable in an independent action, for alimony for the support of his wife and child.

3. Wife Forced to Leave Husband by Reason of Improper Treatment.—*Kinsey v. Kinsey*, 37 Ala. 393; *Galland v. Galland*, 38 Cal. 265; *Finn v. Finn*, 62 Iowa 482; *Prather v. Prather*, 4 Desaus. (S. Car.) 33; *Devall v. Devall*, 4 Desaus. (S. Car.) 79; *Taylor v. Taylor*, 4 Desaus. (S. Car.) 167; *Threewits v. Threewits*, 4 Desaus. (S. Car.) 560; *Almond v. Almond*, 4 Rand. (Va.) 663, 15 Am. Dec. 781; *Graves v. Graves*, 50 Ohio St. 196; *Martin v. Martin*, 23 W. Va. 695; *Kirsch v. Kirsch* (C. Pl.), 18 N. Y. Supp. 447.

What Constitutes Cruelty.—To entitle the wife to a decree for alimony for cruel treatment, the husband's conduct must be shown to have threatened her personal safety, exposed her to danger in her person or health, and rendered her married life wretched or oppressive. *Finley v. Finley*, 9 Dana (Ky.) 52, 33 Am. Dec. 528.

It has been held that mere words of reproach or insult do not amount to legal cruelty, and that no affront, indignity, or torture to the feelings and sensibility, unaccompanied by bodily injury or well-grounded apprehension of such, will justify the wife in leaving her husband, and entitle her to a decree for alimony. See *Rhame v. Rhame*, 1 McCord Eq. (S. Car.) 197, 16 Am. Dec. 597.

But in *Hair v. Hair*, 10 Rich. Eq. (S. Car.) 163, the court said: "Words of menace, intimating a malignant intention to inflict personal injury that might affect the security of life or health, constitute such legal cruelty as

or for other reasons which would justify a divorce.¹

Wife at Fault.—But alimony will not be allowed the wife where, from her own fault, her husband has abandoned her.²

Husband's Willingness, after Separation, to Receive Wife Back.—And the same is true where, after separation, the husband offers to receive her again into his

would justify the wife in withdrawing from the presence of the husband, and claiming against him a decree for alimony. The court must not wait till the threats are carried into execution, but must interpose where they raise a reasonable apprehension of personal violence, and excite such terror as to make life intolerable. In pursuance of the decisions and the practice of the ecclesiastical and consistorial courts of England, in South Carolina alimony is granted for bodily injury inflicted or threatened and impending, amounting to the *sævitia* of the civil law, which may be defined to be personal violence actually inflicted, or menaced, and affecting life or health."

In *Jelineau v. Jelineau*, 2 Desaus. (S. Car.) 45, alimony was granted to a wife, although the husband had not absolutely beaten her nor forced her out of the house, she having retired to avoid a repetition of ill-usage, and although the husband made an offer to receive her back, to avoid maintaining her separately and to delude the justice of the court.

In *Corley v. Corley*, 8 Baxt. (Tenn.) 7, it was held that where the wife was forced by cruel and inhuman treatment to leave her husband, she might, by a bill in equity, have a suitable provision made for her support out of the rents and profits of her land.

Where, a few days after leaving her husband's house, the wife was found with severe bruises and injuries upon her person, and the evidence raised a strong presumption that they were inflicted by him, the court decreed alimony. *Jackson v. Jackson*, 8 Grant's Ch. (U. C.) 499.

Where the defendant in his answer denied the cruelty charged against him, and it was not proved, but at the hearing the defendant consented to a decree of alimony, the court, on the grounds of public policy, refused to interfere. *Gracey v. Gracey*, 17 Grant's Ch. (U. C.) 113. See *Craig v. Craig*, 1 Ch. Chamb. (Ont.) 41.

Where the husband kicked at his wife, and told her to begone, and otherwise conducted himself in a very violent manner, although this was the only instance in which he had ever struck her during the eighteen years they had been married, the court made a decree for alimony, the wife swearing that she was apprehensive of further ill-treatment if she were to return to live with her husband; which decree, on rehearing, was affirmed by a full court. *Rodman v. Rodman*, 20 Grant's Ch. (U. C.) 428.

Specific Acts of Cruelty should be Set Forth in Bill.—Where, with a view of obtaining a decree for alimony, it is desired to give evidence of various acts of violence by the husband, it is necessary to set forth such acts specifically in the bill, in order that the husband may have notice of the acts charged

against him, and so that he may, if he can, adduce evidence in rebuttal or explanation thereof; and this rule cannot be said to operate oppressively upon the wife, as the facts and circumstances charged, if true, must be all within her knowledge. *Rodman v. Rodman*, 20 Grant's Ch. (U. C.) 428.

1. **Other Grounds.**—*Platner v. Platner*, 66 Iowa 378; *Graves v. Graves*, 36 Iowa 310, 14 Am. Rep. 525.

In *Thompson v. Thompson*, 10 Rich. Eq. (S. Car.) 416, it was held that the fact that the husband had abandoned the wife, and was living in adultery, was a circumstance entitling the wife to a large share of his income. But in *Rhame v. Rhame*, 1 McCord Eq. (S. Car.) 197, 16 Am. Dec. 597, it was intimated that the mere fact of the husband's adultery would not warrant a decree for alimony. See also *Hair v. Hair*, 10 Rich. Eq. (S. Car.) 163; *Briggs v. Briggs*, 24 S. Car. 377.

A woman has no action against her husband for alimentary allowance on the ground that his house is not comfortable. *Conlon v. Clarke*, 3 Revue Légale 448, 15 L. C. J. 263.

2. **Alimony Disallowed when Wife in Fault.**—*Bogges v. Bogges*, 4 Dana (Ky.) 308; *Anonymous*, 4 Desaus. (S. Car.) 94; *Howey v. Howey*, 27 Grant's Ch. (U. C.) 57. See also *Angelo v. Angelo*, 81 Ill. 251.

In *Logan v. Logan*, 2 B. Mon. (Ky.) 146, it was said that although the conduct of the wife was turbulent and quarrelsome, and highly disagreeable to the husband, this would not justify his abandonment of her unless it was so violent as to endanger his life.

As was said in *Griffin v. Griffin*, 8 B. Mon. (Ky.) 120, "the law, with due consideration for the frailty of human nature, does not require the conduct of the wife to be entirely blameless to entitle her to alimony. But when it is evident that she has been the chief cause of all the disturbances and scenes of violence in the family, and has pursued a systematic course of petty annoyances, with a view, as expressed by herself, to harass her husband and drive him to desperation, to sustain her claim to alimony under such circumstances would be to encourage family dissensions, and a contemptuous disregard of those duties imposed by the marriage relation." In this case the wife continued to live with her husband some years after the occurrence of the scenes of violence, and alimony was not allowed.

In *McKay v. McKay*, 6 Grant's Ch. (U. C.) 380, where it appeared that the plaintiff's absence from her husband's residence was voluntary, caused chiefly by her own violent temper, and that her husband was still willing to receive and support her, the court dismissed the bill, but ordered the defendant to pay costs. See also *Edwards v. Edwards*, 20 Grant's Ch. (U. C.) 392.

house, and to afford her suitable maintenance.¹

3. Subsequent to Divorce a Vinculo.—A demand for alimony subsequent to a decree of divorce *a vinculo* is very different from a suit for alimony without divorce, as it is sometimes called, but which is really separate maintenance; and where alimony is not allowed as an independent right, and it is denied to courts of equity, in the exercise of their ordinary powers, to allow alimony in a separate suit to enforce the obligation existing at law which rests upon the husband to support his wife, certainly in reason it would seem that after the marital relation has been sundered by a divorce *a vinculo*, alimony cannot be allowed; and so it has been held, and the right to decree alimony after divorce granted has been denied, in several of the states where alimony is allowed as an independent right without divorce.²

Divorce in Ex Parte Proceedings or Obtained by Fraud.—But a divorce obtained by the

1. When after Separation Husband Offers to Receive Wife again.—Walsh *v.* Walsh, 1 Ch. Chamb. (Ont.) 234.

But the mere offer to receive her back will not defeat the wife's petition, unless the court is satisfied that she may return in safety, and will be provided with a suitable maintenance. Taylor *v.* Taylor, 4 Desaus. (S. Car.) 167.

In Thomas *v.* Thomas, 152 Ill. 577, where the wife voluntarily left her husband and went to her former home about two miles distant, and offered to return to her husband if he would come for her, and the husband was willing to receive her if she would return herself, she was held not entitled to a separate maintenance.

In Briggs *v.* Briggs, 24 S. Car. 377, it was said that a cold and formal proposition of the husband to give the wife houseroom and support, did not condone his past offenses; to have such effect, there should be a cordial overture to return to her home and resume the proper place of a wife.

Second Separation and Reconciliation.—In Reid *v.* Robinson, 9 L. C. J., 103, an action *en separation de corps et de biens*, an order for an alimentary allowance was granted the wife during the pendency of the suit. The parties came together, and again separated. It was held that an action by the wife for an allowance was bad, without proof of cause for the second separation.

2. Alimony after Divorce a Vinculo.—Winstone *v.* Winstone, 2 S. & T. 245; Jones *v.* Jones (1892), 95 Ala. 443; Downey *v.* Downey, 98 Ala. 373, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 479; Bowman *v.* Worthington, 24 Ark. 529; Wilde *v.* Wilde, 36 Iowa 321; Blythe *v.* Blythe, 25 Iowa 266; Moon *v.* Baum, 58 Ind. 194; Muckenburt *v.* Holler, 29 Ind. 139, 92 Am. Dec. 345; Fischli *v.* Fischli, 1 Blackf. (Ind.) 360, 12 Am. Dec. 251; Dubois *v.* Johnson, 96 Ind. 6; Rogers *v.* Rogers, 15 B. Mon. (Ky.) 364; Chestnut *v.* Chestnut, 77 Ill. 346; Trotter *v.* Trotter, 77 Ill. 510; Kirrigan *v.* Kirrigan, 15 N. J. Eq. 146; Howell *v.* Howell, 104 Cal. 45; Simpson *v.* Simpson, 31 Mo. 24; Doyle *v.* Doyle, 26 Mo. 545; McGee *v.* McGee, 10 Ga. 477; Goss *v.* Goss, 29 Ga. 109; Prosser *v.* Warner, 47 Vt. 667, 19 Am. Rep. 132; Stratton *v.* Stratton, 73 Me. 481.

In Peltier *v.* Peltier, Harr. (Mich.) 19, the

court said: "The whole current of authorities goes to show that courts of chancery have never entertained jurisdiction in cases of this kind." And in Blythe *v.* Blythe, 25 Iowa 266, where the wife obtained a divorce and no alimony, but subsequently applied therefor, the court said: "That relation [of husband and wife] must exist either *de jure* or *de facto* in order to justify an order for alimony." Hence, as this relation had been dissolved, no alimony could be allowed in this case.

In Shotwell *v.* Shotwell, 1 Smed. & M. Ch. (Miss.) 51, it was held that where, upon the bill of a wife against her husband, a decree of divorce *a vinculo* had been granted, the mere failure of the decree to provide alimony for the wife could not affect her right to such provision at a subsequent time in a separate and independent proceeding; but upon further proceeding in this case, in Lawson *v.* Shotwell, 27 Miss. 630, it was held that there was no good reason existing for her not having asked alimony at the time she had been divorced, and that therefore she could not be allowed to assert a right in a separate *forum* at a subsequent time; but the court said: "We do not intend to intimate that there may not be cases in which an original bill, after a decree for a divorce, could not be maintained for alimony, but only that the present bill shows no sufficient reason for not taking, or at least asking, such a decree from the Circuit Court touching the matters now in litigation. A good reason must be alleged why the alimony was not at the proper time allowed. What will be a good reason must depend upon the facts of the case when presented."

Effect of Disclaimer.—In M'Kanacher *v.* M'Kanacher, 3 Yeates (Pa.) 56, it was held that the wife's disclaimer of alimony on a sentence of divorce was not a perpetual bar to future applications.

As to Property Subsequently Acquired.—In Van Orsdal *v.* Van Orsdal, 67 Iowa 35, it was held that where a husband had procured a valid divorce from his wife in a sister state, even if it was admitted that the wife, always a resident of Iowa, might subsequently maintain an action for alimony out of property found in the state, the rule could apply only to property which the husband owned at the time of the divorce, and not to what he subsequently acquired.

husband in another state, either in *ex parte* proceedings or by fraud, will not bar the wife's right to alimony.¹

4. Subsequent to Legislative Divorce—Constitutionality.—The provision in an act of the legislature declaring the parties divorced, which makes an allowance in the nature of alimony out of the husband's estate for the benefit of the wife, is clearly in the exercise of a judicial power, and therefore unconstitutional and void where it is expressly provided by constitution that neither the legislative, judicial, nor executive departments shall exercise the powers properly belonging to the others;² and it would seem on principle that a court of equity cannot, in an independent suit subsequent to a legislative divorce, decree alimony.

Where Legislative Act Reserves Wife's Right to Alimony.—But where an act of the legislature made an express reservation of the wife's right to alimony, it was held that the legislative divorce did not prevent her maintaining her right in a court of equity in an independent suit.³

III. ALIMONY PENDENTE LITE—1. Definition.—Alimony *pendente lite*, strictly speaking, is that allowance which the husband may be compelled to pay his wife to enable her to prosecute the suit for divorce or separation, or to defend and answer where the proceedings are instituted by him.⁴ But an allowance as alimony *pendente lite* may also be made in an action of alimony without divorce, where the wife is without means, and the husband is able to furnish them.⁵

The allowance *pendente lite* has been ordered in suits for the restitution of

1. *Cook v. Cook*, 56 Wis. 195, 43 Am. Rep. 706; *Cochran v. Cochran*, 42 Neb. 612.

In *Hoffman v. Hoffman*, 46 N. Y. 30, 7 Am. Rep. 299, the husband left the wife when both were domiciled in New York, and obtained a divorce in Indiana, in the proceedings for which she did not appear and had no notice, the service being by publication. In a suit for alimony by the wife in New York, it was held that the Indiana divorce was not a bar, not only on the ground that it was an *ex parte* proceeding, but also that it was obtained by fraud. And to the same effect is *Cox v. Cox*, 19 Ohio St. 502, 20 Ohio St. 439, 2 Am. Rep. 415. See also *Middleworth v. McDowell*, 49 Ind. 386.

Under *New York Rev. Stat.*, vol. 2, § 59, after an entry of a final decree establishing a cause of action in favor of the wife, in an action for limited divorce, the court has no power to order an additional allowance for her support. An order, however, may be made for a final decree in such an action, making provision for the care, custody, and education of the children. And see *Erkenbrach v. Erkenbrach*, 96 N. Y. 456.

2. *Crane v. Meginnis*, 1 Gill & J. (Md.) 463; *Gaines v. Gaines*, 9 B. Mon. (Ky.) 295, 48 Am. Dec. 425; *Maguire v. Maguire*, 7 Dana (Ky.) 184; *Townsend v. Griffin*, 4 Harr. (Del.) 440.

In *State v. Fry*, 4 Mo. 120, it was held that legislative divorces are unconstitutional in that state.

3. In *Richardson v. Wilson*, 8 Yerg. (Tenn.) 67, where an act granting a divorce contained a provision "that nothing in this act contained shall deprive the said Mary Ann of her right to alimony, if by law she is entitled to the same," it was held that the wife

was entitled to such part of her husband's estate as the court deemed proper. And in *Gaines v. Gaines*, 9 B. Mon. (Ky.) 303, 48 Am. Dec. 425, where the wife filed her bill for alimony, and subsequently the husband made an application to the legislature and obtained a divorce, it was held that the act was void as affecting the property rights of the wife, which were then being determined by the proper tribunal.

In *Crane v. Meginnis*, 1 Gill & J. (Md.) 463, it was intimated that a court of equity would grant alimony after a legislative divorce. But it will be remembered that in this state courts of equity have from the earliest time entertained suits for alimony as an independent right.

4. *Simpson v. Simpson* (Iowa 1894), 59 N. W. Rep. 22; *Doolittle v. Doolittle*, 78 Iowa 695.

In *Daniels v. Daniels*, 9 Colo. 133, it was held that although the statute made no provision for alimony, except as an incident to proceedings for divorce, this did not preclude the court from granting temporary or permanent alimony in a proper case, although a decree for divorce was not included in the relief prayed for. See also *Finn v. Finn*, 62 Iowa 482; *Tolman v. Tolman*, 1 App. Cas. (D. C.) 299; *Verner v. Verner*, 62 Miss. 260.

The order can be made only in the court in which the suit is pending. *Bennett v. Southard*, 35 Cal. 688.

5. *Johnson v. Johnson*, 125 Ill. 510.

Alimony *pendente lite* may be allowed when the suit is for alimony alone, under the same circumstances and upon the same principles as if the relief prayed were for absolute divorce. *McFarland v. McFarland*, 64 Miss. 449.

conjugal rights,¹ to enforce a marriage settlement,² on an application for modification of decree,³ and while a reference was pending to determine the proper allowance of permanent alimony.⁴

Action to Set Aside Decree of Divorce.—But it is held that in an action to set aside a decree of divorce, it is not competent for the court to order the defendant to pay a sum of money to the plaintiff to enable her to prosecute the action.⁵

2. General Principles—The Usual Practice.—It was the universal practice of the ecclesiastical courts in *England*, and is now generally the practice in the *United States*, upon an application by the wife to the court, in a divorce suit, to make an allowance for her support during the pendency of the suit, and for costs and expenses to enable her to properly carry it on, if she is without separate means and the husband is able to support her, whether she be libellant or respondent, without a consideration of the merits of the case.⁶

1. *Forde v. Forde*, 16 L. T. N. S. 595.

2. *Wilson v. Wilson*, 1 Desaus. (S. Car.) 219.

3. *O'Brien v. O'Brien*, 19 Neb. 584.

4. *Forrest v. Forrest*, 3 Bosw. (N. Y.) 650.

5. *Wilson v. Wilson*, 49 Iowa 544; *McFarland v. McFarland*, 51 Iowa 565.

Suit to Enforce Alimony.—Alimony *pendente lite* will not be granted in a suit by a divorced woman to enforce a decree of alimony against her former husband. *McQuien v. McQuien*, 61 How. Pr. (N. Y. C. Pl.) 280.

6. *England*.—2 Burns Ecc. L. 433; *Smith v. Smith*, 4 S. & T. 228; *Crampton v. Crampton*, 32 L. J. Mat. Cas. 142; *Fitzgerald v. Fitzgerald*, 5 Eng. Ecc. 472; *Bird v. Bird*, 5 Eng. Ecc. 366; *Brisco v. Brisco*, 2 Hagg. Con. 199; *Cooke v. Cooke*, 2 Ph. 40; *Otway v. Otway*, 2 Ph. 109; *Stone v. Stone*, 3 Curt. Ecc. 341.

Arkansas.—*Glenn v. Glenn*, 44 Ark. 46.

Colorado.—*Daniels v. Daniels*, 9 Colo. 150; *Cowan v. Cowan*, 10 Colo. 540.

Georgia.—*McGee v. McGee*, 10 Ga. 478; *Methvin v. Methvin*, 15 Ga. 99, 60 Am. Dec. 664.

Illinois.—*Armstrong v. Armstrong*, 35 Ill. 109; *Millowitsch v. Millowitsch*, 44 Ill. App. 357; *Newman v. Newman*, 69 Ill. 167; *Burgess v. Burgess*, 25 Ill. App. 525; *Petrie v. People*, 40 Ill. 334; *Jenkins v. Jenkins*, 91 Ill. 167; *Woodley v. Woodley*, 24 Ill. App. 431; *Bowman v. Bowman*, 24 Ill. App. 165.

Indiana.—*Harrell v. Harrell*, 39 Ind. 185.

Kansas.—*Litowich v. Litowich*, 19 Kan. 451, 27 Am. Rep. 145.

Kentucky.—*Meyar v. Meyar*, 3 Metc. (Ky.) 298; *Ballard v. Carperton*, 2 Metc. (Ky.) 412; *Dugan v. Dugan*, 1 Duv. (Ky.) 289.

Maine.—*Farwell v. Farwell*, 31 Me. 591.

Maryland.—*Daiger v. Daiger*, 2 Md. Ch. 335; *McCurley v. McCurley*, 60 Md. 185, 45 Am. Rep. 717; *Tayman v. Tayman*, 2 Md. Ch. 393.

Michigan.—*Story v. Story*, Walk. (Mich.) 421; *Ross v. Griffen*, 53 Mich. 5; *Chaffee v. Chaffee*, 14 Mich. 463; *Haines v. Haines*, 35 Mich. 138.

Mississippi.—*Porter v. Porter*, 41 Miss. 116.

Missouri.—*Morton v. Morton*, 33 Mo. 614; *State v. Seddon*, 93 Mo. 520.

New Jersey.—*Amos v. Amos*, 4 N. J. Eq. 171; *Vreeland v. Vreeland*, 18 N. J. Eq. 43; *Tyrrell v. Tyrrell* (N. J. 1886), 3 Atl. Rep. 266.

New York.—*Hammond v. Hammond*, 1 Clarke Ch. (N. Y.) 151; *Wright v. Wright*, 1 Edw. Ch. (N. Y.) 62; *Mix v. Mix*, 1 Johns. Ch. (N. Y.) 110; *Stanford v. Stanford*, 1 Edw. Ch. (N. Y.) 317; *Denton v. Denton*, 1 Johns. Ch. (N. Y.) 364; *Leslie v. Leslie*, 6 Abb. Pr. N. S. (N. Y. C. Pl.) 193; *Allen v. Allen*, 8 Abb. N. Cas. (N. Y. Supreme Ct.) 175; *Jones v. Jones*, 2 Barb. Ch. (N. Y.) 146; *Rubinsky v. Rubinsky* (Super. Ct.), 24 N. Y. Supp. 920; *Bucki v. Bucki* (Supreme Ct.), 24 N. Y. Supp. 374.

North Carolina.—*Little v. Little*, 63 N. Car. 22; *Scoggins v. Scoggins*, 80 N. Car. 318.

Pennsylvania.—*Downing v. Downing*, 7 Kulp (Pa.) 138; *Melizet v. Melizet*, 1 Pars. Sel. Cas. (Pa.) 78; *Ormsby v. Ormsby*, 1 Phila. (Pa.) 578; *Smith v. Smith*, 11 Pa. Co. Ct. Rep. 465; *Reeves v. Reeves*, 1 W. N. C. (Pa.) 123; *Breinig v. Breinig*, 26 Pa. St. 161; *Banes v. Banes*, 3 Brews. (Pa.) 612; *Power's Appeal*, 126 Pa. St. 320.

Alimony Pendente Lite Is a Common-law Right, and as an established right of England when the common law was adopted by the colonies, is no less a common-law right because it grew up under the usage of the ecclesiastical court. *McGee v. McGee*, 10 Ga. 478.

In *Wilson v. Wilson*, 2 Hagg. Con. 204, Gaslor, J., said: "It is the established law of the ecclesiastical courts in all suits for divorce or suits for the restitution of conjugal rights, that as soon as the court is judicially informed of the fact that the marriage has taken place, it is competent for the wife to apply for alimony pending in a suit. So general has been the practice to allow alimony *pendente lite*, that it is now looked upon as an absolute right, and in the early cases it was so held to be."

Where the Marriage is Admitted or Proved, temporary alimony will be granted almost as of course, though the defendant swears he is willing to receive and maintain the plaintiff. *Carr v. Carr*, 2 Ch. Chamb. (Ont.) 71.

Wife's Refusal to Return to Husband.—The fact that the plaintiff has left the defendant, and refuses to return to him, although he is willing to take her back to live with him, is no answer to an application for *interim* alimony. *Wilson v. Wilson*, 6 Ont. Pr. Rep. 129.

Allowance Not a Matter of Right.—In the absence of a statute so providing, the allowance of alimony *pendente lite* is not a matter of absolute right, but rests in the discretion of the court.¹

Essentials.—Although alimony *pendente lite* should be allowed without an examination of the merits of the case, yet a *prima facie* case must be shown in behalf of the wife, and where she is the libellant or plaintiff it should appear that the suit is brought in good faith, and not merely for the purpose of obtaining money from her husband; for if it appears that the suit is without just or reasonable foundation, or is prompted by malice or oppression towards her husband, or that the husband's success is very apparent, no allowance should be made to the wife.²

In Two Early Cases in Vermont it was held that as the statute conferring jurisdiction in divorce cases gave to the court no power to grant alimony except after the divorce was granted, it would not grant alimony *pendente lite*. *Harrington v. Harrington*, 10 Vt. 505; *Hazen v. Hazen*, 19 Vt. 603.

But in *LeBarron v. LeBarron*, 35 Vt. 365, it was held that in a suit for divorce the court might exercise powers not expressly conferred by statute, and under them grant alimony *pendente lite*. And as to the earlier cases above mentioned, it was said that they were decided without any particular examination or consideration.

Rhode Island.—In this state, during the pendency of petition for divorce or for separate maintenance, the court cannot order the husband to furnish the wife with money to carry on or defend the suit, although it may make an order for temporary support. *Sanford v. Sanford*, 2 R. I. 64.

In Suits for Permanent Alimony.—When a voidable decree for divorce had been rendered, and the wife was subsequently induced by her former husband, upon his representation that the proceedings for divorce were void, to return and live with him, and they lived together for six years as husband and wife, during which he treated her as his wife and so acknowledged her to the world, it was held that she was entitled to temporary alimony to enable her to prosecute an action for permanent alimony. *McFarland v. McFarland*, 51 Iowa 565.

To be Applied to Specific Purpose.—An order requiring the husband, in an action for divorce, to pay money to enable the wife to carry on the suit, is proper, although the order directs the money to be applied to a specific purpose, instead of directing that it be used for the purposes of the suit generally. *Schloemer v. Schloemer*, 49 N. Y. 82.

1. Not Matter of Absolute Right—England.—*Cooke v. Cooke*, 2 Ph. 40; *Jones v. Jones*, L. R. 2 P. & D. 333.

Arkansas.—*Countz v. Countz*, 30 Ark. 73.

California.—*Cleghorn v. Cleghorn*, 66 Cal. 309.

Colorado.—*Daniels v. Daniels*, 9 Colo. 133.

Florida.—*Underwood v. Underwood*, 12 Fla. 434.

Idaho.—*Wyatt v. Wyatt*, 2 Idaho 219.

Illinois.—*Becker v. Becker*, 15 Ill. App. 247; *Stillman v. Stillman*, 99 Ill. 196, 39 Am. Rep. 21; *Foss v. Foss*, 100 Ill. 576.

Iowa.—*Campbell v. Campbell*, 73 Iowa 482.

Kansas.—*Litowich v. Litowich*, 19 Kan. 451, 27 Am. Rep. 145.

Minnesota.—*Wagner v. Wagner*, 39 Minn. 394.

Mississippi.—*Porter v. Porter*, 41 Miss. 116.

Nebraska.—*Shafer v. Shafer*, 10 Neb. 468.

New Jersey.—*Kirrigan v. Kirrigan*, 15 N. J. Eq. 146; *Dougherty v. Dougherty*, 8 N. J. Eq. 540; *Glasser v. Glasser*, 28 N. J. Eq. 22.

New York.—*Griffin v. Griffin*, 23 How. Pr. (N. Y. Supreme Ct.) 189; *Brinkley v. Brinkley*, 50 N. Y. 184, 10 Am. Rep. 460; *Kock v. Kock*, 42 Barb. (N. Y.) 515; *Osgood v. Osgood*, 2 Paige (N. Y.) 621; *Clark v. Clark*, 7 Robt. (N. Y.) 284; *Strong v. Strong*, 5 Robt. (N. Y.) 612, 1 Abb. Pr. N. S. (N. Y.) 358; *Wood v. Wood*, 2 Paige (N. Y.) 108, affirmed in 8 Wend. (N. Y.) 357; *Worden v. Worden*, 3 Edw. Ch. (N. Y.) 387; *Leslie v. Leslie*, 6 Abb. Pr. N. S. (N. Y. C. Pl.) 206; *Frickel v. Frickel* (Super. Ct.), 24 N. Y. Supp. 483; *Carpenter v. Carpenter*, 19 How. Pr. (N. Y. Supreme Ct.) 949; *Desbrough v. Desbrough*, 29 Hun (N. Y.) 593.

Tennessee.—*Ward v. Ward*, 1 Tenn. Ch. 262; *Burrow v. Burrow*, 6 Lea (Tenn.) 499; *Lishey v. Lishey*, 2 Tenn. Ch. 1.

Under *Alabama Code* 1876, § 2694, providing that "pending a suit for divorce, the court must make an allowance for the support of the wife out of the estate of the husband, suitable to his estate, and to the condition in life of the parties," it would seem that the question of temporary alimony, or alimony or support pending the suit, is a matter not of discretion, but of right. *Edwards v. Edwards*, 80 Ala. 99. See also *Jeter v. Jeter*, 36 Ala. 391; *Ex p. King*, 27 Ala. 387; *King v. King*, 28 Ala. 315; *Mims v. Mims*, 33 Ala. 98; *Ex p. Smith*, 34 Ala. 455; *Richardson v. Richardson*, 4 Port. (Ala.) 467, 30 Am. Dec. 538.

2. *Desbrough v. Desbrough*, 29 Hun (N. Y.) 592; *Solomon v. Solomon*, 28 How. Pr. (N. Y. Super. Ct.) 218; *Erwin v. Erwin*, 4 Jones Eq. (N. Car.) 82; *Underwood v. Underwood*, 12 Fla. 434.

Court should be Satisfied of Complainant's Good Faith.—The court should enter into a sufficient examination of the case to determine the good faith of the complainant in exhibiting her bill, which will ordinarily be confined to an inspection of the pleadings. *Harding v. Harding*, 144 Ill. 588.

Suit Withdrawn by Wife.—So, where the wife has understandingly and voluntarily dismissed her suit, the husband cannot be compelled to pay her expenses in suit money.¹

Failure of Wife's Action.—But if she has brought her suit in good faith, it would seem that her failure should not defeat her petition for an allowance for expenses in suit money.²

The Refusal of Permanent Alimony by the Jury does not preclude the court from

Right to Ultimate Relief Doubtful.—In *Carpenter v. Carpenter*, 19 How. Pr. (N. Y. Supreme Ct.) 539, the court said: "This application is made by the plaintiff with full knowledge of the facts set up in the defendant's answer charging her with dereliction in the discharge of her marital duties, and excusing his own conduct, and yet no affidavit is made in explanation or denial of these facts. Then, too, the acts of misconduct and abandonment set up in the complaint are, most of them, denied or explained by the defendant, and the principal allegations are explained by other parties who were witnesses to the transactions. Upon the whole, after a careful examination of the whole matter, I have come to the conclusion that there is too much doubt raised by the facts now presented, as to her right to ultimate relief, to justify me in extending to the plaintiff the relief she now asks."

Wife's Misconduct.—In *Kock v. Kock*, 42 Barb. (N. Y.) 515, although it is said that it was usual to grant alimony and counsel fees in all cases of divorce brought by the husband against his wife, it was held that an allowance would not be made where it appeared from the affidavits that the defendant, prior to her marriage, had lived a life of guilt unknown to her husband, and that since the marriage she had deserted him, and was living with relatives who were able and willing to support her. Clerke, J., said: "It was usual to grant alimony and counsel fees in all actions for divorce brought by the husband against his wife, but of late the rule had been relaxed, and it would be an outrage to grant an allowance in such a case as this."

In *Kratz v. Kratz*, 1 Pa. Dist. Rep. 699, it was held that alimony will not be allowed a wife who, by her own testimony, has been shown to be guilty, but reasonable counsel fees will be allowed.

In *Scott v. Scott*, 17 Ind. 309, it was held that if the wife, being defendant, admits of record the charges in the complaint entitling the plaintiff to a divorce, she deprives herself of any right to an order for alimony pending the proceedings.

Rule of Court Requiring Bill to be Filed by Next Friend.—In *Wood v. Wood*, 8 Wend. (N. Y.) 357, it was held that where the rule of the court required bills filed by a *feme covert* to be filed by a next friend, upon a bill filed by a *feme covert* in her own name, she was not entitled to an allowance to carry on the suit.

Kentucky.—In this state it is provided by statute that in suits for divorce and alimony the husband is bound to pay the costs, including a reasonable compensation to the attorneys of the wife, unless it is made to appear that

the wife is in fault, and has ample estate to pay the same. *Ballard v. Caperton*, 2 Metc. (Ky.) 412; *Dugan v. Dugan*, 1 Duv. (Ky.) 289; *Nikirk v. Nikirk*, 3 Metc. (Ky.) 432; *Meyar v. Meyar*, 3 Metc. (Ky.) 298.

Erroneous Impression as to Law.—Where it appeared that neither party had been blameless in the treatment of the other; that the husband had, on several occasions, used harsh and insulting language towards the wife; that he advised her to obtain a divorce, under an erroneous impression as to the law; and that the plaintiff prosecuted the action in good faith, believing that she had good cause for a divorce, it was held that there was no abuse of discretion in requiring the defendant to pay the actual and necessary disbursements of the plaintiff's attorney in prosecuting the action, and reasonable fees therefor. *Sumner v. Sumner*, 54 Wis. 642.

Unjustifiable Separation.—Where it appeared that the complainant was living with her father, away from the defendant's house, having two of the children with her, and each party claimed that the abandonment was by the other, it was held that unless the defendant, on application, should refuse to receive his wife and provide for her and the children, the motion must be denied. *Martin v. Martin*, 8 N. J. Eq. 563.

And where, on motion for alimony *pendente lite*, on a bill for divorce for cruel treatment, it appeared that the wife left her husband's house without his knowledge, and took their two children with her, and there appeared no sufficient cause for leaving at the time she did, the court refused alimony and said it would not be allowed, unless, on going back with the children and offering to take her place in the family, he should refuse to receive her. *Begbie v. Begbie*, 7 N. J. Eq. 98.

Wife Not Directing Suit.—Where there is a suspicion that the suit is not authorized or directed by the wife, but that it is being carried on by others, and not at her instance, this should be inquired into before granting alimony *pendente lite*. *Swearingen v. Swearingen*, 19 Ga. 265.

1. Suit Dismissed by Wife.—*Thompson v. Thompson*, 3 Head (Tenn.) 527. But in *Weaver v. Weaver*, 33 Ga. 172, where alimony had been granted to the wife, and fees ordered to be paid her counsel, pending the libel for divorce, and the libel was subsequently dismissed without trial, it was held that the order for alimony should be rescinded, but not that for fees of counsel.

2. Lauber v. Mast, 15 La. Ann. 593. See also *Dorsey v. Goodenow*, Wright (Ohio) 120; *Contra*, *Phillips v. Simmons*, 11 Abb. Pr. (N. Y. Super. Ct.) 287.

allowing temporary alimony, or alimony *pendente lite*.¹

Husband's Sworn Denial.—The wife should not be denied alimony because the husband's sworn answer denies the allegation of the bill.²

Effect of Plea to the Jurisdiction.—The fact that there is a plea to the jurisdiction of the court, in a suit for dissolution of the marriage, does not affect the power of the court to allow alimony *pendente lite*.³ But the court may, under special circumstances, where there is a plea to the jurisdiction, refuse an allowance until the determination of the question as to jurisdiction.⁴

3. Necessary Prerequisites—*a. MARRIAGE.*—The rule that the court will not inquire into the merits of the case after divorce, upon an application for alimony *pendente lite*, will not preclude an examination as to the existence of the marital relation; but on the contrary, as the existence of the marriage is the very ground of the application, it must be admitted, or shown, before a decree or order can be made for an allowance.⁵

Prima Facie Case Sufficient.—But, for the allowance of temporary alimony, *prima facie* proof is sufficient; and it is not necessary that the marriage be as con-

1. Gibson v. Patterson, 75 Ga. 549.

2. **Effect of Husband's Sworn Denial.**—Harding v. Harding, 144 Ill. 588; Campbell v. Campbell, 73 Iowa 482; Tyrrell v. Tyrrell (N. J. 1886), 3 Atl. Rep. 266; Wright v. Wright, 1 Edw. Ch. (N. Y.) 62; Hammond v. Hammond, 1 Clarke Ch. (N. Y.) 151; Strong v. Strong, 1 Abb. Pr. N. S. (N. Y. Super. Ct.) 358; Osgood v. Osgood, 2 Paige (N. Y.) 621; McGee v. McGee, 10 Ga. 477; Webber v. Webber, 79 N. Car. 572; Morris v. Morris, 89 N. Car. 109; Shearin v. Shearin, 5 Jones Eq. (N. Car.) 233; Wilson v. Wilson, 2 Dev. & B. (S. Car.) 377.

North Carolina.—Prior to an act of legislature of 1852, now the Code, § 1291, the courts in this state had no power to allow alimony *pendente lite*. Taylor v. Taylor, 1 Jones (N. Car.) 529. In this act it is provided that alimony may be given where any married woman shall apply to a court for a divorce from the bonds of matrimony or from bed and board. Under this act alimony will be allowed the wife in all cases of divorce, including divorce on the grounds rendering marriage null and void *ab initio*. Lea v. Lea, 104 N. Car. 603, 17 Am. St. Rep. 692. But no allowance can be made the wife when she is defendant and does not set up a claim upon her part for a divorce. Reeves v. Reeves, 82 N. Car. 348.

Order by Judge in Vacation.—A judge in vacation has no power to make an order for alimony *pendente lite*, under a statute authorizing the court to order the payment of alimony. Prosser v. Prosser, 64 Iowa 378.

3. Ronalds v. Ronalds, L. R. 3 P. & D. 259; Miller v. Miller, 33 Fla. 453.

4. Bradstreet v. Bradstreet, 6 Mackey (D. C.) 502.

Pending the decision as to the sufficiency of a plea of prior adjudication, filed by a husband to a bill of divorce, the court has jurisdiction in not allowing alimony *pendente lite*. Filer v. Filer, 77 Mich. 469.

5. **England.**—Bird v. Bird, 1 Lee 209; Blackmore v. Mills, 16 W. R. 893, 18 L. T. N. S. 586; Portsmouth v. Portsmouth, 3 Add. Ecc. 63; Nolan v. Nolan, 1 Ch. Chamb. (Ont.) 368.

Colorado.—Cowan v. Cowan, 10 Colo. 540; Daniels v. Daniels, 9 Colo. 133; Kiefer v. Kiefer, 4 Colo. App. 506.

Georgia.—Roseberry v. Roseberry, 17 Ga. 139.

Iowa.—York v. York, 34 Iowa 430; McFarland v. McFarland, 51 Iowa 565; Shaw v. Shaw (Iowa 1894), 61 N. W. Rep. 368.

New Jersey.—Vreeland v. Vreeland, 18 N. J. Eq. 43.

New York.—Brinkley v. Brinkley, 50 N. Y. 184, 10 Am. Rep. 460; Starkweather v. Starkweather, 29 Hun (N. Y.) 488; Humphreys v. Humphreys, 49 How. Pr. (N. Y. Super. Ct.) 140; Bloodgood v. Bloodgood, 59 How. Pr. (N. Y. C. Pl.) 42; Collins v. Collins, 71 N. Y. 269; Collins v. Collins, 80 N. Y. 1.

South Dakota.—Bardin v. Bardin (S. Dak. 1893), 56 N. W. Rep. 1069.

In Kiefer v. Kiefer, 4 Colo. App. 506, it was held that where an answer denied the existence of the marital relation, and set up a proprietary divorce in another jurisdiction, alimony would not be granted until the determination of that issue.

In Shaw v. Shaw (Iowa 1894), 61 N. W. Rep. 368, it is held that on an application for temporary alimony the court is not bound to the allegations and denials of the pleadings in passing on the existence of the marital relation, if other proofs raise a presumption of its existence.

In Taylor v. Taylor, 1 Ch. Chamb. (Ont.) 234, it was held that on an application for an order for temporary alimony, the affidavit as to the marriage should state such particulars that the court may judge for itself whether it has been duly solemnized or not.

Issue Not to be Considered by Referee.—Where the question of alimony during the pendency of the suit is referred, the referee should not go into the question whether the plaintiff and defendant were ever married, especially where that question is the only important one in the suit. The referee cannot decide the question of marriage definitely upon such a reference; for his decision, if adverse, would preclude the plaintiff from the trial of that question before the court and jury, by denying her the means to prosecute

clusively established, as is required for the allowance of permanent alimony.¹

Common-law Marriage.—And for the allowance of temporary alimony, a common-law marriage has been held sufficient, where the marriage, without the observance of the statutory regulations, is not declared void.²

Marriage de Facto.—It is generally held that proof or admission of a marriage *de facto* presents a proper case for the allowance of alimony *pendente lite*, although a marriage *de jure* is denied. So in suits for divorce rendering the marriage null and void from the beginning, as where divorce is sought on the ground of another marriage, alimony *pendente lite* may be allowed upon proof of a marriage in fact.³

the action. *Herforth v. Herforth*, 2 Abb. Pr. N. S. (N. Y. Supreme Ct.) 483.

1. Prima Facie Proof Sufficient.—*McGrath v. McGrath*, 2 Ch. Chamb. (Ont.) 411; *Bardin v. Bardin* (S. Dak. 1893), 56 N. W. Rep. 1069; *Herforth v. Herforth*, 2 Abb. Pr. N. S. (N. Y. Supreme Ct.) 483; *Collins v. Collins*, 80 N. Y. 1.

In *Brinkley v. Brinkley*, 50 N. Y. 184, 10 Am. Rep. 460, Folger, J., said: "Although there may be in the answer a general denial of the existence at any time of the marital relation, the court has the power, from the affidavits and other papers presented to it, to pass upon the question for the purposes of the application, and it is not bound down to the allegation of the complaint; * * * and though the denial of the answer, if standing alone, would bring the case within the rule that where no marital relation is admitted or proven, there is no right to alimony, yet if the matters contained in other papers, or shown by legitimate proofs before the court, make out in the judgment of the court a fair presumption of a fact of marriage, it has the power to grant alimony pending the action and expenses of the action."

In *Collins v. Collins*, 71 N. Y. 270, referring to the above case, and approving the doctrine therein stated, Rapallo, J., said that it "was not necessary that the marriage be established as conclusively as would be required for the ultimate purposes of the action, but that the plaintiff must make out a reasonably plain case of the existence of the marital relation, and she would then be furnished with the means of temporary support and of conducting the suit until the truth or falsity of her allegations could be ascertained."

Evidence in Equipoise, where Third Parties Witness.—In *Smithe v. Smithe*, 61 Iowa 138, after stating the rule that temporary alimony could not be allowed unless the marriage was proved, it was held, however, that where the testimony of the parties *pro* and *con*, as to the marriage, was in equipoise, and a disinterested witness testified that he knew the parties, and was present at the marriage, this established the marriage sufficiently to justify an order for temporary alimony.

2. Common-law Marriage Sufficient.—*Bowman v. Bowman*, 24 Ill. App. 165.

In *Purcell v. Purcell*, 4 Hen. & M. (Va.) 512, it was said that marriage could be shown by cohabitation, name, reputation, and other circumstances. In *Herforth v. Herforth*, 2 Abb. Pr. N. S. (N. Y. Supreme Ct.) 483,

proof of cohabitation, with a recognition by the defendant, and of his treating the plaintiff, on many occasions and in the presence of witnesses, as his wife, was sufficient proof of marriage to entitle her to temporary alimony.

In *Smith v. Smith*, 1 Edw. Ch. (N. Y.) 255, where marriage was denied, but cohabitation was admitted, alimony was allowed. And in *Brinkley v. Brinkley*, 50 N. Y. 184, 10 Am. Rep. 460, where the evidence as to marriage was evenly balanced, but the preponderance was in favor of cohabitation, the wife was allowed alimony.

Denial of Marriage—Cohabitation Meretricious.—But in *York v. York*, 34 Iowa 530, where the marriage was denied, and the cohabitation was meretricious, alimony was denied. In *Humphreys v. Humphreys*, 49 How. Pr. (N. Y. Super. Ct.) 140, it was held that a cohabitation existing between the parties during some four years, which, from the evidence, was considered to be illicit in its character and meretricious in the beginning, was no foundation upon which to rest an application.

3. Mere de Facto Marriage Generally Sufficient.—*Bain v. Bain*, 2 Add. Ecc. 253; *Smyth v. Smyth*, 2 Add. Ecc. 254; *Portsmouth v. Portsmouth*, 3 Add. Ecc. 63; *Bird v. Bird*, 1 Lee 209; *Bradley v. Bradley*, 3 Ch. Chamb. (Ont.) 329; *Vanvalley v. Vanvalley*, 19 Ohio St. 588; *Strode v. Strode*, 3 Bush (Ky.) 227, 96 Am. Dec. 211; *Frith v. Frith*, 18 Ga. 273, 63 Am. Dec. 289, *overruling* *Roseberry v. Roseberry*, 17 Ga. 139; *Cray v. Cray*, 32 N. J. Eq. 25; *Vroom v. Marsh*, 29 N. J. Eq. 15. Compare *Freeman v. Freeman*, 49 N. J. Eq. 102; *Young v. Young*, 2 Cent. L. J. 205.

The rule is thus stated by an eminent author: "After proof of a marriage in fact, alimony pending the suit will be allowed, whether it be commenced by or against the husband, not only in cases of impotency, but in all cases of nullity of the marriage, and in suits of restitution of conjugal rights, or for divorce by reason of adultery or cruelty." *Thelford on Marr. and D.*, 17 Law Sib. N. S. 347 (587).

New York.—In this state, it is an established rule that the existence of the marital relation must be admitted, or, if denied, that there must be proof of it satisfactory to the court, to authorize the allowance of alimony. In *Brinkley v. Brinkley*, 50 N. Y. 184, 10 Am. Rep. 460, the court said that where the facts undisputed are such as that from them a

b. SEPARATION.—From the very nature of the case, it must appear that the parties have separated, and are living apart, before the court can interfere and grant an allowance for the separate maintenance of the wife.¹

Constructive Separation.—Where the parties live in the same house, but in separate apartments, they may be constructively separated. The wife is not bound to accept board in separate apartments in the house where her husband resides, and an offer of such provision by the husband will not defeat the allowance.²

c. WIFE'S NECESSITY—No Allowance when Wife Has Sufficiency.—It must appear that the wife is without the means to maintain herself, and to enable her

presumption arises that the parties were married, so that the affirmative rests upon the defendant to repel that presumption, the court has jurisdiction and power to grant the application, although marriage in fact is denied. *Kennedy v. Kennedy*, 73 N. Y. 369.

In *Collins v. Collins*, 71 N. Y. 270, the answer admitted that the marriage ceremony had been performed, but alleged that, at the time, the plaintiff had a husband living, and the ceremony therefore had no effect, which the plaintiff, although she had abundant opportunity to do so, did not deny. The court held that the plaintiff was not entitled to alimony, as it did not appear that she was a wife. In this case the court said: "When, in answer to the allegation of a marriage, facts are stated showing that the applicant was not competent to contract such marriage, and did not thereby become a wife, such facts should be denied or explained to the satisfaction of the court. If left uncontroverted, the court is not justified in making the order."

But a distinction is observed in actions by the wife, and those against the wife, to set aside the marriage, and it is held that where the husband is plaintiff, and seeks to annul the marriage, the wife is entitled to alimony and counsel fees. *North v. North*, 1 Barb. Ch. (N. Y.) 244, 43 Am. Dec. 778; *Bloodgood v. Bloodgood*, 59 How. Pr. (N. Y. C. Pl.) 42. This was the practice under the Revised Statutes, the provisions of which relating to alimony are substantially enacted under the Code of Civil Procedure. *Lee v. Lee*, 66 How. Pr. (N. Y. Super. Ct.) 207.

But where the wife denies the validity of the marriage, she cannot claim alimony. So in *Appleton v. Warner*, 51 Barb. (N. Y.) 270, where the wife had admitted her marriage to another at the time of her marriage to the plaintiff. So also in *Bartlett v. Bartlett*, 1 Clarke Ch. (N. Y.) 460; *Blinks v. Blinks* (Super. Ct.), 25 N. Y. Supp. 768.

In *Allen v. Allen*, 59 How. Pr. (N. Y. Supreme Ct.) 27, alimony was granted the wife in a divorce suit brought by her to annul the marriage. In *Bloodgood v. Bloodgood*, 59 How. Pr. (N. Y. C. Pl.) 42, this case was, however, disregarded.

In *Mann v. Mann*, 75 N. Y. 614, application was made by the plaintiff for alimony and counsel fees, and the marriage was denied by the alleged husband on the ground that she had been married to another, the facts being that prior to her marriage to her alleged husband she had been married to another, but

had obtained a decree of divorce on service by publication only, and immediately thereafter married the defendant. It was held that the legality of this marriage was too questionable to justify the allowance of alimony, but the court allowed a counsel fee to enable the wife to try the question of the validity of the second marriage.

Lunacy of the Husband.—Where the marriage was sought to be annulled on the ground of the alleged lunacy of the husband, the court refused to proceed in the case until the committee of the husband should furnish the wife with funds to enable her to make her defense. *Smyth v. Smyth*, 2 Add. Ecc. 254. And in *Portsmouth v. Portsmouth*, 3 Add. Ecc. 63, which was a similar case, alimony was allowed.

In *McEwen v. McEwen*, 10 N. J. Eq. 286, it was held that after a petition for divorce on the ground of abuse and ill-treatment, alimony *pendente lite* might be refused against a party who had been declared a lunatic by the court, as the order implied a default and neglect of a moral obligation on the part of the defendant, which could not be imputed to a lunatic.

1. Separation Necessary.—*Sullivan v. Sullivan*, 2 Add. Ecc. 299; *Klemme v. Klemme*, 37 Ill. App. 54; *Burns v. Burns*, 60 Ind. 259; *Harper v. Harper*, 29 Mo. 301; *Anshutz v. Anshutz*, 16 N. J. Eq. 163; *Chapman v. Chapman*, 25 N. J. Eq. 394; *Marsh v. Marsh*, 14 N. J. Eq. 316; *Frey v. Frey*, 10 Lanc. L. Rev. (Pa.) 215; *Batthey v. Batthey*, 1 R. I. 212.

In *Tayman v. Tayman*, 2 Md. Ch. 393, referring to cases where allowance was made, the court said: "In all these cases, it will be found, the application was made by the wife, who is living apart from her husband, and who is without the means of carrying on the suit. If she be living with her husband, an allowance of alimony *pendente lite* would be unnecessary and improper, but it does not therefore follow that, under such circumstances, upon an application by her, the husband would not be made to supply her with money to fee counsel and defray the expense of the suit."

2. Sykes v. Halstead, 1 Sandf. (N. Y.) 483; *Brown v. Smith*, 83 Ill. 291.

Where it was shown that the wife, with her children, occupied the same house with her husband, but that he slept in a room by himself and did not eat at the same table, and they did not live as husband and wife at the time of the action, and had not for many months previous, it was held that there was such an abandonment of the relation as

to properly conduct her suit or defense; when it is shown that she has sufficient means, alimony *pendente lite* will not be allowed.¹

When Provision has already been Made by Husband.—So where provision has been made by the husband for the wife, upon his separation from her, she has no longer a claim upon him.²

Wife Proved to Be Self-supporting.—And where the husband and wife have been living apart for some years, and the wife has supported herself and appears capable of continuing so to do, alimony *pendente lite* may be denied.³

Although the Fact that the Wife Has Some Property is a circumstance to be considered in determining the amount of alimony, if it is not sufficient to support her and enable her to prosecute her suit, or make the proper

would entitle the wife to alimony *pendente lite*. Cowan v. Cowan, 10 Colo. 540.

1. Wife must Be without Adequate Means.—*England.*—Eaton v. Eaton, L. R. 2 P. & D. 51; Goodheim v. Goodheim, 2 S. & T. 250; George v. George, L. R. 1 P. & D. 554; Blackburne v. Blackburne, 36 L. J. Mat. Cas. 88; Belcher v. Belcher, 1 Curt. Ecc. 444; D'Aguilar v. D'Aguilar, 1 Hagg. Ecc. 773; Burrows v. Burrows, L. R. 1 P. & D. 554; Powell v. Powell, L. R. 3 P. & D. 55.

Canada.—Smith v. Smith, 6 Ont. Pr. Rep. 51.

Illinois.—Harding v. Harding, 40 Ill. App. 202; Rawson v. Rawson, 37 Ill. App. 491; Burgess v. Burgess, 25 Ill. App. 525.

Indiana.—Kenemer v. Kenemer, 26 Ind. 330.

Kentucky.—Logan v. Logan, 2 B. Mon. (Ky.) 142.

Maryland.—Coles v. Coles, 2 Md. Ch. 350.

Mississippi.—Porter v. Porter, 41 Miss. 116.

New Jersey.—Westerfield v. Westerfield, 36 N. J. Eq. 195.

New York.—Maxwell v. Maxwell, 28 Hun (N. Y.) 566; Lewis v. Lewis, 3 Johns. Ch. (N. Y.) 519.

South Carolina.—Converse v. Converse, 9 Rich. (S. Car.) 535.

The fact that the wife is destitute of means to carry on her suit, and to support herself during its pendency, is as essential as any other fact to authorize the court to award temporary alimony. This is not a mere matter of discretion, but a settled principle of equity. Rapallo, J., in Collins v. Collins, 80 N. Y. 1.

In Ross v. Ross, 47 Mich. 185, where the complainant did not allege or intimate that she had no property, and from anything that appeared she might have been presumed to have abundant means wherewith to support herself and carry on the suit, it was held that there was no showing upon which an order for alimony and expenses could be based.

Where a wife had succeeded from her own means, or on her own credit, in making her defense, it was held that she was not entitled to an allowance, counsel fees, or expenses. Beadleston v. Beadleston, 103 N. Y. 402; McCarthy v. McCarthy, 137 N. Y. 500.

What will be Taken into Account.—Not only a wife's income derived from separate property will be taken into account in allotting alimony *pendente lite*, but income of which she is in the actual enjoyment, though earned

by herself. Goodheim v. Goodheim, 2 S. & T. 250, 30 L. J. Mat. Cas. 162, 9 W. R. 853, 4 L. T. N. S. 449.

Effect of Subsequent Marriage.—In Coad v. Coad, 40 Wis. 392, on the husband's appeal from a judgment for divorce in favor of the wife, which gave all the appellant's property to the respondent by way of alimony, it appeared that the respondent had married again before the time for appeal from the judgment had expired, and that her second husband was still living. The court denied her motion for an order to pay her a sum sufficient to enable her to litigate the appeal.

Both Parties without Means.—Where it appears that both parties are almost penniless, the power of the wife to maintain herself by her own exertions must be taken into account. Nicholls v. Nicholls, 30 L. J. Mat. Cas. 163, note.

2. When Husband has Made Provision for Wife upon Separation.—McDonough v. McDonough, 26 How. Pr. (N. Y. Super. Ct.) 193; Graves v. Cole, 19 Pa. St. 171; McLaren v. McLaren, 33 Ga. (Supp.) 99.

In Stevens v. Stevens, 49 Mich. 504, alimony was denied a wife where it appeared that she had already received from her husband an amount of property not very disproportionate to the amount which might otherwise have been allowed her.

In Rose v. Rose, 11 Paige (N. Y.) 166, it was held that after a voluntary provision had been made by the husband, the wife was not entitled to alimony *pendente lite*, unless she or her trustee surrendered, or offered to surrender, the voluntary settlement. But in Pinckard v. Pinckard, 22 Ga. 31, 68 Am. Dec. 481, it was said that it was not a sufficient reply to an application for alimony by the wife, that the husband had made provision for her maintenance in the past, and would do so in the future, but that the court should fix the allowance, and not leave it to the discretion of the husband, exasperated with or without cause.

Where it appeared that the wife was possessed of personal property which she had taken from her husband, consisting of jewelry, carriages, horses, furniture, silver, etc., to a very large amount, an application for alimony *pendente lite* was denied. Morrell v. Morrell, 2 Barb. (N. Y.) 480. So also in Bremner v. Bremner, 2 S. & T. 249, 8 L. T. N. S. 611.

3. Wife Self-supporting.—Thompson v.

defense, the court will still compel the husband to make an allowance and supply the deficiency.¹

She is Not Required to Exhaust her Own Resources before claiming alimony *pendente lite*.²

d. HUSBAND'S ABILITY.—As a further prerequisite to the allowance of alimony *pendente lite*, it must be admitted or proved that the husband is able to pay such sum as may be decreed.³

Inability to Supply Wife with Means for Defense—Effect upon His Suit.—And it has been held that where the husband asks for the divorce, if he is unable to supply

Thompson, L. R. 1 P. & D. 553; George v. George, 37 L. J. Mat. Cas. 17; Ober v. Ober (Supreme Ct.), 28 N. Y. St. Rep. 23.

Where the parties have been living separate for years, and the wife did not allege that she was in want, and the husband swore that she was in better circumstances than he was, an order was refused. Bradley v. Bradley, 3 Ch. Chamb. (Ont.) 329.

In Westerfield v. Westerfield, 36 N. J. Eq. 195, a woman and her husband had been apart for more than fourteen years, during which time she had supported herself, and her wants and necessities were not shown to be greater or more pressing than at any previous time. Her application was denied, the court leaving her in the same condition as that in which she had voluntarily remained so many years. And in Anthony v. Anthony, 11 N. J. Eq. 70, where it appeared that the wife, the defendant to a bill for divorce, had lived apart from her husband for more than five years without applying to the court of chancery for protection, and that her allegations of his cruelty were denied, it was held that the allowance of alimony would be improper, though she was shown to be destitute, and he to be worth three thousand to five thousand dollars, but the counsel fees might be allowed. Anthony v. Anthony, 11 N. J. Eq. 70.

In Brown v. Brown, 22 Mich. 241, it appeared that the parties had been accustomed to rely upon their joint labor for support and accumulation. It was held that the allowance should not be so large as to relieve the wife from all necessity of doing something for her support.

1. Where Wife Has Some Property, but Not a Sufficiency.—Holmes v. Holmes, 2 Lee 90; Gruhl v. Gruhl, 123 Ind. 86; Sellers v. Sellers (Ind. 1895), 40 N. E. Rep. 699; Rose v. Rose, 53 Mich. 585; Merritt v. Merritt, 99 N. Y. 643; Campbell v. Campbell, 73 Iowa 482.

Support by Others.—The fact that the wife's mother would support her, or prevent her suffering, does not relieve the defendant of his liability, to be assumed by one upon whom it did not rest in law. Gray v. Gray (Supreme Ct.), 28 N. Y. Supp. 856.

2. May Not be Compelled to Exhaust her own Resources.—White v. White, 50 Ill. App. 149.

She need not resort to the *corpus* or capital of her estate before claiming an allowance from that of her husband. Miller v. Miller, 75 N. Car. 70. So in Hoffman v. Hoffman, 7 Robt. (N. Y.) 474, although the wife was a

professional musician, and had been in the habit of earning enough in her vocation to support herself, and was still able to do so, yet, where it appeared that she was rapidly consuming for her necessary support the remnant of her former earnings, and was unable to obtain employment, and that her husband was earning more than was necessary for his subsistence, he was required to contribute to her support and the payment of her expenses a reasonable sum out of his earnings.

3. Husband's Resources.—Glenn v. Glenn, 44 Ark. 46; Becker v. Becker, 15 Ill. App. 247; Burgess v. Burgess, 25 Ill. App. 525; Umlauf v. Umlauf, 22 Ill. App. 580; Ross v. Ross, 47 Mich. 185; Feigley v. Feigley, 7 Md. 537, 61 Am. Dec. 375; Wait v. Wait, 7 Leg. Gaz. (Pa.) 382; Battey v. Battey, 1 R. I. 212.

Practice in Ecclesiastical Courts—"Allegation of Faculties."—In the ecclesiastical courts, an allowance was improper, except upon an "allegation of faculties" made in the wife's behalf on a showing of the husband's ability. Butler v. Butler, 1 Lee 38.

Husband Insolvent.—Where a husband alleged that he was in insolvent circumstances, and that his only income was meat, drink, washings, and lodgings, and four shillings a week, the court refused to allow alimony *pendente lite*. Capstick v. Capstick, 33 L. J. Mat. Cas. 105.

In Burghoffer v. Burghoffer, 46 Ill. App. 396, where it appeared that the husband was the proprietor of a small jewelry shop, the profits of which were shown to be hardly adequate to pay his rent and board, and it was shown that he was otherwise indebted, an allowance was denied.

Where it was shown that defendant was a pilot, on six months' leave without pay, and that he received no income and possessed no property whatever, allowance to the wife was refused. Fletcher v. Fletcher, 2 S. & T. 434, 31 L. J. Mat. Cas. 82.

Affidavit of Wife as to Husband's Ability.—In Gaylord v. Gaylord, 4 Jones Eq. (N. Car.) 74, the affidavit of the petitioner annexed to her petition which set forth the amount of the defendant's property, and of what kind it consisted, was deemed sufficient *prima facie* to authorize the court to act on the question of alimony. But in Baer v. Baer, 7 Kulp (Pa.) 244, it was held that upon a vague allegation that the husband was the owner of a good farm and other property sufficient to pay the sum asked for, alimony would not be granted.

the wife with means to make her defense he must abandon the suit.¹

Mere Poverty of the Husband, or the fact that he is in poor circumstances, is no defense to an application, but this should be taken into consideration in fixing the amount.²

Husband without Means—Ability to Earn Money.—Allowance will not be denied because the husband has no visible means of support, but it may be allowed in view of the husband's ability to earn money, and of his prospective income.³

4. Effect of Wife's Adultery.—Allegations of the wife's misconduct, and proof that she is partly in fault, will not defeat her application for alimony *pendente lite*.⁴

Wife's Sworn Denial.—And as, upon an application for alimony *pendente lite*, the merits of the case will not be inquired into further than to establish a *prima facie* case, where the divorce is sought on the ground of adultery it is sufficient generally if the wife deny upon oath the charges made against her.⁵

1. Purcell v. Purcell, 3 Edw. Ch. (N. Y.) 194; Mangels v. Mangels, 6 Mo. App. 481.

2. Rublinsky v. Rublinsky (Super. Ct.), 24 N. Y. Supp. 920; Hallock v. Hallock, 4 How. Pr. (N. Y. Supreme Ct.) 160; Cohen v. Cohen, 11 Misc. Rep. (N. Y. C. Pl.) 704; Kittle v. Kittle, 8 Daly (N. Y.) 72; Frickel v. Frickel (Super. Ct.), 24 N. Y. Supp. 483.

In Moss v. Moss, 15 W. R. 532, the court ordered the husband to make his wife an allowance, although his income consisted only of a voluntary allowance from his father. See also Eliot v. Eliot, 77 Wis. 634.

3. Campbell v. Campbell, 37 Wis. 206; Mangels v. Mangels, 6 Mo. App. 481.

In Muse v. Muse, 84 N. Car. 35, where the husband denied that he had any property, but admitted that he was an able-bodied man, an allowance of the court, without an inquiry into the value of his property, was held proper.

Uncertain Income.—Where the petition set forth, as the only source of income of the husband, that on the death or second marriage of his mother he would be entitled to a share in the residuary estate of his father, provided he attained his majority, it was held that, he being still a minor, there was no income from which the court could allow alimony *pendente lite*. Beavan v. Beavan, 8 Jur. N. S. 769, 31 L. J. Mat. Cas. 166.

In Brown v. Brown, 32 L. J. Mat. Cas. 144, where it appeared that the husband had no income, and his only property was a legacy of five hundred pounds, not payable until eleven months after the application for alimony, the court refused to allow alimony *pendente lite*.

Husband Suing in Forma Pauperis.—In Moon v. Moon, 43 N. J. Eq. 403, it was held that in a proper case the court may dispauper a petitioner who is proceeding *in forma pauperis*, under its previous order for a divorce, and order him to pay alimony to his wife and to provide her with the means of making her defense.

4. McFarland v. McFarland, 51 Iowa 565; Methvin v. Methvin, 15 Ga. 97, 60 Am. Dec. 664.

Separation on Account of Wife's Cruelty.—Alimony has been granted to a wife, although her husband obtained a separation on the ground of her cruelty. Pritchard v. Pritch-

ard, 3 S. & T. 523; Forth v. Forth, 36 L. J. Mat. Cas. 122, 16 L. T. N. S. 574.

Wife a Common Drunkard.—In Saunders v. Saunders, 2 Edw. Ch. (N. Y.) 491, alimony was granted the wife, who was shown to be a common drunkard.

Allowance to a Wife in Prison.—In Kelly v. Kelly, 4 S. & T. 227, 32 L. J. Mat. Cas. 181, a wife undergoing a sentence of imprisonment for felony was held entitled to alimony *pendente lite*.

5. Sworn Denial by Wife of Charge of Adultery—England.—Crampton v. Crampton, 32 L. J. Mat. Cas. 142; Whitmore v. Whitmore, 35 L. J. Mat. Cas. 52.

Canada.—Campbell v. Campbell, 6 Ont. Pr. Rep. 128.

New Jersey.—Bray v. Bray, 6 N. J. Eq. 27; Marker v. Marker, 11 N. J. Eq. 256.

New York.—Rublinsky v. Rublinsky (Super. Ct.), 24 N. Y. Supp. 920; Hallock v. Hallock, 4 How. Pr. (N. Y. Supreme Ct.) 160; Wood v. Wood, 2 Paige (N. Y.) 108; Osgood v. Osgood, 2 Paige (N. Y.) 621; Leslie v. Leslie, 6 Abb. Pr. N. S. (N. Y. C. Pl.) 205; Hammond v. Hammond, 1 Clarke Ch. (N. Y.) 151; Frickel v. Frickel (Super. Ct.), 24 N. Y. Supp. 483.

North Carolina.—Webber v. Webber, 79 N. Car. 572.

In a proceeding for a divorce on the ground of the wife's adultery, the wife alleged in her answer that the plaintiff had been guilty of adultery, and upon that ground she had procured a divorce in another state, subsequently marrying the man with whom it was charged that she had committed adultery. The court held that the allowance of alimony *pendente lite* was discretionary. Starkweather v. Starkweather, 29 Hun (N. Y.) 488.

Wife the Complainant—Recriminatory Charges by Husband.—Where the wife is the complainant, the fact that the answer of the husband makes recriminatory charges will not prevent the granting of alimony *pendente lite*. Andrews v. Andrews, Dall. (Tex.) 375.

In De Meli v. De Meli, 67 How. Pr. (N. Y. Supreme Ct.) 20, where a wife brought suit for a separation, and the husband, by counterclaim, charged adultery and sought affirmative relief, and her complaint was dismissed, and she refuted the charge of adultery, it was

Finding against Wife before Final Hearing.—It has been held that although at any time before the final hearing on an issue raised by the wife the jury may have found her guilty, nevertheless alimony *pendente lite* may be allowed.¹

Husband's Recovery in Action of Criminal Conversation.—The fact that a verdict has been recovered by the husband in an action of criminal conversation, will not defeat her right, as this is not even presumptive evidence of guilt as against her.²

Mere Recriminatory Charges, however, made in the wife's answer, on information and belief, in general terms, will not justify the granting of an allowance.³

Wife's Immoral Conduct Proved.—And where it is shown that the wife is living an abandoned and profligate life, alimony will not be allowed her on her denial.⁴

5. Commencement of Payment—Practice in Ecclesiastical Courts.—In ecclesiastical courts it was the practice to order the payment of temporary alimony to be made from the return of the citation, for until then the wife might be considered as able to obtain subsistence from the credit of her husband,⁵ but under special circumstances it might be ordered to run from the issue of the process.⁶

Discretionary.—The time of allowance, however, like the question of amount, is in the discretion of the court, and may be made to relate back to the commencement of the suit⁷ or to run from the time of the grant.⁸

held that she was entitled to an allowance for counsel fees and expenses of preparing for trial.

Suit for Divorce by Husband on Ground of Antenuptial Unchastity.—In *Frith v. Frith*, 18 Ga. 273, 63 Am. Dec. 289, the wife was given alimony, though the divorce was sought by the husband on the ground of antenuptial unchastity.

1. *D'Oyley v. D'Oyley*, 4 S. & T. 226, 29 L. J. Mat. Cas. 165.

Alimony *pendente lite* may be allowed to the date of the decree, notwithstanding the finding of the jury. *Stanford v. Stanford*, 1 Edw. Ch. (N. Y.) 317; *Germond v. Germond*, 1 Paige (N. Y.) 83.

But alimony *pendente lite* was refused after a decree *nisi* had been obtained for a dissolution of marriage by reason of the wife's guilt, she having allowed some months to elapse after commencement of the suit before she filed her petition. *Noblett v. Noblett*, L. R. 1 P. & D. 651, 20 L. T. N. S. 716.

Suit for Dissolution after Divorce a Mensa et Thoro.—In a suit for dissolution of marriage, instituted by the husband, who has previously obtained a divorce *a mensa et thoro* in an ecclesiastical court, on the ground of his wife's adultery, the wife is not entitled to alimony *pendente lite*; she is, however, entitled to costs *de die in diem*. *Holt v. Holt*, 28 L. J. Mat. Cas. 12.

2. *Williams v. Williams*, 3 Barb. Ch. (N. Y.) 628.

3. *Clark v. Clark*, 7 Robt. (N. Y.) 284.

4. *Griffin v. Griffin*, 23 How. Pr. (N. Y. Supreme Ct.) 189; *Kock v. Kock*, 42 Barb. (N. Y.) 515.

5. **In Ecclesiastical Courts, Allowance Made from Time of Return of Citation.**—*Loveden v. Loveden*, 1 Ph. 208; *Hamilton v. Hamilton*, 1 Hagg. Ecc. 23; *Bain v. Bain*, 2 Add. Ecc. 253; *Howe v. Howe*, 3 Ch. Chamb. (Ont.) 494.

In *Harris v. Harris*, 1 Hagg. Ecc. 352, it was ordered that alimony should commence from the return of the citation, but that the amount of all debts which the wife had incurred should be deducted.

6. *Nicholson v. Nicholson*, 31 L. J. Mat. Cas. 165; *Hayward v. Hayward*, 1 S. & T. 85; *Bain v. Bain*, 2 Add. Ecc. 253.

Where the Husband did Not Use Due Diligence in causing the return of the citation to be made, alimony might be made to date from the commencement of the citation. *Ronalds v. Ronalds*, L. R. 3 P. & D. 259.

Cohabitation of Respondent with Co-respondent after Service of Citation.—Where the respondent cohabited with, and was supported by, the co-respondent for some time after the filing of the petition and the service of the citation, the court, in allotting alimony *pendente lite*, ordered that it should run from the date at which the respondent ceased to cohabit with the co-respondent, instead of from the service of the citation. *Holt v. Holt*, 38 L. J. Mat. Cas. 33.

7. *Swearingen v. Swearingen*, 19 Ga. 266; *Russell v. Russell*, 69 Me. 336.

In *New York* the general rule is that alimony *pendente lite* can be allowed only from the time notice of an application for its payment is given. *Thrall v. Thrall*, 83 Hun (N. Y.) 188, citing *Collins v. Collins*, 10 Hun (N. Y.) 275; *Beadleston v. Beadleston*, 103 N. Y. 402; *McCarthy v. McCarthy*, 137 N. Y. 500.

8. *Rees v. Rees*, 3 Phil. 387; *Soules v. Soules*, 3 Grant's Ch. (U. C.) 116.

Where several months had elapsed from the return of the citation, and fifty pounds had been paid on account by order of the court, alimony *pendente lite* of one hundred and twenty pounds per annum was decreed, payable from the date of the decree. *Hayward v. Hayward*, 1 S. & T. 85, 28 L. J. Mat. Cas. 9.

6. Allowance Pending Appeal—Right of Trial Court.—The wife has the right to alimony so long as the litigation continues, and the trial court may make an order therefor, which shall continue pending an appeal from its decree.¹ The trial court generally makes such orders, and in some jurisdictions it alone can grant them, and in such cases the application may not be entertained when first made in the appellate court.²

When Wife's Cause Meritorious, and She is without Means.—The wife, in the court below, is entitled to such an order whenever it is shown that she has a meritorious case on appeal, whether she is the complainant or defendant, and when it is made to appear that she has not enough money to enable her to prosecute her suit, and that the husband has sufficient means to pay such an allowance as may be made.³

Not a Matter of Right—Good Faith.—Her right to alimony pending the appeal is not, however, a matter of absolute right, and will not be allowed as a matter of course; but when application is made, the records in the case should be examined so far as to determine whether her appeal is made in good faith,

1. Trial Court may Order Alimony to Continue during Appeal.—*Bohnert v. Bohnert*, 91 Cal. 428; *State v. St. Louis Ct.*, 99 Mo. 216; *Ex p. King*, 27 Ala. 387; *Jenkins v. Jenkins*, 91 Ill. 167; *Peavey v. Peavey*, 76 Iowa 443; *Callahan v. Callahan*, 7 Neb. 38.

In *Rohrback v. Rohrback*, 75 Md. 317, it was held that, although appeal was taken, the court still had jurisdiction of the parties, and having jurisdiction, it had the power to determine as to the right of the wife to an allowance for counsel fees and costs.

In *McBride v. McBride*, 119 N. Y. 519, it was said that it was the opinion of the court that the Superior Court, in special term, had power to make the allowance during pendency of the appeal, and until the ultimate determination of the action.

In *Van Voorhis v. Van Voorhis*, 90 Mich. 276, the defendant was allowed seven hundred and seventy-five dollars for the expenses of her appeal from a decree granting a divorce on the ground of adultery, where it appeared that she was without means, and that her husband was the owner of valuable property of considerable amount, and where she showed, by a certificate of a member of the bar in good standing, that her claim of appeal was meritorious.

Suit Money.—In *Phillips v. Phillips*, 27 Wis. 252, the principle of the text was recognized, and it was said that although in such a case suit money should not ordinarily be allowed, yet as the husband was not altogether blameless, he was compelled to pay the fees of the clerk of the court and a portion of the expenses of printing.

Application Set Aside upon Abandonment of Appeal.—In *Peavey v. Peavey*, 76 Iowa 443, when it appeared that no appeal was ever perfected, because the wife failed to serve notice of an appeal on the clerk below, although such notice was served on one of the plaintiff's attorneys, and she did not appear in the appellate court, it was held that her appeal should be regarded as abandoned, and that the allowance should be set aside.

Husband's Ability.—It must appear that the husband is able to make the allowance, when

application is made to lower court. *Grant v. Grant* (S. Dak. 1894), 57 N. W. Rep. 1130. See *supra*, this title, *Necessary Prerequisites—Husband's Ability*.

Subsequent Marriage of Wife Pending Appeal.—On the husband's appeal from a judgment of divorce, it appearing that the respondent had married again before the time for appealing had expired, and that her second husband was still living, the court denied her motion for an order on appellant sufficient to enable her to litigate the appeal. *Coad v. Coad*, 40 Wis. 393.

Adultery of Wife Pending Appeal.—In *Goldsmith v. Goldsmith*, 6 Mich. 285, where it appeared that the wife had been guilty of repeated acts of adultery pending the appeal, an order which had been made was rescinded.

2. State v. Seddon, 93 Mo. 520; *Hunter v. Hunter*, 100 Ill. 477; *Reilly v. Reilly*, 60 Cal. 624; *Storke v. Storke*, 99 Cal. 621.

In *Wolff v. Wolff* (Cal. 1894), 37 Pac. Rep. 858, it was held that an order granting counsel fees for an appeal from an order denying a new trial, made before such appeal was taken, would not be reversed as premature, where, on the hearing of the appeal from the order granting such allowance, it appeared that an appeal from the order denying a new trial was pending.

3. Jones v. Jones, L. R. 2 P. & D. 337; *Pleyte v. Pleyte*, 15 Colo. 125; *Goldsmith v. Goldsmith*, 6 Mich. 285; *Weishaupt v. Weishaupt*, 27 Wis. 621; *Lake v. Lake*, 16 Nev. 363; *Lake v. Lake*, 17 Nev. 230; *Jenkins v. Jenkins*, 91 Ill. 167; *Miller v. Miller*, 14 Mo. App. 418; *Dwyer v. Dwyer*, 16 Mo. App. 422; *Clarkson v. Clarkson*, 20 Mo. App. 94; *Disborough v. Disborough*, 51 N. J. Eq. 306. In *Jones v. Jones*, L. R. 2 P. & D. 337, when application was made by the wife for alimony, and an appeal had been taken by her from an order dismissing her petition for separation, *Mellor, J.*, said: "As regards alimony, under such circumstances as the present, so long as the wife continues a wife, there is no real reason why she should not have alimony, and it is due to her until on the petition there is a final decision against her."

and if it appears that it is obviously without merit the application should be denied.¹

7. Amount—*a*. IN GENERAL.—There Is No Fixed Rule as to the amount of allowance to be made, but this is within the judicial discretion to be exercised with a view to all the circumstances of the case, as the husband's income, the estate of the wife, the age and condition of the parties, the disposition and care of the children, and the ability of the parties to care for themselves.²

Amount Usually Less than Permanent Alimony.—The amount allowed as alimony *pendente lite* is, however, as a general rule, less than that allowed as permanent alimony.³

Must Be Sufficient for Actual Wants.—The amount allowed must be sufficient for the actual wants and necessities of the wife, but this has been extended to one-third, and even to one-half, of the income of the husband.

1. Allowance Not Matter of Absolute Right.—*Krause v. Krause*, 23 Wis. 354; *Friend v. Friend*, 65 Wis. 412; *Phillips v. Phillips*, 27 Wis. 252; *Weishaupt v. Weishaupt*, 27 Wis. 625; *Freeman v. Freeman*, 31 Wis. 235; *Whitmore v. Whitmore*, 49 Mich. 417; *Holt-hoef v. Holt-hoef*, 47 Mich. 643; *Zeigenfuss v. Zeigenfuss*, 21 Mich. 414.

Where it was conclusively established in the trial court that the appellant had no adequate cause for deserting her husband on grounds of cruelty; that her deserting him was wilful, and not necessary for her safety; and it did not appear that she had offered to return to her husband's home, a motion for alimony pending the appeal and for suit money was denied. *Friend v. Friend*, 65 Wis. 412.

2. Amount within Discretion of Court.—*England*.—*Rees v. Rees*, 1 Eng. Ecc. 418; *Cooke v. Cooke*, 2 Ph. 40.

Arkansas.—*Bauman v. Bauman*, 18 Ark. 320, 68 Am. Dec. 171.

California.—*Schammel v. Schammel*, 74 Cal. 36; *White v. White*, 73 Cal. 105.

Georgia.—*McGee v. McGee*, 10 Ga. 477; *Campbell v. Campbell*, 67 Ga. 423.

Illinois.—*Harding v. Harding*, 144 Ill. 589; *Plaster v. Plaster*, 67 Ill. 93; *Bergen v. Bergen*, 22 Ill. 187; *Andrews v. Andrews*, 69 Ill. 609; *Ressor v. Ressor*, 82 Ill. 442; *Umlauf v. Umlauf*, 22 Ill. App. 580.

Indiana.—*Powell v. Powell*, 53 Ind. 513.

Maine.—*Call v. Call*, 65 Me. 407.

Michigan.—*Potts v. Potts*, 68 Mich. 492.

Nebraska.—*Small v. Small*, 28 Neb. 843.

New Jersey.—*Amos v. Amos*, 4 N. J. Eq. 171.

New York.—*Hammond v. Hammond*, 1 Clarke Ch. (N. Y.) 151; *Bissell v. Bissell*, 1 Barb. (N. Y.) 430; *Lynde v. Lynde*, 2 Barb. Ch. (N. Y.) 72; *Worden v. Worden*, 3 Edw. Ch. (N. Y.) 387; *Denton v. Denton*, 1 Johns. Ch. (N. Y.) 364.

Payments Made by Husband to be Deducted.—Payments made by the husband to the wife, since the service of the citation, will be deducted from alimony *pendente lite*. *Crampton v. Crampton*, 32 L. J. Mat. Cas. 142.

Where Allowance is Made under Separation Deed.—When husband and wife, at the time of the institution of a matrimonial suit, are living apart under a deed of separation by which an allowance is made to the wife, the mere fact of the institution of the suit does

not entitle the wife to an increased allowance by way of alimony *pendente lite* estimated on the husband's income at that time; but, on the other hand, when it is shown that for several years the wife has maintained herself on the allowance made, it should be deemed sufficient. So where, under a deed of separation executed by the parties many years before, the husband had covenanted to pay an annuity to his wife in accordance with the amount of his income at that period, which annuity he had continued to pay, and the husband afterwards acquired a very large increase of fortune, and finally instituted a suit to dissolve his marriage by reason of the adultery of his wife, it was held that the wife had no claim to alimony pending suit, estimated on the present income of her husband. *Powell v. Powell*, L. R. 3 P. & D. 55, 42 L. J. Mat. Cas. 44, 21 W. R. 62, 29 L. T. N. S. 254, affirmed on appeal, 29 L. T. N. S. 466, 22 W. R. 62.

Vexatious Delay by Husband.—In lieu of interest and allowances to the wife, damages may be imposed upon the husband for vexatiously delaying her, and for expenses for carrying on her suit. *McClung v. McClung*, 40 Mich. 493.

Vexatious Suit.—The institution of vexatious suits by the wife against her husband is a ground for allotting alimony *pendente lite* at less than the usual rate. *Hakewill v. Hakewill*, 30 L. J. Mat. Cas. 254.

Reference to Master.—Where the petition does not state what particular property the husband has, the determination of the amount should be referred to a master or referee. *Story v. Story*, Walk. (Mich.) 421; *Brother-ton v. Brother-ton*, 12 Neb. 75. On a reference to a master to report the amount of alimony and an advance to counsel, the master's report should show the means and ability of the defendant. *Worden v. Worden*, 3 Edw. Ch. (N. Y.) 387.

3. Temporary Alimony Generally Less than Permanent Alimony.—*Cooke v. Cooke*, 2 Ph. 40, 1 Eng. Ecc. 178; *Kempe v. Kempe*, 3 Eng. Ecc. 233; *Otway v. Otway*, 1 Eng. Ecc. 203; *McGee v. McGee*, 10 Ga. 487; *Harding v. Harding*, 144 Ill. 598; *Leslie v. Leslie*, 6 Abb. Pr. N. S. (N. Y. C. Pl.) 203; *Morrell v. Morrell*, 2 Barb. (N. Y.) 483; *Lawrence v. Lawrence*, 3 Paige (N. Y.) 267.

In *Sharon v. Sharon*, 75 Cal. 1, the action

In Some Cases Limited to Actual Wants.—In some cases it has been held that the amount should be limited to the wife's actual wants, until the result of the suit in her favor establishes her right to a more liberal allowance.¹

Then, on the Other Hand, it has been maintained that such an allowance should be made the wife as will enable her to maintain the same position in which she was before the suit commenced.²

One-fifth of the Joint Income has been held to be the usual and proper allowance to the wife for her support pending the suit, to be varied, however, according to the circumstances of the parties.³

The General Principles to be Observed in determining the amount of alimony *pendente lite* are, for the most part, similar to those governing the amount of permanent alimony; and for further discussion of the subject, see that subdivision.⁴ In the notes below will be found a number of cases which may serve as illustrations, and be of assistance in determining the just allowance.⁵

for divorce was brought by the wife, and the answer denied the marriage. On the trial the evidence showed that the marriage had been kept secret, and that the defendant had agreed to pay the plaintiff five hundred dollars per month for her support until the marriage should be publicly acknowledged. It was held that an allowance to the wife of an equal amount per month, as temporary alimony, was reasonable, and that the allowance of a greater sum was an abuse of discretion.

1. Actual Needs of Wife.—*Germond v. Germond*, 4 Paige (N. Y.) 643.

In *Leslie v. Leslie*, 6 Abb. Pr. N. S. (N. Y. C. Pl.) 193, the rule as laid down by Chancellor Walworth in *Germond v. Germond*, 4 Paige (N. Y.) 643, was approved. Daly, J., said: "Alimony, during the suit, [should be confined] to the actual wants of the wife, wholly uninfluenced by the fact that the plaintiff is affluent. * * * This is the only safe rule to follow, to preclude the possibility of a husband's means being used by the wife, in abuse * * * of her privilege to obtain temporary alimony, while it sufficiently carries out the presumption of innocence by awarding her sufficient to provide for her actual wants." Barrett, J., however, in an opinion delivered in this same case, differed as to the limitation of the amount to the "actual wants" of the wife, saying that the general rule as stated by the learned chancellor could not be construed to limit the "actual wants" of the wife, in all cases and under all circumstances, to what could be supplied by any particular sum, maintaining that the "actual wants" of the wife should be construed to be her wants in view of the nature of the husband's means, the situation of the parties in society, and the amount of the husband's income. And this latter seems to be the more just and equitable view.

2. Powell v. Powell, L. R. 3 P. & D. 186; *Leslie v. Leslie*, 6 Abb. Pr. N. S. (N. Y. C. Pl.) 193.

3. Allowance of One-fifth of Joint Income.—*Constable v. Constable*, L. R. 2 P. & D. 17; *Hawkes v. Hawkes*, 3 Eng. Ecc. 230; *Powell v. Powell*, 43 L. J. Mat. Cas. 9. See *Harding v. Harding* (Ill. 1892), 32 N. E. Rep. 206, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 447.

One-fourth of the husband's income has been allowed. *Finlay v. Finlay*, Milw. 575.

And as Low as One-eighth has been ordered. *Butler v. Butler*, Milw. 629.

In *Williams v. Williams*, 29 Wis. 517, Lyon, J., referring to the rule as stated in the text said: "This rule has reference only to the allowance for the support of the wife, and does not include the support of children or the expenses of the action. If the husband be of sufficient ability, the allowance should be such as to enable the wife to live comfortably; and if his estate is large, she should be furnished with means to live in something like the style and manner to which she has been accustomed. This is more especially the rule in cases where * * * it appears that the health of the wife is impaired, and the breach of the marriage contract by the husband has been judicially determined. Yet we apprehend that the cases are few in which the circuit courts will be justified in allowing a larger proportion of the husband's income for the support of the wife *pendente lite* than that above indicated. Certainly, in a large majority of the reported cases which have come under our observation, and in which temporary alimony has been allowed, that proportion has been recognized or acted upon as the correct rule."

The fact that a husband had to maintain several children, the issue of a former marriage, was held to be no ground for allotting less than one-fifth of his income. *Hill v. Hill*, 33 L. T. Mat. Cas. 104; *Grafton v. Grafton*, 27 L. T. N. S. 768.

4. See *infra*, this title, Permanent Alimony.

As to the modification of an allowance made *pendente lite*, see also *infra*, this title, *Modification of Allowance*.

5. Illustrations.—Where it was shown that the husband had an income of fifteen hundred pounds per annum, and the wife had an income from separate property amounting to three hundred pounds, an allowance of two hundred pounds was held to be proper. *Smith v. Smith*, 1 Eng. Ecc. 220. Twenty dollars per month, where the husband had an estate of four thousand dollars, was held not to be excessive. *McGee v. McGee*, 10 Ga. 477. One hundred dollars for attorney's fees and thirty dollars per month was held

b. EXPENSES OF SUIT.—In addition to the sum allowed the wife for her maintenance and support during the pendency of the suit, which alone, strictly speaking, is alimony, it is usual to allow her a sum to defray the expenses of the suit and to employ counsel, sometimes mistakenly called alimony.¹

The Method of Making This Allowance is usually provided for by statute and by special practice in the respective states; therefore, the practitioner is referred to the statutes of his own state for the details of this subject.

Prevailing Rule—Common-law Right.—By the great weight of authority, both in *England*² and in the *United States*,³ the allowance of the expenses of the

to be reasonable, when it was shown that the husband was worth twelve thousand dollars or more. *Simpson v. Simpson* (Iowa 1894), 59 N. W. Rep. 22. Twenty-five dollars per month was held not to be excessive for temporary alimony, when the husband was shown to have an estate of twelve thousand dollars. *Collins v. Collins*, 29 Ga. 517.

Where the husband appeared to be worth forty-five thousand dollars in property, and the necessities of the wife were shown to be great, an allowance of nineteen dollars and twenty-three cents a week for herself and child was held not excessive. *Foss v. Foss*, 100 Ill. 576.

In *Mix v. Mix*, 1 Johns. Ch. (N. Y.) 108, where the husband, a naval officer, had an income of seventy dollars per month, a monthly allowance of twenty dollars was awarded.

In *Brown v. Brown*, 2 Hagg. Ecc. 5, fifty pounds per annum was granted out of an income of one hundred and forty pounds.

In *Harris v. Harris*, 3 Eng. Ecc. 153, where the income of the husband was taken to be two hundred and fifty pounds per annum, considering that he had two children to educate and maintain, and that he would have to pay the expense of the suit on both sides, an allowance of seventy-five pounds per annum was made.

Where the husband was shown to be worth eighteen hundred dollars in one investment, and to have received five thousand dollars through his wife, an allowance of thirty-five dollars per week was held not unreasonable. *Llamosas v. Llamosas*, 4 Thomp. & C. (N. Y.) 574.

Where it appeared that the husband was conducting a large tailoring business, an allowance of thirty dollars per month was considered not unreasonable. *Finkelstein v. Finkelstein*, 14 Mont. 1.

Where it appeared that the husband had only sixty pounds a year, and that on separating from his wife he had handed to her seventy pounds, the amount of her fortune, the court refused to allot alimony *pendente lite*. *Coombs v. Coombs*, L. R. 1 P. & D. 218.

In *Razor v. Razor*, 149 Ill. 621, under the facts of the case, the allowance of one-third of the annual income of the husband was held not improper.

For other examples, see *Yost v. Yost* (Ind. 1895), 41 N. E. Rep. 11; *Aurand v. Aurand*, 55 Ill. App. 426; *Gusman v. Gusman* (Ind. 1895), 39 N. E. Rep. 918; *Cochran v. Cochran*, 42 Neb. 612; *Williams v. Williams* (S.

Dak. 1894), 61 N. W. Rep. 38; *McCarthy v. McCarthy*, 143 N. Y. 235; *Mooney v. Mooney*, 10 Misc. Rep. (N. Y. C. Pl.) 386.

1. Suit Money—England.—*D'Aguilar v. D'Aguilar*, 3 Eng. Ecc. 329; *Bird v. Bird*, 5 Eng. Ecc. 455; *Fitzgerald v. Fitzgerald*, 5 Eng. Ecc. 472; *Belcher v. Belcher*, 6 Eng. Ecc. 372.

Maryland.—*Ricketts v. Ricketts*, 4 Gill (Md.) 105; *Daiger v. Daiger*, 2 Md. Ch. 335; *Tayman v. Tayman*, 2 Md. Ch. 393; *McCurley v. McCurley*, 60 Md. 185.

Michigan.—*Story v. Story*, Walk. (Mich.) 421; *Goldsmith v. Goldsmith*, 6 Mich. 285.

New York.—*Graves v. Graves*, 2 Paige (N. Y.) 62; *Mix v. Mix*, 1 Johns. Ch. (N. Y.) 108; *North v. North*, 1 Barb. Ch. (N. Y.) 241, 43 Am. Dec. 778; *Kendall v. Kendall*, 1 Barb. Ch. (N. Y.) 610.

Oregon.—*Smith v. Smith*, 3 Oregon 363.

Pennsylvania.—*Graves v. Cole*, 19 Pa. St. 171; *Waldron v. Waldron*, 55 Pa. St. 231.

Tennessee.—*Thompson v. Thompson*, 3 Head (Tenn.) 527.

Wisconsin.—*Moe v. Moe*, 39 Wis. 308.

2. In England Regarded as Common-law Right.—*D'Aguilar v. D'Aguilar*, 1 Hagg. Ecc. 773, 3 Eng. Ecc. 329; *Belcher v. Belcher*, 1 Curt. Ecc. 444, 6 Eng. Ecc. 372; *Holmes v. Holmes*, 2 Lee 90, 6 Eng. Ecc. 49; *Fitzgerald v. Fitzgerald*, 1 Lee 649, 5 Eng. Ecc. 472; *Bird v. Bird*, 1 Lee 572, 5 Eng. Ecc. 455.

3. States where Granted Independently of Statute—California.—*Larkin v. Larkin*, 71 Cal. 330.

Maryland.—*Daiger v. Daiger*, 2 Md. Ch. 335; *Tayman v. Tayman*, 2 Md. Ch. 393; *McCurley v. McCurley*, 60 Md. 185, 45 Am. Rep. 717.

Minnesota.—*Wagner v. Wagner*, 36 Minn. 239.

Missouri.—*State v. St. Louis Ct.*, 88 Mo. 135; *Dawson v. Dawson*, 37 Mo. App. 207.

Montana.—*Black v. Black*, 5 Mont. 15.

Nevada.—*Wuest v. Wuest*, 17 Nev. 217; *Lake v. Lake*, 16 Nev. 363; *Lake v. Lake*, 17 Nev. 230.

New Jersey.—*Westerfield v. Westerfield*, 36 N. J. Eq. 195.

New York.—*Wright v. Wright*, 1 Edw. Ch. (N. Y.) 62; *Smith v. Smith*, 1 Edw. Ch. (N. Y.) 255; *Collins v. Collins*, 80 (N. Y.) 1.

Pennsylvania.—*Graves v. Cole*, 19 Pa. St. 173; *Waldron v. Waldron*, 55 Pa. St. 231; *Powers' Appeal*, 120 Pa. St. 320; *Graves v. Cole*, 19 Pa. St. 173.

suit to the wife is held to be independent of statutory authority, and grantable as a common-law right, yet in some states this has been denied, but in most of these states¹ the power has been conferred by statute, so that it now prevails almost universally.

Nature of Expenses Allowed.—The husband should be compelled to pay all the just and reasonable expenses which the wife may incur in the prosecution or defense of the suit.² Reasonable hotel and traveling expenses of the wife while attending court will be allowed, but not those of a traveling attendant.³ A reasonable amount for expense incurred in investigating and acquiring information as to the circumstances of the case should be allowed.⁴

c. COUNSEL FEES.—Upon application made by the wife, a reasonable allowance should be made to her, together with the allowance for her support, to enable her to obtain competent counsel to conduct her suit or defense.⁵

Rights of Wife's Attorney against Husband.—An attorney has no legal claim upon the husband for services and disbursements in defending his wife against a suit brought by him for divorce, but the only mode of securing payment is

Tennessee.—Thompson v. Thompson, 3 Head (Tenn.) 527.

1. Sanford v. Sanford, 2 R. I. 64; Thayer v. Thayer, 9 R. I. 377; Harrington v. Harrington, 10 Vt. 505; Hazen v. Hazen, 19 Vt. 603; Shannon v. Shannon, 2 Gray (Mass.) 285; Wilson v. Wilson, 2 Dev. & B. (N. Car.) 377. But, as stated above, the jurisdiction has been conferred by statute in nearly all of the states.

2. Thompson v. Thompson, 3 Head (Tenn.) 527; Germond v. Germond, 1 Paige (N. Y.) 83; Kendall v. Kendall, 1 Barb. Ch. (N. Y.) 610.

Past Expenses.—In McCarthy v. McCarthy, 137 N. Y. 500, under a statute providing that the court might order the husband to pay a sum of money necessary to enable the wife "to carry on or defend the action," it was held that no allowance could be made for expenses already incurred, unless it appeared that the payment of such was necessary in order to enable the wife to further prosecute or defend. See also Beadleston v. Beadleston, 103 N. Y. 402; Loveren v. Loveren, 100 Cal. 493; Courtney v. Courtney, 4 Ind. App. 221.

3. **Hotel and Traveling Expenses.**—Main v. Main (N. J. Eq. 1892), 24 Atl. Rep. 1024.

Where a decree was reopened and the wife allowed to defend, it appearing that the husband had induced his wife to go into another state so that he might obtain a divorce in her absence, an order was entered requiring him to provide the expenses of her return, though the order was required to contain provisions against diverting the money to any other purpose. Smith v. Smith, 3 Oregon 363.

But where the husband has provided a suitable place for his wife to lodge during separation and proceedings for divorce, and no order is asked for the boarding of herself and her witnesses during trial of the case, the tavern bill for the boarding of the wife and her witnesses cannot be recovered from the husband. Graves v. Cole, 19 Pa. St. 171.

4. **Expense of Investigating and Obtaining Information.**—Allen v. Allen, 2 S. & T. 107.

In Powers' Appeal, 120 Pa. St. 320, where the evidence showed that the husband was the

owner of lands, farms, mills, and houses, and engaged in business, it was held to be a palpable abuse of discretion to refuse the respondent alimony *pendente lite* and counsel fees, the wife having a meritorious cause.

5. **Allowance of Counsel Fees.**—*Alabama.*—Turner v. Turner, 44 Ala. 437.

California.—Lowell v. Lowell, 55 Cal. 316.

Georgia.—Creamer v. Creamer, 36 Ga. 628; Sprayberry v. Merk, 30 Ga. 81, 76 Am. Dec. 637; Glenn v. Hill, 50 Ga. 94.

Illinois.—Dow v. Eyster, 79 Ill. 254; Petrie v. People, 40 Ill. 334; McCulloch v. Murphy, 45 Ill. 256. In this state application may be made by counsel.

Kentucky.—Meyar v. Meyar, 3 Metc. (Ky.) 301; Dugan v. Dugan, 1 Duv. (Ky.) 289.

Maryland.—Tayman v. Tayman, 2 Md. Ch. 393.

New Hampshire.—Ray v. Adden, 50 N. H. 82, 9 Am. Rep. 175.

New York.—Mercer v. Mercer (Supreme Ct.), 25 N. Y. Supp. 867.

Ohio.—Dorsey v. Goodenow, Wright (Ohio) 120.

Tennessee.—Thompson v. Thompson, 3 Head (Tenn.) 527.

Wisconsin.—Sumner v. Sumner, 54 Wis. 642.

Where the order allowing temporary alimony is silent on the point, it will be presumed that an allowance for counsel fees was included in the amount. Bauman v. Bauman, 18 Ark. 320, 68 Am. Dec. 171. See also Waters v. Waters, 49 Mo. 385.

In Sumner v. Sumner, 54 Wis. 642, where it appeared that neither party had been blameless in the treatment of the other; that the husband had, on several occasions, used harsh and insulting language to the wife; that he advised her to obtain a divorce, under an erroneous impression of the law, and that the plaintiff had prosecuted her action in good faith, believing that she had good cause for a divorce, it was held that it was proper to require the husband to pay the disbursements made in prosecuting the action and reasonable fees therefor.

by an order of court for a sufficient allowance for the purpose.¹ Such a claim cannot be maintained as for necessities, and unless especially authorized, counsel fees can be granted only on the application of the wife.² But in some states the rule is otherwise, and the husband is held liable as for necessities.³

Number of Counsel.—No fixed rule can be laid down as to the number of counsel to which the wife is entitled, as this will naturally vary with the difficulties of the particular case and the ability of the husband. And in this matter, just as is the case of many other matters connected with the subject of alimony, the amount of the allowance is determined in the discretion of⁴

Allowance on Appeal.—Where the decision appealed from provided that the matter of allowing an attorney's fees should be continued to the next term, and the appellant made no complaint of such provision, the court refused the allowance, there being no proper evidence before the court on which to make such allowance. *Blair v. Blair*, 74 Iowa 311.

Referee's Report in Favor of Wife—Further Prosecution by Husband.—Where, in the husband's action for divorce, the referee reports in favor of the wife, and the husband desires to prosecute further, counsel fees should be allowed the wife. *Donnelly v. Donnelly*, 63 How. Pr. (N. Y. C. Pl.) 481.

1. Claim of Attorney for Fees.—*Parson v. Darrington*, 32 Ala. 227; *Newell v. Cooke*, 40 Conn. 596; *Sheldton v. Pendleton*, 18 Conn. 417.

Such a claim is an incident to the wife's right to temporary alimony, and is only cognizable during the suit by the court having jurisdiction. *Glenn v. Hill*, 50 Ga. 94; *Williams v. Monroe*, 18 B. Mon. (Ky.) 514; *Wing v. Hurlburt*, 15 Vt. 607, 40 Am. Dec. 695; *Parson v. Darrington*, 32 Ala. 227; *Morrison v. Holt*, 42 N. H. 478, 80 Am. Dec. 120; *Dow v. Eyster*, 79 Ill. 256; *Cook v. Walton*, 38 Ind. 228; *Coffin v. Dunham*, 8 Cush. (Mass.) 404, 54 Am. Dec. 769.

2. Creamer v. Creamer, 36 Ga. 618; *Mercer v. Mercer* (Supreme Ct.), 25 N. Y. Supp. 867.

3. McCurley v. McCurley, 62 Md. 422.

So in *Iowa* it is established that in actions for divorce the husband is liable to the wife's attorney for reasonable fees earned in conducting the litigation in behalf of the wife. *Clyde v. Peavy*, 74 Iowa 47; *Porter v. Briggs*, 38 Iowa 166; *Preston v. Johnson*, 65 Iowa 285.

England.—In *Wilson v. Ford*, L. R. 3 Exch. 68, Channel, B., said: "I think that where a suit was instituted, as it was here, for restitution of conjugal rights and for alimony *pendente lite*, the expenses in relation to it were necessary to her as wife, and such as she was justified in incurring."

In *Stocken v. Patrick*, 29 L. T. N. S. 507, where it appeared that the wife had good ground for instituting a suit for separation, because of the cruelty of her husband, and her attorney having brought suit for divorce on the ground of adultery and cruelty, which was compromised by an agreement for a deed of separation, the solicitor was held entitled to sue and recover of the husband for his costs

as between attorney and client. See also *Ottaway v. Hamilton*, 3 C. P. Div. 393.

4. Considerations Determining Number of Counsel.—*Hecht v. Hecht*, 28 Ark. 92; *Sharon v. Sharon*, 75 Cal. 1; *Stillman v. Stillman*, 99 Ill. 196, 39 Am. Rep. 21; *Jenkins v. Jenkins*, 91 Ill. 168; *Ricketts v. Ricketts*, 4 Gill (Md.) 105; *Black v. Black*, 5 Mont. 15; *State v. Sachs*, 3 Wash. 371.

Ordinarily, an allowance for one attorney only is sufficient. *Uhlman v. Uhlman*, 51 N. Y. Super. Ct. 361.

Proof of the Amount of Labor or the Value of Services of counsel is not necessary to sustain an allowance for counsel fees; the court may determine from its own experience, and from the facts and circumstances of the case as disclosed by the papers, what is a reasonable fee. *DeLlamosas v. DeLlamosas*, 62 N. Y. 618.

In Determining the Reasonableness of the Amount, the ability of the husband to earn money may be taken as a basis of the allowance. *Pryre v. Pryre*, 79 Cal. 336; *Eidenmuller v. Eidenmuller*, 37 Cal. 364.

Illustrations as to Number of Counsel and Amount of Fees.—In *Collins v. Collins*, 29 Ga. 517, where the husband was shown to have a clear estate of twelve thousand dollars; in view of the high character of the wife, and that her character for chastity was attacked, an allowance of five hundred dollars for counsel fees was held not excessive.

In *Blake v. Blake*, 70 Ill. 618, a fee of six thousand dollars was reduced to two thousand dollars.

In *Williams v. Williams*, 29 Wis. 517, an allowance of three thousand five hundred dollars was reduced to one thousand dollars.

In *Dugan v. Dugan*, 1 Duv. (Ky.) 289, it was held that the wife would not be allowed to tax her husband with the fees of as many as four lawyers.

In a suit by the wife for divorce, the husband filed a counter-claim for divorce for the wife's adultery, and another to have the marriage declared void for fraudulent concealment by the wife, before marriage, of her previous unchastity. The issues on both counter-claims being found against the husband, the court ordered him to pay the wife's attorney five hundred and seventy-five dollars for the expenses of her defense. This was held reasonable, the litigation having been protracted, and of a nature to require a large amount of work and considerable expenditure of money on the wife's part. *Varney v. Varney*, 52 Wis. 120, 38 Am. Rep. 726.

the court; but only necessary litigation should be provided for.¹

Agreement by Attorney for Contingent Fee.—It is proper to refuse an allowance for counsel fees for an attorney who has agreed to give his services for a contingent allowance;² but the existence of such a contract does not preclude an allowance of a sum for fees of other counsel whose services are rendered necessary.³

Dismissal of Divorce Suit by Husband.—Where the husband dismisses his suit for divorce before a decision is rendered upon the wife's application for alimony *pendente lite*, he is liable to compensate the wife's counsel for services rendered.⁴

After Adverse Termination of Wife's Suit.—But it is held that, after a dismissal of the wife's libel, the court can make no further order requiring the husband to pay counsel fees.⁵

Condonation Pending Action.—Nor can such an order be made, if, pending the suit for divorce, the parties admit a condonation, and ask for a dismissal.⁶

8. Termination.—Alimony *pendente lite* continues, in the discretion of the court, until the termination of the proceedings, even up to the time of the appellate proceeding, when the question of allowance is to be taken in hand by the appellate court.⁷ When the time for making a motion for a new trial

An allowance of one thousand dollars as attorney's fees was held not excessive, where the defendant was the owner of considerable property, and had been persistent and determined in resisting the wife's effort to succeed in her cause, thereby entailing upon her attorneys a large amount of labor in the protection of her rights. *Schammel v. Schammel*, 74 Cal. 36.

Fees Thereofore Earned.—In a suit for separate maintenance by a wife, the court made an order allowing her attorneys two hundred and fifty dollars for fees "thereofore earned." It was held that the recital that the fees were thereofore earned did not prevent the court, in the event of further claim being made, from considering what might be just on the whole case. *White v. White*, 50 Ill. App. 151.

Practice of Court.—In *Money v. Money*, 1 Spinks 117, where it was shown to be the practice of the court for the parties to have two attorneys, it was held that the wife was *prima facie* entitled thereto. See also *Suggate v. Suggate*, 1 S. & T. 497.

1. Only Necessary Litigation to be Provided for.—*Jeter v. Jeter*, 36 Ala. 391; *Uhlman v. Uhlman*, 51 N. Y. Super. Ct. 361; *Atherton v. Atherton* (Supreme Ct.), 31 N. Y. Supp. 977.

In *Parker v. Parker*, 71 Miss. 164, Campbell, C. J., said: "The allowance for means of defense should be limited by the necessity of the case and the reasonable cost of conducting the case of the wife. * * * It is not to be assumed in advance that the wife will be successful, and secure a liberal alimony in the end, and pay her counsel on that basis *pendente lite*. * * * The court need not at once fix the sum to be allowed for counsel fees, and should not attempt to provide for contingencies."

And in *Baldwin v. Baldwin*, 6 Gray (Mass.) 341, the court said: "The view of the court is, that they cannot enter into the question, as between counsel and client, as to what charges may properly be made by the counsel actually employed, but the respondent is to

be allowed a reasonable amount to meet the charges of the suit, including counsel fees."

2. *White v. White*, 86 Cal. 212; *Sharon v. Sharon*, 75 Cal. 1.

3. *White v. White*, 86 Cal. 212.

4. *Stevens v. Stevens*, 1 Met. (Mass.) 279; *Gossett v. Patten*, 23 Kan. 340; *Thorndike v. Thorndike*, 1 Wash. Ter. 175; *Freeman v. Freeman*, 8 Abb. N. Cas. (N. Y. Supreme Ct.) 174; *Germond v. Germond*, 1 Paige (N. Y.) 83; *Anonymous*, 15 Abb. Pr. N. S. (N. Y. Supreme Ct.) 307.

Where alimony had been granted and fees ordered to be paid pending a libel for divorce, and the libel was subsequently dismissed without trial, the order for alimony was rescinded, but not for counsel fees. *Weaver v. Weaver*, 33 Ga. 172. The court may, however, diminish the amount allowed for counsel fees. *Waters v. Waters*, 49 Mo. 385.

5. *Newman v. Newman*, 69 Ill. 167.

6. *Reynolds v. Reynolds*, 67 Cal. 176; *Chase v. Chase*, 29 Hun (N. Y.) 527.

Fees Not to be Refunded upon Wife's Failure.—But a wife who has prosecuted in good faith an unsuccessful suit for divorce, will not be compelled to refund the amount paid by the husband for her counsel fees. *Lishey v. Lishey*, 6 Lea (Tenn.) 418.

7. Termination of the Proceedings.—*Holleman v. Holleman*, 69 Ga. 676; *Langan v. Langan*, 91 Cal. 654.

Where, during a divorce suit instituted by the wife, the husband was ordered to pay a certain sum monthly, and the wife was adjudged entitled to a divorce, but the question of alimony was reserved, it was held that the husband's liability for monthly allowance continued as before. *Ex p. Ambrose*, 72 Cal. 398.

A distinction is to be made between the allowance of counsel fees and the allowance for the wife's maintenance. So in *Dawson v. Dawson*, 37 Mo. App. 207, it was held that alimony *pendente lite*, in so far as it is granted to defray counsel fees and costs of suit, ceases at once upon the final ascertainment of the wife's guilt; but such alimony, in so far as

or taking an appeal has elapsed, however, the allowance ceases,¹ and after dismissal of the bill no alimony can be compelled.²

Upon the Death of Either Party, of course, the right to alimony ceases.³

IV. PERMANENT ALIMONY—1. Nature.—Permanent alimony, as has been seen,⁴ is that allowance which the husband is required to make the wife for her maintenance upon termination of the divorce proceedings; that is, upon a decree of separation, upon the ground that the husband is bound to support his wife even after separation from him.⁵

Assignability.—This alimony is not a debt or liability which is assignable.⁶

Liability for Debts.—Nor can it be appropriated for a debt existing prior to the decree of divorce.⁷

2. In Dissolution and Nullity Suits.—At Common Law the ecclesiastical courts did not have power to grant alimony upon a divorce *a vinculo*, but only in case of divorces *a mensa et thoro*. And in the absence of statute authorizing it, it is held that alimony cannot be allowed upon a decree declaring a marriage null and void from the beginning, or upon a decree for dissolution.⁸ But

allowed for the support of the wife, continues until the actual dissolution by a final decree of divorce.

Delay in Prosecution.—The wife's delay in prosecuting a suit may be ground for discontinuing an allowance. *Fowler v. Fowler*, 4 Abb. Pr. (N. Y. Supreme Ct.) 411; *Ward v. Ward*, 1 Tenn. Ch. 262.

Where the trial of a suit by the wife was postponed at her instance, the court directed the payment of alimony, which had been allowed her, to be suspended from the date of the postponement until the case was tried. *Rogers v. Rogers*, 34 L. J. Mat. Cas. 87. But in *Peterson v. Peterson*, 6 Ont. Pr. Rep. 150, where the plaintiff had neglected to proceed to a hearing at the first hearing term after issue joined, it was held that this was no bar to her obtaining *interim* alimony, it appearing that the neglect was owing to a mere slip on the part of her solicitor; that she had a *bona fide* intention to go to a hearing, and had made offers to change the venue, with a view to enable the cause to be speedily heard.

Delay in Application for Enforcement.—The failure to apply during the pendency of the suit, for a remedy to enforce an order for alimony *pendente lite*, cannot operate to deprive the plaintiff of the right to sue for it after a final verdict disallowing permanent alimony. *Gibson v. Patterson*, 75 Ga. 549; *Barney v. Barney*, 14 Iowa 189.

1. Where Time for Appealing or Moving for New Trial has Expired.—*Madan v. Madan*, 17 W. R. 265, 19 L. T. N. S. 612; *Wells v. Wells*, 3 S. & T. 542, 33 L. J. Mat. Cas. And see *Nicholson v. Nicholson*, 31 L. J. Mat. Cas. 165; *Persons v. Persons*, 7 Humph. (Tenn.) 183; *Chestnut v. Chestnut*, 77 Ill. 346.

2. After Dismissal of Bill.—*Heilbron v. Heilbron*, 158 Pa. St. 297; *Chestnut v. Chestnut*, 77 Ill. 346; *Wright v. Wright*, 6 Tex. 29; *Persons v. Persons*, 7 Humph. (Tenn.) 183.

3. Gaines v. Gaines, 9 B. Mon. (Ky.) 295, 48 Am. Dec. 425; *O'Hagan v. O'Hagan*, 4 Iowa 509.

4. See supra, this title, *Definition*.

5. 1 Bla. Com. 441; *Bowman v. Worthington*, 24 Ark. 522; *Francis v. Francis*, 31 Gratt. (Va.) 283.

The term "alimony," as used in the constitution and statute of *New Hampshire*, means that provision or allowance which is made to a wife on a divorce from the bonds of matrimony, and does not embrace other classes of cases as is sometimes the fact in the English practice. *Sheafe v. Sheafe*, 24 N. H. 564.

Not in Lieu of Dower.—Alimony granted to a wife divorced on account of cruel treatment by her husband, under *Indiana* Rev. Stat. 603, §§ 53–61, cannot be granted in lieu of dower. *Russell v. Russell*, 1 Ind. 510.

Maintenance.—Under authority to make such provision for the maintenance of the wife as may seem right and proper, the court may make an allowance for alimony; that is, an amount to be determined according to the principles to be applied in determining alimony as known to the law. *Dupont v. Dupont*, 10 Iowa 112, 74 Am. Dec. 378.

6. Not Assignable.—*In re Robinson*, 27 Ch. Div. 160; *Jordan v. Westerman*, 62 Mich. 170, 4 Am. St. Rep. 836; *Kempster v. Evans*, 15 L. R. A. 391; *Daniels v. Lindley*, 44 Iowa 567.

Discharge in Insolvency.—Alimony is not a debt "founded on a contract" within the meaning of a statute providing for relief from such debts by a discharge in insolvency. *Noyes v. Hubbard*, 15 L. R. A. 394.

Inhibition of Imprisonment for Debt Not Applicable.—Nor is it a "debt," within the constitutional inhibition of imprisonment for debt, and the defendant may be held to answer a rule for contempt in default of payment. *Pain v. Pain*, 80 N. Car. 322. See also *Chase v. Ingalls*, 97 Mass. 524.

Alimony Is Not Itself an "Estate," in the technical legal sense of that word, nor is it a "charge" upon the husband's estate, but it is a mere personal charge upon, or duty of, the husband, which the court will control and enforce against him from time to time, at discretion, compelling the payment thereof from his income, whether he have an estate or not. An inaccurate expression on this subject in *Donovan v. Donovan*, 20 Wis. 586, is corrected in *Campbell v. Campbell*, 37 Wis. 206.

7. *Romaine v. Chauncey*, 129 N. Y. 566; *Andrews v. Whitney*, 82 Hun (N. Y.) 117.

8. *Godolf Abr.* 508; *Bird v. Bird*, 1 Lee

both in *England* and in the *United States*, where the marriage was void, as when the husband had a former wife living, and the woman was of good character and blameless, an allowance has been decreed her.¹

The Matter of Alimony is Regulated by Statute in many of the states, and by them is allowed, as a general rule, in favor of the wife in all cases of divorce.² It is said, however, that where the divorce is unqualified and absolute, the nature and principles of the provisions to be made for her rights are essentially and radically different.³

3. Where Wife Is in Fault.—As a general rule, at common law, no alimony could be assigned to the wife from whom the husband had obtained a divorce for her fault or misconduct, as for adultery on her part.⁴

621; *Aughtie v. Aughtie*, 1 Ph. 201; *Smith v. Smith*, 3 S. & R. (Pa.) 248; *Fischli v. Fischli*, 1 Blackf. (Ind.) 360, 12 Am. Dec. 251; *Miller v. Clark*, 23 Ind. 370; *Davol v. Davol*, 13 Mass. 264; *Calame v. Calame*, 24 N. J. Eq. 440; *Bartlett v. Bartlett*, 1 Clarke Ch. (N. Y.) 460; *Harris v. Harris*, 31 Gratt. (Va.) 13; *Boggers v. Boggers*, 6 Baxt. (Tenn.) 299; *Chenault v. Chenault*, 5 Snead. (Tenn.) 248.

In *Bird v. Bird*, 1 Lee 622, where sentence of nullity was pronounced on the ground of former marriage, Sir George Lee said: "As to allowing her a sum of money (though I thought her case a very compassionate one) I was of opinion I had no warrant to do it by law or practice; there was no instance of giving a woman a sum of money in a cause of nullity of marriage by reason of a former marriage, and therefore I thought I had no authority to do it."

In *Zule v. Zule*, 1 N. J. Eq. 97, it was said that where there is a decree of divorce on the ground of prior marriage, it is different from other decrees of divorce growing out of other causes; but whether in this case the wife was entitled to alimony, it was not necessary to consider.

In *Bartlett v. Bartlett*, 1 Clarke Ch. (N. Y.) 460, it was held that under a statute providing that "in every suit brought, either for a divorce or for a separation, the court may, in its discretion, require the husband to pay," etc., a provision could not be made for the wife upon a decree declaring the marriage null and void.

1. In *Scrimshire v. Scrimshire*, 4 Eng. Ecc. 562, upon declaring the marriage null and void *ab initio*, an allowance was made the wife. The court said: "Under the particular circumstances of this case, in which there is no doubt that a marriage was had freely and voluntarily, and that this affair has been prejudicial to Miss Jones, who is a lady of good character, I shall, agreeably to precedent, give a sum to her, *nomine expensarum*, and fix it at four hundred pounds."

And in *Strode v. Strode*, 3 Bush (Ky.) 228, 96 Am. Dec. 211, where the husband concealed the fact that he had a wife living, and married a second, the latter being blameless was held entitled to alimony.

2. Statutes.—*Vanvalley v. Vanvalley*, 19 Ohio St. 588; *Chunn v. Chunn*, 1 Meigs (Tenn.) 131.

In *England*, under 20 and 21 Vict., the allowance may be made to the wife on a dis-

solution of the marriage. *Fisher v. Fisher*, 2 S. & T. 410.

In *Maine*, under the statutes, it is held that on a divorce *a vinculo*, for impotence, alimony cannot be decreed. *Chase v. Chase*, 55 Me. 21.

In *Virginia*, in *Harris v. Harris*, 31 Gratt. (Va.) 13, it was said that, under the code, alimony should be allowed in case of a divorce *a vinculo*, upon the same principles as in a divorce *a mensa*.

In *Wisconsin* alimony is allowed for every divorce except adultery of wife. Wis. Rev. Stat., c. 111, § 24.

In *Tuggles v. Tuggles* (Ky. 1895), 30 S. W. Rep. 875, where the judgment of divorce was obtained by the husband, but the custody of the children adjudged in favor of the wife, it was held that failure to grant alimony was correct, but a reasonable amount should be allowed the wife for the maintenance of the children.

In *Tilton v. Tilton* (Ky. 1895), 29 S. W. Rep. 290, it was held that where a wife sues for divorce and alimony she may recover alimony although a divorce is denied her. See also *Johnston v. Johnston*, 54 Kan. 726.

3. *Calame v. Calame*, 24 N. J. Eq. 440; *Parsons v. Parsons*, 9 N. H. 309, 32 Am. Dec. 362.

In *Fisher v. Fisher*, 2 S. & T. 410, it was said that it would not be politic to give the wife any great pecuniary interest in obtaining a dissolution of the marriage tie. And it being shown that the husband's fortune and income were not large or certain, it was held that a bare maintenance should be awarded. See the comments upon this case in *Sidney v. Sidney*, 4 S. & T. 180.

Restoration of Wife's Property.—It is provided in some states that upon a decree of divorce *a vinculo*, the property which comes to the husband by means of the marriage will be returned to the wife. *Dean v. Dean*, 5 Pick. (Mass.) 428; *Tewksbury v. Tewksbury*, 4 How. (Miss.) 112; *Kirby v. Kirby*, 1 Paige (N. Y.) 261; *Holmes v. Holmes*, 4 Barb. (N. Y.) 295.

4. Misconduct of Wife.—*Ayl. Parer.*, p. 58; 3 Bla. Comm. 94; *Jee v. Thurlow*, 4 D. & R. 11; *Emmett v. Norton*, 8 C. & P. 506, 34 E. C. L. 503; *Lovett v. Lovett*, 11 Ala. 763; *Glover v. Glover*, 16 Ala. 440; *Fivecoat v. Fivecoat*, 32 Iowa 198; *Doyle v. Doyle*, 26 Mo. 545; *McIntire v. McIntire*, 80 Mo. 471; *Shafer v. Shafer*, 10 Neb. 469; *Perry v.*

Statutory Provisions.—And in several states alimony is allowed only upon a divorce obtained for the adultery or other fault of the husband, and expressly prohibited when for the adultery of the wife.¹ But independent of considerations of exact justice, in order that the offender may not become an outcast from society, and upon the further humane and moral ground that the wife may not become tempted to continue in a course of vice, it is provided by statute in many of the states that the husband must make provision for his erring wife upon divorce from her.² And under statutes providing generally that when a divorce is decreed the court may make such an order as to the maintenance of the wife as may seem proper, it is held that the court may make provision for the guilty wife.³

Rule Relaxed under Special Circumstances.—And, independent of statute, alimony has been allowed the wife upon a divorce on the husband's complaint, under particular circumstances justifying it.⁴ And where, under other circumstances, an allowance would be denied, if the wife has contributed substantially to the joint property her guilt should not be further punished by a forfeiture of all interest therein, but an allowance should be made to her.⁵

Gross Misconduct of Wife.—Although the court may, under statutory authority, in its discretion, allow the wife alimony where the divorce has been decreed

Perry, 2 Barb. Ch. (N. Y.) 311; Waring v. Waring, 100 N. Y. 570; Davis v. Davis, 75 N. Y. 221; Palmer v. Palmer, 1 Paige (N. Y.) 276.

The husband, on being granted a divorce for the offense of the wife—as here, her extreme cruelty to him—cannot be required to pay any sum from his separate property towards her subsequent support, there being no statutory provision therefor. Everett v. Everett, 52 Cal. 383.

1. Dickerson v. Dickerson, 26 Neb. 318; State v. Smith, 19 Wis. 558. Where the wife left the husband without sufficient cause, it was held that the court, upon decreeing the divorce, could not allow her alimony out of the husband's estate. Harris v. Harris, 31 Gratt. (Va.) 13; Carr v. Carr, 22 Gratt. (Va.) 168; Lee v. Lee, 1 Duv. (Ky.) 197. See also Woolfolk v. Woolfolk (Ky. 1895), 29 S. W. Rep. 742; Griffin v. Griffin, 8 B. Mon. (Ky.) 121. But compare Reynolds v. Reynolds, 92 Mich. 104.

Upon Decree Nisi in Favor of the Husband after Allowance.—If permanent alimony has been allotted to a wife on her obtaining a decree of judicial separation, and the husband afterwards obtains a decree nisi for dissolution of marriage on the ground of her adultery, the court will not discharge the order for payment of alimony before that decree has been made absolute. Stoate v. Stoate, 30 L. J. Mat. Cas. 180.

Divorce Allowed the Husband by Mistake.—Although a statute denied alimony to the wife when a divorce was obtained by the husband, yet, where a divorce had been improperly granted to the husband instead of to the wife, it was held that she was entitled to an allowance. Gains v. Gains (Ky. 1892), 19 S. W. Rep. 929.

And where the husband had sued for and obtained a decree, on the statutory ground of having lived apart from the wife for five years, and it appeared that the wife had given him no cause for the desertion, it was held

that she should be allowed alimony, although the statute made an allowance only upon a divorce obtained by her. Lacey v. Lacey, 95 Ky. 110.

In *Missouri* it is provided that in all cases of divorce from the bond of matrimony, the guilty party shall forfeit all rights and claims under, and by virtue of, marriage. McIntire v. McIntire, 80 Mo. 470.

2. Luthé v. Luthé, 12 Colo. 421; Richardson v. Wilson, 8 Yerg. (Tenn.) 67.

3. Spittler v. Spittler, 108 Ill. 120; Deenis v. Deenis, 79 Ill. 76; Reavis v. Reavis, 2 Ill. 242; Coon v. Coon, 26 Ind. 189; Hedrick v. Hedrick, 28 Ind. 291; Graves v. Graves, 108 Mass. 314; Janvrin v. Janvrin, 59 N. H. 23; Sheafe v. Sheafe, 24 N. H. 564; Sheafe v. Loughton, 36 N. H. 240; Buckminster v. Buckminster, 38 Vt. 248, 88 Am. Dec. 652.

But in *Connecticut*, under such a general statute, it is held that the court has no power to make an allowance to a woman divorced for her own misconduct. Allen v. Allen, 43 Conn. 419.

4. Jee v. Thurlow, 4 D. & R. 11; Gaines v. Gaines, 9 B. Mon. (Ky.) 295, 48 Am. Dec. 425; Fulk v. Fulk, 8 Blackf. (Ind.) 561.

As in *Pence v. Pence*, 6 B. Mon. (Ky.) 496, where the husband was partly in fault; and in *Dailey v. Dailey*, Wright (Ohio) 514, where a divorce was decreed for a single act of adultery in the wife, and there was hope of reconciliation, and the property was earned by the parties in wedlock, alimony was allowed on the ground that the wife should not be turned loose to prostitution or starvation.

And in *Pritchard v. Pritchard*, 3 S. & T. 523, in granting to the husband a judicial separation for the wife's cruelty, the court ordered him to make provision for her future support.

5. **Where Husband Receives Property by His Wife.**—Bent v. Bent, 2 S. & T. 392, 30 L. J. Mat. Cas. 175.

In *Sheafe v. Loughton*, 36 N. H. 240, Bell, J., discussing the propriety of such an allowance,

the husband, yet it will not be justified in making an allowance where the conduct of the wife is grossly improper, as where she has been guilty of promiscuous adulterous intercourse.¹ And where allowed, the circumstances of the misconduct of the wife should materially affect the determination of the amount.²

And where the Entire Blame does Not Rest on the Wife, but the husband is partly in fault, this should be considered, and an allowance should be granted.³

4. Amount—*a.* IN GENERAL—Matter of Judicial Discretion.—The allowance of permanent alimony is a matter of sound judicial discretion, to be exercised with reference to established principles and upon a view of all the circumstances of each particular case, such as the estate and ability of the husband, the condition and means of the wife, and the conduct of the parties.⁴

said: "The ordinary course is to allow alimony to the wife, where she is the injured party and the libellant, but the power of the court is not limited to that case. The wife may be in the wrong. She may have an unhappy temper or an unfortunate disposition; she may have ill-treated her husband or deserted him, or have otherwise misconducted herself; and yet the property she may ask as alimony may be all such as was her own before her marriage, or such as has been accumulated, in whole or in part, by her own industry; and her fault may be far from such as ought to be punished by the forfeiture of all her property or her interest in the husband's property, thus leaving her to beg or starve. She may have so conducted herself that her husband may be well entitled to a divorce, and yet she may be a wronged and injured woman; and there seems, therefore, to be good reason why the court should be vested with the power of making to her a just and reasonable allowance in any such case."

And in *Deenis v. Deenis*, 79 Ill. 74, where it appeared that the husband had ample property, which was in part accumulated by the wife's exertions, and that the wife was without separate estate, and had cause for deserting her husband, Scholfield, J., said: "It is equitable that the husband, out of his abundance, should contribute to her support, to prevent her becoming a burden upon others, even if her conduct had been far more objectionable than it is proved to have been."

In *Fivecoat v. Fivecoat*, 32 Iowa 198, it was said that the allowance to the wife divorced for her misconduct could only be "where the husband had acquired property by the wife, or she had been the meritorious cause of it, by a comparative lifetime of industry or otherwise, and he was not without fault as respects her crime."

1. Gross Misconduct on Part of Wife.—*Spaulding v. Spaulding*, 133 Ind. 122; *Conner v. Conner*, 29 Ind. 48; *Hickling v. Hickling*, 40 Ill. App. 73; *Whitsell v. Whitsell*, 8 B. Mon. (Ky.) 50; *Goldsmith v. Goldsmith*, 6 Mich. 285; *Stock v. Stock*, 11 Phila. (Pa.) 324; *Bray v. Bray*, 6 N. J. Eq. 27.

Wife Leaving Husband to Live with Paramour.—Such an allowance would be manifestly improper to a wife who had deserted her husband to live with her paramour. A wife who lives a life of shame, giving her person to the

embraces of different men, has no claim upon the husband she has disgraced, to support and maintain her. *Spaulding v. Spaulding*, 133 Ind. 122.

Reason for Vesting Courts with Discretionary Power.—In *Spitler v. Spitler*, 108 Ill. 120, referring to the statute allowing alimony to the wife in all cases in the discretion of the court, Mulkey, J., said: "It was manifestly not the object of the legislature, in adopting the provisions of the statute, to abrogate the general principles or policy of the law relating to the subject of alimony, but rather to clothe the courts with power to mitigate occasional hardships that would otherwise occur on account of the inflexible rule that the wife is not entitled to alimony where the divorce is granted to the husband on account of her own misconduct. This modification of the general rule on the subject was intended to meet cases of hardship, and afford relief to the erring wife when demanded by mitigating circumstances."

2. *Zuver v. Zuver*, 36 Iowa 190; *Reavis v. Reavis*, 2 Ill. 242; *Buerfening v. Buerfening*, 23 Minn. 563.

3. *Edwards v. Edwards*, 84 Ala. 361.

4. Question of Amount Largely Matter of Discretion—England.—*Smith v. Smith*, 1 Eng. Ecc. 244; *Rees v. Rees*, 3 Ph. 387; *Powell v. Powell*, L. R. 3 P. & D. 186; *Jones v. Jones*, L. R. 2 P. & D. 333.

Georgia.—*McGee v. McGee*, 10 Ga. 477; *Dicken v. Dicken*, 38 Ga. 663; *Hill v. Hill*, 47 Ga. 332.

Illinois.—*Bergen v. Bergen*, 22 Ill. 187; *Reavis v. Reavis*, 2 Ill. 242; *Jolliff v. Jolliff*, 32 Ill. 527; *Andrews v. Andrews*, 69 Ill. 609; *Foote v. Foote*, 22 Ill. 425; *Wilson v. Wilson*, 102 Ill. 297.

Indiana.—*Hedrick v. Hedrick*, 28 Ind. 291; *Powell v. Powell*, 53 Ind. 513.

Iowa.—*Farley v. Farley*, 30 Iowa 353.

Kentucky.—*Whitsell v. Whitsell*, 8 B. Mon. (Ky.) 50.

Nebraska.—*Shafer v. Shafer*, 10 Neb. 472; *Smith v. Smith*, 19 Neb. 715; *Small v. Small*, 28 Neb. 843.

Nevada.—*Lake v. Bender*, 18 Nev. 361.

New Jersey.—*Marker v. Marker*, 11 N. J. Eq. 256.

New York.—*Miller v. Miller*, 6 Johns. Ch. (N. Y.) 91; *Burr v. Burr*, 7 Hill (N. Y.) 207; *Starkweather v. Starkweather*, 29 Hun (N. Y.) 488; *Forrest v. Forrest*, 6 Duer (N. Y.)

One-third of Husband's Income Usual Rule.—Owing to the large discretionary powers vested in the courts, no fixed rules can be predicated, yet it has been held that one-third of the husband's income is the usual allowance.¹

This may be Extended to a Moiety under peculiar circumstances justifying it.²

102; *Hallock v. Hallock*, 4 How. Pr. (N. Y. Supreme Ct.) 160.

Pennsylvania.—Breinig *v.* Breinig, 26 Pa. St. 161; *Waldron v. Waldron*, 55 Pa. St. 231.

Tennessee.—Robinson *v.* Robinson, 7 Humph. (Tenn.) 440.

Virginia.—Bailey *v.* Bailey, 21 Gratt. (Va.) 43; *Harris v. Harris*, 31 Gratt. (Va.) 13.

The amount and time of payment are within the discretion of the trial court. *McCarthy v. McCarthy*, 143 N. Y. 235.

Principles of Allowance in Divorce a Vinculo.

—The rule of the ecclesiastical courts as to the amount of permanent alimony awarded to a wife, who had obtained a divorce *a mensa et thoro*, is said to furnish no guide for the exercise of the discretion of the court in determining what provision should be made by a husband for a wife who has obtained a decree of dissolution of marriage. The principles by which the court will be guided in exercising that discretion are, that a wife, having been deprived of her position by her husband's misconduct, ought not to purchase redress at the cost of being left destitute; that it would be impolitic to give a wife any great pecuniary interest in obtaining a dissolution of the marriage tie, and that such provision should be payable only so long as the wife remains chaste and unmarried. *Fisher v. Fisher*, 31 L. J. Mat. Cas. 1, 10 W. R. 122, 5 L. T. N. S. 364, 2 S. & T. 410, 8 Jur. N. S. 103.

Question for Court, Not for Jury.—Questions of the amount of alimony to be decreed on a decree of divorce are for the court, and not for the jury. But a direction to the jury to find the value of the defendant's real estate, with a view to the amount of alimony, and to find also what amount should be allowed, and a finding to that effect, furnish no ground for setting aside the verdict on the question of adultery. The finding on the question of alimony was merely surplusage. *Forrest v. Forrest*, 6 Duer (N. Y.) 102; *Dailey v. Dailey* (Supreme Ct.), 30 N. Y. Supp. 337.

Reference.—Alimony may be decreed by the court without referring the matter to a master, where neither party requests a reference. *Miller v. Miller*, 1 N. J. Eq. 386. But when affirming a decree for divorce, objection was made to the amount of the alimony, it was held that the evidence as to the husband's income being indefinite, that question might be given to a referee to report to the court. *Brotherton v. Brotherton*, 12 Neb. 75. And generally a decree of divorce may reserve to the wife, who is the complainant, the right to go before a master and get his report as to a proper allowance to her for alimony. *Coolidge v. Coolidge*, 1 Barb. Ch. (N. Y.) 77.

1. General Rule.—One-third of Husband's Income.—*England*.—*Pomfret v. Pomfret*, cited in 1 Eng. Ecc. 244; *Hyde v. Hyde*, 29 L. J. Mat. Cas. 150; *Wallis v. Wallis*, 29 L. J. Mat.

Cas. N. S. 151, notes; *Kempe v. Kempe*, 1 Hagg. Ecc. 532.

Canada.—*McCulloch v. McCulloch*, 10 Grant's Ch. (U. C.) 320.

Delaware.—*Jeans v. Jeans*, 2 Harr. (Del.) 142.

Georgia.—*Halleman v. Halleman*, 65 Ga. 476.

Minnesota.—*Segelbaum v. Segelbaum*, 39 Minn. 258.

Mississippi.—*Armstrong v. Armstrong*, 32 Miss. 279.

New York.—*Miller v. Miller*, 6 Johns. Ch. (N. Y.) 90.

South Carolina.—*Williams v. Williams*, 4 Desaus. (S. Car.) 183; *Prather v. Prather*, 4 Desaus. (S. Car.) 33.

Washington.—*Tierney v. Tierney*, 1 Wash. Ter. 568.

In *Lockridge v. Lockridge*, 3 Dana (Ky.) 28, 28 Am. Dec. 52, the court said: "A third of the annual value of the husband's estate is as much as has usually been allowed for alimony. The ratio has sometimes been a fourth. We are inclined to think that a third would not be unreasonable in this case."

Where a divorce was decreed for cruelty on evidence that was not very strong, an allowance of alimony amounting to half of the defendant's property, and made payable in money, was held excessive, and one-third considered ample, the defendant being also allowed to elect whether he would pay in money, or in real estate freed from incumbrances, in which latter case the land was to be apportioned on reference to a circuit court commissioner, whose costs should be equally divided between the parties. *Hamilton v. Hamilton*, 37 Mich. 603.

In *Pennsylvania* one-third of the husband's annual profit or income from his estate or labor is the maximum of alimony. See *McClurg's Appeal*, 66 Pa. St. 366.

In *Oregon* it is provided by statute that the party in whose favor a decree shall be made shall in all cases be entitled to the undivided one-third part in his or her individual right. *Oregon Civil Code*, § 495. See *Rees v. Rees*, 7 Oregon 48. In *Hall v. Hall*, 9 Oregon 452, where the pleadings were silent as to any claim for relief and as to the amount of the husband's property, a decree for the undivided one-third of all the real property then owned by the husband was held proper.

2. A Moiety Sometimes Allowed.—*Smith v. Smith*, 1 Eng. Ecc. 244; *Taylor v. Taylor*, cited in 1 Eng. Ecc. 244; *Dawson v. Dawson*, 110 Ill. 279; *Wilson v. Wilson*, 102 Ill. 297.

As in *Cooke v. Cooke*, 1 Eng. Ecc. 178, where a large part of the property was shown to have come by the wife. In *Otway v. Otway*, 1 Eng. Ecc. 244, although a large part of the property came by the wife, she was given less than a moiety, as the husband had six children to support.

One-fourth or Less has been Allowed.—Under particular circumstances, one-fourth or less has been held proper.¹

An Allowance, where the Wife is Blameless, equal to what the law gives her on the death of her husband, has been held to be reasonable.²

Where Wife has Contributed to Husband's Property.—Where the wife has contributed equally with her husband to the accumulation of the property, or has contributed largely thereto from her separate property or by her labor, she should be allowed a larger proportion than otherwise, even to an equal proportion with her husband.³

Husband may Not be Divested of All His Property.—In no case, it is held, should the husband be divested of all his estate, whether community or not.⁴

Interest.—After maturity, interest runs upon the alimony due,⁵ but unless

According to the practice of the ecclesiastical courts, the court is not at liberty to allot more than one moiety of the joint income to the wife, although she may have brought more than one moiety of the property into settlement. *Haigh v. Haigh*, L. R. 1 P. & D. 709, 38 L. J. Matt. Cas. 37, 20 L. T. N. S. 281.

In *McCartin v. McCartin*, 37 Mo. App. 471, it was held that alimony when awarded in gross should not ordinarily exceed one-half of the entire estate of the husband.

In *New York* from one-fourth to one-half of the husband's income has been allowed where the wife was not to have the custody of their children. *Burr v. Burr*, 7 Hill (N. Y.) 207; *Lawrence v. Lawrence*, 3 Paige (N. Y.) 267; *Peckford v. Peckford*, 1 Paige (N. Y.) 274.

1. *Bush v. Bush*, 37 Ind. 164; *Turner v. Turner*, 44 Ala. 437; *Draper v. Draper*, 68 Ill. 17.

2. *Thornberry v. Thornberry*, 4 Litt. (Ky.) 251.

3. **Where Wife has Brought Property to the Husband.**—*Cooke v. Cooke*, 1 Eng. Ecc. 178; *Street v. Street*, 2 Eng. Ecc. 195; *Burr v. Burr*, 7 Hill (N. Y.) 207; *Ressor v. Ressor*, 82 Ill. 442; *Von Glahn v. Von Glahn*, 46 Ill. 143; *Stillman v. Stillman*, 7 Baxt. (Tenn.) 169; *Chunn v. Chunn*, 1 Meigs (Tenn.) 131.

In *Musselman v. Musselman*, 44 Ind. 106, it was held that when the wife had contributed to the accumulation of the husband's property, and the divorce had been granted the wife, the rule was that she should not be placed in a worse condition than if she survived him.

In *Smith v. Smith*, 2 Ph. 235, one thousand pounds was allotted the wife out of a joint income of two thousand pounds. The court said: "It is a rule of equity that no man shall take advantage of his own wrong. Perhaps it would be just that, where the husband violated the matrimonial engagement, and the fortune originally belonged to the wife, he should give back the whole of it." Courts, however, have not gone that length.

The Reason and Justice of This Rule are well set forth in *Dinet v. Eigenmann*, 80 Ill. 276. Walker, J., said: "Where, under the law in force when the marriage in this case occurred, the wife had money which became the property of the husband by marriage, and a divorce followed, it was but equitable and just that she should have all, or a portion, of it restored to her. So where the husband con-

verted her means into real estate, and took the conveyance to himself, it is eminently just that all, or at least a portion, of such real estate be transferred to her, or at least the amount of money invested in it. So where a wife, from her industry, economy, and business capacity, contributes largely to the accumulation of a fortune, every principle of justice demands that she have at least a portion of her accumulations. In such a case, it would be positively wrong to turn her off, where the husband is in the wrong, with what would merely pay her board and simply clothe her respectably."

In *Ressor v. Ressor*, 82 Ill. 442, where husband and wife had lived together, and by their joint labor, management, and economy had acquired property sufficient to support them both comfortably, and subsequently the wife obtained a divorce, it was held that she was entitled to an amount that would support her comfortably without reference to her ability to labor and contribute to her own support.

Where the wife put six thousand dollars into the business of her husband, and he afterwards, when she was forced by his adultery to abandon him, clandestinely removed the stock of goods worth fifteen thousand dollars from New Orleans to Memphis, and at the filing of her bill for divorce was worth one hundred thousand dollars, it was held that a decree for twenty thousand dollars' worth of real estate as alimony was proper. *Stillman v. Stillman*, 7 Baxt. (Tenn.) 169.

4. *Craig v. Craig*, 31 Tex. 203; *Ross v. Ross*, 78 Ill. 402. So it is erroneous to decree an amount of alimony larger than the sum total of the defendant's property. *Chenault v. Chenault*, 5 Sneed (Tenn.) 248. Nor can a decree setting apart half of the husband's lands to the wife, and the remainder to the children, be justified. *Robinson v. Robinson*, 7 Humph. (Tenn.) 440.

But in *Wuest v. Wuest*, 17 Nev. 217, under a statute authorizing the court to make such disposition of the property of the parties as should appear just, it was held that in a proper case the court might award all of the husband's property to the wife, besides compelling the husband to contribute monthly to the support of a child. He should not, however, in addition, be compelled to pay his wife's counsel fees.

5. **Interest.**—In *Illinois* the legal rate of interest upon judgments and decrees is six

expressly provided for, instalments of alimony, when paid at the times fixed in the order of court, do not bear interest.¹

b. CIRCUMSTANCES DETERMINING—(1) *Estate and Faculties of Husband*.—In determining the amount of alimony to be allowed, the court must inquire into the circumstances of the parties, and particularly into the financial condition of the husband, his ability to earn money, the amount of his property at the time, and his annual income.²

The Fact that the Husband Has No Estate is no ground for denying the wife alimony, but where he is shown to be able-bodied and capable of making money, the court will compel him to provide the wife with support according to their circumstances and condition in life.³

per cent., and the instalments in a decree for alimony, if not paid when due, must not bear interest beyond this rate. *Becker v. Becker*, 79 Ill. 532.

In *Kansas* it has been held to be not an abuse of discretion for the court to allow to the wife a specified sum in money, and to provide in the decree, as a penalty, that if the sum be not paid at once it shall draw interest at the rate of twelve per cent. until paid. *Blankenship v. Blankenship*, 19 Kan. 159.

In *Wisconsin* the decree should so order the manner of payment of the gross sum allowed as not to render it unduly burdensome, but the plaintiff will be entitled to interest at seven per cent. on the amount allowed from the day the judgment is entered. *Williams v. Williams*, 36 Wis. 363.

1. *Winemiller v. Winemiller*, 114 Ind. 540.

2. *Considerations Determining Amount*.—*Ratcliffe v. Ratcliffe*, 1 S. & T. 467; *Turner v. Turner*, 44 Ala. 437; *Jeter v. Jeter*, 36 Ala. 391; *Phelan v. Phelan*, 12 Fla. 449; *Jenkins v. Jenkins*, 69 Ga. 483; *Andrews v. Andrews*, 69 Ill. 609; *Firman v. Firman*, 109 Ill. 63; *Umlauf v. Umlauf*, 22 Ill. App. 580; *Call v. Call*, 65 Me. 407; *Hedrick v. Hedrick*, 128 Ind. 522; *Gusman v. Gusman* (Ind. 1895), 39 N. E. Rep. 918, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 485; *Bailey v. Bailey*, 21 Gratt. (Va.) 43. See *supra*, this title, *Alimony Pendente Lite*.

Should Not be Unduly Burdensome.—While the wife should be fully protected by a proper allowance, it should be so done as not to unnecessarily oppress the husband. *Abey v. Abey*, 32 Iowa 575. The times of payment should be so adjusted as to avoid, if possible, a sacrifice of the husband's property to pay the amounts allowed. *Farley v. Farley*, 30 Iowa 353.

Evidence must be Heard from Both Sides as to the husband's faculties and means, and it is certainly error to refuse to hear evidence on the part of the husband, and hear only the wife and her witnesses. *Jenkins v. Jenkins*, 69 Ga. 483.

3. *Husband without Property—Ability to Earn Money—England*.—*Brisco v. Brisco*, 2 Hagg. Con. 199; *Higgs v. Higgs*, 3 Hagg. Ecc. 472; *Goodheim v. Goodheim*, 2 S. & T. 250.

California.—*Eidenmuller v. Eidenmuller*, 37 Cal. 364.

Georgia.—*Carlton v. Carlton*, 44 Ga. 216.

Illinois.—*Foote v. Foote*, 22 Ill. 425.

Kentucky.—*Canine v. Canine* (Ky. 1891), 16 S. W. Rep. 367.

Missouri.—*Schmidt v. Schmidt*, 26 Mo. 235.

New Jersey.—*Holmes v. Holmes*, 29 N. J. Eq. 9.

New York.—*Lawrence v. Lawrence*, 3 Paige (N. Y.) 270; *Kirby v. Kirby*, 1 Paige (N. Y.) 261.

Rhode Island.—*Batley v. Batley*, 1 R. I. 212.

South Carolina.—*Prince v. Prince*, 1 Rich. Eq. (S. Car.) 282.

Wisconsin.—*Pauly v. Pauly*, 69 Wis. 419.

In *Prince v. Prince*, 1 Rich. Eq. (S. Car.) 282, Johnson, C. J., said: "If the labor of the husband is of a comparatively unprofitable character, or if he is sickly, allowance should be made for these circumstances. If, on the other hand, he is in good health and skilful, and is actually realizing considerable profits, the partner of his fortunes should not be refused a reasonable participation in them."

In *Canine v. Canine* (Ky. 1891), 16 S. W. Rep. 367, where the husband had no estate, the court held that he must maintain his wife out of his earnings. Holt, C. J., said: "The fact that the appellee has no estate is no reason why a just allowance should not be made, because he is shown to be about thirty years of age, blessed with good health, and educated in a profitable profession. She has a right to claim a support from his personal exertions. What she would have been entitled to claim if yet living with him, she has a right to now ask. The extent of it justly depends upon, and must be regulated by, circumstances, such as the condition in life of the parties, their health, the estate of the one or the other, his income or ability to earn money. * * * Manifestly the appellant is entitled to something. If the appellee is not making money at his profession, he, being able-bodied, can find some business, the income from which should be equitably divided between them."

In *Bailey v. Bailey*, 21 Gratt. (Va.) 57, Christian, J., said: "While the parties are living together they are bound to contribute by their several personal exertions to a common fund, which in law is the husband's, but from which the wife may claim support. If she is compelled to seek a divorce on account of his misconduct, she loses none of her rights in this respect, only she is to draw her maintenance in a different way; that is, under a decree for alimony, based, if he has

What Property to be Taken into Account.—In estimating the value of the husband's property in determining the amount to be allowed the wife, all of his property will be taken into account, although he derives no income therefrom, as shares of stock paying no dividend, and real estate returning no rent.¹

Property Subsequently Acquired.—But it is held that property acquired subsequently to a divorce *a vinculo* should not be considered, for the wife can have no claim to the husband's further earnings or acquisitions any more than to his protection.²

Income of Previous Year the Basis.—The husband's income must be estimated at the amount of the previous year, and not by an average of years.³

Husband Unemployed—Average of Earnings.—But where the husband is temporarily out of employment, the allotment may be upon the average earnings.⁴

Husband's Liabilities to be Considered.—The obligations or debts of the husband should be considered, and deductions made from the husband's income or property therefor, so that the rights of the husband's creditors may be protected.⁵

no property, upon his earnings or his ability to earn money.”

In *Muse v. Muse*, 84 N. Car. 35, where the husband denied that he had any property, but admitted that he was an able-bodied man, the court ordered an allowance without inquiry into the value of his property.

But in *Feigley v. Feigley*, 7 Md. 563, 61 Am. Dec. 375, it was held that, the defendant being entirely without property, no decree for alimony could be passed against him, alimony being an allowance out of the husband's estate.

1. *Crampton v. Crampton*, 32 L. J. Mat. Cas. 142; *Harris v. Harris*, 3 Eng. Ecc. 153; *Close v. Close*, 25 N. J. Eq. 434.

Pension Money.—Pension money may very properly be considered as part of the husband's estate, rendering him liable for alimony, as it is designed as well for the wife's benefit, and an allowance may be made where pension money is the only means of the husband. *Tully v. Tully*, 159 Mass. 91; *Hedrick v. Hedrick*, 128 Ind. 522.

Voluntary Allowance.—In *Haviland v. Haviland*, 3 S. & T. 114, 9 Jur. N. S. 208, 32 L. J. Mat. Cas. 66, 67, 144, 11 W. R. 550, 7 L. T. N. S. 757, it was held that a wife cannot include in her husband's income liable to alimony any purely voluntary allowance made to him, though possibly there might be circumstances under which the wife might be entitled to alimony out of income to which the husband might have no strict legal right.

Evidence of Fraudulent Conveyance.—Evidence that just before the wife had sued for divorce and alimony the husband conveyed away his property to his daughter, was held to be admissible on the question whether he had means to obey an order for alimony. *Stuart v. Stuart*, 123 Mass. 370. See also *Burrows v. Purple*, 107 Mass. 428. See *infra*, this title, *Lien of Alimony*.

Presumption that Principal Yields Income.—In determining the allowance of alimony, the amount of the principal of the defendant's estate being stated by himself, it is just to assume that he makes that principal yield a reasonable income, unless he shows some sufficient reason why he does not and cannot. *Forrest v. Forrest*, 5 Bosw. (N. Y.) 672.

2. Property Acquired after Divorce a Vinculo.—In *Cralle v. Cralle*, 79 Va. 182; *In re Spencer*, 82 Cal. 110; *Chenault v. Chenault*, 5 Sneed (Tenn.) 248.

But the contrary is held in *Cox v. Cox*, 20 Ohio St. 439. In this case it was held that on a petition for alimony after an *ex parte* divorce had been procured by the husband in another state, the court could take into consideration accessions of property by the husband since the date of the divorce. The court said: “We think the court had the right, in the exercise of its discretion, to regard the property of the husband as of the date of the *ex parte* divorce, or as of the date of the application for alimony, or both, as under all the circumstances seemed reasonable and just.”

3. *Kelly v. Kelly*, 1 Spinks 412; *Williams v. Williams*, L. R. 1 P. & D. 370.

4. *Thompson v. Thompson*, 37 L. J. Mat. Cas. 33.

5. Debts and Obligations of Husband Taken into Account.—*Chunn v. Chunn*, 1 Meigs (Tenn.) 131.

If the husband has contracted to pay off a debt by annual instalments, the amount of each instalment may be deducted from his income. *Patterson v. Patterson*, 33 L. J. Mat. Cas. 36.

The husband may deduct from real property the expenses of ordinary current repairs, but not of extraordinary and permanent improvements, which ought to be charged on the *corpus* of the income. *Hayward v. Hayward*, 1 S. & T. 85, 28 L. J. Mat. Cas. 9.

Premium for Insurance.—The general rule in estimating the husband's income is, that he is not entitled to deduct sums paid by way of premium to maintain a policy of insurance on his life; but where a policy was under settlement for the benefit of his wife and children after his death, and the premium was deducted and paid over to the office by his employers, the court allowed him to deduct the amount of such premium in estimating his income. *Forster v. Forster*, 2 S. & T. 553, 31 L. J. Mat. Cas. 184, 10 W. R. 810, 6 L. T. N. S. 693, *citing Harris v. Harris*, 1 Hagg. Ecc. 351, as conclusive that it was the

Where the Husband Has a Mere Expectancy or Reversionary Interest, this is a proper consideration in determining alimony.¹

(2) *Means and Condition of Wife*.—When Wife in Comfortable Circumstances.—The wife's means and ability to earn money are to be considered, and when it appears that she has sufficient means or separate property to support herself in that position in society to which she is accustomed, the court, as a rule, will not be justified in making her an allowance as alimony.²

When Husband has Already Provided for Wife.—So alimony will be denied to the wife where her husband has already given her a fair share of his property, or a sum not disproportionate to the amount of alimony which might otherwise have been allowed her.³

The Condition of the Wife's Health, Her Age, and similar circumstances, should be given due consideration, and a larger allowance be made to her where she is old and in ill-health, than where she is young and vigorous.⁴

invariable rule of the ecclesiastical courts not to allow deductions for premiums upon life insurance.

Income Tax in England.—When an allotment of permanent alimony has been made to the wife upon a calculation of the husband's income, in which calculation the income and property tax has been deducted, the husband is not allowed, under the Income-Tax Act, 5 & 6 Vict., c. 35, §§ 102-103, to deduct the tax from his payments of alimony to the wife. *Frankfort v. Frankfort*, 4 No. Cas. 280.

1. Expectancies.—*Stone v. Stone*, 3 Curt. Ecc. 341. In this case, when objection was made to allegations of a reversionary interest, Dr. Lushington said: "The general principle regulating such allegations is this: the wife is at liberty to plead the income of the husband, and the source from whence it is derived. With regard to his reversionary property, and by the word 'reversionary' I mean such property as the husband is entitled to for a vested interest expectant on the death of some person or on the happening of some other contingency, it is both usual and proper that such property should be stated. I think that with regard to permanent alimony, the court would make a different allotment in a case where the income of the husband was derived from his sole personal labor or exertions, from what it would when he had moreover a large reversionary property in expectancy. Therefore it does not appear to me that there is any objection to the husband's reversionary property. The article, however, pleads what is the amount of the property of the father of the husband, without discriminating between what is reversionary interest and what a mere presumed expectancy in the husband. A case may possibly arise in which, under peculiar circumstances, the court would allow the property of the husband's father to be stated."

In *Cox v. Cox*, 20 Ohio St. 441, the court said: "In a proper case there is no good reason why the court may not, among other things, look to and regard what the husband has in expectancy, as well as that which he has in possession."

2. When Wife Has Sufficiency.—*Westmeath v. Westmeath*, 3 Knapp P. C. C. 42; *Chaires v. Chaires*, 10 Fla. 308; *Hawes v. Hawes*, 66 Ga.

142; *Pinckard v. Pinckard*, 22 Ga. 31, 68 Am. Dec. 481; *Morse v. Morse*, 25 Ind. 156; *Small v. Small*, 28 Neb. 843; *Romaine v. Chauncey*, 129 N. Y. 566, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 485; *Wright v. Wright*, 6 Tex. 29.

A wife had an income, from property settled on her by her husband, of one hundred and ninety-six pounds a year. The husband had an income of three hundred and sixty-seven pounds a year. There were three children of the marriage, who were in the custody of the wife. The court, in allotting permanent alimony, ordered that, in addition to the one hundred and ninety-six pounds a year which the wife enjoyed under the settlement, the husband should allow her for the maintenance of the children thirty pounds a year for each. *Todd v. Todd*, 42 L. J. Mat. Cas. 62, 29 L. T. N. S. 252.

The wife, during coverture, became entitled to a small estate of inheritance. On the dissolution of the marriage on her petition, by reason of the husband's adultery and cruelty, the court ordered that he should pay to the wife an annuity to the amount of two-thirds of the rents, and secure such an annuity on the property. *George v. George*, 38 L. J. Mat. Cas. 34, 20 L. T. N. S. 232.

Reversionary Interest of Wife.—In *Rawlings v. Rawlings*, 4 S. & T. 158, where the husband's income was professional, and the wife was entitled to a sum of money in reversion, which was imminent, the court refused to make any order for alimony, and also to consider the conduct of the parties.

3. Stevens v. Stevens, 49 Mich. 504; *Harrison v. Harrison*, 49 Mich. 240; *Corey v. Corey*, 81 Ind. 469.

Provision by Agreement with Wife's Father.—In a suit by the wife for separation, after she had left her husband and had gone to reside with her father, who had agreed with the husband to support her, the court refused alimony. *Bartlett v. Bartlett*, 1 Clarke Ch. (N. Y.) 460.

4. Wife's Health and Age.—*Lovett v. Lovett*, 11 Ala. 763; *Webster v. Webster*, 64 Wis. 438; *Schlosser v. Schlosser*, 29 Ind. 488.

Alimony should not be lavishly allowed where the wife is young and healthy, brought no property to her husband and did not aid

Where the Parties Accustomed to Rely upon Their Joint Labors.—Where the parties have been accustomed to rely upon their joint labor for their support, the allowance ought not to be so large as to relieve the wife from the necessity of doing anything for her own support.¹

(3) *Dependencies—Children.*—The court should consider whether or not there are children or other relations of the husband who have claims on him for sustenance or education.²

Children Intrusted to Mother.—As a rule, where the children of the marriage are placed under the charge of the mother, an allowance will be made for them sufficient to maintain them in a manner corresponding to the condition of their father.³ The education of the children intrusted to the care of the wife should enter as an item of expense in ascertaining the amount of alimony.⁴

But where the Children are Grown up, it is not proper to make an allowance on their account.⁵

(4) *Conduct of the Parties.*—The conduct of the parties may very properly be taken into consideration upon the question of alimony.⁶

Husband's Misconduct.—And where the husband's conduct has been grossly cruel, and the wife has suffered much, alimony may be allowed in the nature of damages, or compensation for her physical and mental suffering.⁷

him in accumulating any, obtained a previous divorce for the purpose of marrying him, and lived with him only a short time. *Cummings v. Cummings*, 50 Mich. 305.

In *Bursler v. Bursler*, 5 Pick. (Mass.) 427, alimony was allowed without regard to the husband's income alone, the illness of the wife requiring extraordinary expenses.

1. *Brown v. Brown*, 22 Mich. 242.

If the complainant is able to contribute towards her own support, she will be expected to do so, and not sit down and fold her hands and depend upon the labor of her husband and the income of his small estate to support her in idleness. *Gardner v. Gardner*, 54 Ga. 560.

But where husband and wife had lived together until they were too old to perform hard work, and had, by their joint labor, management, and economy, acquired property sufficient to support them both comfortably, and the wife obtained a divorce, it was held that she was entitled to such an amount as would support her comfortably without reference to her ability to labor and thereby contribute to her own support. *Ressor v. Ressor*, 82 Ill. 442.

2. *Lawrence v. Lawrence*, 3 Paige (N. Y.) 267; *Peckford v. Peckford*, 1 Paige (N. Y.) 274; *Sesterhen v. Sesterhen*, 60 Iowa 307; *McGee v. McGee*, 10 Ga. 477; *Plaster v. Plaster*, 53 Ill. 445; *Dow v. Dow*, 38 N. H. 188; *King v. Miller* (Wash. 1894), 38 Pac. Rep. 1020; *Thomas v. Thomas*, 41 Wis. 229.

3. *Maintenance of Children.*—*Richmond v. Richmond*, 2 N. J. Eq. 90; *Draper v. Draper*, 68 Ill. 17; *Plaster v. Plaster*, 67 Ill. 93.

Where the husband was shown to be worth property to the value of nine thousand dollars, and the custody of the children was given to the wife, it was held that an allowance of four hundred dollars per annum was not excessive. *Becker v. Becker*, 79 Ill. 532.

4. *Heninger v. Heninger*, 90 Va. 271.

5. *Amos v. Amos*, 4 N. J. Eq. 171.

For a detailed treatment of this branch of the subject, see the title *DIVORCE*.

6. *Conduct of the Parties to be Considered.*—*Severn v. Severn*, 7 Grant's Ch. (U. C.) 109; *Becker v. Becker*, 79 Ill. 532; *Stewartson v. Stewartson*, 15 Ill. 145; *Ifert v. Ifert*, 29 Ind. 473; *Metzler v. Metzler*, 99 Ind. 384; *Helden v. Helden*, 7 Wis. 296.

7. *Husband's Delinquency—Alimony in Nature of Damages.*—*Morris v. Morris*, 31 L. J. Mat. Cas. 33; *Avila v. Avila*, 31 L. J. Mat. Cas. 176; *Cooke v. Cooke*, 2 Ph. 40; *Pauly v. Pauly*, 69 Wis. 419; *Barker v. Dayton*, 28 Wis. 367; *Ifert v. Ifert*, 29 Ind. 473; *Mussing v. Mussing*, 104 Ill. 126; *Bergen v. Bergen*, 22 Ill. 187.

In *Burr v. Burr*, 7 Hill (N. Y.) 207, Nelson, C. J., said: "Where the delinquency of the husband has been established, and the wife is the injured party, driven by his cruelty from the comfort of domestic enjoyments, she should be liberally supported." Senator Strong said: "Where the husband's income is unusually large, and the ill treatment which produced the separation has been extremely inhuman and continued for a long period, the clear dictates of justice, and a proper regard for the protection of public morals, require that the atrocity of the case should be taken into consideration, so that it should be distinguished from those where faults are more venial or have been of shorter duration."

In *Pauly v. Pauly*, 69 Wis. 419, Orton, J., said: "The respondent was compelled to fly from his cruelty and tyranny to save herself and her child from injury, and she certainly ought to have the most liberal provision made for her support in the future, compatible with his ability to pay it or earn it. Alimony in such a case is in the nature of damages or compensation for the injury and for the abused wife's physical and mental sufferings, and for the loss of what ought to be a good husband's society; and she ought to be made

Wife's Misconduct.—And on the other hand, where the wife has contributed to the cause of separation or divorce, the court should make an allowance of a less sum than otherwise.¹

c. EFFECT OF AGREEMENT BETWEEN THE PARTIES—Before Divorce.—The husband and wife may not enter into an agreement in proceedings already commenced, or about to be instituted, in respect to alimony, for the purpose of facilitating a divorce, because a contract intended to promote a dissolution of marriage is contrary to public policy.²

Agreement between Wife and Solicitor before Decree.—And upon the same principle, an agreement between the wife and her solicitor, in advance of a decree for divorce and alimony, for a division of the amount allowed, is void.³

After Divorce.—Subsequent to the decree of divorce, the parties may make such agreement with reference to alimony as they desire.⁴

Court Adopting Agreement of the Parties.—In making the allowance, the court will, as a rule, adopt an agreement entered into by the parties, if just and equitable,⁵

as well off, pecuniarily, away from him as could reasonably have been expected with him."

In *Stevens v. Stevens*, 49 Mich. 504, where cruelty was established, but there were circumstances which indicated that, while in no way excusing the respondent, they might fairly be considered as lessening the degree of suffering in mind which usually attends such injuries as the complainant had received, and it was shown that the wife owned considerable property, alimony was denied.

Where the only income of the husband was sixty pounds a year, derived from an independent property, and he turned his wife out of doors, and his mistress was living with him, the court awarded a moiety of the income as permanent alimony. *Avila v. Avila*, 31 L. J. Mat. Cas. 176.

1. Wife in Fault.—*Conner v. Conner*, 29 Ind. 48; *Zuver v. Zuver*, 36 Iowa 190; *Buerfening v. Buerfening*, 23 Minn. 563; *Boubon v. Boubon*, 3 Robt. (N. Y.) 715. See also *Boyd v. Boyd*, 1 Harp. Eq. (S. Car.) 144.

In *Peckford v. Peckford*, 1 Paige (N. Y.) 274, in making the allowance, the court said that if the conduct of the wife had been discreet, prudent, and submissive to her husband, the allowance to her would have been greater. But in *Hoover v. Hoover* (Ky. 1893), 21 S. W. Rep. 234, where the husband secured a divorce on the ground of abandonment, but it appeared that he had, by false charges of incontinency, forced his wife to return to her father's house, it was held that she was entitled to an allowance.

In *Jeter v. Jeter*, 36 Ala. 391, it was held that in determining the amount of permanent alimony upon a divorce on account of the husband's adultery, the wife's conduct is a proper matter for consideration, but that a liberal allowance of alimony to the wife, upon her obtaining a divorce from the bond of matrimony, will not be denied because, after her husband has withdrawn all manifestation of affection and deprived her of his counsel, she spoke of him and of her marriage in an indiscreet and reprehensible manner to a man with whom she had once had a matrimonial engagement.

Denial of Conjugal Rights.—Where, upon a suit for divorce, it appeared that the husband

was worth two thousand five hundred dollars, but that the wife had denied him conjugal privileges without reason, it was held that one hundred dollars was sufficient alimony. *Tumbleson v. Tumbleson*, 79 Ind. 558.

2. Agreement Intended to Promote Dissolution Void.—*Viser v. Bertrand*, 14 Ark. 267; *Stilson v. Stilson*, 46 Conn. 15; *Moon v. Baum*, 58 Ind. 194; *Fischli v. Fischli*, 1 Blackf. (Ind.) 360, 12 Am. Dec. 251; *Stokes v. Anderson*, 118 Ind. 533; *Muckenburt v. Holler*, 29 Ind. 139, 92 Am. Dec. 345; *Weeks v. Hill*, 38 N. H. 199; *Sayles v. Sayles*, 21 N. H. 312, 53 Am. Dec. 208; *Stoutenburg v. Lybrand*, 13 Ohio St. 228. See also *Seeley's Appeal*, 56 Conn. 202.

A Note Given in Pursuance of Such Agreement, and upon no other consideration, is also void. *Adams v. Adams*, 25 Minn. 72; *Everhart v. Puckett*, 73 Ind. 409.

3. Jordan v. Westerman, 62 Mich. 170, 4 Am. St. Rep. 836. See also *McCabe v. Britton*, 79 Ind. 224.

4. Preston v. Williams, 81 Ill. 176.

An action may be maintained by a woman upon a promissory note given to her by her former husband, after she has obtained a divorce from him, in pursuance of a written agreement made before the divorce, and conditioned upon the divorce being decreed, and which was called to the attention of the court, by the terms of which agreement, which were carried out by the parties, she was to convey her lands to him and release her dower and homestead rights, and he was to give her a sum of money and the note in suit, which were to be in lieu of alimony. *Chapin v. Chapin*, 135 Mass. 393.

Fraud.—But an agreement obtained by fraud to accept a different provision in lieu of the alimony, does not bar her rights. *Gray v. Gray*, 83 Mo. 106.

5. Petersine v. Thomas, 28 Ohio St. 596; *Crews v. Mooney*, 74 Mo. 26; *Emery v. Neighbour*, 7 N. J. L. 144; *Fletcher v. Holmes*, 25 Ind. 458; *Miller v. Miller*, 64 Me. 484; *Daggett v. Daggett*, 5 Paige (N. Y.) 509, 28 Am. Dec. 442. See also *Morrison v. Morrison*, 49 N. H. 69.

In *Calame v. Calame*, 24 N. J. Eq. 440, the husband abandoned his wife and proposed by

and this will thereafter conclude the parties.¹

An agreement between the parties to submit to two referees the question of the amount of alimony, and that the award shall be made a part of the decree, is binding on the parties.²

d. ILLUSTRATIONS AS TO AMOUNT.—In the notes following will be found a number of cases in addition to those already cited, showing various amounts allowed under a particular state of facts, in accordance with the foregoing principles, which the practitioner may find useful.³

letter to give her certain property and a specific sum of money, which she accepted. He, however, subsequently refused to fulfil his promise, and, upon a divorce in favor of the wife, a decree was entered for the conveyance of the property and the payment of the amount proposed. See also *Calame v. Calame*, 25 N. J. Eq. 548.

In *Speck v. Dausman*, 7 Mo. App. 165, Bakewell, J., said: "The wife could not contract for alimony whilst the marriage existed; and such pretended agreements, if they are to have any force, must be subjected to the examination of the divorce court, and derive their sanction from a decree made by the court with a knowledge of the facts. If fair and equitable, the arrangement between the parties will receive the sanction of the court. If concealed from the court, their tendency is to produce collusion."

When a deed of separation provided that the husband should pay the wife fifty dollars per week for her support, and that on default in payment an order might be made by the court granting alimony at the same rate, it was held that the husband could not afterwards object to an allowance at that rate. *Thrall v. Thrall* (Supreme Ct.), 31 N. Y. Supp. 591.

Where the evidence showed that the marriage had been kept secret, and that the defendant had agreed to pay a certain sum for the wife's support until the marriage should be openly acknowledged, it was held that the allowance of a greater amount was an abuse of discretion. *Sharon v. Sharon*, 75 Cal. 1.

In *Worral v. Jacob*, 3 Meriv. 268, Sir William Grant called attention to this singularity, that while the court refused to enforce an agreement with respect to the separation, nevertheless it would put in force the accessorial agreement for the support of the wife.

In *Iowa* it seems that very great latitude is allowed the parties in making such agreements under its statutes, and a contract between the parties that in consideration of the conveyance of certain property to the wife she will make no claim for alimony upon divorce, has been upheld. See *Martin v. Martin*, 65 Iowa 255; *Blake v. Blake*, 7 Iowa 46.

1. *Buck v. Buck*, 60 Ill. 242; *Storey v. Storey*, 125 Ill. 608, 8 Am. St. Rep. 417.

2. *Stratton v. Stratton*, 77 Me. 373; *Carter v. Carter*, 109 Mass. 309.

An agreement that the question of alimony should be referred to a member of the court is not objectionable. *Snow v. Gould*, 74 Me. 540, 43 Am. Rep. 604; *Johnson v. Johnson* (Cal. 1894), 35 Pac. Rep. 637.

3. The Following Allowances have been

Made.—Two hundred dollars per month, where the husband was shown to have an annual income of nearly ten thousand dollars. *Emerson v. Emerson*, 68 Hun (N. Y.) 37.

Ten dollars a week, where the husband was shown to earn twenty-five. *Scragg v. Scragg* (Supreme Ct.), 44 N. Y. St. Rep. 845.

Twenty-five dollars per month out of a monthly income of one hundred and twenty-five. *Thiesing v. Thiesing* (Ky. 1894), 26 S. W. Rep. 718.

One hundred and sixty pounds for wife and their children, where the husband's income was four hundred pounds. *Wheeldon v. Wheeldon*, 2 S. & T. 388.

One thousand pounds, out of an annual income of eight thousand pounds. *Edwards v. Edwards*, 17 S. & T. 584.

Five hundred dollars a year, where the husband had an income of one hundred and fifty dollars per month. *Pearce v. Pearce* (Ky. 1891), 16 S. W. Rep. 271.

One hundred and twenty dollars a year was not unreasonable where the man, shown to be worth one thousand dollars, married the woman to escape prosecution for seduction, and abandoned her almost immediately. *Arnold v. Arnold* (Ky. 1890), 14 S. W. Rep. 376.

Eight dollars per week, where husband was worth from twenty to seventy-five thousand dollars. *Potts v. Potts*, 68 Mich. 492.

One hundred and fifty dollars a year, where the husband was shown to be worth from one thousand two hundred dollars to two thousand dollars, and able to earn a support by his own labor. *Verner v. Verner*, 64 Miss. 184.

Two dollars per week, where the husband had nothing but his monthly earnings as an employee of a fire department. *Russell v. Russell*, 75 Mich. 572.

One hundred and twenty-five dollars per month, where the husband had a monthly income of four hundred and thirty-two dollars. *Schammel v. Schammel*, 74 Cal. 36.

Twenty dollars per month, where the husband's income was two hundred and fifty dollars. *Rogers v. Rogers* (Cal. 1892), 31 Pac. Rep. 157.

When the husband was shown to have an annual income of nearly ten thousand dollars, an allowance of one hundred and fifty dollars per month was increased to two hundred dollars. *Emerson v. Emerson*, 68 Hun (N. Y.) 37.

Seven hundred and twenty dollars per annum was not excessive, when the husband had three thousand eight hundred dollars per annum and there were four children, the custody of whom was adjudged in favor of the wife. *Firman v. Firman*, 109 Ill. 63.

5. Mode of Allowance—Periodical Payments.—Alimony, properly speaking, is a periodical allowance for the wife's support, where she has separated from her husband; and, accordingly, the allowance to the wife should be a sum to be paid from time to time, and in the absence of special agreement or statutory authorization, the court may not decree alimony in gross or special property therefor.¹

The defendant owned real estate of the annual value of about one hundred and twelve pounds ten shillings, but subject to a debt of one hundred pounds; he had also household furniture and farm stock, and he worked his farm. The plaintiff, with her eight children, lived apart from him on account of cruelty, and with no means. On a reference to the master to fix permanent alimony, he allowed thirty-seven pounds ten shillings, which on appeal was increased to eighty pounds, per annum. *McCulloch v. McCulloch*, 10 Grant's Ch. (U. C.) 320.

In Gross.—Two thousand dollars was held not excessive, where the husband's property was from four to six thousand dollars, and he was in vigorous physical health. *Johnson v. Johnson*, 36 Ill. App. 152.

Two thousand dollars, when the husband was worth eight thousand five hundred dollars. *Wilde v. Wilde*, 37 Neb. 891.

One thousand dollars, when the husband had seven hundred dollars of the wife's property, and was worth about three thousand dollars. *Lacey v. Lacey*, 95 Ky. 110.

One thousand five hundred dollars, out of five thousand dollars, for the support of the wife and two small children. *Robinson v. Robinson*, 79 Cal. 511.

Five hundred dollars, when it was shown that the husband was worth from two to three thousand dollars. *Evans v. Evans*, 93 Ky. 510.

Four-sevenths of a lot worth fifteen thousand dollars, where the estimate of the husband's property ranged from fifteen thousand to thirty-seven thousand dollars. *Douglass v. Douglass*, 81 Iowa 258.

Five thousand dollars, when the husband was in the possession of a liberal estate, was of high social standing, and of great physical and mental ability. *Pauly v. Pauly*, 69 Wis. 419.

Three thousand five hundred dollars, when the husband was worth fifteen thousand dollars. *Barber v. Barber*, 74 Iowa 301.

Three thousand dollars, where the husband was worth four times that amount. *Draper v. Draper*, 68 Ill. 17.

Ten thousand dollars, where the husband's estate was estimated at nearly one million dollars. *Burr v. Burr*, 10 Paige (N. Y.) 20.

Fifteen hundred dollars, out of three thousand five hundred dollars, was held not excessive. *Metzler v. Metzler*, 99 Ind. 384.

Excessive Allowances.—Four hundred and fifty dollars, out of less than fifteen hundred dollars, was held excessive, the husband being over sixty years of age, and unable to earn more than from three to five dollars a week. *Ensler v. Ensler*, 72 Iowa 159.

Four hundred dollars annually was held excessive where the wife had separate property amounting to three thousand dollars, and the

husband was worth twenty thousand dollars. *Newsome v. Newsome*, 95 Ky. 383.

Fifteen hundred dollars, where the husband's property did not exceed four thousand five hundred dollars. *Sleeper v. Sleeper*, 65 Hun (N. Y.) 454.

Thirty thousand dollars, in addition to three thousand dollars as alimony *pendente lite*, was excessive where there were no children and the husband was worth fifty-six thousand seven hundred dollars. *Williams v. Williams* (S. Dak. 1894), 61 N. W. Rep. 38.

Thirty thousand dollars absolutely, when the husband was worth one hundred thousand dollars, which had accumulated before the marriage, was held excessive. *Van Glahn v. Van Glahn*, 46 Ill. 134.

When the husband's estate was worth seven thousand dollars, and consisted largely of a farm of one hundred and twenty acres, alimony of four thousand dollars was allowed, but no provision was made for the maintenance and education of a minor child, the custody of which had been awarded to the mother. It was held that this allowance was excessive by one thousand dollars. *Graft v. Graft*, 76 Ind. 136.

For Further Illustrations as to Amount, see *Johnson v. Johnson* (Cal. 1894), 35 Pac. Rep. 637; *Dawson v. Dawson*, 110 Ill. 279; *Johnson v. Johnson*, 24 Ill. App. 80; *Andrews v. Andrews*, 69 Ill. 609; *Farrell v. Farrell*, 28 Ill. App. 37; *Robbins v. Robbins*, 101 Ill. 416; *Hyatt v. Hyatt*, 33 Ind. 309; *Rudman v. Rudman*, 5 Ind. 63; *Rourke v. Rourke*, 8 Ind. 427; *Doolittle v. Doolittle*, 78 Iowa 691; *Barnes v. Barnes*, 59 Iowa 456; *Sesterhen v. Sesterhen*, 60 Iowa 307; *Green v. Green* (Ky. 1890), 12 S. W. Rep. 945; *Berryman v. Berryman*, 59 Mich. 605; *Thompson v. Thompson*, 79 Mich. 124; *Burlage v. Burlage*, 65 Mich. 624; *Reed v. Reed*, 86 Mich. 600; *Gercke v. Gercke*, 100 Mo. 237; *Atkins v. Atkins*, 13 Neb. 271; *McConahey v. McConahey*, 21 Neb. 463; *Smith v. Smith*, 19 Neb. 706; *McGechie v. McGechie*, 43 Neb. 523.

1. Payment by Instalments.—*Ross v. Ross*, 78 Ill. 402; *Von Glahn v. Von Glahn*, 46 Ill. 136; *Keating v. Keating*, 48 Ill. 241; *Maguire v. Maguire*, 7 Dana (Ky.) 181; *Wallingsford v. Wallingsford*, 6 Har. & J. (Md.) 489; *Calame v. Calame*, 25 N. J. Eq. 548; *Crain v. Cavana*, 62 Barb. (N. Y.) 109; *Almond v. Almond*, 4 Rand. (Va.) 662, 15 Am. Dec. 781; *Bacon v. Bacon*, 43 Wis. 197.

In *Hagarty v. Hagarty*, 11 Grant's Ch. (U. C.) 562, where an act expressly allowed a sum in gross upon dissolution of the marriage, but there was no such clause in the act relating to a judicial separation, it was held that the court could not compel the payment of a sum in gross in lieu of an annual sum by way of such alimony.

Divesting Husband of Fee Simple.—The court cannot, without express legislative authority, divest the husband of the fee-simple title of any portion of his land, and transfer it to the wife in lieu of alimony.¹ And unless otherwise authorized, upon a decree *a mensa*, an allowance to the wife in specific property of the husband does not divest his right; the property continues in him, and will revert to him upon her death, or upon reconciliation.²

Consent of Parties.—But it is held that by the consent of the parties there may be an allowance in gross, or an allotment of specific property.³

By Statute.—So, also, it is held that under a general statutory authority to make such orders for alimony, or the maintenance of the wife, as shall be deemed reasonable and just, the court may make a decree for a gross sum.⁴ On the other hand, where the statute is express that the decree must be for a sum of money in gross, the court may not, in lieu thereof, give specific property to the wife.⁵

Statutes Authorizing Sum in Gross—Portion of Estate—Restoration of Property.—In some of the states, statutes exist which provide for an allowance in gross, or a portion of the husband's estate, or the restoration to the wife of the property which the husband received from her by the marriage, or for other methods of allowance not substantially dissimilar. In the notes will be found enumerated the states in which such legislation has been enacted, and cases that have arisen thereunder.⁶

This allowance in gross, or an allotment of real estate, is to be granted in view of the wealth and ability of the parties, and other circumstances of the case, and an annual allowance is the more suitable when the property of the

A decree for alimony at sixty dollars per month, may be considered an allowance from year to year at seven hundred and twenty dollars per year. *Merrick v. Merrick*, 5 Mo. App. 123.

1. Husband may Not be Divested of Fee Simple.—*Campbell v. Campbell*, 37 Wis. 206 (*overruling* the decision of *Cole, J.*, in *Donovan v. Donovan*, 20 Wis. 586); *Wallingsford v. Wallingsford*, 6 Har. & J. (Md.) 485; *Miller v. Miller*, 75 N. Car. 70; *Frakes v. Brown*, 2 Blackf. (Ind.) 295; *Russell v. Russell*, 4 Greene (Iowa) 26, 61 Am. Dec. 112; *Parsons v. Parsons*, 9 N. H. 309; *Purcell v. Purcell*, 4 Hen. & M. (Va.) 507.

In *Campbell v. Campbell*, 37 Wis. 217, *Ryan, C. J.*, said: "By all the authorities, alimony is not only not an estate, but is a mere personal duty of the husband, which courts will control and enforce, from time to time, in their discretion; in some sense a charge upon the husband personally, but in no sense a charge upon his estate, if he have one."

2. Taylor v. Taylor, 93 N. Car. 418, 53 Am. Rep. 460.

In *Rogers v. Vines*, 6 Ired. (N. Car.) 293, *Ruffin, C. J.*, said as to alimony: "In its nature * * * it is a provision for a wife separated from her husband, and it cannot continue after reconciliation, or the death of either party. There is no occasion for it after the death of the husband, for she then becomes entitled to dower and a distributive share, though divorced *a mensa et thoro*; unless, indeed, she should lose dower by leaving her husband and living in adultery. Moreover, the decree for alimony vests in the wife no absolute right to the allowance, whether it consist of money or specific things; for, besides that it ceases

upon reconciliation, it may be changed from time to time, and reduced or enlarged in the discretion of the court."

3. Agreement of Parties to Gross Sum.—*Crews v. Mooney*, 74 Mo. 26, *Calame v. Calame*, 25 N. J. Eq. 548.

4. Statute Authorizing Gross Sum.—*Robinson v. Robinson*, 79 Cal. 511; *Plaster v. Plaster*, 47 Ill. 290; *Burrows v. Purple*, 107 Mass. 428; *Graves v. Graves*, 108 Mass. 315; *Wilmore v. Wilmore*, 15 B. Mon. (Ky.) 49; *Lockridge v. Lockridge*, 3 Dana (Ky.) 28, 28 Am. Dec. 52; *Thornberry v. Thornberry*, 4 Litt. (Ky.) 251; *Twing v. O'Meara*, 59 Iowa 326; *Jolly v. Jolly*, 1 Iowa 8; *Inskeep v. Inskeep*, 5 Iowa 204; *Cole v. Cole*, 23 Iowa 433; *Zuver v. Zuver*, 36 Iowa 190; *Williams v. Williams* (S. Dak. 1894), 61 N. W. Rep. 38.

In *Russell v. Russell*, 4 Greene (Iowa) 261, 61 Am. Dec. 112, although there was no statute relied on, where the husband desired it, it was held that the wife should be allowed a definite part of his property in preference to a periodical claim on him, and that while she could not have a portion of his realty allotted to her in fee, yet such portion might be decreed to her during her natural life, as well as one-half of the household furniture.

5. Green v. Green, 7 Ind. 113; *Rice v. Rice*, 6 Ind. 100.

6. Allowance in Gross—Division of Estate, Etc.—*California*.—*Eslinger v. Eslinger*, 47 Cal. 62.

Connecticut.—*Allen v. Allen*, 43 Conn. 419; *Sanford v. Sanford*, 5 Day (Conn.) 353.

District of Columbia.—*Jackson v. Jackson*, 1 McArthur (D. C.) 34.

Georgia.—Under the Code of 1863, the court can give the wife only an interest for

husband has not been acquired through the wife; and courts should not readily vest the fee of the husband in her.¹

life in a portion of the husband's estate. *Odom v. Odom*, 36 Ga. 319; *Gholston v. Gholston*, 54 Ga. 285.

Iowa.—*Inskeep v. Inskeep*, 5 Iowa 204.

Kansas.—*Blankenship v. Blankenship*, 19 Kan. 159. See also *Johnston v. Johnston*, 54 Kan. 726.

Maine.—*Prescott v. Prescott*, 59 Me. 146; *Call v. Call*, 65 Me. 407.

Michigan.—*Taylor v. Gladwin*, 40 Mich. 232; *McClung v. McClung*, 42 Mich. 53; *Brick v. Brick*, 65 Mich. 230.

Minnesota.—*Semrow v. Semrow*, 23 Minn. 214.

Missouri.—*Chester v. Chester*, 17 Mo. App. 657.

Nevada.—*Darrenberger v. Haupt*, 10 Nev. 43.

New Hampshire.—*Wiggin v. Smith*, 54 N. H. 313.

North Carolina.—*Davis v. Davis*, 68 N. Car. 180.

Ohio.—*Piatt v. Piatt*, 9 Ohio 37; *Gallagher v. Fleury*, 36 Ohio St. 590.

Oregon.—*GrosLouis v. Northcut*, 3 Oregon 394; *Brooks v. Aukeny*, 7 Oregon 461.

Texas.—*Whetstone v. Coffey*, 48 Tex. 269.

Wisconsin.—*Thomas v. Thomas*, 41 Wis. 229; *Hopkins v. Hopkins*, 40 Wis. 462; *Campbell v. Campbell*, 37 Wis. 206; *Williams v. Williams*, 36 Wis. 363; *Wilke v. Wilke*, 28 Wis. 296; *Bacon v. Bacon*, 43 Wis. 197; *Donovan v. Donovan*, 20 Wis. 586; *Gallagher v. Gallagher*, 89 Wis. 461.

In *Loveren v. Loveren* (Cal. 1895), 39 Pac. Rep. 801, it was held that in an action for divorce the court may, in disposing of the community property, ignore an agreement between the parties relating to a division of the property, and an independent action to set aside the same is unnecessary.

Massachusetts.—In this state, upon a final decree granting a divorce against a husband, the court may award a gross sum to the wife in full arrears of alimony and her costs and expenses pending the suit, and of future alimony and all expenses of maintaining the children, of whom she is given the custody. *Burrows v. Purple*, 107 Mass. 428.

Washington.—The court, instead of granting a sum absolutely to the wife as alimony, may decree that a certain sum shall be paid into the hands of a trustee, the interest to be paid to the wife quarterly during her natural life, and at her death the principal to revert to the husband. *Madison v. Madison*, 1 Wash. Ter. 60.

Payment in Instalments.—When a gross sum is allowed, it may be ordered to be paid in gross or in instalments in the discretion of the court. *Piatt v. Piatt*, 9 Ohio 37; *Taylor v. Gladwin*, 40 Mich. 232; *Houston v. Houston*, 4 Ind. 139.

Division of Community Property Subsequent to Divorce.—In *Whetstone v. Coffey*, 48 Tex. 269, it was held that though the court had authority, upon granting a divorce, to make partition of community property, yet if it was

not done, the divorce did not preclude the woman from afterwards bringing a suit to recover her interest in the property.

Division of Wife's Property.—In *Jackson v. Jackson*, 1 McArthur (D. C.) 34, it was held that § 9, Act of 1860, 12 Stat. at L. 59, which provides that where a divorce is granted within the *District of Columbia*, the court allowing the same shall have power, if it see fit, to award alimony to the wife, and to retain her right of dower, and to award to the wife such property, or the value thereof, as she had when she was married, or such part or the value thereof as the court may deem reasonable, having a regard to the circumstances of the husband at the time of the divorce, does not mean that the wife alone is to be considered on the question of property. The more just and equitable meaning of the section is, that the court is to award to the wife, upon her obtaining a divorce, only such part of the property, by whatever title the same may be held, as is reasonable, in view of the circumstances of the husband. If the wife has acquired the legal title when it has been paid for by their joint earnings and industry, it must be regarded as a trust for the benefit of the husband as well as of the wife. When, therefore, the statute directs that the wife shall be allowed a reasonable portion of it, the power is given to divide the property as well as to divorce the parties.

Alimony Set Out by Metes and Bounds.—

Where, after a divorce, alimony is set out to the wife by metes and bounds, the fee to no land outside the boundaries of the alimony will pass as appurtenant to such alimony. *Wiggin v. Smith*, 54 N. H. 213.

Household Furniture.—In *Doe v. Doe*, 52 Hun (N. Y.) 405, it was held that in making an allowance by way of alimony, it was not proper for the court to direct the transfer of the household furniture to the wife and daughter of the guilty party.

1. *Jolliff v. Jolliff*, 32 Ill. 527; *Von Glahn v. Von Glahn*, 46 Ill. 134; *Dinet v. Eigemann*, 80 Ill. 274; *Robbins v. Robbins*, 101 Ill. 417; *Keating v. Keating*, 48 Ill. 241; *Shaw v. Shaw*, 114 Ill. 586.

In *Ross v. Ross*, 78 Ill. 404, it was said that if the property was not bought with the wife's money there was nothing in the case calling for a division of the fee.

In *Wilson v. Wilson*, 102 Ill. 301, *Dickey, J.*, said: "The cases are very rare where the fee in lands held by the husband should ever be required to be transferred to the wife, unless she has some special equity in that particular land, arising from the purchase having been made with her money, or from some other cause, substantially placing the husband in the position, as to that property, equivalent to that of a trustee holding in his name for the wife, or in a position in its nature equitably equivalent thereto. In such cases, though the form of the decree may be that of adjusting the question of alimony, the

Where Husband would Be Likely to Withhold Payments.—Where it appears that the husband would be likely to vexatiously delay or withhold payments, the allowance of a gross sum may be more reasonable.¹

Where the Estate of the Husband Consists Wholly in Land, he may be given an election to pay in money or lands.²

Husband's Property Not Easily Divisible.—Where the husband's property is of such a nature that it is not capable of a division, or would be injured greatly by a division, the court will determine a gross sum to be paid in lieu thereof.³

Valuation of Lands.—Where the allowance is to be made in land at a fair valuation, it must be according to the value of the property, as shown by the testimony taken in the case, and not by any new estimate after values have changed.⁴

Property in Another State.—Where a portion of the husband's real estate may be allotted, the court may award property of the husband located in another state.⁵

6. Lien of Alimony—Pendency of Bill for Divorce and Alimony.—As a general rule, a divorce suit and petition for alimony create no lien upon the estate of the husband, there being no claim upon any particular property, and the proceedings being rather *in personam*.⁶ But it has been held that where the bill

substance is more in the nature of the enforcement of a trust. * * * The property of the husband here not only was not bought with her money, but she holds property in her name bought by him with his own money. The income from that property ought to be taken into consideration in fixing alimony for her, and the amount to be enjoyed annually by her, including the income from this property to which she has title, ought not to exceed, in any event, the one-half of the sum of his income and that income added together."

Property Held as Tenants in Entirety.—In *Alexander v. Alexander* (Ind. 1895), 40 N. E. Rep. 55, it is held that in an action for divorce the court may not make a division between the parties of real estate that is held by them as tenants in the entirety.

No Proof as to Source of Property.—Where the husband had purchased a house and lot, and caused the same to be conveyed to his wife during coverture, expecting to use the same with his wife, it not appearing how much of the fund used in payment arose from the labor and earnings of the wife, the court decreed the house and lot as alimony. *Daily v. Daily*, 64 Ill. 329. See also *Orr v. Orr*, 8 Bush (Ky.) 156.

Attacking Division—Laches.—In *Ferry v. Ferry*, 9 Wash. 239, it was held that a division of property in divorce proceedings may not be attacked by the wife on account of the husband's misrepresentations as to the value of his realty, when she knew the specific tracts owned by the husband before the decree was entered, and waited for three years before taking steps to set the division aside.

1. *McClung v. McClung*, 40 Mich. 493.

2. *Hamilton v. Hamilton*, 37 Mich. 603.

3. *Lyon v. Lyon*, 21 Conn. 198.

In *Fischli v. Fischli*, 1 Blackf. (Ind.) 360, 12 Am. Dec. 251, it was held that the court might take into view the whole property of the husband, whatever it might be, and the allowance might be made for a gross sum or an annuity which would give the wife a de-

mand against the husband wherever he or his property might be found.

4. *McClung v. McClung*, 42 Mich. 53.

5. *Boggers v. Boggers*, 6 Baxt. (Tenn.) 299.

In *Sanford v. Sanford*, 5 Day (Conn.) 353, where the husband was an inhabitant and resident of another state during the whole time from the date of the petition to the time of the decree, and had not been within the state during the same period and had no property within the state; but, on the hearing of the cause, he appeared by attorney and was heard; it was held that the court had jurisdiction to make a decree allowing the plaintiff a gross sum proportioned according to the value of his estate outside of the state.

6. General Rule—No Lien.—*Hamlin v. Bevans*, 7 Ohio 161, 28 Am. Dec. 625; *Feigley v. Feigley*, 7 Md. 537, 61 Am. Dec. 375; *Almond v. Almond*, 4 Rand. (Va.) 662, 15 Am. Dec. 781; *Brightman v. Brightman*, 1 R. I. 112; *Spencer v. Spencer*, 9 R. I. 162; *Daniel v. Hodges*, 87 N. Car. 95; *O'Brien v. Putney*, 55 Iowa 292; *Scott v. Rogers*, 77 Iowa 483.

Rights of Purchasers.—The commencement and pendency of a bill for divorce, which merely sets forth the defendant's lands as affecting the amount of alimony to be allowed, but asserts and seeks no rights in respect to them, is no notice of *lis pendens* to affect the rights of purchasers from the defendant. *Sapp v. Wightman*, 103 Ill. 150.

In *Gilmore v. Gilmore*, 5 Jones Eq. (N. Car.) 284, where a husband assigned a chose in action of the wife for value and without notice of an equity in the wife, and the assignee commenced a suit in a court of competent jurisdiction to reduce it into possession and get a decree for the same, it was held that the filing of a petition for divorce and alimony by the wife did not constitute such a *lis pendens* as would restrain the assignee from proceedings to reduce it into possession.

contains special allegations of specific real or personal property, and the property is put in actual litigation, there is a *lis pendens*.¹

Effect of Decree for Alimony.—And the decree for alimony creates no lien upon the estate of the husband in the absence of statutes so providing, unless the decree fastens it upon some particular property; it is a personal charge upon the husband rather than upon his estate.² The court, however, may declare the allowance to be a charge upon special real estate of the husband.³

In *Brightman v. Brightman*, 1 R. I. 112, where the wife, upon a decree of divorce, was allowed alimony out of the real and personal estate generally of her husband, a conveyance by the husband of a certain tract before the granting of the possession was not interfered with. The court said: "We do not apprehend that the rule of *lis pendens* is applicable to this case. The prayer of the complainant's petition was for divorce and for alimony out of her husband's estate. It did not affect the title to his real estate, or necessarily seek to put an incumbrance on it. Alimony is to be granted out of the personal or real estate, and not necessarily a charge on either. * * * If such a prayer locks up the real, it equally does the personal, estate of a respondent to such a petition, and each and every part of it. The instant such a petition is filed, the respondent's business, however extensive it may be, must stop. Purchasers and dealers with him, by the policy of the law, are bound by the decree for alimony that may be passed, although they do not even know that they are dealing with a married man. * * * We do not think this case falls within the rule of *lis pendens*, nor within the reason of that rule."

1. Exception to General Rule.—In *Daniel v. Hodges*, 87 N. Car. 99, the general rule, as stated, is said to be the received doctrine in regard to the exclusion of the application of *lis pendens* in proceedings for alimony; but it was held that this case was an exception, in that the property in question, the only property of the husband, was described specifically in the petition for alimony, and was assigned the wife by order of the court, she being in actual possession at the time the deeds were executed. Ashe, J., delivering the opinion of the court, said: "While the prayer of the petition for alimony is in the usual form, it is stated in the petition, that the lot in question was the only property in the state owned by the husband, and was the only property out of which alimony could be granted, and it was specifically described with such particularity that every person reading the petition could learn thereby what property it was she sought to have made subservient to her claim. And although the prayer of her petition was in the usual general form, it was as evident that she was seeking to subject the lot in question to her claim for alimony, as if she had specifically prayed that it might be assigned to her. And then it was assigned to her by the order of the court, and she was put in possession, and was occupying it when the deeds were executed to Hall (the grantee) and the plaintiff, he having, at the time of his purchase, actual notice of the pendency of the

suit, the order of the court, and the possession of the defendant by virtue of the order." So, in *Tolerton v. Williard*, 30 Ohio St. 579, a decree under a petition for divorce and alimony, charging the real estate of the husband with equities of the wife, was preferred to the lien of a mortgage executed and recorded pending the proceedings, the mortgagee having actual notice thereof. And see *Wilkinson v. Elliott*, 43 Kan. 590; *Powell v. Campbell*, 20 Nev. 232, 19 Am. St. Rep. 350.

2. When Lien Created by Decree.—*Olin v. Hungerford*, 10 Ohio 271; *Casteel v. Casteel*, 38 Ark. 477; *Campbell v. Campbell*, 37 Wis. 206; *Grove's Appeal*, 68 Pa. St. 143; *In re Fisher* (R. I. 1895), 31 Atl. Rep. 579.

In *Coulter v. Lumpkin*, 94 Ga. 225, it was held that a judgment or decree for alimony has only the lien of ordinary general judgments for money, as to any property of the defendant not specifically dealt with and described in the judgment or in the pleadings.

A decree awarding alimony to the wife "to be paid by the husband out of his real and personal estate," is not sufficient to create a charge on the husband's real estate. *Lawton's Petition*, 12 R. I. 210.

Under *Nebraska Comp. Stat.* 1893, c. 25, § 4a, making a decree for alimony a lien on land, the same as a judgment at law, and enforceable in like manner, a decree of divorce ordering the sale of specific land for the payment of alimony is improper. *Nygren v. Nygren*, 42 Neb. 408.

3. Court may Make Allowance a Charge.—*California*.—*Robinson v. Robinson*, 79 Cal. 511.

Illinois.—*Wightman v. Wightman*, 45 Ill. 167; *Andrews v. Andrews*, 69 Ill. 609; *Errissman v. Errissman*, 25 Ill. 136; *Storey v. Storey*, 125 Ill. 608, 8 Am. St. Rep. 417; *O'Callaghan v. O'Callaghan*, 69 Ill. 552; *Thomas v. Thomas*, 44 Ill. App. 604.

Iowa.—*Daniels v. Lindley*, 44 Iowa 567; *Sesterhen v. Sesterhen*, 60 Iowa 301; *Russell v. Russell*, 4 Greene (Iowa) 26, 61 Am. Dec. 112; *Harshberger v. Harshberger*, 26 Iowa 503.

Kansas.—*Blankenship v. Blankenship*, 19 Kan. 159; *Brandon v. Brandon*, 14 Kan. 342.

Maine.—*Hills v. Hills*, 76 Me. 486; *Stratton v. Stratton*, 77 Me. 373.

Minnesota.—*Mahoney v. Mahoney* (Minn. 1894), 61 N. W. Rep. 334.

New Jersey.—*Calame v. Calame*, 24 N. J. Eq. 440; *Holmes v. Holmes*, 29 N. J. Eq. 9; *Stoy v. Stoy*, 41 N. J. Eq. 370.

New Mexico.—*Lamy v. Catron* (N. Mex. 1890), 23 Pac. Rep. 773.

New York.—*Galusha v. Galusha*, 108 N. Y. 114; *Forrest v. Forrest*, 6 Duer (N. Y.) 102.

Intervening Creditors.—But it cannot direct that the decree shall date back to the time of the levy of an attachment, and become a lien to the exclusion of the rights of intervening creditors.¹

Description of Property.—When a lien is declared, the property must be described by definite terms that will afford identification.²

Transfers by Husband — Good Faith.—The divorce suit creates no lien upon the husband's estate, and he may alienate his property at will, and strip himself of the means of supporting his wife, provided he does so *bona fide*.³

In Anticipation of Divorce Proceedings.—But a conveyance made by the husband in anticipation of the wife's libel for divorce, and to prevent her from recovering alimony, is void as against her under the protection of the statutes to prevent fraudulent conveyances.⁴ And a purchaser from the husband, with

Ohio.—*Hamlin v. Bevans*, 7 Ohio 161, 28 Am. Dec. 625; *Olin v. Hungerford*, 10 Ohio 268; *Tolerton v. Williard*, 30 Ohio St. 579.

Oklahoma.—*Gardenhire v. Gardenhire* (Okla. 1894), 37 Pac. Rep. 813.

Vermont.—*Foster v. Foster*, 56 Vt. 540.

Washington.—*King v. Miller* (Wash. 1894), 38 Pac. Rep. 1020.

In *Kurtz v. Kurtz*, 38 Ark. 119, this right, however, was denied. It was said that future payments should not be made a lien upon the husband's property. See also *Casteel v. Casteel*, 38 Ark. 477. And in *Swansen v. Swansen*, 12 Neb. 210, where the court was authorized by statute to require security, a decree charging alimony a lien upon real estate was reversed.

Under the statutes in *Illinois*, the allowance is not a charge upon personal property. *Yelton v. Handley*, 28 Ill. App. 642.

Property of Nonresident.—Upon allowing permanent alimony against a nonresident who has real property in the state, the alimony may be charged upon such property; and where the interest on incumbrances and the taxes have been left unpaid by him, a receiver may be appointed, unless he shall give security to make such payment. *Holmes v. Holmes*, 29 N. J. Eq. 9.

Real Estate in Remainder.—A decree may declare the allowance of alimony a lien upon a remainder in real estate, which is vested as to interest, though contingent as to amount. *MinYoung v. MinYoung*, 47 Ohio St. 501.

When Lien of Future Allowance Accrues.—In *Stoy v. Stoy*, 41 N. J. Eq. 370, it is held that the alimony which accrues after the docketing of the decree allowing it, becomes a lien on the land of the defendant as fast as it becomes due.

Lands Situated in Another County.—In *Harshberger v. Harshberger*, 26 Iowa 508, it was held that a district court having jurisdiction of the cause in an action for divorce and alimony, may rightfully declare and enforce a lien for alimony granted in the action, against real estate of the defendant situated in another county. But see *Sapp v. Wightman*, 103 Ill. 150, where the jurisdiction was limited by statute.

1. *Daniels v. Lindley*, 44 Iowa 567; *Hamlin v. Bevans*, 7 Ohio 161, 28 Am. Dec. 625; *Halleman v. Halleman*, 65 Ga. 476.

2. *Hills v. Hills*, 76 Me. 488; *Stratton v. Stratton*, 77 Me. 373.

3. A conveyance which was good when made, and not then designed to defraud the grantor's wife, cannot be attacked by her on her application for alimony. *Metzler v. Metzler*, 99 Ind. 384.

4. **Fraudulent Transfers — England.**—*Blenkinsopp v. Blenkinsopp*, 1 De G. M. & G. 495; *Brown v. Brown*, 2 Hagg. Ecc. 5.

Colorado.—*Gregory v. Filbeck*, 12 Colo. 379.

Illinois.—*Tyler v. Tyler*, 126 Ill. 525, 9 Am. St. Rep. 642.

Indiana.—*Metzler v. Metzler*, 99 Ind. 384; *Plunkett v. Plunkett*, 114 Ind. 484; *Frakes v. Brown*, 2 Blackf. (Ind.) 295.

Iowa.—*Pickett v. Garrison*, 76 Iowa 347, 14 Am. St. Rep. 220.

Maine.—*Bailey v. Bailey*, 61 Me. 361.

Maryland.—*Feigley v. Feigley*, 7 Md. 537, 61 Am. Dec. 375; *Ricketts v. Ricketts*, 4 Gill (Md.) 107.

Massachusetts.—*Burrows v. Purple*, 107 Mass. 428.

New Hampshire.—*Morrison v. Morrison*, 49 N. H. 69; *Janvrin v. Curtis*, 63 N. H. 312.

New York.—*Foster v. Townshend*, 68 N. Y. 203; *Donnelly v. Shaw*, 7 Abb. N. Cas. (N. Y. Supreme Ct.) 264.

Oregon.—*Wetmore v. Wetmore*, 5 Oregon 470.

Pennsylvania.—*Bouslough v. Bouslough*, 68 Pa. St. 495.

Tennessee.—See *Brooks v. Caughran*, 3 Head (Tenn.) 464.

Texas.—*Lott v. Kaiser*, 61 Tex. 666.

Vermont.—*Green v. Adams*, 59 Vt. 602, 59 Am. Rep. 761.

Wisconsin.—*Damon v. Damon*, 28 Wis. 512.

Wife within Statute of Fraudulent Conveyances.—Though the wife is not a creditor of the husband, nevertheless she is within the protection of the Statute of 13 Elizabeth. In *Bailey v. Bailey*, 61 Me. 363, where it was contended on the part of a husband that a person in the situation of the wife could not be recognized as a creditor within the statute of frauds, the court held that the wife was included within "and others," whose just and lawful action would be interfered with by the conveyance. And in *Livermore v. Boutelle*, 11 Gray (Mass.) 217, 71 Am. Dec. 708, in reference to the wife's claim as being within the statute of fraudulent conveyances, the court said that if the wife was not a creditor, "she was of the 'others' whose just and lawful

knowledge of the fraudulent intent, is precluded from setting up the deed against her claim for alimony.¹ And he may be made a party in the action with the husband, and the court may vest the title in the wife by way of alimony.²

7. Commencement of Payment.—The decree usually states the time of the commencement of the payment of the periodical allowances, and this is, as a general rule, from the date of the decree.³ But the decree may include alimony since the filing of the libel, if not already paid.⁴

8. Modification of Allowance—*a.* IN GENERAL.—The amount of alimony allowed *pendente lite*,⁵ or the allowance made the wife as permanent alimony,

actions, suits, etc., would be delayed and hindered or defeated by such conveyance." *Approved in Chase v. Chase*, 105 Mass. 387.

When a Husband, pending a Suit for Divorce and permanent alimony, brought against him by his wife, conveys his property to his son, such conveyance will be declared void, when it appears to have been made to defeat the rights of the wife, and when the son has been properly made party to the suit for divorce. *Turner v. Turner*, 44 Ala. 437. See also *Questel v. Questel*, *Wright (Ohio)* 492. And the burden of proof is on the grantor to show a valuable consideration. *Atkins v. Atkins*, 18 Neb. 474.

Evidence of Fraudulent Intent.—Where the evidence showed that the defendant, before bringing an action for divorce, disposed of all his property, of a considerable amount, and that subsequent to the divorce in the wife's favor, the defendant married the co-defendant, to whom land was conveyed, the negotiation and purchase of which were shown to have been carried on by the defendant, and paid for with the proceeds of the property disposed of by him, it was held that this former disposition was for the purpose of avoiding payment of alimony and was fraudulent. *Boog v. Boog*, 78 Iowa 524.

And where a husband, after a suit for divorce, threatened to dispose of his property so that the wife could get nothing; and subsequently made a sale to his brother without any previous offer to sell, and the sale was attempted to be justified on the ground that it was made in payment of a debt which was shown by oath only; and upon his own showing the property was greatly in excess of the debt; it was held that a finding that the sale was made in fraud of the wife's rights was supported by the court. *Draper v. Draper*, 68 Ill. 17.

The wife's inchoate claim for dower, at the time of filing her libel for divorce, cannot be said to exist after her bill has been dismissed; and if the husband subsequently obtains a divorce, and is ordered to pay alimony, a voluntary conveyance by him, previous to the filing of his bill, is not necessarily fraudulent as against her. *Janvrin v. Janvrin*, 60 N. H. 169.

Fraudulent Antenuptial Conveyance.—In *Way v. Way*, 67 Wis. 662, it was held that in a wife's divorce suit the court may adjudge the husband's antenuptial conveyance, made in fraud of her rights, void, and vest the title

in her by way of alimony, the holders of the legal title being made parties.

Wife Party to Fraud.—One who participates in a fraud cannot avoid the transaction; so, where a wife joined her husband in conveying the latter's land, in order to place it beyond the reach of an anticipated action against her husband, it was held that, after obtaining a divorce, she could not have the conveyance set aside and the land subjected to the payment of a judgment for alimony in her favor. *Barrow v. Barrow*, 108 Ind. 345.

Action Not Maintainable by Receiver.—A receiver appointed in an action for divorce, pursuant to 1 *New York Rev. Stat.* 148, § 60, authorizing the sequestration of the rents and profits of the husband's real property to enforce payment of alimony, does not take title to the land; hence he cannot sustain an action to set aside the husband's fraudulent conveyance of the land, or his fraudulent assignment of a mortgage, for the purchase money on such conveyance, or an action to restrain the assignment or the foreclosure of such mortgage. *Foster v. Townshend*, 68 N. Y. 203.

1. *Nix v. Nix*, 10 Heisk. (Tenn.) 546.

2. *Way v. Way*, 67 Wis. 662; *Damon v. Damon*, 28 Wis. 510; *Gibson v. Gibson*, 46 Wis. 449.

If a third person is made a codefendant to a divorce suit brought by a wife, and is shown to conspire to convert the wife's money, it may be decreed that he shall pay alimony. *Black v. Black*, 5 Mont. 15.

3. General Rule—From Date of Decree.—*Durant v. Durant*, 1 Hagg. Ecc. 528, 3 Eng. Ecc. 231; *Kempe v. Kempe*, 1 Hagg. Ecc. 532, 3 Eng. Ecc. 233; *Cooke v. Cooke*, 2 Ph. 40; *Soules v. Soules*, 3 Grant's Ch. (U. C.) 113; *Ricketts v. Ricketts*, 4 Gill (Md.) 105; *Holmes v. Holmes*, 29 N. J. Eq. 9.

4. *Robinson v. Robinson*, 2 Lee 593; *DeBlaquiere v. DeBlaquiere*, 3 Hagg. Ecc. 322; *Burrows v. Purple*, 107 Mass. 435; *Burr v. Burr*, 10 Paige (N. Y.) 20; *Forrest v. Forrest*, 25 N. Y. 501; *Barber v. Barber*, 21 How. (U. S.) 582.

But in *Soules v. Soules*, 3 Grant's Ch. (U. C.) 113, where in a suit for separate maintenance alimony *pendente lite* had not been applied for, the court refused to carry the allowance for alimony back to a date beyond the time of making the decree.

5. Alimony Pendente Lite.—*Cox v. Cox*, 3 Add. Ecc. 276; *Kurtz v. Kurtz*, 38 Ark. 119; *McGee v. McGee*, 10 Ga. 477; *Stillman v. Stillman*, 99 Ill. 1; *Raymond v. Raymond*, 13

upon a decree of divorce *a mensa et thoro*,¹ may, when the circumstances justify it, be increased or diminished as the case demands. So also in case of an allowance of alimony without divorce.²

But in the Case of a Decree a Vinculo, the award is absolute, and cannot be altered after the expiration of the term or the time in which a new trial may be had,³ unless in the decree the court reserves the right to do so,⁴ or unless the power to subsequently modify the decree is given expressly by statute.⁵

Ill. App. 189; *Waters v. Waters*, 49 Mo. 385; *Forrest v. Forrest*, 5 Bosw. (N. Y.) 672; *Atkins v. Atkins*, 13 Neb. 273; *Amos v. Amos*, 4 N. J. Eq. 171; *Richmond v. Richmond*, 2 N. J. Eq. 90; *Nary v. Braley*, 41 Vt. 180; *Moe v. Moe*, 39 Wis. 308. As where there arises unusual litigation on the part of the husband, *Leslie v. Leslie*, 11 Abb. Pr. N. S. (N. Y. C. Pl.) 311.

Allowance to Make Defense to Such Application.—The wife is entitled to an allowance to defend a petition to diminish the alimony, after a decree of divorce, as much as to carry on the divorce suit originally. *Helden v. Helden*, 9 Wis. 557, 11 Wis. 554.

1. Permanent Alimony upon Divorce a Mensa.—*Harmar v. Harmar*, 32 L. J. Mat. Cas. 118; *Saunders v. Saunders*, 1 S. & T. 72; *DeBlanquere v. DeBlanquere*, 3 Hagg. Ecc. 322; *Otway v. Otway*, 2 Ph. 109; *Rawlings v. Rawlings*, 34 L. J. Mat. Cas. 147; *Smith v. Smith*, 45 Ala. 264; *Bauman v. Bauman*, 18 Ark. 320, 68 Am. Dec. 171; *Wheeler v. Wheeler*, 18 Ill. 39; *Lockridge v. Lockridge*, 2 B. Mon. (Ky.) 258; *Rogers v. Vines*, 6 Ired. (N. Car.) 293; *Taylor v. Taylor*, 93 N. Car. 418, 53 Am. Rep. 460; *Miller v. Miller*, 6 Johns. Ch. (N. Y.) 90.

Modification of Lien.—In *Thomas v. Thomas*, 44 Ill. App. 604, it was held that when an allowance is made a lien upon the lands of the husband, and the lien covers more land than is necessary to secure the payment, application may be made that the decree be modified in this respect.

2. Alimony without Divorce.—*Beck v. Beck*, 43 N. J. Eq. 668; *Anonymous*, 1 Desau. (S. Car.) 112; *Whorwood v. Whorwood*, 1 Rep. Ch. 223.

3. Divorce a Vinculo—General Rule, No Alteration.—*Fries v. Fries*, 1 McArthur (D. C.) 291; *Smith v. Smith*, 45 Ala. 264; *Howell v. Howell*, 104 Cal. 45; *Mitchell v. Mitchell*, 20 Kan. 665; *Stratton v. Stratton*, 73 Me. 481; *Kamp v. Kamp*, 59 N. Y. 212; *Kerr v. Kerr*, 59 How. Pr. (N. Y. C. Pl.) 255; *Park v. Park*, 80 N. Y. 156; *Sampson v. Sampson*, 16 R. I. 456; *Sammis v. Medbury*, 14 R. I. 214; *Hardin v. Hardin*, 38 Tex. 616.

4. Qualification—Reservation in Decree.—*Fries v. Fries*, 1 McArthur (D. C.) 291; *Lockridge v. Lockridge*, 3 Dana (Ky.) 28, 28 Am. Dec. 52; *Beck v. Beck*, 43 N. J. Eq. 668; *Galusha v. Galusha*, 138 N. Y. 272; *Severn v. Severn*, 6 Grant's Ch. (U. C.) 109.

A decree which provides that the award may be modified upon the application of either party, sufficient cause being shown therefor, is not a temporary decree, and the presumption is that it remains unchanged. *Bennett v. Bennett*, *Deady* (U. S.) 299.

New York.—Under the statute in this state, the adjustment of alimony is regarded as final, so that the decree cannot be changed in this respect after final adjournment for the term, whether the divorce was absolute or limited. *Erkenbrach v. Erkenbrach*, 96 N. Y. 456; *Kamp v. Kamp*, 59 N. Y. 212; *Park v. Park*, 80 N. Y. 156, *affirming* 18 Hun (N. Y.) 466; *Johnson v. Johnson*, 65 How. Pr. (N. Y. C. Pl.) 517; *Kerr v. Kerr*, 59 How. Pr. (N. Y. C. Pl.) 255.

In *Cullen v. Cullen*, 55 N. Y. Super. Ct. 346, it was held that even where a decree refusing alimony was only *a mensa et thoro*, and expressly reserved the right to the court to make future modifications of it for the support of the wife, as circumstances should require, this could not be done, though the case is different where the defendant consents. *Stahl v. Stahl*, 59 Hun (N. Y.) 621, 12 N. Y. Supp. 854.

The modification of an order for temporary alimony is expressly provided for. N. Y. Code Civ. Pro., § 1769.

Maine.—The power to alter the decree from time to time, as circumstances may require, relates only to the custody of the children. Me. Stat., c. 60, § 19.

5. Qualification—Statutory Authorization.—*Arkansas*.—*Bauman v. Bauman*, 18 Ark. 320, 68 Am. Dec. 171; *Bowman v. Worthington*, 24 Ark. 522.

Colorado.—*Mills' Ann. Stat.* (1891), § 1567.

Georgia.—*McGee v. McGee*, 10 Ga. 477.

Illinois.—*Robbins v. Robbins*, 101 Ill. 416; *Lennahan v. O'Keefe*, 107 Ill. 620; *Stillman v. Stillman*, 99 Ill. 196, 39 Am. Rep. 21; *Cole v. Cole*, 142 Ill. 19, *affirming* 35 Ill. App. 544; *Wheeler v. Wheeler*, 18 Ill. 39; *Foot v. Foot*, 22 Ill. 425.

Iowa.—*Alderson v. Alderson*, 84 Iowa 198; *Wilde v. Wilde*, 36 Iowa 319; *Shaw v. McHenry*, 52 Iowa 182; *Fisher v. Fisher*, 32 Iowa 20; *Jungk v. Jungk*, 5 Iowa 541; *Blythe v. Blythe*, 25 Iowa 266; *Andrews v. Andrews*, 15 Iowa 423.

Kentucky.—*Lockridge v. Lockridge*, 3 Dana (Ky.) 28, 28 Am. Dec. 52.

Maine.—*Call v. Call*, 65 Me. 407.

Massachusetts.—*Graves v. Graves*, 108 Mass. 314; *Albee v. Wyman*, 10 Gray (Mass.) 222; *Sparhawk v. Sparhawk*, 120 Mass. 390.

Michigan.—*Perkins v. Perkins*, 12 Mich. 456; *Goodman v. Goodman*, 26 Mich. 417.

Minnesota.—*Weld v. Weld*, 28 Minn. 33; *Semrow v. Semrow*, 23 Minn. 214.

Mississippi.—*Code* (1892), § 1565.

Missouri.—*Waters v. Waters*, 49 Mo. 385.

Nebraska.—*Ellis v. Ellis*, 13 Neb. 91.

New Hampshire.—*Sheafe v. Sheafe*, 36 N. H. 155.

Change should be Made with Caution.—The court should be very slow, under any circumstances, to revise or alter the former decree, and the application for the modification of an allowance should not be granted unless it appears that the changed circumstances of the parties render the modification necessary.¹ The alteration must be made upon the change of circumstances, and these must be shown to have changed since the original decree,² unless, perhaps, it be made upon facts occurring before, of which the party was excusably ignorant at the time.³

Wife Acquiring Property—Husband's Reduced Faculties.—There may very properly be a reduction in the amount of allowance, if subsequently the wife acquires property, so that her means increase,⁴ or where the husband's faculties or resources have been largely impaired or reduced, so that he is no longer in a condition to support the wife in the same manner as before.⁵

South Dakota.—*Greenleaf v. Greenleaf* (S. Dak. 1894), 61 N. W. Rep. 421.

Vermont.—*Buckminster v. Buckminster*, 38 Vt. 248, 88 Am. Dec. 652.

Wisconsin.—The statute (Rev. Stat., c. 111, § 28) conferring authority on the court to revise and alter the decree for alimony, or an allowance, is inapplicable to a judgment for the division of real property, and such a judgment cannot be revised after the term. *Bacon v. Bacon*, 43 Wis. 197; *Campbell v. Campbell*, 37 Wis. 206; *Hopkins v. Hopkins*, 40 Wis. 462; *Donovan v. Donovan*, 20 Wis. 586; *Coad v. Coad*, 41 Wis. 23; *Thomas v. Thomas*, 41 Wis. 229. But if the original decree is merely for alimony, it may afterwards be modified so as to make a final division of the husband's estate. *Blake v. Blake*, 75 Wis. 339; *Campbell v. Campbell*, 37 Wis. 206.

1. *Barrett v. Barrett*, 41 N. J. Eq. 139; *Thurston v. Thurston*, 38 Ill. App. 464; *Buckminster v. Buckminster*, 38 Vt. 248, 88 Am. Dec. 652. The court, it is said, will consider whether the changed circumstances have been brought about by improper conduct. *Fisher v. Fisher*, 32 Iowa 20.

Sum Allowed by Consent.—In a suit by a wife against her husband, followed by a decree for divorce *a mensa et thoro*, a sum had been allotted as alimony, by consent. Eight years afterwards her father died, and left her, by will, a small yearly income; the husband thereupon applied for a reduction of the alimony. It was held that he was not entitled thereto. *Saunders v. Saunders*, 1 S. & T. 72, 4 Jur. N. S. 147.

Death of the Party.—The right to change a previous decree as to alimony does not exist after the death of the party against whom the change is sought, and proceedings already commenced therefor abate upon the death of such party. *O'Hagan v. O'Hagan*, 4 Iowa 509.

Change from Continuing Alimony to Gross Sum.—In *King v. Miller*, 10 Wash. 274, it was held that when continuing alimony is granted in divorce proceedings for the support of the wife and infant children, the court may subsequently entertain an action to make the husband pay a sum in gross instead of periodically.

2. **Change of Circumstances must have Occurred since Original Decree.**—*Reid v. Reid*,

74 Iowa 681; *Shaw v. McHenry*, 52 Iowa 182; *Wilde v. Wilde*, 36 Iowa 319; *Blythe v. Blythe*, 25 Iowa 266; *Weld v. Weld*, 28 Minn. 33; *Cole v. Cole*, 142 Ill. 19; *Luthe v. Luthe*, 12 Colo. 429; *Petersine v. Thomas*, 28 Ohio St. 596; *Olney v. Watts*, 43 Ohio St. 499; *Perkins v. Perkins*, 12 Mich. 456; *Straus v. Straus* (Supreme Ct.), 14 N. Y. Supp. 671; *Simonds v. Simonds* (Supreme Ct.), 10 N. Y. Supp. 606.

In *Massachusetts* the decree for alimony may be revised not only for the reason of altered circumstances of either or both of the parties; but also the former relations and conduct of the parties, the circumstances of the separation, and the facts upon which any former decree was founded, as well as any new facts bearing upon the question, may be taken into consideration. *Graves v. Graves*, 108 Mass. 314; *Sparhawk v. Sparhawk*, 120 Mass. 390.

3. *Semrow v. Semrow*, 23 Minn. 214; *Straus v. Straus* (Supreme Ct.), 14 N. Y. Supp. 671.

4. **Subsequent Acquisition of Property by Wife.**—*Cole v. Cole*, 142 Ill. 19. Where the wife is permitted by the court to receive a legacy which is sufficient to furnish her a reasonable support, the husband should be discharged from his liability for alimony. *Holmes v. Holmes*, 4 Barb. (N. Y.) 295.

But in *Saunders v. Saunders*, 1 S. & T. 72, it was held that a reduction was not justified by the fact that subsequent to the granting of alimony the wife received a small income by will.

5. **Husband's Reduced Resources.**—*Cox v. Cox*, 3 Add. Ecc. 276; *Davies v. Davies*, 32 L. J. Mat. Cas. 152, 4 S. & T. 228; *State v. Second Judicial Dist. Ct.* (Mont. 1894), 36 Pac. Rep. 757.

The fact that the husband said that his income had been reduced, without stating the grounds for the reduction, would not justify the court in interfering. *Shirley v. Wardrop*, 1 S. & T. 317.

Upon Reduction, Excess Not to be Refunded.—On modifying a previous order for payment of a larger amount than is necessary for counsel fees, the court will not—the order having been complied with—order the excess refunded. *Uhlman v. Uhlman*, 51 N. Y. Super. Ct. 361.

Husband Paying Debts of Wife.—So, likewise, the fact that the husband has been compelled to pay debts incurred by the wife, may be a ground for reduction.¹

Unprofitable Speculations.—But the fact that the husband's income has been reduced by unprofitable speculations, is held to be no ground for a proportionate reduction of the amount of alimony previously allotted.²

Wife's Needs Greater or Husband's Resources Greater.—On the other hand, if the wife's necessities increase,³ or the husband is shown to have acquired property since the original decree, or his resources have otherwise increased, an increase in alimony may be allowed.⁴

Wife Maintaining Another Person.—No additional allowance, however, should be made to the wife merely because her expenses have been increased by reason of her assisting a person whom the defendant was under no legal or moral obligation to support.⁵

When Education of Children Completed.—The allowance may be decreased where the burden of maintaining and educating children has ceased.⁶

An Agreement Is No Bar to the modification,⁷ and, on the other hand, the petition may be modified by agreement.⁸

b. REMARRIAGE.—A decree for alimony is not affected by the mere subsequent marriage of the woman to whom it is granted, in the absence of a provision in the decree that it shall be, although the marriage in some cases may afford sufficient ground for reducing the amount or even stopping the allowance;⁹ as, for instance, where the wife marries a man who is able to

1. *Robbins v. Robbins*, 101 Ill. 416.

2. *Neil v. Neil*, 4 Hagg. Ecc. 273.

The court will consider whether the change of circumstances has not been brought about by improper conduct on the husband's part. *Fisher v. Fisher*, 32 Iowa 20.

3. *Cole v. Cole*, 142 Ill. 19.

Sickness of Wife.—In *Bursler v. Bursler*, 5 Pick. (Mass.) 427, where it was shown on a petition for an increase of alimony, that the wife was afflicted with a disease which required extraordinary expenses, it was held that the increase should be allowed. The court said: "The situation of the petitioner required extraordinary expenses, and if the parties had not been divorced, the respondent would have been morally obliged to spend more than his income and to sell part of his real estate to pay those expenses, and his improper conduct ought not to excuse him from doing what, by his marriage contract, it would have been his duty to perform."

4. *Graves v. Graves*, 108 Mass. 314; *Otway v. Otway*, 2 Ph. 109. See also *Cox v. Cox*, 20 Ohio St. 439. In *Mildeberger v. Mildeberger*, 12 Daly (N. Y.) 195, on the granting of a divorce to the wife from bed and board, annual payments of alimony were ordered to be made by the husband, and provision was made in the decree for future applications, and afterwards the amount was reduced on a showing of poverty; later the husband inherited a large fortune, and it was held that for this reason the annual amount should be increased, but that the increase should not be extended back.

5. *Halsted v. Halsted*, 5 Duer (N. Y.) 659.

6. *Kerr v. Kerr*, 9 Daly (N. Y.) 517.

Death of Child in Wife's Care.—But in *Thurston v. Thurston*, 38 Ill. App. 464, a reduction sought after the death of a child in

the care of its mother was denied, it appearing that the amount allowed by the original decree was small; that at the time of the decree the wife was able to work and aid in the support of herself and child; that after the child's death her health was so impaired, from overwork in her efforts to sustain herself and child, that she was unable to perform any considerable labor.

No reduction should be made in an allowance, upon the death of a child in the mother's care, unless it appears that the allowance was for the support of the wife and such child, and not merely for the wife's own use. *Semrow v. Semrow*, 23 Minn. 214.

7. *Blake v. Blake*, 75 Wis. 339.

8. *Allison v. Allison* (S. Dak. 1894), 58 N. W. Rep. 563.

9. **Effect of Remarriage.**—*King v. King*, 38 Ohio St. 370; *Shepherd v. Shepherd*, 1 Hun (N. Y.) 240. But see *Stillman v. Stillman*, 99 Ill. 196.

In *Shepherd v. Shepherd*, 1 Hun (N. Y.) 240, where it appeared that the defendant's ability was ample, and the plaintiff needed her allowance, the court refused to disturb such allowance on account of the divorced wife's remarrying. *Daniels, J.*, said: "The statute empowers the court, upon making a decree in favor of the wife, dissolving the marriage for the misconduct of the husband, to require him to provide such suitable allowance for her support as it shall deem just, having regard to the circumstances of the respective parties. And the continuance of that allowance is in no way rendered dependent on the fact that she shall not afterwards marry again. * * * Beyond that, the statute expressly secures to the wife the right to marry again where she is the innocent party to the decree. And it neither expressly, nor by any reasonable implication, deprives

afford her a reasonable support, there may be a reduction.¹

In *England* it is usually provided that the allowance made as alimony shall continue only *dum sola et casta vixerit*.²

c. **SUBSEQUENT ADULTERY OF WOMAN.**—The adultery of the wife subsequent to divorce and allowance of alimony will not, of itself, require reduction by the court,³ especially where it is not shown whether the alimony was granted the wife merely for support or on account of property which the husband derived from her.⁴ But if the wife lives with, and is supported by, her paramour, the continuance of alimony would be improper.⁵

9. **Termination—*a.* DEATH.**—The allowance of alimony being, in its nature, a provision made by the husband for his wife's support, it necessarily ceases upon the death of either party, and unless expressly authorized⁶

her of her allowance by way of alimony for so doing."

But in *Bowman v. Worthington*, 24 Ark. 522, the subsequent remarriage of the wife was held to annul the allowance of alimony, and that, therefore, after the death of her second husband, the wife could not claim the alimony allowed her from her first husband.

1. **Remarriage of Woman to One Able to Support Her.**—*Sidney v. Sidney*, 4 S. & T. 178; *Bowman v. Worthington*, 24 Ark. 522; *Albee v. Wyman*, 10 Gray (Mass.) 222; *Olney v. Watts*, 43 Ohio St. 499; *Bankston v. Bankston*, 27 Miss. 692.

Where the allowance is cut off on this ground, the order should not be made retroactive so as to cut off alimony that has previously accrued. *Stillman v. Stillman*, 99 Ill. 196, 39 Am. Rep. 21. In justifying the discontinuance of the allowance in this case, Scott, J., said: "It would be difficult to suggest or conceive any cause that would present grounds more 'reasonable and proper' for suspending further payment of alimony than the subsequent marriage of the divorced wife. * * * Treating alimony, as may be done, as the equivalent of that obligation for support which arises in favor of the wife out of the marriage contract, and which is lost when that contract is annulled by the decree, she obtains the same obligation for support by a second marriage. It is unreasonable that she should have the equivalent of an obligation for support, by way of alimony from a former husband, and an obligation from a present husband for an adequate support at the same time."

2. See *Fisher v. Fisher*, 2 S. & T. 410; *Chetwynd v. Chetwynd*, L. R. 1 P. & D. 39; *Sidney v. Sidney*, 4 S. & T. 178.

In *Gladstone v. Gladstone*, 1 Prob. Div. 442, *Hannen, P.*, said: "I think it perfectly reasonable in these cases, where the husband is called upon to sacrifice a portion of his means, that the conditions *dum sola et casta vixerit* should be imposed, but am of opinion that when the effect of the order is only to deprive the husband of his interest in the wife's fortune, and to put the innocent wife into immediate possession of her own income, no such condition ought to be imposed."

3. **Subsequent Adultery of Woman.**—*Forrest v. Forrest*, 3 Bosw. (N. Y.) 661; *Cross v. Cross*, 63 N. H. 444; *Alexander v. Alexander*, 20 Wash. L. Rep. 443; *Cole v. Cole*,

35 Ill. App. 544, *affirmed* in *Flood v. Flood*, 5 Bush (Ky.) 169.

In *Sloan v. Cox*, 4 Hayw. (Tenn.) 75, it was held that the wife's subsequent adultery was no defense to proceedings by way of scire facias for arrears of alimony.

4. *Cole v. Cole*, 142 Ill. 19.

5. In *Holt v. Holt*, L. R. 1 P. & D. 610, it was held that while the wife was living with her paramour, and was supported by him, this was an answer to an application by the wife for alimony, while the support continued, but not after it ceased. See also *Madañ v. Madañ*, 37 L. J. Mat. Cas. 10, 18 L. T. N. S. 337, 16 W. R. 712; *Cogswell v. Tibbetts*, 3 N. H. 41.

6. **In Absence of Statute, Ceases upon Death of Either Party.**—*Knapp v. Knapp*, 134 Mass. 353; *Casteel v. Casteel*, 38 Ark. 477; *Smith v. Smith*, 1 Root (Conn.) 349; *Gaines v. Gaines*, 9 B. Mon. (Ky.) 299, 48 Am. Dec. 425; *Pearce v. Pearce* (Ky. 1891), 16 S. W. Rep. 271; *Francis v. Francis*, 31 Gratt. (Va.) 283; *Wallingsford v. Wallingsford*, 6 Har. & J. (Md.) 485; *Lockwood v. Krum*, 34 Ohio St. 7; *Field v. Field*, 15 Abb. N. Cas. (N. Y. Supreme Ct.) 434; *Wren v. Moss*, 6 Ill. 560; *Maxwell v. Sawyer* (Wis. 1895), 63 N. W. Rep. 283. In this last case the testator bequeathed to a woman from whom he had been divorced, the same amount which he had while living paid to her as alimony. It was held that she would take the amount bequeathed, and that her right to alimony ceased.

In *Field v. Field*, 66 How. Pr. (N. Y. Supreme Ct.) 346, it was held that a decree directing the payment of alimony during the life of the plaintiff must be construed to mean during the lives of both parties, and that upon the death of the husband the right to alimony was at an end.

In *Lennahan v. O'Keefe*, 107 Ill. 620, it was held that alimony ceased at the death of the husband, and that a reservation in the decree that alimony should be paid "until the further order of the court," was mere surplusage.

Parol Evidence.—In *Maxwell v. Sawyer* (Wis. 1895), 63 N. W. Rep. 283, it was held that it is inadmissible to show that there was a parol agreement between the parties, before the entry of the divorce judgment, to the effect that the alimony adjudged should continue during the life of the petitioner.

Abatement of Suit.—In *O'Hagan v. O'Hagan*, 4 Iowa 509, where, during the pendency of

by statute,¹ a decree granting permanent alimony to continue during the natural life of the wife, is erroneous.²

Special Agreement.—The husband may, by agreement, bind his personal representatives for the payment of alimony to the wife during her life.³

b. RECONCILIATION.—In reason, if the wife returns to her husband after a divorce *a mensa et thoro*, and is reconciled to him, she cannot continue to have alimony.⁴ But if she again separates herself in consequence of renewed acts of cruelty, the decree has been held still good, and enforceable, notwithstanding the condonation.⁵

10. Arrears of Alimony.—Divorce from Bonds of Matrimony.—Although the death of either party puts an end to the wife's demand for alimony, yet arrears of alimony decreed upon a dissolution are in the nature of a debt, and may be claimed out of the husband's estate,⁶ and upon the death of the wife may be collected by her personal representative.⁷

Separation from Bed and Board.—But if there is merely a separation from bed and board, arrears cannot be collected from the husband, as such property upon the wife's death reverts to him.⁸

Where Husband has Unjustly Withheld Payments.—But if, during the life of the wife, the husband unjustly withholds payment, by reason of which the wife contracts debts, her representative may sue and recover for the benefit of her creditors.⁹

In the Ecclesiastical Courts arrears could not be collected beyond one year.¹⁰

the wife's bill for further allowance, the husband died, and the administrator of the husband's estate was made a party respondent, the bill was held to be properly dismissed. Wright, C. J., said: "We do not understand that any court has yet held that the wife, after the death of the husband, may ask an allowance of this character. Nor is there any case to be found in the books, as we believe, recognizing the right of the wife to prosecute her suit for alimony, commenced in the husband's lifetime, after his decease."

But in *Seibly v. Ingham* Circuit Judge (Mich. 1895), 63 N. W. Rep. 528, it was held that the court might decree an absolute divorce, reserving the question of permanent alimony; and the subsequent death of the defendant would not affect its jurisdiction to award such alimony of the decedent's estate.

Provisions for Maintenance of Children.—In *Miller v. Miller*, 64 Me. 484, it was held that a decree made in a divorce suit, that the mother shall have the care and custody of the children, and that the father shall pay a certain sum quarterly towards their support, which by its terms is to continue in force till the further order of the court, is not discharged by his death.

1. Statutory Authorization.—*Smythe v. Banks*, 73 Ga. 303. But where authorized by statute, it must appear unequivocally that the court intended that the decree should bind the heir. *Lennahan v. O'Keefe*, 107 Ill. 620.

Term Not Specified.—In *Ex p. Hart*, 94 Cal. 254, it was held that a decree allowing alimony to the wife, without naming the period during which it should be paid, was valid and sufficiently certain, and would be construed as intending the payment to continue during the life of the wife, or until modified by the court.

2. *Dewes v. Dewes*, 55 Miss. 315; *Lockridge v. Lockridge*, 3 Dana (Ky.) 28, 28 Am. Dec. 52; *Kurtz v. Kurtz*, 38 Ark. 119.

3. *Miller v. Miller*, 64 Me. 484; *Storey v. Storey*, 125 Ill. 608; *Carson v. Murray*, 3 Paige (N. Y.) 483.

4. *Tiffin v. Tiffin*, 2 Binn. (Pa.) 202; *Lockridge v. Lockridge*, 3 Dana (Ky.) 28, 28 Am. Dec. 52; *Holbrook v. Holbrook*, 18 La. Ann. 643; *Rogers v. Vines*, 6 Ired. (N. Car.) 293.

5. *Nathans v. Nathans*, 2 Phila. (Pa.) 393.

6. *Knapp v. Knapp*, 134 Mass. 353; *Allen v. Allen*, 100 Mass. 373; *Wren v. Moss*, 6 Ill. 560; *Sloan v. Cox*, 4 Hayw. (Tenn.) 75.

A sum ordered to be paid the wife, upon a divorce from the husband, is recoverable out of his estate. *Smith v. Smith*, 1 Root (Conn.) 349.

Sum in Gross.—And when a gross sum is awarded to the wife for alimony, it becomes a debt from the former husband to her, and upon her death before payment, the husband is not discharged, but the sum due passes to her personal representative as any other money decree. *Dinet v. Eigenmann*, 80 Ill. 274.

7. *Miller v. Clark*, 23 Ind. 370.

8. *Stones v. Cooke*, 7 Sim. 22; *Vandergrucht v. DeBlaquiere*, 8 Sim. 315.

Savings of Wife from Allowance.—In *Darden v. Joyner*, 9 Ired. (N. Car.) 339, where, by statute, after the divorce the wife had "capacity to acquire and dispose of such property as she might procure by her own industry, * * * or in any other manner," it was held that the husband had no right to the accumulation of savings from her allowance of alimony granted her on a divorce *a mensa et thoro*.

9. *Clark v. Clark*, 6 W. & S. (Pa.) 85; *Bouslough v. Bouslough*, 68 Pa. St. 495.

10. *DeBlaquiere v. DeBlaquiere*, 3 Hagg. Ecc. 322.

ALIUNDE.—The term *aliunde* means independent of.¹

ALIVE.—See BORN; LIVING.

ALIZARIN.—See note 2.

ALL—I. DEFINITION AND GENERAL RULES.—"All" is defined to mean every one, or the whole number, quantity, extent, duration, amount, quality, or degree of.³ In the notes will be found examples of this comprehensive use of the word.

1. As: "Nothing is said in the deed itself, nor proved *aliunde*, about the conveyance of a lien for money." *Sherwood v. Waller*, 20 Conn. 262.

2. "It seems that *alizarin* is a red coloring matter, of the character of the Turkish reds, and is extensively used as a dyestuff. It is the coloring principle of madder, and is extracted from madder root. It is also made from anthracene, which is one of the products of coal tar." *In re Schaeffer's Appeal*, 2 App. Cas. (D. C.) 4.

3. *State v. Cummings*, 17 Neb. 316, *following* Webster's Dict. That case was upon a statute regulating the sale of intoxicating liquors, which began as follows: "*All* persons who shall sell," etc. It was held that this applied to every person, a wholesale dealer as well as a retail, and that there were no exceptions. See also, for the use of *all* in its comprehensive sense, *Benson v. Pottsville Miners' Bank*, 20 Pa. St. 373; *Harrington v. Smith*, 28 Wis. 43; *Andrew v. Deshler*, 43 N. J. L. 19; *Agawam Bank v. Strever*, 18 N. Y. 502; *Maghee v. Camden, etc.*, R. Co., 45 N. Y. 514, 6 Am. Rep. 124; *Tichenor v. Allen*, 13 Gratt. (Va.) 34; *Battertons v. Porter*, 2 Litt. (Ky.) 389; *Jones v. Fox*, 23 Fla. 454; *New Bedford R. Co. v. Old Colony R. Co.*, 120 Mass. 400; *James v. Bligh*, 11 Allen (Mass.) 4; *Posey v. Pressley*, 60 Ala. 243; *Ex p. Voll*, 41 Cal. 33; *Doe v. Roe*, 18 Q. B. 806, 83 E. C. L. 806; *Milne v. Graham*, 1 B. & C. 192, 8 E. C. L. 82.

"**ALL** Includes the Whole.—Thus, in *State v. Babcock*, 22 Neb. 37, it was held that a provision that *all* appropriations, general or special, should end with the fiscal quarter, was no broader than the provision that *all* appropriations shall end with such fiscal quarter, as the word *all* includes the whole.

All Creditors—Composition Agreement.—A provision in a composition agreement that "it is not to be binding on any one unless agreed to and signed by *all* of the creditors," applies to secured as well as unsecured creditors. *Kinsing v. Bartholew*, 1 Dill. (U. S.) 155.

All Fraud—Insurance Policy.—A policy provided that "*all* fraud," etc., on the part of the assured, "shall cause a forfeiture of *all* claim under this policy." It was contended that where there were several subject-matters embraced in the policy, the forfeiture should apply only to the subject-matter to which the fraud related. The court refused to sustain the contention, saying: "'*All* fraud,' etc., 'shall cause a forfeiture of *all* claim under this policy.' A more comprehensive word than *all* cannot be found in the English language; and it certainly has in this case the comprehensive meaning contended for by the counsel of the defendants, instead

of the restricted meaning contended for by the counsel for the plaintiff, unless very strong reasons can be furnished for construing it in the latter sense." *Moore v. Virginia F., etc., Ins. Co.*, 28 Gratt. (Va.) 516, 26 Am. Rep. 373.

All Cases.—See also the titles REMOVAL OF CAUSES; UNITED STATES COURTS. And as to the use of the words in a limited sense, see *infra*, this title.

The provision in the Constitution of the United States declaring that the judicial power of the United States extends "to *all* cases in law and equity arising under the Constitution and laws of the United States," etc., embraces alike civil and criminal cases. *Tennessee v. Davis*, 100 U. S. 270; *Martin v. Hunter*, 1 Wheat. (U. S.) 304; *Cohens v. Virginia*, 6 Wheat. (U. S.) 264.

In *Nashville v. Cooper*, 6 Wall. (U. S.) 247, the court said: "The constitutional power is given in general terms. No limitation is imposed; the broadest language is used. '*All* cases' so arising are embraced."

And for a broad construction given to "*all* cases," see *Loomis v. Bourn*, 63 Conn. 445.

The words, "in *all* cases," in a statute, have been limited to *all* of a particular class of cases. *Flake v. Van Wagenen*, 54 N. Y. 25; *Jackson v. Reeves*, 53 Ind. 231; *Gilbert v. Neely*, 35 Ark. 24; *Clore v. Graham*, 64 Mo. 249; *Brinsfield v. Austin*, 39 Ala. 227. Compare *Ex p. Ezell*, 40 Tex. 451, 19 Am. Rep. 32; *In re Dole*, 11 Blatchf. (U. S.) 499. See *supra*, this title, for "*all* cases" in its comprehensive sense.

And so in *Blevings v. People*, 2 Ill. 172, it was held that the words "in *all* cases," as used in section 158 of the Criminal Code of *Illinois* of that time, applied only to *all* cases tried by a jury.

In *State v. Rising*, 10 Nev. 97, it was held that the expression "*all* cases at law in the *Nevada* Constitution" had no application whatever to criminal cases.

All Road Crossings.—Where railroad companies were required to construct cattle-guards at *all* road crossings, it was held that this included road crossings adjacent to the station buildings of a railroad company. The court said: "The judgment cannot be sustained. The duty enjoined is to construct and maintain cattle-guards at *all* road crossings, and it is not for courts to nullify, by construction, the plain and explicit requirements of the statute; to hold, as was done by the referee, that road crossings adjacent to the station buildings of a railroad company are not within its purview. When the statute declares that cattle-guards shall be constructed 'at *all* road crossings,' we have no right to create exceptions, or say in effect, that because a railroad company chooses to locate its station buildings

The term "all" is frequently used as the equivalent of "any."

not on, but near, a public-highway crossing, and thereby cattle-guards may inconvenience it and the public, it is not bound to construct and maintain them." *Bradley v. Buffalo, etc., R. Co.*, 34 N. Y. 427.

All Stockholders.—A provision creating a statutory liability for stockholders used the expression "*all* stockholders." In *Brown v. Hitchcock*, 36 Ohio St. 681, it is said: "The expression '*all* stockholders' must be regarded, in the absence of any legislative indication to the contrary, as including not only those who were such at the time the indebtedness was incurred, but all those who successively stand in their shoes in respect to the same stock." See also *Wheelock v. Kost*, 77 Ill. 298; and the title STOCK AND STOCKHOLDERS.

All Words.—A statute of *Virginia*, which aimed at the practice of duelling, provided that "*all* words which, from their usual construction and common acceptance, are considered as insults," etc., should be actionable. It was contended that this provision extended only to spoken words, upon the ground that written words were actionable at common law. The court refused to sustain this contention, saying: "'*All* words' of the character described shall be actionable, and it can hardly be supposed that the legislature, in an effort to suppress duelling, intended to make *all* insulting words actionable without justification or excuse if spoken, and not to provide for such words if published to the world in a newspaper; for, as defamatory or insulting words *written* (and the term includes words printed) indicate greater deliberation and malice, and in general are more permanent and extensive in their operation, than words spoken, which often proceed from sudden passion, and may be soon forgotten, so are they more wounding to the feelings of the person aggrieved, and consequently more likely to lead to violence, and the commission of the offense which was designed to be suppressed." *Chaffin v. Lynch*, 83 Va. 106. See also *Moseley v. Moss*, 6 Gratt. (Va.) 534.

All the Said Cattle.—In an action on the case by a commoner for disturbing his common by putting on cattle, where the plea was a right of common appurtenant for cattle levant and couchant; and a replication was filed, with conclusion to the country, that "*all* the said cattle in the said declaration mentioned" were not defendant's own commonable cattle levant and couchant, the word *all* was interpreted to mean that the levancy and couchancy was untruly alleged as to all the cattle, not that it was truly alleged of some and falsely of others. For if the latter, it should have been expressly averred, and the word *all*, being in the replication quite ambiguous, must be taken most strongly against the party pleading; and as the plaintiff's opening showed that the defendant had a right to some commonable cattle, the court directed a verdict for the defendant. *Bowen v. Jenkin*, 6 Ad. & El. 911, 33 E. C. L. 243.

All Rights.—Trade-Marks.—See also the title TRADE-MARKS.

B., the inventor of a patent medicine, conveyed to *F.* the exclusive right to use *B.*'s name in making and in selling such medicine for ten years, in return for a sum to be paid every three months; and further granted to *F.*, if he performed his contract for the full ten years, "*all* of the rights and privileges" to use *B.*'s name in making and selling such medicine, without fee or reward to *B.*, for fifty years. It was held that *F.* had the same exclusive right as against *B.* for the fifty years as for the ten years. The court said: "There is no question that an exclusive right was granted for the ten years ending January 1st, 1876; but it is claimed that thereafter a bare right or privilege was granted, in common with *Jonas Blackman*, to use his name and to manufacture said medicines. The determination of this question depends upon the construction which shall be given to the grant of '*all* of the rights and privileges to use my name.' An exclusive right had been given for ten years, upon the payment of royalty, and thereafter '*all* of the rights and privileges' to use the name of the grantor were given, without royalty, for the term of fifty years. The terms '*an* exclusive privilege,' and '*all* of the rights and privileges,' as used in this contract, are synonymous, and by the words '*all* of the rights and privileges' are meant *all* the rights, or the entire right, which the grantor had at the expiration of the term of ten years. Each word in the phrase '*all* of the rights' is to have the force which naturally belongs to such word, and, by construing the words to mean a conveyance of a bare right, the same effect is given to the language as if it had been '*I* convey the right, or a right, to use my name,' which construction leaves the word *all* without any significance. If the grantor retained the right in common with *Filkins* to use the name of the inventor, he did not convey *all* of his rights, but retained as much as he granted." *Filkins v. Blackman*, 13 Blatchf. (U. S.) 446.

Insurance on All or Either of Certain Buildings.

—Under a policy of fire insurance which insures a certain sum "on *all* or either" of certain specified buildings, the insurers are liable for the full amount of a loss, not exceeding the sum insured, occasioned by the burning of a single one of the buildings. *Com. v. Hide, etc., Ins. Co.*, 112 Mass. 136, 17 Am. Rep. 72.

All Convenient Speed.—See SPEED.

Arbitration and Award.—As to the scope of the terms in a submission of "*all* demands," "*all* disputes," "*all* differences," etc., see the title ARBITRATION AND AWARD.

All Possible Skill and Care.—See SKILL.

All Possible Foresight.—See POSSIBLE.

All Necessary Help.—See HELP.

"All My Household Furniture."—See HOUSEHOLD.

All Right.—See RIGHT; and the title ESTOPPEL.

All Debts.—See DEBT.

1. *Agawam Bank v. Strever*, 18 N. Y. 502.

It also has the term of "every,"¹ and is sometimes read as "each" or "every one of."²

In the definitions and examples given above, the term "all" has been generally used in its proper and very comprehensive sense, as equivalent to "every one of," "the whole of," etc. But the term is frequently used more loosely; and in order to determine the intention, it is necessary to qualify its meaning, limiting its application to all of a particular class by the consideration of the context and subject-matter and the application of the principle of *ejusdem generis*.³

1. *Bloom v. Xenia*, 32 Ohio St. 467; *Stone v. Elliott*, 11 Ohio St. 258.

A statute provided that *all* by-laws should be read. This was construed to mean that every by-law should be read. *Bloom v. Xenia*, 32 Ohio St. 467.

2. *Sherburne v. Sischo*, 143 Mass. 443; *Towle v. Delano*, 144 Mass. 100.

All is equivalent to "each and every." *Burnett v. Railroad Co.*, 54 L. J. Q. B. 539; *Stroud Jud. Dict.*

3. *Bellamy v. Bellamy*, 6 Fla. 62; *State v. Townley*, 18 N. J. L. 311; *Reed v. Bush*, 5 Binn. (Pa.) 457; *Pearce v. Cowie*, 1 Holt N. P. 69; *Reed v. Jones*, 15 Wis. 44; *Howland v. Howland*, 100 Mass. 222; *Hay v. Goldsmidt*, cited in *Hogg v. Snaith*, 1 Taunt. 349; *Jiggitts v. Bennett*, 31 Miss. 610.

Limited by the Context or Subject Matter.—The term is often carelessly used in written instruments, and requires to be qualified and limited to the subject-matter. Thus, where a statute provided that "in *all* cases' where a levy is made on property which is claimed by a third person, and good and sufficient security is tendered by the party claiming the same, it shall be the duty of the sheriff to leave the same in possession of such claimant," it was held that these words, "in *all* cases," only meant in *all* cases in which the defendant is the claimant. "True," said the court, "it says that in *all* cases where a levy is made, etc. One is amazed, in casting a glance over our statute-book, to find how often this form of expression occurs, frequently signifying, as here, not absolutely *all*, but *all* of a particular class only. Indeed, it seems to be common to all writings, lay as well as legal, sacred as well as profane. And the generality of the phrase is frequently to be restrained in an act, not only by the context, but by the general form and scheme of the statute, as demonstrative of the intention of the legislature. Here it means, in *all* cases where the claimant is in possession of the property he shall not be deprived of it, but it shall be left with him. * * * It is made the duty of the sheriff to leave the property with the claimant. How could this be done unless it had been previously found there? Under the view contended for by counsel for the relator, other phraseology would have been used. It would have been made the duty of the levying officer to deliver or turn over the property to the claimant, not leave it with him." *Phillips v. State*, 15 Ga. 518.

Release.—See also the title RELEASE.

Thus, a release of *all* claims and demands whatsoever, was restricted to the subject-

matter under consideration at the time the release was given. *McIntyre v. Williamson*, 1 Edw. Ch. (N. Y.) 34; see also *Jackson v. Stackhouse*, 1 Cow. (N. Y.) 122.

Receipt.—So a receipt given in satisfaction of a certain judgment therein specified, and also "of *all* claims and demands," will not avail against another suit pending between the same parties and not shown to have been intended by them to be included in the receipt. *Grumley v. Webb*, 44 Mo. 444. See also the title RECEIPTS.

Provision that All Wheat shall be Weighed by Inspectors.—A statute provided that inspectors should carefully weigh and determine the weight of *all* wheat inspected by them. It was contended that the weight of a lot of wheat could not be ascertained without weighing *all* and every part of it; "that *all* means *all*, and nothing else." But the court held, from a consideration of the whole statute, that the legislature meant that the weight of the lot was to be ascertained by weighing a fair average portion and measuring the whole. *Frazier v. Warfield*, 13 Md. 279.

Guardian's Bond.—In *Ordinary v. Heishon*, 42 N. J. L. 18, the court said: "The first objection to this assignment is that the breach is confined to an omission to file an inventory of the estate of the infants, received by him, while the condition of the bond is that he will deliver an inventory of *all* the estate which he shall have received or taken into possession. But this is hypercritical, as, by necessary intendment, the covenant on this subject must be so contracted as to be held to relate to the estate of the minors. It leads to absurdity, to assign to the terms in question a meaning that will convert them into a stipulation that the guardian in this bond bound himself to put in an account of every estate, though belonging to strangers, that might come into his hands."

All Future Erections or Additions.—In *Holbrook v. Chamberlin*, 116 Mass. 162, 17 Am. Rep. 146, it was said: "The right of a tenant to remove trade fixtures may doubtless be qualified by the covenants in the lease. But we are of opinion that the covenant to deliver up in good order '*all* future erections or additions' to or upon the premises is limited, in purpose and effect, to new buildings erected or old buildings added to, * * * and cannot be extended so as to deprive the tenants of the right to remove trade fixtures, much less personal property, put by them upon the premises during the term."

All Persons.—In *Hallowell v. Gardiner*, 1 Me. 93, it was held that by the words "*all*

II. CONSTRUCTION IN WILLS.—The word “all” has received frequent interpre-

persons” in the *Maine* Poor Law, describing those who may gain a settlement, were intended only those persons who are legally capable of gaining a settlement in their own right in any other mode. The court said: “It is true, the language of the second section of Stat. 1793, c. 34, in the ninth mode of gaining a settlement, is general: ‘All persons, citizens as aforesaid, dwelling and having their homes in any unincorporated place, at the time when the same shall be incorporated into a town or district, shall thereby gain a legal settlement therein.’ And in the cases of *Bath v. Bowdoin*, 4 Mass. 452, and *Buckfield v. Gorham*, 6 Mass. 445, the court decided that such incorporation had the same effect before the statute just mentioned. But notwithstanding the generality of the language ‘all persons,’ the clause must be understood with such limitations as the legislature must have intended; and they seem to have intended that all persons legally capable of gaining a settlement in any other mode should, *ipso facto*, gain one in the method mentioned in that article; but not that a married woman, or a slave, should thus obtain a settlement.” See also *Milo v. Kilmarnock*, 11 Me. 455.

All Ordinances.—A stipulation in the bond of a retail liquor dealer “to observe all ordinances which may be passed,” was held not to bind him to observe ordinances which the town authorities had no power to pass. *Gilham v. Wells*, 64 Ga. 199.

Mechanic's Lien.—A mechanic's lien law extended the lien to all laborers. In *Dano v. Mississippi, etc.*, R. Co., 27 Ark. 567, the court said: “This word *all*, as it is used in this act, is not to be construed literally as giving to every laborer a lien for his labor. The clerk of a merchant or banker, in one sense of the word, is a laborer, and so are ordinary house servants; but they do not come within the purview of this act, because they produce nothing to which a lien could attach.”

Same—All Buildings.—See also **MECHANICS' LIENS**.

In *Atascosa County v. Angus*, 83 Tex. 202, it was held that where a statute granted to mechanics a lien on “all buildings” which they might erect, this did not include public buildings and grounds. The court said: “The weight of authority numerically, and also for the better reason, asserts the rule that builders' and mechanics' liens can only be created against public buildings and grounds when the right is expressly conferred by the statute; that the grant of liens against ‘all buildings’ will not be held to include public buildings and grounds, unless they are, by the express terms of the statute, included within its operation.” *Approved* in *Dallas v. Loonie*, 83 Tex. 291.

All Debts—Attachment Statute.—See also **DEBT**; and the title **ATTACHMENT**.

Upon the question whether the words “all debts” in an attachment statute include negotiable paper in the hands of a subsequent

bona fide holder, *Lowrie, J.*, in *Kieffer v. Ehler*, 18 Pa. St. 391, says: “Care is to be taken that laws of general, shall not be regarded as of universal application; and this caution is required in relation to the law for attaching debts in execution, and declaring that ‘all debts’ so attached shall remain in the hands of the garnishees to answer the debt. In acts of assembly, as well as in common parlance, the word *all* is a general, rather than a universal, term, and is to be understood in one sense or the other, according to the demands of sound reason. It is certainly broad enough to include debts due by bills of exchange and promissory notes; and there is nothing in their nature that excludes them from its operation. But they have a legal quality that renders the hold of an attachment upon them very uncertain. Unlike all other property, they carry their whole evidence of title on their face; and the law assures the right of him who obtains them for valuable consideration, by regular indorsement, and without actual notice of any adverse claim, or of such suspicious circumstances as should lead to inquiry. To hold that an attachment prevents a subsequent *bona fide* indorsee for value from acquiring a good title, would be almost a destruction of one of the essential characteristics of negotiable paper. It would be a great injury to persons in embarrassed circumstances holding such paper, for no one could buy it from them with any confidence in the title. Moreover, it would present the strange result, that the more hands such paper had passed through, and the more indorsers there were on it, the less it would be worth in the money market, for it would be subject to the more risks of attachment. Under such views it has always been held, that an attachment is unavailable against a *bona fide* holder for value of negotiable paper, who obtains it after attachment, before maturity, and without notice. *Ludlow v. Bingham*, 4 Dall. (Pa.) 47; *Maine F., etc., Ins. Co. v. Weeks*, 7 Mass. 439; *Enos v. Tuttle*, 3 Conn. 27; *Huff v. Mills*, 7 Yerg. (Tenn.) 42; *Hinsdill v. Saford*, 11 Vt. 309; *Little v. Hale*, 11 Vt. 482; *Eunson v. Healy*, 2 Mass. 32; *Grant v. Shaw*, 16 Mass. 344, 8 Am. Dec. 142; *Cushman v. Haynes*, 20 Pick. (Mass.) 132.” This was *approved* in *Stone v. Elliott*, 11 Ohio St. 258.

In *Perkins v. Guy*, 2 Mont. 15, it was held that a statute providing that “all debts due such defendant” might be attached, did not extend to judgments and promissory notes not due.

“All My Interests.”—The assignment of “all the interests” of a member of a special partnership to buy lands, was held not to pass any collateral benefit which he derived as agent of the partnership, such as the expenses and costs in securing the land bought by the partnership. *Stewart v. Stebbins*, 30 Miss. 66.

Instruction—Manslaughter.—The trial court instructed the jury that they were to consider the circumstances of the killing, instead of *all* the circumstances, which latter were the

tation by the courts when used in wills, its meaning depending largely upon the circumstances of each individual case.¹

statutory words. This was held to be no error. The appellate court said: "The word *all*, in the connection used, is a word of emphasis only, and is not in any sense essential to the completeness of the direction. The court is never required to give instructions in the exact language of the statute; it would be in some cases erroneous to do so; it is sufficient if the substance is correctly given." *People v. McDonald*, 2 Idaho 14.

1. See also the titles **WILLS; LEGACIES AND DEVISES; EFFECTS; ESTATE; PROPERTY.**

"**All My Real Property.**"—"All my real property" has been held to import the same as "*all my estate.*" *Nicholls v. Butcher*, 18 Ves. Jr. 193.

"**All My Landed Estate.**"—A devise of "*all my landed estate,*" followed by a description of several tracts of land, will not pass a lot not described. *Myers v. Myers*, 2 McCord Eq. (S. Car.) 214, 16 Am. Dec. 648.

"**All My Estate, both Real and Personal.**"—"All my estate, both real and personal," to which the grantor is "entitled in law or equity" in possession, remainder or reversion, passes the grantor's whole estate. *Mundy v. Vawter*, 3 Gratt. (Va.) 518; *Godfrey v. Humphrey*, 18 Pick. (Mass.) 537, 29 Am. Dec. 621.

Descriptive of Locality.—The term *all* in a will may be descriptive of locality rather than of interest. *Jackson v. Harris*, 8 Johns. (N. Y.) 144; cited in *Hilton v. Hilton*, 2 MacArthur (D. C.) 73.

Money.—See also the title **MONEY.**

Under a bequest to a daughter of "*all goods and things of every kind and sort which shall be found in her closet,*" at the grantor's death, money found there was held not to pass. *Roberts v. Kuffin*, 2 Atk. 113.

But "*all my property of every description,*" will pass money. *Hurdle v. Outlaw*, 2 Jones Eq. (N. Car.) 75.

"All my other personal property" was, under the circumstances, held not to pass money. *Wolf v. Schaeffner*, 51 Wis. 53.

"All the money," in a will, has been held to mean not only the money that might be on hand, but *all* investments of money under the directions of the will that should stand in the place of, and be convertible into, money. *Hollingsworth v. Hollingsworth*, 65 Ala. 321.

General Devise.—See also the title **LEGACIES AND DEVISES.**

A devise of "*all my property,*" certain described portions excepted, is a general devise. *Mayo v. Bland*, 4 Md. Ch. 484. See also *Fairer v. Park*, 3 Ch. Div. 309.

Property Otherwise Disposed of.—"All my personal estate" in a will was held to be confined to such part of the personalty as had not been otherwise disposed of. *Burdett v. Young*, 9 Mod. 93.

And so, a second clause in a will disposing of "*all my real estate,*" was held not to revoke a previous devise of certain real estate for life with remainder over. *Roe v. Nevill*, 11 Q. B. 467, 63 E. C. L. 467; *Alsop v. Rus-*

sell, 38 Conn. 99. And so of the words "*all my property.*" *West v. Randle*, 79 Ga. 28.

Specific Bequest.—See also the title **LEGACIES AND DEVISES.**

The words "*all I am possessed of*" have been confined to a specific bequest of stock immediately preceding, where the whole tenor of the will showed that they could not be given their usual sense. *Wilde v. Holtz-meyer*, 5 Ves. Jr. 811.

Same—"All My Personal Property."—A bequest of "*all my personal property, all sums of money which I may possess, or may be owing to me at the time of my decease, together with all furniture, farming implements,*" etc., is not specific. *Fairer v. Park*, 3 Ch. Div. 309.

"**All I am Possessed of.**"—The words "*all I am possessed of*" will carry *all* the testator's interest in personal estate, which the testator may have at the time of his death, not at the time of the making of the will, if not inconsistent with other parts of the will. *Wilde v. Holtz-meyer*, 5 Ves. Jr. 811.

"**All the Property I Possess.**"—A conveyance of "*all the property I possess,*" where there was no apparent motive for making an exception, was held to mean *all* that the party owned, as well in remainder as in immediate occupation. *Brantley v. Kee*, 5 Jones Eq. (N. Car.) 332.

Stocks, Bonds, Choses in Action.—"All my property of every description," in a will, passes not only tangible property, but stocks, bonds, and choses in action. *Hurdle v. Outlaw*, 2 Jones Eq. (N. Car.) 75.

And the words "*all my notes,*" have been held to include bonds as well as notes, but not judgments upon either. *Perry v. Maxwell*, 2 Dev. Eq. (N. Car.) 496.

But the words "*I give all in Suffolk,*" have been held not to include a bond which happened to be at the testator's house in Suffolk, on the ground that choses in action have no locality. *Moore v. Moore*, 1 Bro. C. C. 127.

So "*all my personal property of every name and nature,*" will pass choses in action. *Sherman v. Dodge*, 28 Vt. 26.

In *Stuart v. Bute*, 11 Ves. Jr. 657, it was held that under a bequest of "*my house and all that shall be in it at my death,*" cash would pass, but not a promissory note.

Deposit in Savings Bank.—It has been held that a bequest of "*all my accounts*" does not pass a deposit in a savings bank. But a bequest of "*all my personal property of whatever kind, except my notes, bonds and accounts,*" has been held to include such a deposit. *Gale v. Drake*, 51 N. H. 78.

"**All My Furniture and Other Household Effects.**"—The words "*all my furniture and other household effects,*" will not include articles of consumption. *Foxall v. McKenney*, 3 Cranch (C. C.) 206.

All the Rest and Residue.—See also the titles **WILLS; LEGACIES AND DEVISES; REST; RESIDUE.**

These and kindred words are continually used in wills, in what is called the residuary

Whether a Fee Passes.—"All my estate," in a will, has been held to carry a fee; for an estate for life or in tail would not be the donor's estate, but a new and less estate.¹

The words "all I have, to have and to hold forever," mean every description of property, and are sufficient to pass a fee.² And so the expressions, "all my freehold,"³ "all my property, both personal and real forever,"⁴ "all my lands,"⁵ "whatsoever else I have in the world,"⁶ "all my estate, real and personal,"⁷ "all my plantation,"⁸ "all my temporal estate,"⁹ "all that I shall die possessed of,"¹⁰ "all I have," "all I am worth,"¹¹ "all my real estate,"¹² will pass a fee. But a devise of "all my homestead farm," has been held not to pass a fee.¹³

What Expressions Are Sufficient to Carry Real Estate.—The question whether the words "all my estate and effects" will include real estate or not, depends, first, upon the immediate context of the will; secondly, upon the general form and scheme of the will as demonstrating the intention.¹⁴ But a will wherein the testator says, "I give all to my mother," will not pass lands;¹⁵ nor will the expression "all my effects," pass realty.¹⁶ Land will not pass under the words, "all my worldly goods,"¹⁷ It has been decided that under a devise of "all my property, etc.,"¹⁸ real estate passes; and the same has been held in the case of a devise of "all my estate whatsoever,"¹⁹

clause, to denote what is left after certain specific bequests and devises. *Graydon v. Graydon*, 23 N. J. Eq. 229; *In re Pringle*, 17 Ch. Div. 819.

The words "all the rest" are sufficient to pass all the rest of the property, real as well as personal. *Attree v. Attree*, L. R. 11 Eq. 280.

Such words will pass a freehold. *Dobson v. Bowness*, L. R. 5 Eq. 404. See also *Parker v. Parker*, 5 Met. (Mass.) 134.

And also contingent interests and remainders. *Cruger v. Heyward*, 2 Desaus. Eq. (S. Car.) 422.

In an administration bond for the proper distribution of "all the rest and residue," this phrase means, what remains after payment of debts. *Carrol v. Connet*, 2 J. J. Marsh. (Ky.) 201.

1. *Bridgewater v. Bolton*, 6 Mod. 110; *Barnes v. Patch*, 8 Ves. Jr. 604; *Kellogg v. Blair*, 6 Met. (Mass.) 322; *Godfrey v. Humphrey*, 18 Pick. (Mass.) 537, 29 Am. Dec. 621.

"All my estate," etc., carries the fee, notwithstanding words of locality are added. Thus, "all my estate, real and personal, situate at S." *Denn v. Hood*, 7 Taunt. 35, 2 E. C. L. 35. To the same effect, *Doe v. Wright*, 8 T. R. 64; *Lambert v. Paine*, 3 Cranch (U. S.) 97; *Jackson v. Babcock*, 12 Johns. (N. Y.) 389; *Neide v. Neide*, 4 Rawle (Pa.) 75.

2. *Clingan v. Mitcheltree*, 31 Pa. St. 32.

3. *Roe v. Pattison*, 16 East 221. See also *Rodenfels v. Schumann*, 45 N. J. Eq. 387.

4. *Doe v. Roper*, 11 East 518. "All my property." *Mayo v. Carrington*, 4 Call (Va.) 472, 2 Am. Dec. 580.

5. *Kennon v. M'Roberts*, 1 Wash. (Va.) 96, 1 Am. Dec. 428.

But these would not include lands mortgaged to the deviser. *Winson v. Littleton*, 1 Vern. 3. It was held otherwise, however, where the words were "all my estate, whether real or personal," that the deviser had in the

lands. *Ballard v. Carter*, 5 Pick. (Mass.) 112, 16 Am. Dec. 377.

6. *Hopewell v. Ackland*, 1 Comyn. 168.

7. *Piatt v. Sinton*, 37 Ohio St. 353; *Denn v. Hood*, 7 Taunt. 35, 2 E. C. L. 35; *Bridgewater v. Bolton*, 6 Mod. 106; *Doe v. Wright*, 8 T. R. 64; *Morrison v. Semple*, 6 Binn. (Pa.) 94. See also *Roseboom v. Roseboom*, 81 N. Y. 356; *Jackson v. Babcock*, 12 Johns. (N. Y.) 389; *Lambert v. Paine*, 3 Cranch (U. S.) 97; *Mundy v. Vawter*, 3 Gratt. (Va.) 518. But compare *Doe v. Harvey*, 4 B. & C. 610, 10 E. C. L. 419.

8. *French v. M'Ilhenny*, 2 Binn. (Pa.) 13.

9. *Tanner v. Wise*, 3 P. Wms. 295.

10. *Pitman v. Stevens*, 15 East 505. Compare *Monk v. Mawdsley*, 1 Sim. 286; *Chamberlain v. Owings*, 30 Md. 454.

11. *Huxstep v. Brooman*, 1 Bro. C. C. 437; *Davenport v. Coltman*, 9 M. & W. 481.

12. *Godfrey v. Humphrey*, 18 Pick. (Mass.) 537, 29 Am. Dec. 621; *Bacon v. Woodward*, 12 Gray (Mass.) 379; *Morrison v. Semple*, 6 Binn. (Pa.) 94; *Carr v. Jeannerett*, 2 McCord (S. Car.) 66.

"All my real property," *Nicholls v. Butcher*, 18 Ves. Jr. 193.

13. *Den v. Sayre*, 3 N. J. L. 183.

14. *Barnes v. Patch*, 8 Ves. Jr. 604; *Woollam v. Kenworthy*, 9 Ves. Jr. 137. See also *Wilde v. Holtzmeier*, 5 Ves. Jr. 811. This language was held to pass realty in *Andrews v. Brumfield*, 32 Miss. 117; *Hogan v. Jackson*, Cowp. 299; *Stokes v. Salomons*, 4 Eng. L. & Eq. 133.

15. *Bowman v. Milbanke*, 1 Lev. 130, T. Raym. 97.

16. *Henderson v. Farbridge*, 1 Russ. 479.

17. *Farish v. Cook*, 78 Mo. 212.

18. *Doe v. Morgan*, 6 B. & C. 512, 13 E. C. L. 239; *Mayo v. Carrington*, 4 Call (Va.) 472, 2 Am. Dec. 580; *Harrell v. Hoskins*, 2 Dev. & B. (N. Car.) 479; *Jackson v. Housel*, 17 Johns. (N. Y.) 281; *Laing v. Barbour*, 119 Mass. 523; *Fogg v. Clark*, 1 N. H. 167.

19. *Scott v. Alberry*, 1 Comyn. 337.

"all I am worth,"¹ "all and every my property,"² "all my temporal estate,"³ "all the rest,"⁴ "all that I may die possessed of."⁵ The words, "all I have,"⁶ are sufficient to carry real estate unless the context shows a different intent. But though "all his estate," will pass everything a man has, if the word "all" is coupled with the word "personal," or a local description, then the gift will pass only personalty or the specific estate particularly described.⁷

Wills—Additional Words of Description.—Where the principal description purports to be of all of any property described, any additional description apparently designed to apply to the same property, but which proves to be only partially true, will not be construed to restrict the grant to a portion of the property, but all will pass. It would be otherwise, should the additional expressions upon their face purport to be qualifications or limitations of a preceding general description.⁸

III. PHRASES IN WHICH THE TERM OCCURS.—In the notes will be found the interpretation and meaning of some technical phrases in which the term occurs.⁹

1. *Huxstep v. Brooman*, 1 Bro. C. C. 437. But such a devise will not pass land which belonged to testator's wife. *Mitchell v. Mitchell*, 1 Ired. (N. Car.) 257.

2. *Doe v. Langlands*, 14 East 370; *Rosseter v. Simmons*, 6 S. & R. (Pa.) 452.

3. *Tanner v. Wise*, 3 P. Wms. 295.

4. *Attree v. Attree*, L. R. 11 Eq. 280. So of the words "all that I possess indoors or out-of-doors." *Tolar v. Tolar*, 3 Hawks. (N. Car.) 74, 14 Am. Dec. 575.

5. *Monk v. Mawdsley*, 1 Sim. 286; *Tolar v. Tolar*, 3 Hawks. (N. Car.) 74, 14 Am. Dec. 575. And see *Noel v. Hay*, 5 Madd. 38.

6. *Doe v. Morgan*, 6 B. & C. 518, 13 E. C. L. 240.

7. *Hogan v. Jackson*, Cowp. 306; *Cook v. Jaggard*, L. R. 1 Exch. 125; *Thomas v. Phelps*, 4 Russ. 348; *Wilce v. Wilce*, 5 M. & P. 682; *Evans v. Jones*, 46 L. J. Exch. 280; *Day v. Dameron*, 12 Sim. 200; *Davenport v. Coltman*, 12 Sim. 588; *Monk v. Mawdsley*, 1 Sim. 286; *Stroud Jud. Dict.*

8. *Drew v. Drew*, 28 N. H. 489; *Worthington v. Hylyer*, 4 Mass. 205; *Goodtitle v. Southern*, 1 M. & S. 299.

"Such are the cases, 2 Edw. IV. 27, 'all his land in D. called N.;' *Goodtitle v. Southern*, 1 M. & S. 299, 'all that my farm, called Trogue's farm;' *Doe v. Jersey*, 1 B. & Ald. 550, 'all that my B. F. estate;' *Lodge v. Lee*, 6 Cranch (U. S.) 237, 'all that tract or upper island called Eden;' though in these cases the property is also designated by name; *Stukely v. Butler*, Hob. 169, 'all woods, etc., growing upon the whole manor of C.;' *Harrington v. Pole*, Dyer 77, b., 'all lands belonging to the late monastery of B.;' *Hill v. St. John*, 3 Bro. P. C. 375, 'all the messuages and advowsons;' etc.; *Marshall v. Hopkins*, 15 East 309, 'all my messuages with all my lands;' etc.; *Swift v. Evers*, 2 Rolls. Abr. 52, 'all the tithes pertaining to — rectory;' *Strutt v. Finch*, 2 Sim. & St. 229, 'all my copyhold messuages, lands, etc., whatsoever and wheresoever;' *Oxenforth v. Cawkwell*, 2 Sim. & St. 558, 'all my copyhold messuages;' *Worthington v. Hylyer*, 4 Mass. 196, 'all that my farm of land in W. on

which I now dwell,' etc.; *Cutler v. Tufts*, 3 Pick. (Mass.) 272, 'one moiety of certain lands,' etc.; *Thatcher v. Howland*, 2 Met. (Mass.) 41, 'all my real property or homestead, so called in D.;' *Field v. Huston*, 21 Me. 69, 'all the land I own in said town;' *Hibbard v. Hurlburt*, 10 Vt. 173, 'all the tracts, etc., which were left me by my said husband;' *Ela v. Card*, 2 N. H. 175, 9 Am. Dec. 46, 'the whole of lot No. 14,' etc. *Drew v. Drew*, 28 N. H. 512.

9. **All Faults.**—See also the title IMPLIED WARRANTY.

"The meaning," says *Heath, J.*, in *Pickering v. Dowson*, 4 Taunt. 779, "of selling with all faults is, that the purchaser shall make use of his eye and understanding to discover what faults there are." See also *Smith v. Richards*, 13 Pet. (U. S.) 41.

In *Schneider v. Heath*, 3 Campb. 506, *Mansfield, C. J.*, says: "The words ['that is, with all faults as they lie'] are very large to exclude the buyer from calling upon the seller for any defect in the thing sold; but if the seller was guilty of any positive fraud in the sale, these words will not protect him. There might be such fraud, either in a false representation, or in using means to conceal some defect. I think the particular is evidence here, by way of representation, that states the hull to be nearly as good as when launched, and that the vessel required a most trifling outfit. Now, is this true or false? If false, it is a fraud, which vitiates the contract. What was the fact? The hull was wormeaten, the keel was broken, and the ship could not be rendered seaworthy without a most expensive outfit. The agent tells us he framed this particular without knowing anything of the matter. But it signifies nothing, whether a man represents a thing to be different from what he knows it to be, or whether he makes a representation which he does not know at the time to be true or false, if in point of fact it turns out to be false."

If goods are sold with "all faults," parol evidence is admissible to show that these words have a well-established meaning in the trade in such goods, and what that meaning

ALLEGED.—"Alleged" means as charged or stated.¹

ALLEGIANCE. (See also the titles ALIENS; ESCHEAT; DENIZATION; CITIZENSHIP; NATURALIZATION.)—"Allegiance," otherwise called "ligeance," is the obligation or tie existing between the sovereign and the subjects of any given state, and may be described as the lawful and faithful obedience and duty which the subjects of every state owe to the state or its head in return for the protection which the state affords to them.² Allegiance is of four kinds, namely; (1) natural allegiance—that which arises by nature and birth; (2) acquired allegiance—that arising through some circumstance or act other than birth, *e. g.*, by denization or naturalization; (3) local allegiance—that arising from residence simply within the country, for however short a time; and (4) legal allegiance—that arising from oath, taken usually at the town or leet, for by the common law the oath of allegiance might be tendered to every one upon attaining the age of twelve years.³

is. But the phrase "with *all* faults" cannot be limited to *all* such faults or defects as the thing described ordinarily has. That would be to deprive it of force entirely. Its meaning is, such faults or defects as the article sold might have, retaining still its character and identity as the article described. *Whitney v. Boardman*, 118 Mass. 242.

In *Shepherd v. Kain*, 5 B. & Ald. 240, 7 E. C. L. 82, cited in *Henshaw v. Robins*, 9 Met. (Mass.) 83, 43 Am. Dec. 367, it was held that in the sale of a copper-fastened vessel "with *all* faults," the term meant such faults as a copper-fastened vessel might have, but that it would not cover the sale of a vessel not copper-fastened.

All Fours.—Two decisions or cases which are alike in all material respects are said to run upon "all fours."

1. *Watt v. People*, 126 Ill. 33.

2. *Calvin's Case*, 7 Coke 1; 6 Jac. 1.

"Ligeance is a true and faithful obedience of the subject due to his sovereign." *Calvin's Case*, 7 Coke 8; *State v. Hunt*, 2 Hill (S. Car.) 1.

3. *Brown's Law Dict.* (Sprague's ed.); 8 Opin. Atty.-Gen. 139; 9 Opin. Atty.-Gen. 356.

The obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign, in return for the protection he receives. It may be an absolute and permanent obligation, or it may be qualified and temporary. *Carlisle v. U. S.*, 16 Wall. (U. S.) 147.

Allegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is; and **allegiance** by birth is that which arises from being born within the dominions and under the protection of a particular sovereign. Two things usually concur to create citizenship: *First*, birth locally within the dominions of the sovereign; and *second*, birth within the protection and obedience, or in other words, within the ligeance, of the sovereign. That is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from, and consequently owe obedience or allegiance to, the sovereign, as such, *de facto*. There are some exceptions which are founded

upon peculiar reasons, and which, indeed, illustrate and confirm the general doctrine. Thus, a person who is born on the ocean is a subject of the prince to whom his parents then owe **allegiance**; for he is still deemed under the protection of his sovereign, and born in a place where he has dominion in common with all other sovereigns. So the children of an ambassador are held to be subjects of the prince whom he represents, although born under the actual protection and in the dominions of a foreign prince. *Inglis v. Sailor's Snug Harbor*, 3 Pet. (U. S.) 155.

Allegiance is a tie or *ligamen* which binds the subject to the king in return for that protection which the king affords the subject. It denotes the duty of the citizen to the government. *State v. Hunt*, 2 Hill (S. Car.) 1.

Faalty.—See also **FEALTY**.

Allegiance is also often spoken of as **faalty**. *Wallace v. Harmstad*, 44 Pa. St. 501.

By whom Due.—"As to **allegiance**, it is indeed due from every citizen to the state, but it is a political obligation, and is as binding on him who enjoys the protection of the commonwealth, without owning a foot of soil, as on him who counts his acres by hundreds and thousands. So also it is due to the Federal Government, through which none of our titles have been derived. The truth is, that this obligation, which is reciprocal to the right of protection, results out of the political relations between the government and the citizen, and bears no relation whatever to his land titles any more than to his personal property." *Wallace v. Harmstad*, 44 Pa. St. 501.

Kinds of Allegiance.—In *Jackson v. Goodell*, 20 Johns. (N. Y.) 188, *Spencer, C. J.*, citing 1 Bl. Comm. 366, says: "'**Allegiance** is the tie or *ligamen* which binds the subject to the king, in return for that protection which the king affords the subject.' **Allegiance**, both express and implied, is of two sorts—the one natural, the other local; the former being perpetual, the latter temporary. **Natural allegiance** is such as is due from all men born within the king's dominions, immediately upon their birth, for immediately upon their birth they are under the king's protection. **Natural allegiance**, he [Blackstone] says is perpetual, and for this reason

At common law, allegiance due to the state of one's birth could not be renounced without the consent of the sovereign.¹ But now, by statute in the *United States* and in *England*, the subject may change his allegiance at will.²

ALLEY.—An alley is a narrow passage or way in a city, as distinguished from a public street.³ The proper uses of such passages are quite as familiar as those of streets, so that the word "alley" has a definite meaning.⁴

The Term Relates to a City.—The words, "streets and alleys," relate exclusively to the ways or thoroughfares of towns and cities.⁵

ALLOCATUR. (Lat., "it is allowed.")—A word formerly written on a writ or order, by the judge granting the same, to signify his approval; hence, the term by which the master's or prothonotary's allowance of a sum referred to his consideration is called, whether touching costs, damages, or matter of account.⁶

Especially used in modern English practice to signify the certificate of a master as to the result of a taxation of costs.⁷

ALLOCUTION. (See also title SENTENCE.)—Allocution is the formal address of the judge to the prisoner, asking him why sentence should not be pronounced.⁸

evidently founded on the nature of government; that *allegiance* is a debt due from the subject, upon an implied contract with the prince, that so long as the one affords protection, so long the other will demean himself faithfully. Natural-born subjects have a great variety of rights, which they acquire by being born within the king's ligeance, which can never be forfeited, but by their own misbehavior; but the rights of aliens are much more circumscribed, being acquired only by residence, and lost whenever they remove. 'If an alien,' he [Blackstone] says, 'could acquire a permanent property in lands, he must owe an *allegiance* equally permanent to the king, which would probably be inconsistent with that which he owes his natural liege lord; besides, that thereby the nation might, in time, be subject to foreign influence, and feel many other inconveniences. It is on these principles that an alien, when he purchases lands, cannot hold them, if the government see fit to proceed for an escheat, and that he is absolutely precluded from taking by descent, having no heritable blood.'

1. **Renunciation of Allegiance.**—1 Bl. Comm. 369; 2 Kent's Comm. 449; 8 Op. of Atty.-Gen. 139; 9 Op. of Atty.-Gen. 356. See also the titles EXPATRIATION; NATURALIZATION.

2. U. S. Rev. Stat., §1999; St. 33 Vict., c. 14, May 10th, 1870.

3. *Winston v. Johnson*, 42 Minn. 398.

The word *alley* when not qualified by the term "private," is conventionally understood, in its relation to towns or cities, to mean a narrow street in common use. *Bailey v. Culver*, 12 Mo. App. 183.

4. *Paul v. Detroit*, 32 Mich. 112, citing *Tillman v. People*, 12 Mich. 401; *People v. Jackson*, 7 Mich. 432, 74 Am. Dec. 729; *Jackson v. People*, 9 Mich. 111, 77 Am. Dec. 491.

5. *Debolt v. Carter*, 31 Ind. 367.

Obstruction.—See also the titles ABUTTING OWNERS, vol. I, p. 224; STREETS AND SIDEWALKS.

In *Beecher v. People*, 38 Mich. 291, 31 Am. Rep. 316, the court said: "The finding, if otherwise correct, shows no obstruction. Assuming that *alleys* may, under some circumstances, involve public easements in the nature of ways, yet their primary purpose, even then, is not to be substitutes for streets, but to serve as means of accommodation to a limited neighborhood for chiefly local convenience. Nothing can be treated as a punishable obstruction that does not interfere with its accustomed uses. It cannot be said that covering it in by a roof is necessarily any obstruction whatever."

An Alley is a Road.—*Sharett's Road*, 8 Pa. St. 92.

Term does Not Include Street.—In *Matter of Woolsey*, 95 N. Y. 140, it was held that the term *alley* as used in the constitution did not include "street." The court said: "Although the word *alleys* has reference more particularly to narrow passages in cities, yet, of itself, it furnishes no reason for claiming that streets were embraced within the provision."

Whether a Highway.—In *Paul v. Detroit*, 32 Mich. 108, it was held that an *alley* is not a highway in the proper sense of the term. It is for the convenience of adjacent property, but not for general travel or passage like streets.

Alleys Are Not Public Highways, and cannot be governed by the same rule. They are for the accommodation of abutting owners, but the public has no general right of way through them. *Bagley v. People*, 43 Mich. 355, 38 Am. Rep. 192; *Horton v. Williams*, 99 Mich. 427. See the title ABUTTING OWNERS, vol. I, p. 224.

Dedication.—As to the platting of a town, giving the public the right to the use of alleys, see *Hatton v. Chatham*, 24 Ill. App. 622. And see generally the title DEDICATION.

6. Lee's Dict.

7. Archb. Pr. 129.

8. *State v. Ball*, 27 Mo. 326.

ALLODIAL.—For a full discussion of the question by what tenure, whether feudal or allodial, land is held in each of the several states, see the title **REAL PROPERTY**.

I. DEFINITION.—As applied to lands, “allodial” signifies, “held by an absolute ownership, without recognizing any superior to whom any duty was due on account thereof;” as distinguished from feudal, where the property in lands was held to reside in the king or lord paramount, who granted out the use thereof to others, who were permitted to hold them upon condition of performing certain duties and services for their superior.¹

II. INCIDENTS.—Allodial lands, or boc-lands as they were called, were alienable at the will of the owner, by sale, gift, or last will. They were liable for his debts, and descended, if undevise, to his heirs without respect to primogeniture. They might be granted absolutely, or for a limited interest, on any conditions or services the grantor thought proper, and for any estate, to take effect at once, or at a future time, or on the happening of some event. They were frequently entailed, and marriage settlements thereof were also common. They were conveyed by the delivery of a symbol of possession, as a twig or turf; or by a writing or charter, called a land-boc, which was generally deposited in a monastery for safe-keeping.²

III. HISTORY.—The tenures existing throughout civilized Europe before the introduction of the feudal system were allodial. In England they were not abolished entirely till the time of the Conqueror, who introduced the system of feuds in its rigor. By the statute of 12 Car. II. most of the existing feudal tenures, and the services incident thereto, were swept away, and free and common socage became, and continues to be to this day, the principal kind of tenure, the whole system being thus feudal, at least in theory.³ The charters of the early colonies (among them Massachusetts, Rhode Island, Connecticut, Pennsylvania, Maryland, Virginia, the Carolinas, and Georgia) generally prescribed that lands should be held of the crown, “in free and common socage, and not *in capite* by knight-service,” and in them this tenure differed from allodial only in recognizing in theory the doctrine of fealty.⁴ Since the Revolution, however, the tenures in most of the states have been rendered by statute or declared by the courts allodial,⁵ although many names and even rules of purely feudal origin still exist, principally in the forms and methods of conveyance.⁶

ALLODIUM. (See also **ALLODIAL**.)—Allodium is the land possessed by a man in his own right, without owing any rent or service to any superior.⁷

ALLONGE. (See also the title **BILLS AND NOTES**.)—A paper attached to, and made a part of, a promissory note or bill of exchange, on which an indorsement may be written whenever, for some reason, it is inconvenient to

1. 1 Washb. on Real Prop. (4th ed.) 16-18.

Allodial Land is that whereof the owner had the complete and absolute property, free from all services to any particular lord. Wallace v. Harmstad, 44 Pa. St. 499.

2. See, on this subject, 1 Spence Eq. Juris. 19-125; Digby on Real Property, c. 1, § 1.

3. 2 Black. Com. 47, 77-79.

4. Williams on Real Prop. (6th ed.) 6, note.

5. (See, for full discussion, the title **REAL PROPERTY**.)—In *Louisiana* (Xiques v. Bujac, 7 La. Ann. 498); *Pennsylvania* (Wallace v. Harmstad, 44 Pa. St. 500); *Virginia* (Acts of 1785); *Maryland* (Matthews v. Ward, 10 Gill & J. (Md.) 443); *New York* (Const. of 1846, art. 1, §§ 12, 13; Cornell v. Lamb, 2 Cow. (N. Y.) 652; Van Rensselaer v. Hays, 19 N. Y. 92); *Connecticut* (Rev. Laws 1849, p.

454); *Wisconsin* (Rev. Stat. 1849, art. 1, § 14. See Barker v. Dayton, 28 Wis. 367); *New Jersey* (Rev. Stat. 1877, p. 166, § 73).

6. See 2 Shars. Black. Com. 77, note; 1 Smith's Land. & Ten. (Morris's ed.) 6, note.

Wisconsin.—*Allodial*, as used in Wisconsin Const., art. 1, § 14, means free; not subject to the burdens and restrictions on alienation connected with feudal tenures. The section does not prohibit the legislature from regulating conveyances, or dower, or other rights growing out of the domestic relations. Barker v. Dayton, 28 Wis. 367. See also the title **REAL PROPERTY**.

7. McCartee v. Orphan Asylum Soc., 9 Cow. (N. Y.) 513, 18 Am. Dec. 516, citing 2 Bl. Com. 104.

write on the back of the note the contract between the parties, while at the same time that contract is one which, if on the note, would pass the title.¹

ALLOPATHIC MEDICINE. (See generally the title PHYSICIANS AND SURGEONS.)—See note 2.

ALLOT—ALLOTMENT.—To “allot,” means to set apart a thing to a person as his share, as to allot a fund or land.³

To “allot” is usually understood as meaning to set apart a portion of a particular thing or things to some person.⁴

Allotment is the setting apart and apportioning of the property held formerly by joint owners, so that each one may hold in severalty his own specific share;⁵ also the portion so set apart.⁶

1. *Crosby v. Roub*, 16 Wis. 626, 84 Am. Dec. 720. See also *Folger v. Chase*, 18 Pick. (Mass.) 63; *French v. Turner*, 15 Ind. 61; *Osgood v. Artt*, 17 Fed. Rep. 577; *Crutchfield v. Easton*, 13 Ala. 338; *Fountain v. Bookstaver*, 141 Ill. 461.

Webster defines the word *allonge* to mean a paper attached to a bill of exchange for receiving indorsements too numerous to be written on the bill itself. *Doll v. Hollenbeck*, 19 Neb. 643.

“It is not necessary, however, that the indorsement should be upon the original bill or note, in order to constitute it such in the full sense of the term. It sometimes happens that by rapid circulation from hand to hand the back of the paper is completely covered by indorsements; and, in such cases, the holder may tack or paste on a piece of paper sufficient to bear his own and subsequent indorsements, and thereon the indorsements may be made. Such addition to the original instrument is called an *allonge*, and it becomes, for the purposes above named, incorporated as a part of it.” *Doll v. Hollenbeck*, 19 Neb. 643, citing *Daniel on Neg. Instruments*, § 690.

Physical impossibility.—All the cases where the question is raised, and all elementary writers, concur in saying that an indorsement may be made on another paper attached to, and made a part of, the note. Such paper is called an *allonge*. And it is true that the usual reason stated for using such a paper is, that there is no longer room on the note to make the indorsement. But this does not mean that there must be an actual physical impossibility to write the indorser's name on the original paper. On the contrary, the usage of the mercantile law is, as Chief Justice Marshall says, “founded in convenience.” And all that its spirit or its letter requires is, that when it is inconvenient to write on the back of the note the real contract between the vendor and the vendee, which, if so written, would pass the title, it may be written on another paper and attached to it with like effect. Thus, suppose the consideration for the ordinary indorsement was a sale of real estate, and the parties desired to express the consideration, it might be wholly unnecessary, yet no one could question their right to do so. *Crosby v. Roub*, 16 Wis. 616, 84 Am. Dec. 720.

2. In *Bradbury v. Bardin*, 34 Conn. 452, the question was of fraud in the sale of the defendant's business as a physician, the declara-

tion alleging that the defendant falsely represented his practice to be the regular *allopathic* practice. The court said: “*Allopathic* practice and legitimate business, in the connection in which they are used, mean the ordinary method commonly adopted by the great body of learned and eminent physicians, which is taught in their institutions, established by their highest authorities, and accepted by the larger and more respectable portion of the community. By eclectic practice, without imputing to it, as the counsel for the plaintiff seem inclined to, an odor of illegality, we presume is intended another and different system, unusual and eccentric, not countenanced by the classes before referred to, but characterized by them as spurious and denounced as dangerous. It is sufficient to say that the two modes of treating human maladies are essentially distinct, and based upon different views of the nature and causes of diseases, their appropriate remedies, and the modes of applying them.” See also *Bradbury v. Bardin*, 35 Conn. 582.

3. *Fort v. Allen*, 110 N. Car. 190. And in that case it was said, that *allotted* in itself implied a full partition of the land.

4. *Glenn v. Glenn*, 41 Ala. 571.

5. *Rapalje & Lawrence Dict.*; *Glenn v. Glenn*, 41 Ala. 577.

6. See General Enclosure Act, 8 & 9 Vict., c. 118, §§ 72, 73, 74.

“**Allot and Award.**”—By an Inclosure Act the commissioners were required to “set out, allot, and award” to the improper rectors and curate, in lieu of tithes, etc., certain plots out of the commons, and to distinguish and separate the several *allotments*; and “the same *allotments*” were declared to be in full discharge of all tithes. It was held that this latter phrase referred to and included the award, and that the tithes were not extinguished by setting out and *allotting* the lands without an award. *Ellis v. Arnison*, 5 B. & Ald. 47.

But where there was a provision that the portions which, by the act, were to be “*allotted* and awarded,” immediately after such *allotments* were made should “be, remain, and enure to the several persons to whom the same shall be respectively *allotted*, who shall from thenceforth stand and be seised and possessed thereof to such and the same uses” as the lands in lieu of which such *allotments* were made, it was held that one who was seised in fee of this latter land became so of the former immediately after the *allotment*

ALLOTMENT-NOTE.—In merchant-shipping, a note made by a seaman stipulating for the payment of his wages by his employers to certain persons, in fixed instalments, at particular times.¹

ALLOW. (See also ALLOWANCE; SUFFER; PERMIT.)—To allow, in its ordinary sense, means “to grant,” “to admit,” “to afford,” or “to yield,” “to grant license to,” “to permit.”²

To allow has been defined as “to suffer,” “to tolerate.”³

and before execution of the award. *Doe v. Saunder*, 5 Ad. & El. 664, 31 E. C. L. 404.

Indian Treaty.—An Indian treaty provided for the location and allotment of lands for the benefit of Indians. In *Johnson v. McGehee*, 1 Ala. 187, it was held that the location or allotment is the mode by which the proper executive officer determines that the choice of land made by the tribe is approved, and that the lands are not subject to other claims.

In treaties made with reference to lands guaranteed to the Indians, allotted was said to indicate not “a favor conferred,” but “a right acknowledged.” *Worcester v. Georgia*, 6 Pet. (U. S.) 582.

Of Shares in a Corporation. (See also the title STOCK AND STOCKHOLDERS.)—This takes place where shares in excess of the amount authorized in the charter are subscribed for and an apportionment is provided for by law, the contract being incomplete and the subscribers not being present shareholders until such allotment has been made. Where there is no such provision, all subscriptions beyond the authorized number are void *ab initio*. *Walker v. Devereaux*, 4 Paige (N. Y.) 229; *Crocker v. Crane*, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228. See *Buffalo, etc., R. Co. v. Dudley*, 14 N. Y. 336; *Danbury, etc., R. Co. v. Wilson*, 22 Conn. 436.

Allotment of Dower. (See also the title DOWER.)—Where the constitution gave the Probate Court jurisdiction in “all matters of the allotment of dower,” allotment was defined as “an apportionment of the interest of one or more parties entitled to a share of the estate,” and the clause was held not to confer jurisdiction over the “rights of strangers claiming title to the land adversely to the deceased and his representatives.” *Jiggitts v. Bennett*, 31 Miss. 610.

“Allot” and “Allow.”—It was provided by statute that if a widow’s separate estate should be less than her dower interest in, and distributive share of, her husband’s estate, so much “must be allowed her” as, with her separate estate, would be equal to her dower and distributive share. It was held that “allowed” was an appropriate word where an allowance of money is made in lieu of dower, or as compensation, and that if allotted had been used it would have meant that she should have had the balance due her in land. “To allot is usually understood as meaning to set apart a portion of a particular thing or things to some person,” while “allowed means something substituted by way of compensation for another thing.” *Glenn v. Glenn*, 41 Ala. 571.

1. MacLachlan on Merch. Ship. 207.

2. Doty v. Lawson, 14 Fed. Rep. 901. And

in that case it was held, where the vendors contracted that they would not construct, or allow to be constructed, a dam or other improvement below the water power conveyed, that it was not a breach of such covenant where the land was sold at foreclosure sale, and the government erected a dam.

To permit, consent to, or approve, as an account; to admit the validity of something contested between the parties, as a demurrer or plea, an appeal, exceptions, a claim against an estate in administration; to permit to have, as costs, compensation; to give a fit portion out of a larger property or fund, as alimony, a sum for maintenance, etc. *Rapalje and Lawrence Dict.*; *Abbott’s Law Dict.*

3. *Gregory v. U. S.*, 17 Blatchf. (U. S.) 330.

Allow or Permit.—To support a plea that the trustees under a private act of Parliament did not “allow or permit” the defendant to exercise a certain exclusive right, it is necessary to prove some positive act of obstruction on their part, and it is not enough to prove that a third party took it away, he having a right to it. *Townson v. Green*, 2 C. & P. 110, 12 E. C. L. 49.

Same—In a Repealing Act.—An act repealing all acts “permitting” a certain thing to be done was held to repeal an act containing a proviso that nothing contained therein “shall prohibit” any person from doing the thing referred to, and it was said that allowing would have had the same force. *Huxham v. Wheeler*, 3 H. & C. 75.

Contract—I Allow to Give.—The words “I allow to give W. J. two hundred and fifty dollars to be paid in two years after date,” written on an instrument, were held to constitute no valid obligation, and to be equivalent to “I intend to give.” *Harmon v. James*, 7 Ind. 263.

“Allow” and “Allot.” (See ALLOTMENT.)—*Glenn v. Glenn*, 41 Ala. 571. In this case allowed was defined to be “substituted by way of compensation for another thing.”

Wills—“I Allow” in the Sense of “I Will.”—The testator, after providing for his wife for life, made the following provision: “After the death of my wife, I allow all my estate to be disposed of at public sale, and as soon as the proceeds of the sale are collected, it is my will that the amount be equally divided among my daughters.” It was held that the words “I allow,” were used in the sense of “I will,” and amounted to a positive direction, which worked an equitable conversion of the real estate. *Ramsay v. Hanlon*, 33 Fed. Rep. 426.

And so, where the testator used the following words with reference to his wife: “And I also allow my son Henry to give her a support off my plantation during her lifetime,” it

ALLOWANCE. (As to claims against decedents, see the title DEBTS OF DECEDENTS. As to allowance to wife and children out of husband's estate, see the title ALLOWANCES; see also ALLOW.)—The act of permitting or admitting the validity of; also, a portion or share given, as to children, married women, guardians, trustees, executors, etc.¹

was held that the word *allow* was expressive of his intention that his son Henry should support his wife during her life, and that Henry took the plantation subject to that charge. *Hunter v. Stembridge*, 12 Ga. 192.

And so, in *Cabeen v. Gordon*, 1 Hill Eq. (S. Car.) 51, it was held that the word *allow* in a will might be construed as synonymous with "direct" or "give" so as to effectuate the intention of the testator. And see *White v. Com.*, 110 Pa. St. 93.

But compare *Payne v. Howard*, 107 Pa. St. 579, where, under the circumstances, *allowed* was held equivalent to "permitted."

Charter-Party—Forty Days shall be Allowed. (See also the titles CHARTER-PARTY; DEMURRAGE.)—Where it was covenanted in a charter-party that "forty days shall be *allowed* for unloading and loading again," it was held that a detention of the vessel beyond that period by reason of the crowded state of the docks was a breach of the covenant. *Randall v. Lynch*, 2 Campb. 352.

Accounts—Examine, Settle, and Allow Accounts. (See also the title COUNTIES.)—The power given to the board of supervisors of a county to "examine, settle, and *allow*" all accounts chargeable against such county involves also the right to reject if sufficient reasons for *allowing* are not presented. *People v. Dutchess County*, 9 Wend. (N. Y.) 508.

Render and Allow. (See also RENDER.)—Where a statute requires an assignee to render an account to the probate judge within six months, this does not require the account to be *allowed* within that time. *Thomas v. Clark*, 65 Me. 296.

Removal of Assignee—Debts Allowed.—Under a statute providing that an assignee may be removed upon the application of a majority of the creditors, who shall also represent a majority in value of the debts *allowed*, it was held that by "debts *allowed*" were meant those *allowed* by the assignor, or assignee, or proved; not those established by judgment or order of court. The court said: "The statute requires that the majority of the creditors should represent a majority in value of the debts *allowed* against said estate. The learned counsel of the respondent contends that this proceeding is premature, because such debts have not been *allowed*. There is no proceeding by our statute for the allowance of any of the debts or claims, except when they are contested. The word *allowed* was evidently an oversight, on the mistaken supposition that the statute provided for it. It must have a reasonable construction, and means *allowed* by the assignor or assignee, or proved, as in the *New York* and *Michigan* statutes. In such sense, all these debts have been *allowed*." *Burt v. Barnes*, 87 Wis. 523.

Allowing All People to Pass and Repass.—It was held, with reference to a deed in which

these words were contained, that the very term *allowing* presupposed "the absence of a right to pass and repass without the permission of the grantee." *Parsons v. Miller*, 15 Wend. (N. Y.) 564.

Verdict Allowed and Recorded.—A statute gave the right to take damages in gross "at any time within three months after the verdict is *allowed* and recorded." It was held, that the verdict was not "*allowed* and recorded" until exceptions taken at the time of trial had been overruled by the Supreme Court, and that an election made within three months of that time, though more than three months after the acceptance of the verdict in the lower court, was not too late. *Hamilton v. Farrar*, 131 Mass. 572.

Interest Allowed. (See also the title INTEREST.)—A territorial law in force in certain counties of the late territory of *Dakota*, which provided that in those counties "it shall be lawful to take, receive, retain, and contract for any rate [of interest] agreed on between the parties," *allowed* and fixed the rate of interest by law in such counties or district, within the meaning of section 5197, Rev. Stat. U. S., which provides that "any association may take, receive, reserve, and charge on any loan * * * interest *allowed* by the laws of the state, territory or district where the bank is located." *Guild v. Deadwood First Nat. Bank*, 4 S. Dak. 566. The court said: "The term 'fixed,' as used in that section, evidently means 'provided by law,' '*allowed* by law,' 'settled or established by law,' and the term *allowed* in the first clause, and the term 'fixed' in the second clause, were used in the national banking act in substantially the same sense. This seems to be the view taken by the Supreme Court of *California*. In *Hinds v. Marmolejo*, 60 Cal. 229, that court says: 'Reading the entire section, and considering the two clauses together, as they must be considered, we are of the opinion that the word 'fixed,' used in the last clause, is used in the same sense as the word *allowed* in the first clause, and that by the words, 'the laws of the state or territory,' is meant statute laws."

1. "The term *allowance* is ordinarily only another name for a gift or gratuity to a child or other dependent." *Taylor v. Staples*, 8 R. I. 170, 5 Am. Rep. 556. And in that case it was held that a credit entered by a father, in account with his son, in these words: "By further *allowance* to pay for house, etc., \$5,000," was not a promise founded on a consideration which could be enforced against the representatives of the father.

Allowances are made by husband to wife, parents to children, the head of a family to its members, superannuated dependents and servants, from the benevolent to the poor, and in cases where the act is discretionary

The word "allowance" means to put upon allowance, to restrain or limit to a certain quantity of provisions or drink.¹

with the donor, as a reward for benefits conferred, or services voluntarily rendered by one to another. *Mangam v. Brooklyn*, 98 N. Y. 596, 50 Am. Rep. 705.

1. *Webst. Dict.*, followed in *Feagin v. Comptroller*, 42 Ala. 516.

"Allowances" of a Soldier.—Forfeiture of the *allowances* of a soldier for desertion was held to include bounty (he having been restored to duty and afterwards honorably discharged). "Under the term *allowances* everything was embraced which could be recovered from the government by the soldier in consideration of his enlistment and services, except the stipulated monthly compensation designated as pay." *U. S. v. Landers*, 92 U. S. 77.

Alimony—"Allowances" to a Wife. (See also the titles *ALIMONY*, p. 91; *ALLOWANCES*, p. 156.)—The chancellor was authorized by statute, upon granting a divorce, to "decree the wife an *allowance* out of the estate of the husband." It was held that such allowance passed to her in absolute right as a permanent provision for her support, not liable to increase or diminution. *Smith v. Smith*, 45 Ala. 264.

Alimony—Whether the Term Allowance Imports a Stated Sum Payable Periodically.—In *Jeter v. Jeter*, 36 Ala. 408, it was contended that the term *allowance* (with relation to an allowance of alimony) *ex vi termini* implied a stated sum to be paid from time to time. Although the court admitted that the term was frequently used in that sense, still it held that it might as well embrace a decree for a sum in gross as for sums payable at stated intervals. See also *Piatt v. Piatt*, 9 Ohio 37; *Robinson v. Robinson*, 79 Cal. 511.

Allowance and Settlement.—Where the certificate of the trial judge and the attestation of the clerk of court showed that a case was properly settled, etc., except that the judge, in his certificate, used the word *allowance* instead of the word "settlement," it was held that the case would be considered as properly settled. *Atchison, etc., R. Co. v. Cone*, 37 Kan. 567.

Executors and Administrators. (See also the title *EXECUTORS AND ADMINISTRATORS*.)—Where a statute declared that after auditing, etc., the accounts of executors, an *allowance* may be decreed, the court said: "The term *allowance*, used in the statute, can mean nothing more than the sanction or approbation which the court gives to acts of the executor or administrator as manifested by his account." *Gildart v. Starke*, 1 How. (Miss.) 457.

Trustees. (See also the title *TRUSTS AND TRUSTEES*.)—Under a statute allowing trustees "just *allowances*," it has been held that they are not entitled to compensation for services rendered in the performance of their trusts, but only to charges and expenses. *State Bank v. Marsh*, 1 N. J. Eq. 288.

Allowances of a trustee, in England, are the expenses and charges to which he may be en-

titled outside of the ordinary fee bill. See *Downing v. Marshall*, 37 N. Y. 390.

With Allowance.—The acceptance of a conveyance and patent of land described in the articles of agreement as containing a certain number of acres "with *allowance*" was considered an agreement on both sides to abide by the estimated quantity in the official survey and patent, "be the same more or less." *McLelland v. Creswell*, 13 S. & R. (Pa.) 143.

Pecuniary.—As to whether an *allowance*, as used in the English Public Health Act of 1875, § 189, includes a pecuniary *allowance*, see *Reg. v. Ramsgate*, 23 Q. B. Div. 66.

See also, as to the meaning of the term in that act, *Edwards v. Salmon*, 23 Q. B. Div. 531; *Burgess v. Clark*, 14 Q. B. Div. 735; *Whiteley v. Barley*, 21 Q. B. Div. 154; *Stroud's Jud. Dict.*

Remuneration for Losses.—A board of county commissioners *allowed* a contractor a sum of money to partly compensate him for losses which he proved to their satisfaction that he had incurred in the erection of county buildings. This was held to fall within a statute permitting *allowances* for voluntary services. The court said: "The case of *Fordyce v. Montgomery County*, 28 Ind. 454, is not, as we think, in conflict with the view which we take here. In that case, the board of commissioners made an order to donate one hundred and twenty-five thousand dollars to a railroad company, to be used in grubbing, bridging, and putting ties on the track of the road. We do not think the donation was an *allowance* within the meaning of the statute above quoted, and, therefore, did not rest in the discretion of the commissioners. One of the definitions of the word *allowance*, as given by Worcester, is 'something conceded as a compensation; abatement; deduction.' The case before us comes within that definition, but a donation to a railroad company does not." *Carroll County v. Richardson*, 54 Ind. 153.

Allowance Distinguished from Salary or Compensation.—The Constitution of *New York* prohibits the legislature from passing a private or local bill "creating, increasing or decreasing fees, percentage or *allowances*, of public officers during the term for which said officers are elected or appointed." It was held that this prohibition applied only to those irregular and uncertain modes of compensating public servants indicated by words of like meaning with fees, percentage, etc., and did not include the fixed salaries of officers. *Mangam v. Brooklyn*, 98 N. Y. 585, 50 Am. Rep. 705. The court in that case said: "To the uses of the words shown by these citations, others of the same character could be made indefinitely, and we have yet to discover any employment of the word *allowance* by law-makers or others which is the exact equivalent of either of the words 'salary' or 'compensation.' Reference to the works of the lexicographers shows Webster's definition to be, 'The act of allowing, granting

or admitting.' 'Permission or license.' 'That which is allowed; a portion appointed; a limited quantity of meat and drink when provisions fall short.' 'A customary deduction from the gross weight of goods.' The substance of the definitions in Crabbe's English Synonyms, is that an allowance is gratuitous; it ceases at the pleasure of the donor. Stipends and salaries are the requital of some supposed service, and are paid yearly or at even portions of a year, and are the subject of contract between the parties. Worcester gives a definition similar to that of Crabbe, but refers to the word 'salary' as one of the synonyms of *allowance*, distinguishing them, however, by stating that the latter is gratuitous and the former a stated compensation, payable under a contract. Richardson's English Dictionary gives, 'to permit, to concede, to suffer, to assent, to yield.' Other lexicographers give definitions similar to those of Worcester and Crabbe, and seem to exclude the idea that the terms are analogous, except, perhaps, in a very loose and imperfect sense. It would seem from the foregoing illustrations that the word *allowance* has a plain, definite and precise meaning attached to it by authors and law-makers, and the duty of the court to enforce it as it reads is clear and unmistakable. We have no power, and it is not our office, to stretch the meaning of words used, for the purpose of covering an object which we have no other means of determining to have been within the contemplation of the authors of the constitution, than that of the language employed by them. It, therefore, seems to us not only a reasonable but a necessary inference from the invariable use by the authors of the constitution of the words 'salary' and 'compensation' when referring to that kind of payment made to public officers by way of salary, and their deliberate exclusion from the clause in question, that they did not intend to include salaried officers within its meaning."

Rent—Whether an Allowance in Addition to Salary.—A demise of rooms is a "bargain or contract" within the meaning of § 193 of the Public Health Act, 1875, and if an officer, employed by a local board constituted under that statute, lets rooms to the board at a rent payable by it to him, although the rooms are used by it in the transaction of its business, he becomes liable to the penalty imposed by that section; for the rent payable by the local board cannot be considered as an *allowance* to the officer in addition to his salary within the meaning of §§ 189, 193, it being unconnected with the performance of any services in the course of his employment under the board. *Burgess v. Clark*, 14 Q. B. Div. 735.

Fees and Allowances.—A statute increased the fees of certain officers "now allowed by law," fifty per cent. The law then prescribed fees and *allowances* to which sheriffs were entitled in criminal cases. It was held that the compensation for victualing prisoners in jail in criminal cases, fell under the head of

allowances, and therefore was not increased. The court said: "Under the head of 'fees and *allowances*' to sheriffs in criminal cases, many items are specified in the statute which we deem it unnecessary to mention in detail. After enumerating them all with particularity, the code specifies in what manner they shall be collected and paid; and in providing for their collection and payment, certain of them are specified as fees only, viz.: 'the fees which accrue against defaulting persons, witnesses and bail;' 'the fees which accrue on the removal of a convict to the penitentiary;' 'the fees for services rendered in each criminal case,' etc.; but the claims of sheriffs for victualing prisoners are not called fees; they are designated as accounts; and a mode is provided for the proof and payment of the accounts due to sheriffs which are payable by the state.' Thus, we have a fair exposition in the act itself of the legislative intent in the use of the phrase 'fees and *allowances*' by which it appears to be reasonably clear and certain that sheriff's accounts for victualing prisoners do not come under the denomination of fees, but fall under the head of *allowances*. The word *allowance* means, according to Webster, 'to put upon allowance, to restrain or limit to a certain quantity of provisions or drink,'" etc. *Feagin v. Comptroller*, 42 Ala. 521.

"Allowance" to Officers.—An act declaring that the county commissioners "shall make no *allowance* not specially required by this act" to certain officers, was held not to prohibit them from allowing the sheriff for fuel furnished to the county jail. The court said: "The word *allowance*, as used in the statute, was not intended to embrace a legal demand which any of the officers named might have against the county, but only such matters as would otherwise, under other laws, have rested in the discretion of the board." *Marion County v. Reissner*, 58 Ind. 260.

Cabin or Other Allowances—Ejusdem Generis.—**Primage.**—A master agreed to accept from the ship-owner a certain sum "for all cabin or other *allowances*." "Other *allowances*" were held rather to refer to *allowances* like cabin and shore money than to those of a different description, and not to prohibit the master from taking primage from the consignee. *Best v. Saunders*, 1 M. & M. 208, 22 E. C. L. 295.

Allowance of the Road.—Plaintiff held under a lease reserving forty pounds per annum in the body thereof, but before the lease was executed, the following words were added, between which and the body of the lease, the signatures were written: "The *allowance* of the road to be made as usual." It had been usual for the lessor to allow the lessee five pounds per annum for so much annually paid by the lessee to a third person, for the use of such road to the demised premises. It was held that this did not reduce the reservation to thirty-five pounds per annum. *Davies v. Stacey*, 12 Ad. & El. 506, 40 E. C. L. 114.

ALLOWANCES.

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CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the titles : ALIMONY; CONFLICT OF LAWS; DIVORCE; DOWER; EXECUTORS AND ADMINISTRATORS; HUSBAND AND WIFE; SUCCESSION.

I. DEFINITION.—Most of the states in the Union have provided by statute for the temporary maintenance of the widow and family of a decedent, out of his estate, until they receive their distributive shares, or until some other provision can be made for their support. This is known as the widow's allowance, to the discussion of which this article is confined.

II. ORIGIN AND NATURE—1. **Origin.**—This allowance is of purely statutory origin,¹ no provision whatever being made by common law for supplying the wants or administering to the necessities of the widow and children immediately after the death of the head of the family.²

2. **Nature.**—The allowance is not intended to compensate the widow for any apparent injustice to which she may, in any case, be exposed by the statute rules of distribution, or by the will of her husband, but merely to furnish her, and the children dependent upon her, with a reasonable maintenance for a short period.³

1. 1 Woerner's Am. Law of Administration, § 77; Schouler's Executors and Administrators, § 448.

2. Hubbard v. Wood, 15 N. H. 74.

Widow's Quarantine.—By Magna Charta (9 Henry III., c. 7), a widow was entitled to remain forty days in her deceased husband's chief mansion house, which was called the

widow's quarantine, within which time her dower was to be assigned to her. 1 Th. Co. Litt. 584; 2 Minor's Inst. 156.

For a full discussion of this subject, see the title DOWER.

3. **Nature of the Allowance**—Connecticut.—Barnum v. Boughton, 55 Conn. 117.

Massachusetts.—Drew v. Gordon, 13 Allen Volume II.

III. BENEFICIARIES—1. Generally.—The statutes differ in the terms used to designate the beneficiaries of the statutory allowance. The words generally used are: "widow," "widow and minor children," "widow and her family," and "surviving family."¹

(Mass.) 120; *Wright v. Wright*, 13 Allen (Mass.) 207; *Hollenbeck v. Pixley*, 3 Gray (Mass.) 521; *Allen v. Allen*, 117 Mass. 27; *Slack v. Slack*, 123 Mass. 443; *Dale v. Hanover Nat. Bank*, 155 Mass. 141; *Lisk v. Lisk*, 155 Mass. 153.

New Hampshire.—*Hubbard v. Wood*, 15 N. H. 74; *Duncan v. Eaton*, 17 N. H. 441; *Mathes v. Bennett*, 21 N. H. 188; *Kingman v. Kingman*, 31 N. H. 182; *Foster v. Foster*, 36 N. H. 437; *Woodbury v. Woodbury*, 58 N. H. 44.

Pennsylvania.—*Hettrick v. Hettrick*, 55 Pa. St. 290.

For Present Support Only.—In *Adams v. Adams*, 10 Met. (Mass.) 170, Shaw, C. J., in delivering the opinion of the court, said: "We are of opinion that this provision is intended for the present relief of the widow, for the maintenance of herself and children; that it is temporary in its nature, and personal in its character, and confers no absolute or contingent right of property which can survive her, or go to her personal representative."

The allowance to a widow is made for her present support; that is, for her support presently upon and immediately after the death of her husband. It is not a free gift to the widow, but is intended to enable her to support herself until her interest in the estate can be set out to her. *Mathes v. Bennett*, 21 N. H. 188.

The *New Hampshire* statute authorizing the judge of probate to make the widow a reasonable allowance out of the personal estate of her deceased husband for her present support, did not intend to give her a share of the estate as heir, but to provide for her support for the time being. *Duncan v. Eaton*, 17 N. H. 441.

It was held in *Illinois*, that the design of the statute was to furnish the necessary sustenance for the household of the decedent for one year from his death, and to enable the widow to keep her domestic circle, as respects the remaining members, unbroken during that time, and the allowance of bedding, furniture, and provisions should be made upon this basis. *Strawn v. Strawn*, 53 Ill. 263.

It was also held in *Vincent v. Vincent*, 1 Heisk. (Tenn.) 333, that the policy of the statute is to keep the family together, at least for a year after the death of the intestate, and to make the widow the head of the family. See also *Bayless v. Bayless*, 4 Coldw. (Tenn.) 359.

Allowance Regarded as an Advancement, if Estate is Solvent.—The exemption of personal property to the value of one thousand dollars to the widow and minor children of a decedent, when selected and allowed, vests in them the absolute title and entire interest in the property so selected and allowed, free from all claims of creditors; but if the estate is solvent, this exemption is in the nature of an advancement to them, to be accounted for by

them on final settlement as parts of their distributive shares, or of their legacies, if there be a will disposing of the entire estate. *Hunter v. Law*, 68 Ala. 365.

1. See *Strawn v. Strawn*, 53 Ill. 263; *Sherman v. Sherman*, 21 Ohio St. 631; *Sawyer v. Sawyer*, 28 Vt. 245.

"Family" Defined.—In *Wilson v. Cochran*, 31 Tex. 677, 98 Am. Dec. 553, the court, in construing the homestead exemption clause of the Texas Constitution, thus defines the word "family": "The constitution protects from forced sale the homestead of a family. This protection requires no aid from legislation. It is made secure by the fundamental law of the state from all invasion by any legal process, and is intended to be made by this constitutional provision, the inviolable sanctuary of the family; not merely the head of the family, but of all its members, whether consisting of husband, wife, and children, or any other combination of human beings living together in a common interest, and having the same common object in their pursuits and occupations. Such a combination of persons thus circumstanced necessarily constitutes a family."

See also *Rock v. Haas*, 110 Ill. 528; *Wade v. Jones*, 20 Mo. 75, 61 Am. Dec. 584; *Marsh v. Lazenby*, 41 Ga. 153; *Connaughton v. Sands*, 32 Wis. 387; *McMurray v. Shuck*, 6 Bush (Ky.) 111, 99 Am. Dec. 662; *Childs v. Jones*, 60 Ala. 352.

What the Family Includes.—The word "family," as used in the *Illinois* statute, does not include alone the widow and minor children of the deceased, but also such persons as constituted the family of the deceased at the time of his death, whether servants, or children who had attained their majority. In this are not to be included boarders, but only the persons constituting the private household of the deceased. *Strawn v. Strawn*, 53 Ill. 263.

By the *North Carolina* statutes, the family of the deceased, for the purposes of allowance, are, besides the widow, every child, either of the deceased or of the widow, and every other person to whom the deceased, or the widow, stood *in loco parentis*, who was residing with the deceased at his death, and whose age did not then exceed fifteen years. *North Carolina Code*, § 2119.

Children of a Former Husband.—Under the *Tennessee* statutes of 1813, c. 119, and 1837, c. 13, the widow is entitled to so much of the estate of her husband as is adequate to the support of herself and family until the expiration of one year after the death of her husband. If she has children who are under age and reside with her, though they be children of a former husband, they are part of her family, within the meaning of the statutes above mentioned. *Sanderlin v. Sanderlin*, 1 Swan (Tenn.) 441.

2. Allowance to Widow Alone.—When the term “widow” is used alone, the award becomes her property, free from all claims of the children,¹ and where the terms used are “widow and children constituting the family of deceased,” the widow is entitled to take, if there be no children.²

1. For Widow's Exclusive Benefit.—*Benjamin v. Laroche*, 39 Minn. 334; *Weaver v. Weaver*, 109 Ill. 225. In this latter case it was held that the children of the deceased, members of the widow's family, have no vested interest in her award; that it is no trust property, held by her for the benefit of the family, but that the language of the statute giving the right very strongly negatives any such hypothesis.

In re Scoville's Estate, 20 Ill. App. 426, it was held that the widow's award becomes her sole and exclusive property forever, and the award, once properly made and approved by the court, cannot be abrogated and a part thereof given to any other member of the family by the court. See also *Mowser v. Mowser*, 87 Mo. 437; *Hastings v. Myers*, 21 Mo. 519.

Widow's Allowance Not Dependent on Existence of a Family.—It was held in *McMahill v. McMahill*, 113 Ill. 461, that the widow's award given by section 74, chapter 3, of the Revised Statutes of *Illinois*, does not depend upon her having a family; that she is entitled to more, however, if she has a family, the amount to be graduated according to the size of the family; but the award, whatever may be its amount, belongs to the widow as her sole and exclusive property, and this being so, she may release her award by accepting another provision in lieu of the same. *Phelps v. Phelps*, 72 Ill. 545, 22 Am. Rep. 149, distinguished.

Widow of an Insolvent Testator.—The widow of an insolvent testator is entitled to the same benefit as the widow of an insolvent intestate as to property exempt from execution. *Pride v. Watson*, 7 Heisk. (Tenn.) 232.

Applicable to All Widows—Tennessee.—The Act of 1842, c. 44, Tenn. Stat., which provides that certain articles of property therein exempted from execution shall be secured to the widow after the death of the husband, and shall not go to the executor or administrator, applies to all widows, irrespective of the value of the estates of their deceased husbands. The property vests, at the death of the husband, in the widow, and no demand is necessary to sustain an action of trover against the administrator or executor who has appropriated it. *Curd v. Curd*, 9 Humph. (Tenn.) 171.

Confined to Widow.—It was held in *Johnson v. Corbett*, 11 Paige (N. Y.) 265, that the widow was entitled to her reasonable sustenance out of the estate of her husband during her quarantine, whether the estate is solvent or insolvent, and that this provision must be confined to her, as no provision is made by law for the children.

Exempt Property Vests in Widow Absolutely.—It was held in *Morris v. Morris*, 9 Heisk. (Tenn.) 814, that, at the death of the husband, the property exempt from execution goes di-

rect to the widow; that the representative has no control of it, and if he interferes with or converts it, he is individually liable as a wrongdoer, but not on his bonds. See also *Kellogg v. Graves*, 5 Ind. 509; *Grafton v. Smith*, 66 Miss. 408; *Whitley v. Stephenson*, 38 Miss. 113.

2. Little v. McPherson, 76 Ala. 552; *Woodbridge v. Woodbridge*, 70 Ga. 733; *Stewart v. Stewart*, 74 Ga. 355; *Kain v. Fisher*, 6 N. Y. 597; *Compton v. Perkins*, 92 Tenn. 715; *Sawyer v. Sawyer*, 28 Vt. 245.

See also *Walley's Estate*, 11 Nev. 260.

Widow the Sole Beneficiary where there Are No Children.—A *Kentucky* statute provides that “if an intestate leaves a widow, the following property shall be set apart by the appraisers of the estate and vest in such widow for the use and benefit of herself and the infant children of the intestate, if any, residing in her family;” and then, after naming the articles, it further provides: “But if there be no such infant children residing with the widow, and there are adult or infant children not residing with her, the provision contained in this section for the widow, or the value of such portion thereof as she receives, shall be charged to her in the distribution.” It was held, under this statute, that the title to such allowance vested in the widow, if there were no infant children residing with her, and no adult or infant children not residing with her. *Newman v. Winlock*, 3 Bush (Ky.) 241.

Widow Not a Technical Trustee.—Under the *Pennsylvania* Act of 1851, which provides that the widow or children of any testator dying within that commonwealth, testate or intestate, might retain real or personal property belonging to the estate to the value of three hundred dollars, it has been held that this amount should be paid directly to the widow, and that she is not a technical trustee; though, in a certain sense, she is a trustee for herself and family, she is not, however, for the adult children who are not members of her family, and that she is responsible only in a court of conscience, the law having left to her discretion the proper use of the fund placed in her hands, declaring only that it is intended for herself and family. *Nevins' Appeal*, 47 Pa. St. 230; *King's Appeal*, 84 Pa. St. 345. See also *Johnson v. Corbett*, 11 Paige (N. Y.) 265.

Allowance Reverts to General Estate if there Are No Children.—The construction placed upon the *Iowa* statute by the Supreme Court of that state is, that it was obviously intended for the benefit of the widow and family of the deceased; not the widow alone, but the widow and children; that the property set apart to the widow, under section 2361 of the Revision, is not absolutely hers, and she has no right to sell the same and receive the proceeds to her own use, but such property, when no longer needed or used by her as the head

3. Allowance to Minor Children.—Many states not only provide an allowance for the widow and the family under her care, but also make an express allowance for the minor children in case of the death of the widow, or where there is no widow.¹

of the intestate family, falls into the general estate of the testator, and is not liable for debts, but is to be distributed according to law. *Wilmington v. Sutton*, 6 Iowa 44; *Schaffner v. Grutzmacher*, 6 Iowa 137; *Gaskell v. Case*, 18 Iowa 147; *Paup v. Sylvester*, 22 Iowa 371; *Meyer v. Meyer*, 23 Iowa 359, 92 Am. Dec. 432.

Nonresident Widow.—The exemption of personal property to the widow and children of decedent by the *Alabama* statute, like the exemption of a homestead, is intended for the benefit of residents, and contemplates the existence of the family relation in that estate; hence, where the decedent died in Alabama, after a residence of several years, while his family continued to reside at his former residence in New York, and never came to Alabama until after his death, it was held that they were not entitled to the statutory exemption of one thousand dollars. *Ex p. Pearson*, 76 Ala. 521. See also *Allen v. Manasse*, 4 Ala. 554.

The same doctrine has been held in *Pennsylvania*. *Coates' Estate*, 12 Phila. (Pa.) 171; *Spier's Appeal*, 26 Pa. St. 233; *Platt's Appeal*, 80 Pa. St. 501; *Monk's Estate*, 9 Montg. Co. L. Rep. (Pa.) 113.

It has, however, been held in *New York* that the provisions of the statute are not confined to cases where the deceased was a resident of that state, and where the intestate died on his way to this country, leaving a widow and minor children in Germany, it was held that they were entitled to the allowance, although they had never even been in the State of New York. *Kapp v. Public Administrator*, 2 Bradf. (N. Y.) 258.

It has also been held in *Louisiana*, where the widow, "if in needy circumstances," is allowed the usufruct of one thousand dollars in lieu of the homestead, that the widow was entitled to this allowance, although neither she nor her children had ever been in Louisiana. The reason given by the court for this was that the *lex domicilii* of the husband controlled. *Christie's Succession*, 20 La. Ann. 383.

It has been held in *Georgia* that on the death of a husband and father residing in that state, his widow and minor children are entitled to a year's support out of his estate as against his creditors, whether resident or nonresident, though his family may never have resided in Georgia, and though they may have lived for a long time separate and apart from him, he having made no provision for them by will or otherwise, in lieu of the statutory allowance for their year's support. *Farris v. Battle*, 80 Ga. 187. See also *Shaffer v. Richardson*, 27 Ind. 122, construing the *Indiana* statute on this point.

Widow of a Nonresident.—In *Tennessee* it has been held that the statute of that state, providing for a year's support for the widow

out of the estate of her deceased husband, does not embrace widows of nonresident decedents. *Graham v. Stull*, 92 Tenn. 673.

The same construction has been placed upon the statutes of *Alabama*, *Massachusetts*, *Mississippi*, *Missouri*, and *North Carolina*. *Auerbach v. Pritchett*, 58 Ala. 451; *Shannon v. White*, 109 Mass. 146; *Barber v. Ellis*, 68 Miss. 172; *Richardson v. Lewis*, 21 Mo. App. 531. See also *Talmadge v. Talmadge*, 66 Ala. 199.

Personal property in *North Carolina* belonging to a deceased citizen of another state is, by comity, disposed of and distributed according to the laws of the latter state. Hence, a widow of such a person is not entitled to have her year's allowance set apart in North Carolina, though she became a citizen of that state after the death of her husband. *Medley v. Dunlap*, 90 N. Car. 527. See also *Munds v. Cassidey*, 98 N. Car. 558, and *Simpson v. Cureton*, 97 N. Car. 112, where the widow of one who died a nonresident of North Carolina applied to a justice of that state, before administration was granted, and had her year's support allowed to her, and it was held that the judgment allowing it was void, and that she was liable for a conversion in an action against her by the administrator.

It was held in *Mitchell v. Word*, 64 Ga. 208, that while, by comity, the wife of a nonresident who died intestate may be allowed to sue in Georgia for her year's support, there being property there of the decedent, especially if there be no debts against the intestate in the state of his residence, yet the amount of her recovery will be regulated by the law of the state of the intestate's domicile.

For a further discussion of this subject, see the title CONFLICT OF LAWS.

1. *Brown v. Walter*, 58 Ala. 310; *Edwards v. McGee*, 27 Miss. 92; *Whitcomb v. Reid*, 31 Miss. 567, 66 Am. Dec. 579; *Alexander's Estate*, 13 Phila. (Pa.) 564; *Rhea v. Greer*, 86 Tenn. 59. See also *Woodbridge v. Woodbridge*, 70 Ga. 733; *Davis v. Gower*, 85 Me. 167; *Carter v. Hinkle*, 13 Ala. 529.

Right of Children in Allowance.—The *Mississippi* statute allowing to the widow and children of a deceased person a year's support out of the estate, vests a substantive right to the same in the children, and if they be not her children, and live separate from her, under the control of their guardian, they will be entitled to have a fair and equitable division of the sum set apart for a year's allowance. *Womack v. Boyd*, 31 Miss. 443.

The special allowance made by the *Illinois* statute for the widow of a deceased person is as much for the advantage of the children of the deceased as for the widow. She has no power to release it, and it cannot in such cases be affected by an ante-nuptial contract. *Phelps v. Phelps*, 72 Ill. 545, 22 Am. Rep. 149. But see *Weaver v. Weaver*, 109 Ill.

Rights in Mother's Estate.—Under some of the statutes the minor child of a

234, where the doctrine laid down in this case is limited.

It was held in *Moore v. Moore*, 60 Cal. 526, that the family allowance is as much for the advantage of the children of the deceased as for the widow, and it cannot be affected by any agreement or understanding between the widow and the administrator which would have the effect to deprive the children of it, or divert it to any other use than that specified in the law.

Widow may Waive Her Rights in Favor of Children.—In *California*, where the widow, having ample means of her own, gives her consent, the whole of the allowance may be assigned for the use and support of the minor children. *Palomare's Estate*, 63 Cal. 402. See also *Roberts v. Messinger*, 134 Pa. St. 298.

Rights of Posthumous Child.—In *Mississippi* a posthumous child of a decedent is entitled to share in the sum allowed for the year's support of the widow and children. *Womack v. Boyd*, 31 Miss. 443.

Where the intestate died childless, but left his widow *enceinte*, and she shortly afterwards gave birth to a child, it was held that the widow was entitled to the benefit of the act allowing widows certain additional property where there shall be infant children of the intestate residing with the widow. *Husbands v. Bullock*, 1 Duv. (Ky.) 21.

Children of Different Mothers.—An administrator on the joint estates of a deceased husband and his first wife cannot appropriate the entire allowance for one year's support made by the court, though furnished from the community property of the first marriage, to the exclusive use of the children of the first marriage, if there are minor children of the deceased husband by a subsequent marriage. *Harmon v. Bynum*, 40 Tex. 325.

Grandchildren.—It is held in *Durkin's Succession*, 30 La. Ann. 669, that the word "children," as used throughout the *Louisiana* Act, are those descriptively mentioned in the first clause as the "minor children of a deceased person," for whose benefit alone the bounty provided by the act was intended, and that the word "children," as there used, should be taken as having the largest import, and as including grandchildren and other descendants who are minors.

It has also been held in *Louisiana* that where a man died, leaving a widow in necessitous circumstances, and an insolvent estate, and the widow died without claiming the one thousand dollars reserved to her by law, and the children of the deceased are all majors, but there are minor grandchildren of the deceased, the offspring of a daughter who died previously to him, his grandchildren are entitled to the one thousand dollars from the succession in preference to the major heirs or creditors. *Vives' Succession*, 35 La. Ann. 371.

Nonresident Minor.—It has been held in *Georgia* that when an intestate dies in that state and administration is granted there upon his effects, his minor child is entitled to

an allowance of a year's support therefrom, although such intestate and his wife, the mother of the child, had been totally divorced, and the child, at the time of making the application for the support, resided with her mother in another state, the custody of such child having been awarded to the mother in the decree for divorce, it appearing that no provision as to alimony was made to the wife and child; that there was no discharge of the father's obligation to support the child and no subsequent marriage by the father, and that the child was his only heir at law. *Maddox v. Patterson*, 80 Ga. 719. See also *Nelson v. Thompson*, 2 Pa. Dist. Rep. 844.

Child of Nonresident.—It has been held in *Illinois* that children of a nonresident are not entitled to the allowance given where there is no widow, as the provisions of the statute are intended to apply to residents only. *Veile v. Koch*, 27 Ill. 129.

Adult Children.—Under the *Alabama* Act of April, 1873, entitled "an act to regulate property exempted from sale for the payment of debts," only children under the age of twenty-one years of age can claim an interest in the exempted personal property. *Thompson v. Thompson*, 51 Ala. 493; *Henderson v. Tucker*, 70 Ala. 381; *Childs v. Jones*, 60 Ala. 352.

This construction has also been placed upon the *Louisiana* statute. *Durkin's Succession*, 30 La. Ann. 669; *Vives' Succession*, 35 La. Ann. 371.

It has also been held in *Pennsylvania* that adult children married, and having maintenance and means of livelihood, are not entitled to the exemption provided by the Act of April, 1851, of that state, for widows and children. *Steel's Estate*, 13 Phila. (Pa.) 398.

See also *Compton v. Perkins*, 92 Tenn. 715.

Adult Child without Means of Support.—It has, however, been held in *Pennsylvania* that the "children" of decedents, who are entitled to the exemption, are not necessarily "minor children," and that an unmarried daughter, without means of support, living with, and dependent upon, her father, is, equally with his minor children, within the letter and spirit of the Act of April 14, 1851. *Halbe's Estate*, 20 Phila. (Pa.) 117; *Young's Estate*, 3 Pa. Dist. Rep. 758; *Barr's Appeal*, 1 Mona. (Pa.) 764.

Vermont—Children over Seven Years of Age.—It was held in *Vermont*, under the Probate Act of 1821, that no allowance could be made for the support of the members of an intestate's family who were over seven years of age. *Mead v. Byington*, 10 Vt. 116.

Children Not Residing with Widow.—It was held in *Alexander v. Alexander*, 86 Ky. 688, that personal property of an intestate set apart by the statute as exempted from distribution is for the exclusive benefit of the widow, where there are no infant children of the intestate residing with her, infant children of the intestate not residing with the widow not being entitled to any part of the property thus set apart, or to any interest therein,

widow, who was a member of her family at the time of her death, is entitled to a year's support out of her estate.¹

Step-children.—It has been held in *Tennessee* that step-children, living with the widow at the time the year's support is assigned, and afterwards taken away from her without her consent, are not entitled to any part of the year's allowance.²

IV. AMOUNT OF ALLOWANCE.—In some states the amount of the allowance is fixed by statute,³ while in other states it is left to the discretion of the probate court,⁴ due regard being taken of the number and condition of the

although they be children by a former marriage, and have no natural mother.

Under the *Indiana* statute, a widow and minor children are entitled to occupy the dwelling-house and adjacent fields, not exceeding forty acres, for one year from the death of the husband, free of rent; and, where the minor children are removed by their guardian, he cannot maintain an action against the widow to recover any part of the rental value of the premises for such year. *Weaver v. Low*, 29 Ind. 57.

1. *Brown v. Hemphill*, 74 Ga. 795; *Lesh v. Wirth*, 14 Ill. 39.

Where the real and personal property of a decedent, who was a widow at the time of her death, was appraised at less than three hundred dollars, and her only surviving child claimed to have the property set aside to her use under the *Pennsylvania* Act of April 14, 1851, which claim the lower court sustained, it was held, on appeal, that the lower court was right in ordering the property to be set apart to the minor child. *Himes' Appeal*, 94 Pa. St. 381, *distinguishing King's Appeal*, 84 Pa. St. 345.

The provisions of the *Missouri* Rev. Stat. 1889, § 110, for exemptions in favor of children under the age of sixteen out of the estate of their mother, apply only when their mother was a widow at the time of her death. *Baer v. Pfaff*, 44 Mo. App. 35.

2. *Vincent v. Vincent*, 1 Heisk. (Tenn.) 333.

3. **Statutes Fixing the Amount.**—*Alabama*.—*Darden v. Reese*, 62 Ala. 311; *Tucker v. Henderson*, 63 Ala. 280; *Hunter v. Law*, 68 Ala. 365; *Henderson v. Tucker*, 70 Ala. 381; *Jenks v. Terrell*, 73 Ala. 238; *Mitcham v. Moore*, 73 Ala. 542; *Loeb v. Richardson*, 74 Ala. 311; *Bell v. Hall*, 76 Ala. 546.

Indiana.—*Kellogg v. Graves*, 5 Ind. 509; *Loring v. Craft*, 16 Ind. 110; *Dunham v. Tappan*, 31 Ind. 173; *Nelson v. Wilson*, 61 Ind. 255; *Whiteman v. Swem*, 71 Ind. 530; *Langley v. Mayhew*, 107 Ind. 198.

Louisiana.—*Aaron's Succession*, 11 La. Ann. 671; *White's Succession*, 29 La. Ann. 702; *DeBoisblanc's Succession*, 32 La. Ann. 17; *Waddell's Succession*, 44 La. Ann. 361.

See also *Marx's Succession*, 27 La. Ann. 99.

Maryland.—*Crow v. Hubard*, 62 Md. 560.

Missouri.—*In re Motier's Estate*, 7 Mo. App. 154.

New York.—*Matter of Durscheidt* (Supreme Ct.), 47 N. Y. St. Rep. 419; *Lyendecker v. Eisemann*, 3 Dem. (N. Y.) 72; *Apple-gate v. Cameron*, 2 Bradf. (N. Y.) 119; *Kelly v. Moore*, 18 Abb. N. Cas. (N. Y. Supreme Ct.) 468.

Pennsylvania.—*Compher v. Compher*, 25 Pa. St. 31; *Detweiler's Appeal*, 44 Pa. St. 243.

Exempt Personal Property.—In *Arkansas*, in addition to her dower, the widow is entitled, by virtue of section 62 of the statute, to certain articles therein enumerated unconditionally, and against the rights of creditors, whether the estate be or be not insolvent. Section 63 gives her one hundred and fifty dollars' worth of the appraised value of the personalty, provided she selects it before sale or distribution. This interest she takes absolutely against the heirs and distributees, but not against creditors. *Hill v. Mitchell*, 5 Ark. 608.

It has been held in *Alabama* that the Orphans' Court has no power to authorize an executor to sell the dead victuals and liquors, laid in by the deceased for consumption in his family, and left at his death, or the property exempt by law from sale, and that the widow may, notwithstanding such authorization, maintain trespass against the executor. Removal of part of the children from the family will not prevent the widow from recovering her share of the dead victuals. *Carter v. Hinkle*, 13 Ala. 529.

Money in Lieu of Specific Articles.—It was held in *Ex p. Reavis*, 50 Ala. 210, that the widow may elect, or the appraisers appointed by the court may allot to her, money instead of other personal property, as exempt from administration.

For a full discussion of this subject, see the title EXEMPTIONS.

4. **Amount within Discretion of Court.**—*California*.—*In re Lux Estate*, 100 Cal. 593. See also *In re Garrity's Estate* (Cal. 1894), 38 Pac. Rep. 628, *affirmed* in (Cal. 1895) 41 Pac. Rep. 485.

Iowa.—*In re Dewell's Estate*, 88 Iowa 14; *McReynolds' Estate*, 61 Iowa 585.

Maine.—*Kersey v. Bailey*, 52 Me. 198; *Gowen, Appellant*, 32 Me. 516; *Walker, Appellant*, 83 Me. 17; *Cooper, Petitioner*, 19 Me. 260.

Massachusetts.—*Hollenbeck v. Pixley*, 3 Gray (Mass.) 521; *Washburn v. Hale*, 10 Pick. (Mass.) 429; *Washburn v. Washburn*, 10 Pick. (Mass.) 374; *Slack v. Slack*, 123 Mass. 443; *Dale v. Hanover Nat. Bank*, 155 Mass. 141; *Wright v. Wright*, 13 Allen (Mass.) 207; *Hale v. Hale*, 1 Gray (Mass.) 518; *Drew v. Gordon*, 13 Allen (Mass.) 120; *Litchfield v. Cudworth*, 15 Pick. (Mass.) 23.

Michigan.—*North v. Van Tassel*, 84 Mich. 69.

New Hampshire.—*Cummings v. Allen*, 34 N. H. 194; *Piper v. Piper*, 34 N. H. 563;

surviving family, and the solvency or the insolvency of the estate.¹

When Whole Estate Allowed.—Under some of the statutes, when the estate of the decedent is very small, not exceeding a fixed amount, the court is authorized to assign the whole thereof for the use and support of the widow and children, after payment of the funeral expenses, and charges of administration.²

Allowance of Whole of Personal Estate.—In one instance the court allowed the widow of an intestate the whole of the personal estate, and directed the charges of administration to be deducted from the proceeds of real estate sold by order of court for the payment of the intestate's debts.³

Amount Regulated by Size of Family at Death of Husband.—Where the purpose of the statute was to provide for the dependent family of the deceased residing with the widow at the death of her husband, and not at the date of her application, and there were, according to the report of the commissioner, two children residing with the widow at the death of her husband, and one died before the application for the year's support was filed, the widow was adjudged entitled to an allowance for two children.⁴

Where Widow's Allowance Exceeds Amount Fixed by Statute.—It has been held that if the widow is allowed, by compromise and agreement with the administrator and distributees, to select and retain property and choses in action of greater value than the statutory allowance, the creditors can only charge the administrator with the excess.⁵

Proceeds of Life-insurance Policy.—It has been held in *Louisiana* that money received by the widow and minor children of a deceased person, from benevolent societies of which he was a member, and due to his family at his death, should be deducted from the amount allowed by law.⁶

Mathes v. Bennett, 21 N. H. 188; *Woodbury v. Woodbury*, 58 N. H. 44; *Kingman v. Kingman*, 31 N. H. 182; *Buffum v. Sparhawk*, 20 N. H. 81; *Duncan v. Eaton*, 17 N. H. 441.

Vermont.—*Richardson v. Merrill*, 32 Vt. 27.
Wisconsin.—*Ford v. Ford*, 80 Wis. 565.

In *Texas* the amount of the allowance is left to the discretion of the court, provided only that in no case shall the allowance exceed one thousand dollars. *Tex. Civ. Stat.*, art. 1985.

And the widow is not entitled to have an heir's allowance assigned to her out of the estate when an adequate provision in lieu thereof has been made by the will of the testator. *Little v. Birdwell*, 27 Tex. 688; *Trousdale v. Trousdale*, 35 Tex. 756.

1. Considerations Determining the Amount.—*In re Stevens' Estate*, 83 Cal. 325; *In re Lux Estate*, 100 Cal. 593; *Cheney v. Cheney*, 75 Ga. 66; *Strawn v. Strawn*, 53 Ill. 263; *Brown v. Hodgdon*, 31 Me. 65; *Gilman v. Gilman*, 53 Me. 184; *Kersey v. Bailey*, 52 Me. 198; *Lisk v. Lisk*, 155 Mass. 153; *Washburn v. Washburn*, 10 Pick. (Mass.) 374; *Duncan v. Eaton*, 17 N. H. 441; *Buffum v. Sparhawk*, 20 N. H. 81. See also *Foster v. Foster*, 36 N. H. 437.

Amount of Widow's Dower a Factor in Fixing Allowance.—In making an allowance to a widow out of the personal estate of her deceased husband, regard must be had to the circumstances of the estate and the amount of her dower. *Duncan v. Eaton*, 17 N. H. 441.

Widow must be Charged with Provisions Consumed.—It was held in *Wells v. Wilder*, 36 Ga. 194, that the statutes allowing a widow

one year's support for herself and minor children, out of the estate of her deceased husband, do not contemplate that she should live at the homestead and consume the provisions belonging to the estate, and have a year's support also allowed. Also, that whenever the widow applies for an assignment of a year's support, she must be charged with the value of what she has previously consumed.

2. When Whole Estate Allowed—Statutes.—*Boyden v. Ward*, 38 Vt. 628; *Palomares' Estate*, 63 Cal. 402; *Hampton v. Physick*, 24 Ark. 561.

In *Georgia*, where the appraisers appointed to set apart a year's support find that the estate is worth less than five hundred dollars, the statute makes it their duty to set the whole apart for the widow or minor children, or both. *Stewart v. Stewart*, 74 Ga. 355.

Minimum Allowance.—In *Georgia* the statute allows the family of a deceased person a year's support out of his estate, the amount to be fixed by the appraisers, but the provision set apart for the family shall, in no event, be less than the sum of one hundred dollars, and, if it shall appear upon the first appraisal of the estate that it does not exceed in value the sum of five hundred dollars, it is the duty of the appraisers to set apart the whole of the estate for the support of the widow and children. *Doyle v. Martin*, 61 Ga. 410.

3. *Brazer v. Dean*, 15 Mass. 183.

4. *In re Hayes*, 112 N. Car. 76.

5. *Byrd v. Jones*, 84 Ala. 336. See also the title EXECUTORS AND ADMINISTRATORS.

6. *Wellmeyer's Succession*, 34 La. Ann. 819.

Money Instalments.—It is held that the court may, in a proper case, direct the executor to pay to the widow, for the support of herself and children, a sum of money in quarterly instalments, instead of setting apart for their support specific property, and it is not a valid objection to such order that the executor has not, at the time, enough money on hand to pay the first instalment.¹

When Allowance may be Refused.—In some jurisdictions the court may, in the exercise of its discretion, refuse the allowance altogether, when it deems the condition of the widow and children such as not to render an allowance necessary.² But in *Vermont* it seems that the court's discretion extends only to the amount to be awarded, and it may not be denied entirely.³

Reasonableness of Amount.—In the note below will be found cases passing upon the amount of the allowance, in some it being held reasonable,⁴ and in others excessive,⁵ under the circumstances of the case.

V. HOW ALLOWANCE MAY BE BARRED—1. **Delay in Making Application.**—Lapse of time, and delay in making application for an allowance, such as will cause embarrassment and discomfort in the settlement of the estate, may be good ground for a refusal to make the allowance.⁶

1. *McReynolds' Estate*, 61 Iowa 585.

2. **When Allowance may be Denied.**—*Kersey v. Bailey*, 52 Me. 198.

In *Hollenbeck v. Pixley*, 3 Gray (Mass.) 521, it was held that, since the widow had no family to support, no child to provide for, and all of her separate property, which was considerable, was secured to her on marriage, and confirmed to her on the separation, and was considerably increased before the decease of her husband, no new debts devolving upon her by that event, and she incurring no additional expenses, there was no ground to question the discretion of the judge of probate in declining to make the widow a personal allowance out of her husband's estate.

In *Louisiana* the statute provides for the allowance to the widow and minors only in case of "necessitous circumstances," and the court may refuse it altogether if, in its judgment, they are not in necessitous circumstances. *Aaron's Succession*, 11 La. Ann. 671; *White's Succession*, 29 La. Ann. 702; *DeBoisblanc's Succession*, 32 La. Ann. 17.

It has been in *Iowa* that where it has been ascertained that an estate is insolvent, and that after the final settlement there will remain no sum whatever in the hands of the executors for the widow or children, there is no provision of law that would justify the County Court in making an order directing the executors to pay a portion of the assets of the estate to the widow for her support and that of her minor children. *In re Hieschler*, 13 Iowa 597. See also *In re Peet's Estate*, 79 Iowa 185.

3. **Vermont**—Discretion of Court Extends to Amount Only.—*Sawyer v. Sawyer*, 28 Vt. 245.

4. **Allowance Held to be Reasonable.**—*In re Dewell's Estate*, 88 Iowa 14; *Bacon v. Perkins*, 100 Mich. 183; *Ford v. Ford*, 80 Wis. 565; *McReary v. Robinson*, 12 Smed. & M. (Miss.) 318; *Buffum v. Sparhawk*, 20 N. H. 81. See also *Richardson v. Estate of Merrill*, 32 Vt. 27.

5. **Allowance Held to be Excessive.**—*Foster v. Foster*, 36 N. H. 437; *Dale v. Hanover Nat. Bank*, 155 Mass. 141.

6. **Undue Delay in Applying for Allowance.**—*Kingman v. Kingman*, 31 N. H. 182; *Cornwell v. Deck*, 2 Redf. (N. Y.) 87; *Burk v. Gleason*, 46 Pa. St. 297; *Williams' Appeal*, 92 Pa. St. 69; *Tibbin's Estate*, 5 Phila. (Pa.) 100; *Hunts' Estate*, 14 Phila. (Pa.) 330; *Lawley's Appeal* (Pa. 1887), 9 Atl. Rep. 327; *Neill v. Kuhn*, 15 Pa. Co. Ct. Rep. 565; *McGowen v. Zimpelman*, 53 Tex. 479. See also *Tiebout v. Millican*, 61 Tex. 514.

Delay of Four Years.—*Hubbard v. Wood*, 15 N. H. 74, it was held that the judge of probate had no authority to grant the widow an allowance four years after the death of her husband. See also *Hoffeditz's Estate*, 4 Pa. Dist. Rep. 125.

Delay of Thirty Years.—In *Mathes v. Bennett*, 21 N. H. 188, it was held that no decree for an allowance could be made after a lapse of thirty years from the death of the husband.

Application Simultaneous with Grant of Administration—North Carolina.—It was held under the *North Carolina Act of 1796* that a widow, where her husband died intestate, must file her petition for a year's support at the term of the County Court at which the letters of administration upon his estate were taken out. *Gillespie v. Hymans*, 4 Dev. (N. Car.) 119.

Delay of Twelve Months.—It was held in *Cook v. Sexton*, 79 N. Car. 305, that an application for a year's support, made after the expiration of twelve months from the death of the husband, is barred by the statutes of limitation.

Delay of Two Years.—It has been held in *Illinois* that the widow's award, although in one sense a demand against the estate of her husband, is not such a demand as is required to be exhibited against the estate within two years, or to be forever barred. *Miller v. Miller*, 82 Ill. 463. See also *Lisk v. Lisk*, 155 Mass. 153.

But see *Cronan v. Scranton*, 2 Lack. Jur. (Pa.) 413, where it was held that if minor children allow over two years to elapse after their mother's remarriage before making

2. Misconduct or Desertion.—Misconduct on the part of the wife, such as

application for an allowance, their claim is forever barred.

Application Prior to Distribution.—Missouri.—In *Missouri* the right of the widow to her statutory allowance will not be at all affected by the fact that she applies for personal property after the same has been converted into money, provided she makes her application prior to its distribution or payment for debts. *Cummings v. Cummings*, 51 Mo. 261. See also *In re Welch's Estate*, 106 Cal. 427.

Application Made before Sale of Property.—It was held in *Lyman v. Byam*, 138 Pa. St. 475, that a demand by a widow upon an administrator to set apart, out of her deceased husband's real estate, enough to satisfy her claim of three hundred dollars, is in time if made before a sale of the property for the payment of debts. See also *Neff's Appeal*, 21 Pa. St. 243.

It was held in *Denny v. Denny*, 113 Ind. 22, that the right of a widow to select and take, at the appraised value, articles mentioned in the inventory, not exceeding five hundred dollars in value, continues up to the time of the sale, and such right is not affected by the fact that she has made a partial selection before the return of the inventory. See *Johnson v. Robertson*, 7 Blackf. (Ind.) 425.

It has been held in *Missouri* that if a widow postpones her application for the allowance, out of her deceased husband's estate, of personalty to which she is entitled under the statute, until after the administrator has used the personalty in payment of debts, she loses her right, and her loss will not be made good to her out of the proceeds of real estate subsequently sold to pay the remainder of the debts. *Drowry v. Bauer*, 68 Mo. 155.

Lapse of Time from Taking out Administration.—It was held in *Ex p. Rogers*, 63 N. Car. 110, that it is not the lapse of time since the death of the husband, but such lapse since the taking out of administration, that affects the right of a widow to a year's provision. Therefore, where the husband died in June, 1860, and administration was not taken out until the February term, 1868, it was held that the widow was entitled to such provision under a petition filed at that term. *Gillespie v. Hymans*, 4 Dev. (N. Car.) 119, distinguished and approved. See also *Allen v. Allen*, 117 Mass. 27.

Application must be Made before Confirmation of Appraiser's Report.—It has been held in *Mississippi* that parties claiming an interest in the annual allowance made by the probate court for the support of the widow and children of a decedent must present their claim before the report of the appraisers, appointed to set aside the allowance, has been confirmed by the court; otherwise, they will be deemed to have waived their rights in favor of other beneficiaries whose claims are presented. *Dease v. Cooper*, 40 Miss. 114.

Waiver of Privilege.—It has been held in *Pennsylvania* that the right of a widow to retain property to the value of three hundred dollars, out of the estate of her deceased husband, is waived unless claimed before the ex-

penses of a full administration are incurred. By claiming and taking but part she waives the residue, and cannot afterwards claim it out of the real or personal estate of the deceased. *Baskin's Appeal*, 38 Pa. St. 65; *Cranse's Estate*, 6 Phila. (Pa.) 71. See also *Shumate v. McGarity*, 83 Pa. St. 38; *Deck's Estate*, 6 Phila. (Pa.) 72; *Heller's Estate*, 11 Phila. (Pa.) 120.

It was held in *Davis' Appeal*, 34 Pa. St. 256, that the right of a widow to retain real or personal property of her deceased husband's estate, to the value of three hundred dollars, is a personal privilege which she may waive. The privilege is waived if she neglects to demand an appraisal. So, if an appraisal is made, and she elects to retain less than the value of three hundred dollars, she waives her claim to all which she neglects to retain. See also *Huffman's Appeal*, 81 Pa. St. 329.

It was, however, held in *Kirkpatrick's Estate*, 5 Phila. (Pa.) 98, that where all debts are paid and a surplus of money remains in the hands of the executor to be distributed among the legatees, and where no interests have intervened from the time of taking out the letters testamentary, it may not be too late for the widow to present her claim before the money is distributed, her delay causing no additional expense in administration, and the other legatees being deprived of nothing to which they were entitled under the law. See also *Kelly's Estate*, 14 Pa. Co. Ct. Rep. 51; *Buddy's Estate*, 7 Pa. Co. Ct. Rep. 466; *McCann's Estate*, 27 W. N. C. (Pa.) 439; *Weir's Estate*, 28 W. N. C. (Pa.) 268.

Presumption of Waiver.—In *Pennsylvania* a delay of five years in asserting a claim for an allowance is held to operate as conclusive proof of a waiver of a right. See also *King v. Johnson*, 94 Ga. 665; *Donoghue's Estate*, 46 Leg. Int. (Pa.) 454. See also *Davey's Estate*, 9 Pa. Co. Ct. Rep. 125.

But see *Fox's Estate*, 5 Kulp (Pa.) 218, where it was held that a delay of three years is a conclusive waiver. *McNeill's Estate*, 6 Kulp (Pa.) 168; *Kern's Appeal*, 120 Pa. St. 523.

But a delay of two years by a widow in claiming her allowance is not necessarily evidence of a waiver. *Snider's Estate*, 16 Pa. Co. Ct. Rep. 238.

It has been held in *Alabama* that if no selection is made or claim preferred for an allowance until after the administrator has obtained an order to sell the property for the purposes of administration, and has sold it, the claim of exemption must be regarded as waived. *Henderson v. Tucker*, 70 Ala. 381. See also *Little v. McPherson*, 76 Ala. 552.

But see *Mitcham v. Moore*, 73 Ala. 542.

Waiver by Inconsistent Demands.—It was held in *Pennsylvania* that where a widow, who was also executrix, made no claim of exemption before the auditor, but sought to establish her ownership of the fund which, it was claimed, should have been included in her

adultery,¹ or voluntary desertion,² is, in some states, made an express bar to a decree for an allowance.

account, she could not, after the auditor had decided adversely to her, claim the fund under the exemption laws. *Countryman's Estate*, 151 Pa. St. 577, *distinguishing* *Speakman's Appeal*, 71 Pa. St. 25. See also *Telford v. Boggs*, 63 Ill. 498.

Remarriage of the Widow as a Bar.—It has been held in *Pennsylvania* that where the widow delays in making her application for the statutory allowance until after her remarriage, her right to the same is barred, since what a widow may take under the act, she takes in her character as widow, as a provision for the temporary wants of her family; therefore, if she remarries before making her election her right no longer exists. *Kern's Appeal*, 120 Pa. St. 523; *Machemer's Estate*, 140 Pa. St. 544. See also *Burk v. Gleason*, 46 Pa. St. 297.

But see *Venus' Estate*, 2 York Leg. Rec. (Pa.) 193, where it was held that the widow's right to exemption is not ousted by her subsequent marriage. See also *Cronan v. Scranton*, 2 Lack. Jur. (Pa.) 413; *Drygalski's Estate*, 6 Kulp (Pa.) 50.

Estoppel.—It was held in *Bourguignon's Estate*, 28 W. N. C. (Pa.) 315, that delay in claiming the statutory exemption can only act as an estoppel where there are persons having interests as creditors or distributees, with the present right of participation in the estate, who are or may have been induced by the widow's inaction to believe that her claim was waived.

The property which is, under the *Iowa* statute, exempt to the widow as the head of the family, is not to be deemed assets in the hands of the administrator, nor to be administered upon as such. The fact that the widow consents to such administration, under a misapprehension of her rights, will not estop her from afterwards claiming the property or its proceeds; and, in order to entitle a party to claim the benefit of an estoppel of this character, it must be shown that he acted in good faith, relying upon the estoppel and in the belief of its truth. *Ellsworth v. Ellsworth*, 33 Iowa 163.

1. Adultery.—*Cook v. Sexton*, 79 N. Car. 305; *Leonard v. Leonard*, 107 N. Car. 171, where she was also living apart from her husband at the time of his death. In *North Carolina*, however, prior to the Act of 1871-72, c. 193, § 44, a widow was not barred of her right to an allowance by her adultery, etc., as she was of her dower. *Walters v. Jordan*, 12 Ired (N. Car.) 170.

It has been held under the *Indiana* statute that the wife's former adultery, discontinued before the death of her husband, is not a bar to a decree for an allowance to her from the estate of her deceased husband. *Zeigler v. Mize*, 132 Ind. 403. See also *Slack v. Slack*, 123 Mass. 443; *Sabalot v. Populus*, 31 La Ann. 854.

2. Desertion by Wife.—*Sanders' Estate*, 1 York Leg. Rec. (Pa.) 115; *Kahn's Estate*, 16 Pa. Co. Ct. Rep. 72; *Tozer v. Tozer*, 2 Am. L. Reg. 510.

In *Odiorne's Appeal*, 54 Pa. St. 175, 93 Am. Dec. 683, it was held that where a wife leaves her husband, and renounces all conjugal intercourse a considerable time before his death, she is not such a widow on his death as is contemplated by the acts entitling her to administer his estate, and to receive the three hundred dollars; that the acts above referred to, contemplate a wife who lives with her husband till his death, and faithfully performs all her duties to his family, not one who voluntarily separates herself from him and performs none of those duties.

But it has been held in *Missouri* that a widow is entitled to the allowance provided for by the Missouri Rev. Stat., § 107, where she remains the wife of the deceased up to the time of his death, although she may have abandoned him without sufficient cause. *Mowser v. Mowser*, 87 Mo. 437. See also *Matter of Shedd*, 60 Hun (N. Y.) 367, *affirmed* in 133 N. Y. 601.

Where Desertion is Justifiable.—An intestate left a widow to whom he was married in 1855, after having unlawfully cohabited with her for eight years. They lived together after marriage for about two years, when difficulties arising between them on account of his gross and confirmed habits of intoxication, which had existed throughout their cohabitation, they agreed that she should live apart from him for a year, and then return. Before she went away he withdrew his consent, but she insisted on leaving. At the end of the year she returned; but, finding that he had a housekeeper, with whom she believed him to be living in adultery, there being no bed in the house but his own, she went away and never returned, and was not asked to do so, but continued living apart from him, rendering him no services, and supporting herself until his death, which took place some years afterwards. She had no children by him, was in her seventieth year, and had no means of support. The probate court, upon the application of the widow, made her an allowance of three hundred and fifty dollars, and its decree was affirmed, on appeal by the administratrix, by a justice of the court. It was held, upon appeal to the full court, that the decree should be affirmed with costs. *Slack v. Slack*, 123 Mass. 443. See also *Simpson's Estate*, 22 W. N. C. (Pa.) 172; *DeWalt's Estate*, 38 Pittsb. L. J. (Pa.) 275; *Groom's Estate*, 6 York Leg. Rec. (Pa.) 139.

Desertion by Husband.—It has been held in *Pennsylvania* that where a husband leaves his wife in a foreign country with the understanding that she is to follow him when he shall have made a home for her in this country, and he subsequently settles in *Pennsylvania*, but does not inform her of his whereabouts, and afterwards bigamously marries another woman and then dies, the first wife is entitled to the widow's exemption out of his estate if it appears that she was at all times ready to join her husband, and would have done so if she had not been

Divorce.—The allowance is also barred by an absolute divorce,¹ and in *Pennsylvania* by a divorce *a mensa et thoro*.²

3. Antenuptial Agreement as a Bar.—According to the weight of authority, a widow may, by virtue of an antenuptial agreement, bar her interest in the statutory allowance, at least where no minor children survive.³

kept in ignorance of his whereabouts. *Grieve's Estate*, 165 Pa. St. 126, *distinguishing* *Spier's Appeal*, 26 Pa. St. 233. See also *Terry's Appeal*, 55 Pa. St. 344; *Quickel's Estate*, 5 York Leg. Rec. (Pa.) 71.

Separation by Mutual Consent.—Where a husband and wife execute a written agreement to separate, whereby each for a valuable consideration relinquish whatever marital rights either might have in the estate of the other, and they forthwith cease to cohabit, and such separation is actual, immediate, and continuous, it is held that on the death of the husband the widow is not entitled to the three hundred dollars exemption provided by the Act of April 14, 1851. *Speidel's Appeal*, 107 Pa. St. 18; *Dillinger's Appeal*, 35 Pa. St. 357; *Ross' Estate*, 6 Kulp (Pa.) 521; *Spier's Appeal*, 26 Pa. St. 233; *Hettrick v. Hettrick*, 55 Pa. St. 290; *Platt's Appeal*, 80 Pa. St. 501. See also *In re Noah's Estate*, 88 Cal. 468; *Linton v. Crosby*, 56 Iowa 386, 41 Am. Rep. 107; *In re Odell's Estate*, 52 Mich. 592.

Remarriage of Woman under Mistaken Belief that She was Divorced.—The right of the widow to have an allowance set over to her out of the estate may very properly be tested by reference to her relations with the deceased, and her right, as wife, to call on him for her maintenance during his lifetime. A wife who has separated from her husband, and remarried under the erroneous impression that she was divorced, had children by such second marriage, and never at any time had conjugal relations with deceased, cannot be well said to be a member of his family so as to entitle her to a family or widow's allowance. *Byrne's Estate*, *Myricks Prob.* (Cal.) 1. See also *Pearson v. Darrington*, 32 Ala. 227.

1. Absolute Divorce.—A woman who has been divorced from her husband is not at his death entitled to the benefit of sections 29 and 30 of article 2, of the *Missouri* statute, exempting certain specific articles of property from the debts of her deceased husband, and also the sum of two hundred dollars, allowed her under the latter section; because she cannot be considered as included in his family. *Dobson v. Butler*, 17 Mo. 87. See also *Richardson's Estate*, 132 Pa. St. 292.

2. Divorce a Mensa et Thoro.—Where a widow had been deserted by her husband, and obtained a divorce *a mensa et thoro*, and for a number of years had ceased to communicate with him, and he contributed nothing towards her support, it was held that she was not entitled to the statutory exemption out of her deceased husband's estate. *In re Fyock's Estate*, 9 Lanc. L. Rev. (Pa.) 89.

It was held in *Hettrick v. Hettrick*, 55 Pa. St. 290, that a widow who has been divorced *a mensa et thoro* is not entitled to the three hun-

dred dollars exemption on the death of her husband, under the Act of April 14, 1851, the purpose of the act being to make immediate provision for the wants of the family upon the death of its head; and, to entitle the widow, the family relation must exist at the husband's death, at least in contemplation of law.

Legal Marriage Essential.—No right to an allowance exists unless there has been a legal marriage. *Grimm's Estate*, 131 Pa. St. 199. See also *State v. Lichtenberg*, 4 Wash. 231; *Lockhart v. White*, 18 Tex. 102.

3. McMahon v. McMahon, 113 Ill. 461 (*distinguishing* *Phelps v. Phelps*, 72 Ill. 545, 22 Am. Rep. 149); *Claypool v. Jaqua*, 135 Ind. 499; *Shaffer v. Matthews*, 77 Ind. 83; *McNutt v. McNutt*, 116 Ind. 545; *Paine v. Hollister*, 139 Mass. 144; *Tiernan v. Binns*, 92 Pa. St. 248. See also *Dillinger's Appeal*, 35 Pa. St. 359; *Mahaffy v. Mahaffy*, 61 Iowa 679; *In re Collins' Estate*, 66 Iowa 79. See also *Plank's Estate*, 1 York Leg. Rec. (Pa.) 108; *Houghton v. Houghton*, 14 Ind. 505, 77 Am. Dec. 69.

In *Weaver v. Weaver*, 109 Ill. 225, it was held that the widow was estopped by such an agreement, whether there were any children of her husband remaining with her as a part of her family or not.

It was held in *Blackinton v. Blackinton*, 110 Mass. 461, that to a petition by a widow to a probate court, for an allowance out of her husband's estate, it is no defense that by a marriage contract she released all claim upon his estate. This decision seems to be based upon the reason that the probate court had no power to try the validity of the contract or to give effect to its provisions, its jurisdiction over all matters relating to settlement of estates of deceased persons being limited and exclusive.

Where Agreement is Violated.—It was held in *Sheldon v. Bliss*, 8 N. Y. 31, that where an antenuptial agreement provides that the husband shall make a certain settlement on his widow by will, in lieu of dower or any set portion, and the terms of the will do not correspond with such agreement, his widow is entitled to the exempted property allowed by statute.

Agreement Not Affecting After-acquired Property.—In *McReynolds' Estate*, 61 Iowa 585, the court questioned whether an antenuptial contract entered into by a woman, with the design of barring her right to an allowance out of her husband's property, could be set up against her; but did hold that where the contract expressly provides that it shall not apply to any property acquired after marriage, and where the parties had been married twenty years, the husband having been a large farmer, and having accumulated a large amount of personal property upon

Good Faith—Presumption.—But the contract, to be valid, must be fairly and intelligently executed by the intended wife, and its terms must be reasonable;¹ and, if the provision secured to her is disproportionate to the means of the intended husband, there is a presumption of designed concealment on his part, and the burden is upon those claiming in his right to prove that there was full knowledge on the wife's part of all that materially affected the contract.²

Contract must be Executed.—So long as the contract remains executory, the widow is at liberty to repudiate it.³

4. Separate Estate as a Bar.—In a majority of the states, where the amount of the allowance is fixed by statute, the possession of separate property by a widow or minor children does not affect, in the least, their right to the allowance.⁴ But in those states where the amount is left to the discretion of the probate court, the possession of a separate estate, by the widow or minor children, is a fact to be taken into consideration in determining the amount of the allowance to be decreed.⁵

5. Testamentary Provisions as a Bar—Intent.—In some cases it is held that the widow is entitled to a statutory allowance in addition to any bequest or other provision made for her by her husband's will,⁶ unless the intent to bar

the farm, the widow was entitled to an allowance out of the property.

1. *Achilles v. Achilles*, 151 Ill. 136; *Weaver v. Weaver*, 109 Ill. 225.

2. *Achilles v. Achilles*, 151 Ill. 136.

3. *Weaver v. Weaver*, 109 Ill. 225; *Brenner v. Gauch*, 85 Ill. 368; *Phelps v. Phelps*, 72 Ill. 545.

4. **In Some Jurisdictions, Possession of Separate Estate Immaterial.**—*Chiselm v. Chiselm*, 41 Ala. 327; *Johnston v. Davenport*, 42 Ala. 317; *Jordan v. Strickland*, 42 Ala. 315; *Thompson v. Thompson*, 51 Ala. 493; *Darden v. Reese*, 62 Ala. 311; *In re Lux Estate*, 100 Cal. 593; *Coleman v. Brooke*, 37 Miss. 71; *Whitley v. Stephenson*, 38 Miss. 113; *Wally v. Wally*, 41 Miss. 657. See also *Palethorp's Estate*, 34 W. N. C. (Pa.) 68; *Sawyer v. Sawyer*, 28 Vt. 245; *Lisk v. Lisk*, 155 Mass. 153.

Louisiana.—In *Louisiana*, however, where the statute provides that one thousand dollars may be decreed for the relief of the widow and minor children in necessitous circumstances, the fact that the widow has separate property may be shown in derogation of her claim. *Aaron's Succession*, 11 La. Ann. 671; *DeBoisblanc's Succession*, 32 La. Ann. 17.

Nevada.—In *Nevada*, if the widow has a maintenance derived from her own property, equal to the portion set apart to her by the statute, then the whole property so set aside goes to the minor children. *Nevada Gen. Stat.* 1885, § 2796.

Texas.—In this state, while no allowance will be set apart for the maintenance of the widow and minor children for a year, in case they possess an adequate separate estate, yet the possession of such estate will not, under the statute, defeat their right to an allowance in lieu of the homestead and other property specifically designated as exempt by statute. *Mabry v. Ward*, 50 Tex. 404.

Minor Children with Separate Estates.—Where two minor children, orphans, had separate property of the value of nearly

twenty-five hundred dollars, it was held that they were not entitled under the *Texas* statute to an allowance for a year's support out of the property of the estate of their deceased father; on the ground that they had separate property, adequate to their maintenance, which brought them within the exceptions of the statute. *Sloan v. Webb*, 20 Tex. 189.

But the fact that minor children are earning their living is not *per se* a bar to their receiving the allowance. *Cooper v. Pierce*, 74 Tex. 526.

5. In Some States, Separate Estate Bar to an Allowance.—*Hollenbeck v. Pixley*, 3 Gray (Mass.) 521; *Kersey v. Bailey*, 52 Me. 198. See also *Washburn v. Washburn*, 10 Pick. (Mass.) 374; and *Duncan v. Eaton*, 17 N. H. 441, where it was held that regard should be had to the separate estate and the amount of the widow's dower, in decreeing her allowance.

6. Effect of Testamentary Provisions—California.—*In re Walker's Estate*, 77 Cal. 642.

Illinois.—*Deltzer v. Scheuster*, 37 Ill. 301.

Indiana.—*Loring v. Craft*, 16 Ind. 110; *Dunham v. Tappan*, 31 Ind. 173; *Nelson v. Wilson*, 61 Ind. 255; *Whiteman v. Swem*, 71 Ind. 530; *Smith v. Smith*, 76 Ind. 236.

Massachusetts.—*Williams v. Williams*, 5 Gray (Mass.) 24.

Missouri.—*Bryant v. McCune*, 49 Mo. 546; *Register v. Hensley*, 70 Mo. 189; *Schoeneich v. Reed*, 8 Mo. App. 356.

New York.—*Vedder v. Saxton*, 46 Barb. (N. Y.) 188; *Matter of Frazer*, 92 N. Y. 239. See also *Matter of Tobin* (Surrogate Ct.), 40 N. Y. St. Rep. 366; *Hatch v. Bassett*, 52 N. Y. 359.

Ohio.—*Collier v. Collier*, 3 Ohio St. 369; *Bane v. Wick*, 14 Ohio St. 505; *Watts v. Watts*, 38 Ohio St. 480.

Vermont.—*Meech v. Weston*, 33 Vt. 561.

Allowance where Widow is Beneficiary under Will.—In *Shipman v. Keys*, 127 Ind. 353, it was held that the widow's statutory allowance would not be barred by the acceptance of a

the widow of her allowance clearly appears from some provision in the will.¹

Renunciation of Provision of Will.—While in other cases it is held that, in order to entitle her to the statutory allowance, it is necessary for her to renounce the will,² especially where the assertion of the right to take both under the law and under the will would defeat the manifest purpose of the testator.³

But a Will Disposing of All Testator's Estate, and making no provision for the widow, cannot affect her right to the statutory allowance,⁴ as she is entitled to her allowance whether her husband died testate or intestate, solvent or insolvent.⁵

6. Death of Widow as a Bar.—In some states it is held that the death of the widow, before a final decree for her statutory allowance has been made, abates her petition;⁶ while, in other states, it is held that her allowance

provision under her husband's will, unless her right to take under both the law and the will would defeat the purpose of the testator, as shown by the disposition he made of the residue of his property; and that a general disposition of the residue of his property, not purporting to be in lieu of the widow's absolute claim, was not enough to compel her to elect between the will and the absolute claim, and that she was entitled to both.

It has also been held in *Michigan*, under the statute authorizing the probate court to make a reasonable allowance for the support of the testator's widow and minor children, while the estate is being settled, that such allowance is proper, even where the widow and children are legatees under the will. *Moore v. Moore*, 48 Mich. 271; *North v. Van Tassel*, 84 Mich. 69. *Compare Kinney v. Kinney*, 34 Mich. 250. See also *Henry's Estate*, 65 Wis. 551.

Under the *Pennsylvania* statute of 1851, the widow has a right to retain real or personal property to the amount of three hundred dollars from the estate of her deceased husband, whether he died testate or intestate, solvent or insolvent. An acceptance by the widow of a provision under the will of her husband does not deprive her of this right. So much of the estate is withdrawn from the general course of administration, and appropriated by law to the use of the widow and family. *Compher v. Compher*, 25 Pa. St. 31; *Snider's Estate*, 16 Pa. Co. Ct. Rep. 233.

1. *Cowdrey v. Hitchcock*, 103 Ill. 262; *Richards v. Hollis*, 8 Ind. App. 353; *In re Klostermann*, 6 Mo. App. 314; *Hasenritter v. Hasenritter*, 77 Mo. 162. See also *Pemberton v. Pemberton*, 29 Mo. 408; *Wilson v. Morris*, 94 Tenn. 547.

Allowance Expressly Barred by Will.—It was held in *Peeble's Estate*, 157 Pa. St. 605, that a widow has a right to claim the exemption of three hundred dollars, although her husband has, by his will, directed that the legacy bequeathed to her shall be in lieu of dower and exemption, and the widow has elected to take under the will. But see *McManus' Estate*, 14 Phila. (Pa.) 660, where it was held that the widow may be debarred by express words in her husband's will and acceptance under it of the gifts in place of the exemption.

2. In Some States, Allowance Barred unless Will is Renounced.—*Claudel v. Palao*, 28 La.

Ann. 872; *Brown v. Hodgdon*, 31 Me. 65; *Crane v. Crane*, 17 Pick. (Mass.) 422; *Little v. Birdwell*, 27 Tex. 688; *Trousdale v. Trousdale*, 35 Tex. 756; *Golder v. Littlejohn*, 30 Wis. 344. See also *Currier, Appellant*, 3 Pick. (Mass.) 375.

Under a *Connecticut* statute, if the widow and family of the deceased person have adequate provision made for their support, either by will or in any other manner, they are not entitled to a support out of the shares of others, not members of the family. *Leavenworth v. Marshall*, 19 Conn. 408.

3. Where Assertion of Both Rights would Defeat Testator's Purpose.—*Shafer v. Shafer*, 129 Ind. 394; *Snodgrass v. Meeks*, 12 Ind. App. 70; *Mulford v. Mulford*, 42 N. J. Eq. 68; *Godman v. Converse*, 43 Neb. 463. See also *Like v. Cooper*, 132 Ind. 391.

It was held in *Langley v. Mayhew*, 107 Ind. 198, *criticising Nelson v. Wilson*, 61 Ind. 255, and *Whiteman v. Swem*, 71 Ind. 530, that the claim of the widow of a decedent to the five hundred dollars for which provision is made by section 2269, *Indiana Rev. Stat.* 1881, may be released and relinquished by her election to take under an inconsistent testamentary provision. *Followed in Hurley v. McIve*, 119 Ind. 53.

4. Testator cannot Bar Allowance by Will.—*Ward v. Wolf*, 56 Iowa 465; *Linton v. Crosby*, 61 Iowa 293; *In re Peets' Estate*, 79 Iowa 185; *Graves v. Graves*, 10 B. Mon. (Ky.) 31; *Crow v. Hubard*, 62 Md. 560; *Miller v. Stepper*, 32 Mich. 194; *In re Pulling's Estate*, 93 Mich. 274; *Runnels v. Runnels*, 27 Tex. 515; *Baker v. Baker*, 57 Wis. 382.

5. Testacy or Intestacy, Solvency or Insolvency, does Not Affect Allowance.—*McReary v. Robinson*, 12 Smed. & M. (Miss.) 318; *Loury v. Herbert*, 25 Miss. 101; *Turner v. Turner*, 30 Miss. 428; *Mason v. O'Brien*, 42 Miss. 420; *Baldy's Appeal*, 40 Pa. St. 328; *Hill v. Hill*, 32 Pa. St. 511. See *Thornton v. Thornton*, 45 Ala. 274.

6. In Some States, Death Abates Petition for Allowance.—*Tarbox v. Fisher*, 50 Me. 236; *Adams v. Adams*, 10 Met. (Mass.) 171.

It has been held in *North Carolina* that if the widow dies before her year's support has been allotted to her, or before the report is confirmed, her right to such allowance ceases, and it does not survive either to her children or to her administrator. *Cox v. Brown*, 5 Ired. (N. Car.) 194; *Kimball*

vests in her absolutely, immediately upon the death of her husband, and that upon her death without receiving her allowance, it goes to her executor or administrator.¹

VI. PRIORITY OVER OTHER CLAIMS.—The statutory allowance, in most states, has priority over the claims of general creditors,² and, in many states, over all specific liens, except the vendor's lien for payment of purchase money.³

v. Deming, 5 Ired. (N. Car.) 418; *Ex p. Dunn*, 63 N. Car. 137.

Decree Not Appealed from.—But it has been held in *Massachusetts* that the decree of a judge of probate allowing to a widow personal estate of her deceased husband, to a certain amount, as necessities, if not appealed from, establishes conclusively her right to select such items from the inventory as she may prefer, to that amount, and to demand the same from the executor, and such right, if exercised by her in her lifetime, survives to her legal representatives, but if not so exercised it does not survive. *Drew v. Gordon*, 13 Allen (Mass.) 120.

1. In Some States, Death of Widow Not a Bar.—*Brown v. Joiner*, 80 Ga. 486; *Cummings v. Cummings*, 51 Mo. 261; *Hastings v. Myers*, 21 Mo. 519; *Bane v. Wick*, 14 Ohio St. 505; *Sherman v. Sherman*, 21 Ohio St. 631. See also *Wally v. Wally*, 41 Miss. 659; *Finney's Appeal*, 113 Pa. St. 11; *Dorah v. Dorah*, 4 Ohio St. 292. Compare *Beck's Estate*, 7 York Leg. Rec. (Pa.) 118.

Survives to Her Personal Representative.—It has been held in *Indiana* that if the statutory allowance given to the widow, out of the personal estate of her deceased husband, is not claimed during her lifetime, it is not barred, but goes to her personal representative. *Bratney v. Curry*, 33 Ind. 399. See also *Kellogg v. Graves*, 5 Ind. 509; *Buddy's Estate*, 7 Pa. Co. Ct. Rep. 466.

In *Illinois* the legal title to the specific articles allowed to the widow upon the death of her husband vests in her, and not in the personal representative of the husband, and, if the widow should die without reducing those articles or their value to possession, and before administration is granted upon the estate of the husband, her administrator may sue and recover their value from the husband's estate. *York v. York*, 38 Ill. 522.

2. Paramount to Claims of General Creditors.—*Livingston v. Langley*, 79 Ga. 169; *In re Dennis' Estate*, 67 Iowa 110; *Mason v. O'Brien*, 42 Miss. 420; *Hastings v. Myers*, 21 Mo. 519; *Williams v. Jones*, 95 N. Car. 504; *Rank's Estate*, 12 Phila. (Pa.) 67; *Lewis v. Steiner*, 84 Tex. 364. See also *Johnson v. Corbett*, 11 Paige (N. Y.) 265; *Baldy's Appeal*, 40 Pa. St. 328; *Hill v. Hill*, 42 Pa. St. 198; *Boyden v. Ward*, 38 Vt. 628; *Barnum v. Boughton*, 55 Conn. 117.

The widow's allowance precedes any distribution of the personal estate. *Gilman v. Gilman*, 54 Me. 531.

Set-off Not Allowed.—Where A died intestate, leaving an estate worth less than three hundred dollars, and, after letters of administration had been granted on petition of the widow, the assets of the estate were, by order of the court, delivered to and vested in her;

and on a suit by the widow upon an account which was part of such assets, the defendant pleaded as a set-off a note of the deceased purchased after his death; the court held that no claim against the decedent, acquired after his property vested in his widow, could be set off against her claim. *Haugh v. Seabold*, 15 Ind. 343.

Allowance Takes Precedence of Funeral Expenses.—It has been held in *Pennsylvania* that the widow's exemption takes precedence of all the expenses of administration, excepting, perhaps, the register's fees for granting letters, and of all debts of decedent; it also takes precedence even of funeral expenses. This may lead to the result that a person who dies leaving but three hundred dollars' worth of property would have to be buried as a pauper if this property were claimed by the widow; but rather than impoverish the living, it is better to pauperize the dead. *Norton's Estate*, 4 Pa. Dist. Rep. 198; *Weir's Estate*, 28 W. N. C. (Pa.) 268; *Formad's Estate*, 14 Pa. Co. Ct. Rep. 104. See also *Groome's Estate*, 7 Pa. Co. Ct. Rep. 519.

In *Illinois* the allowance to the widow is made in all cases, to the exclusion of all creditors; except that where the estate is insolvent, the widow's allowance will be incurred with the payment of the funeral expenses. *McCord v. McKinley*, 92 Ill. 11. This is also the rule in *Indiana*. *Green v. Weaver*, 78 Ind. 494.

In *Georgia* the widow's allowance has preference over all debts, physician's bills for last sickness included. *Whitehead v. McBride*, 73 Ga. 741.

It has been held in *Massachusetts* that the widow's allowance has priority over the debts of her deceased husband, the expenses of his last sickness and funeral, and the charges of settling his estate. *Kingsbury v. Wilmarth*, 2 Allen (Mass.) 310.

Liens Created by Law and Contract.—It was held in *Loeb v. Richardson*, 74 Ala. 311, that the claim of the surviving widow to an allowance out of the estate of her deceased husband, as provided by statute, is paramount to the rights of the personal representative for the general purposes of administration, and to preferred debts of the estate, but it does not override the liens created by law or by the contract of the husband while in life.

Cannot be Waived in Favor of Creditors.—It was held in *Louisiana* that the widow's and minors' portion, being a provision for the destitute, cannot be waived in favor of the creditors, and carried on the account of the administrator as a claim ranked after his. *Waddell's Succession*, 44 La. Ann. 361.

3. Priority over Specific Liens.—*Runyan's Appeal*, 27 Pa. St. 121; *Spencer's Appeal*, 27

VII. OUT OF WHAT PROPERTY TO BE DISCHARGED.—The provisions of most of the statutes require that the allowance shall be discharged out of the proceeds of the personal estate only, and that it shall not extend to the real estate;¹ though in some states it is a charge upon the real, as well as the personal, estate.²

Pa. St. 218; Hildebrand's Appeal, 39 Pa. St. 133; Nottes' Appeal, 45 Pa. St. 361; Giddings v. Crosby, 24 Tex. 295. See also Comeau v. Miller, 46 La. Ann. 1324.

But see Nerpel's Appeal, 91 Pa. St. 334; Allentown's Appeal, 109 Pa. St. 75; and Kauffman's Appeal, 112 Pa. St. 645: where it was held that the widow's allowance does not have precedence over the lien of any mortgage, whether it be for purchase money or not. See also Graves' Estate, 134 Pa. St. 377; Engel's Estate, 4 Northam. (Pa.) 198; Fairbanks v. Robinson, 64 Cal. 250.

Allowance a Debt against the Estate.—In *Ohio* the year's allowance to the widow and minor children is a debt of the estate, and, as a debt, has preference over all others, except the funeral expenses, those of the last sickness, and expenses of administration. *Watts v. Watts*, 38 Ohio St. 480.

Priority over Mortgage.—It was held in *Elfe v. Cole*, 26 Ga. 197, that the one year's support allowed by the Acts of 1838 and 1850, to the family of a decedent or intestate, out of the effects of the estate, is paramount to the lien of a mortgage given by the deceased in his lifetime; *affirming* *Cole v. Elfe*, 23 Ga. 235. See also *Lathrop v. Brown*, 65 Ga. 312; *Miller v. McDonald*, 72 Ga. 20.

Lien Attaching when Husband Acquired Title.—In *Georgia*, while the widow's claim for allowance will take precedence of any lien with which her deceased husband incumbered his title, it cannot take precedence of the liens which adhered to the title when he acquired it. *Murphy v. Vaughan*, 55 Ga. 361.

It has been held in *Pennsylvania* that where a widow acquires land by devise from her husband, she takes it subject to the lien of his outstanding debts, and upon her death a minor child is not entitled to the three hundred dollars exemption out of such land, as the property of his mother, to the exclusion of such creditors of his deceased father. *Wanger's Appeal*, 105 Pa. St. 346.

Lien of Judgment Creditor.—It was held in *North Carolina* that the widow takes the articles allotted to her as a claimant preferred by law to all creditors, but subject to the liens resting upon them as they come into the possession of the administrator of her husband, and personal property allotted to the widow as a year's support is subject to seizure and sale under an execution issued upon a judgment recovered against her deceased husband in his lifetime, tested before his death, but issued thereafter. *Grant v. Hughes*, 82 N. Car. 216.

By the *North Carolina* Code of 1880, section 2116, the widow's allowance has priority over a lien of her husband's judgment creditors. *Williams v. Jones*, 95 N. Car. 504.

This is also the rule in *Indiana*, *Quaken-*

bush v. Taylor, 86 Ind. 270; provided execution has not been issued on the judgment, and the property has vested in the widow by decree of court, *Mead v. McFadden*, 68 Ind. 340. See *Dixon v. Aldrich*, 127 Ind. 296, where it is held that the right of the widow to the statutory allowance is not defeated by a levy made by the sheriff on the property of her deceased husband during his lifetime.

Chattel Mortgage.—It was held in *North Carolina* that a widow's allowance has no priority over a chattel mortgage, even though such mortgage was not registered before assignment of the property to the widow. *Williams v. Jones*, 95 N. Car. 504. See also *Recker v. Kilgore*, 62 Ind. 10.

Trust Funds.—It was held in *Cruce v. Cruce*, 21 Ill. 46, that money in the hands of an intestate guardian, belonging to his wards, coming into the hands of his administrator, ranks in the third class of debts, to be paid as provided for in the one hundred and fifteenth section of the *Illinois* statute of wills, and will be preferred to the statutory allowance to the widow of the deceased guardian, and should be paid in preference to such allowance, where the estate of the deceased is inadequate to satisfy both the allowance and the amount due to the wards.

1. General Rule.—Payable out of Personalty.—*Jelly v. Elliott*, 1 Ind. 119; *Hale v. Hale*, 1 Gray (Mass.) 523; *In re Motier's Estate*, 7 Mo. App. 514; *Drowry v. Bauer*, 68 Mo. 155; *Jewell v. Knette*, 39 Mo. App. 262; *In re Lloyd's Estate*, 44 Mo. App. 670; *Ritchey v. Withers*, 72 Mo. 556.

Proceeds of Sale of Real Estate.—It has been held in *Missouri* that the proceeds of the sale of lands of a decedent cannot be used to make good the deficiency in a widow's allowance. *Ritchey v. Withers*, 72 Mo. 556.

Where Widow Renounces the Will.—But if a widow waives the provision made for her by her husband's will, and claims dower, she is entitled to the same allowance out of the personal estate as if he had died intestate, and this right is not impaired by the circumstance that all the personal estate was specifically bequeathed. *Brown v. Hodgdon*, 31 Me. 65. See also *Miller v. Stepper*, 32 Mich. 194; *Baker v. Baker*, 57 Wis. 382.

Realty Taxed for Administration Charges.—It has been held in *Massachusetts* that where the widow's allowance absorbs all the personal estate, the charges of administration may be deducted from the proceeds of the real estate, sold by order of the court, for the payment of the intestate's debts. *Brazer v. Dean*, 15 Mass. 183.

2. Allowance a Charge upon Realty.—*Cruce v. Cruce*, 21 Ill. 46; *Deltzer v. Scheuster*, 37 Ill. 301; *Claypool v. Jaqua*, 135 Ind. 499; *North v. Van Tassel*, 84 Mich. 69; *Detweiler's Appeal*, 44 Pa. St. 243; *Lyman v. Byam*, 38

Allowance Exceeding Value of Personality.—When the allowance can be discharged only from the personal estate, if it exceeds the value of the latter, to the extent of such excess it cannot be sustained.¹

Money in Lieu of Other Personality.—In *Alabama* the widow may elect, or the appraisers may allot to her, money instead of other personal property, and when such allotment is made, the court of probate may not, *ex mero motu*, set it aside.²

Where the Appraisers Omit to Set Apart to the widow the property exempted by law, and the executors sell the whole at auction, it has been held that the surrogate may decree the payment to the widow of a sum of money in lieu thereof.³

Commutation for Provisions Used by Administrator.—In *Arkansas* it is within the legal discretion of the probate court to allow the widow a certain sum, by way of commutation, for the provisions, etc., on hand at the death of her husband, when they have been used by the administrator, instead of having been delivered to the widow for the subsistence of the family for twelve months thereafter.⁴

Partnership Property.—In some jurisdictions the widow of a deceased partner is held not entitled to any part of the partnership estate, until all the partnership debts are paid, and this notwithstanding the individual estate is inadequate to pay the widow her statutory allowance.⁵ But in *Massachusetts* the court of probate may decree the allowance therefrom, although the assets are insufficient to pay the partnership creditors in full.⁶

Personality Includes Notes and Bonds.—It has been held that the "personal property" to which the widow is entitled includes notes and bonds, as well as property of the description ordinarily sold at administrators' sales.⁷

Judgments.—It has been held that under a decree for an allowance providing that the widow "may select any portion thereof," "from any articles" of the estate, "at the appraisement thereof in the inventory," she may select a judgment founded upon a promissory note returned upon the inventory, and, as accessory to the principal, she is entitled to the interest which accrues after the appraisal.⁸

Property must be That of Decedent.—It is quite clear that the widow can have no legal claim for an allowance upon property with which the husband parted

Pa. St. 475; Larrison's Appeal, 36 Pa. St. 130; Sipes v. Mann, 39 Pa. St. 414; Huffman's Appeal, 81 Pa. St. 329; McCann's Estate, 27 W. N. C. (Pa.) 439; Thomas' Estate, 152 Pa. St. 63; Daggett's Estate, 7 Pa. Co. Ct. Rep. 338; Rank's Estate, 12 Phila. (Pa.) 67; Andress' Estate, 14 Phila. (Pa.) 263. See also Fairbanks v. Robinson, 64 Cal. 250; Scott's Estate, 2 Phila. (Pa.) 135.

It has been held in *Georgia* that real estate may be set apart for the twelve months' support of the family of a deceased husband, and may be sold under order of the ordinary, and the proceeds thereof applied to such support. Miller v. Defoor, 50 Ga. 566; Tabb v. Collier, 68 Ga. 641; Cleghorn v. Johnson, 69 Ga. 369; Steed v. Cruise, 70 Ga. 168; Vandigrift v. Potts, 72 Ga. 665; Cox v. Cody, 75 Ga. 175.

By the *Indiana* statute in force in 1870 a widow, if from any cause she failed or refused to take articles of personal property at the appraised value to the full amount of five hundred dollars, or any part thereof, was entitled to receive that amount or the residue thereof in cash, out of the first moneys received by the executor or administrator,

whether derived from real or personal estate. Leib v. Wilson, 51 Ind. 550. See also Schneider v. Piessner, 54 Ind. 524.

1. Paine v. Paulk, 39 Me. 15. See also Applegate v. Cameron, 2 Bradf. (N. Y.) 119, where it is held that if the appraisers set apart articles valued at a sum exceeding the limit set by the statute the appraisement is on its face a violation of the statute and void.

2. Ex p. Reavis, 50 Ala. 210. See also Darden v. Reese, 62 Ala. 311.

3. Sheldon v. Bliss, 8 N. Y. 31, affirming 7 Barb. (N. Y.) 152. See also Kelly v. Moore, 18 Abb. N. Cas. (N. Y. Supreme Ct.) 468.

4. Green v. Ford, 17 Ark. 586. See also Nelson v. Smith, 12 Smed. & M. (Miss.) 662.

5. Julian v. Wrightsman, 73 Mo. 569. See also Little v. McPherson, 76 Ala. 552; Sellers v. Shore, 89 Ga. 416; Boone v. Sirrine, 38 Ga. 121.

6. Bush v. Clark, 127 Mass. 111.

7. Cummings v. Cummings, 51 Mo. 261. See also Carter v. Carter, 20 Fla. 558, 51 Am. Rep. 618.

8. Gilman v. Gilman, 54 Me. 531.

absolutely in his lifetime,¹ or which was held by him as a pledge and security for money loaned.²

VIII. INCREASE, DECREASE, AND DISCONTINUANCE—1. Increase.—Under the statutes which leave the amount of the allowance to the discretion of the probate court, it has been held that the allowance may be increased on appeal, or on review by the court which first decreed the allowance, where it is ascertained that the first allowance is insufficient, and the estate solvent.³

Services Rendered to the Estate by the Widow.—It has been held that a widow who has drawn her support from the estate of her husband during the year following his death, though it was not formally set apart, and though she rendered valuable services to the estate throughout the same period, is entitled to no further allowance by way of a year's support; if she would obtain compensation for her services, she must look to his representatives.⁴

2. Decrease.—Where the amount of the allowance is discretionary with the court, it may subsequently be reduced, when justified by the circumstances.⁵ In some states it is provided by statute that the amount decreed may be reduced by the court granting the allowance, upon proof of a change in the condition of the family, or of the estate, since the order was made granting a certain amount warranting such action;⁶ while in other states it is held that

1. Must Be Property of Decedent.—Where S., by deed, conveyed to G. all his personal property in trust, first, to pay all the creditors of S., and then to pay the surplus to the sisters of S.; and G. took possession in the lifetime of S., and after his death was proceeding to execute such trust, when, the widow of S. having notified his administrator of her claim for a year's support out of such property, said administrator filed a bill claiming that G. be enjoined from disposing of the property, and the same be delivered to him as administrator; the court held that, S. having by said deed parted absolutely with said property, his widow had no claim upon it, and the injunction was properly refused. *Summerford v. Gilbert*, 37 Ga. 59. See also *Padfield v. Padfield*, 78 Ill. 16; *Murphy v. Rulh*, 24 La. Ann. 74; *Johnson v. Henry*, 12 Heisk. (Tenn.) 696; *Bayless v. Bayless*, 4 Coldw. (Tenn.) 359.

2. Eddy's Estate, 12 Phila. (Penn.) 17.

3. Increase of Allowance.—*Woodbridge v. Woodbridge*, 70 Ga. 733; *Hale v. Hale*, 1 Gray (Mass.) 518; *Gilman v. Gilman*, 53 Me. 184; *Cummings v. Allen*, 34 N. H. 194; *In re Luther's Estate*, 67 Cal. 319. See also *Ward v. Ward*, 95 Ala. 331; *Godman v. Converse*, 43 Neb. 463; *Pulling v. Durkee*, 88 Mich. 387.

It has been held in *Ohio*, under section 48 of the Administration Act of that state, that an allowance decreed to a widow may be reviewed and increased for the benefit of the widow by the probate court, on petition of a person interested, although the petition for the review may not be filed until after the expiration of the twelve months, and after the death of the widow. *Sherman v. Sherman*, 21 Ohio St. 631.

Additional Allowance.—Where the family allowance previously granted to the widow of a deceased person for a limited period has been exhausted, the estate being solvent, she is entitled to such further allowance as is necessary for her maintenance during the

progress of the settlement of the estate. *Roberts v. McKimmon*, 67 Cal. 349.

Where the debts exceeded the whole estate, which was about six thousand four hundred dollars, and the widow's dower was worth six hundred and forty dollars, and the court had allowed her six hundred dollars, a further allowance was not deemed reasonable. *Cummings v. Allen*, 34 N. H. 194.

Additional Allowance to Children.—It has been held in *Maine* that a judge of probate, after making an allowance to a widow, out of her husband's estate, for herself and the minor children by a previous wife, cannot afterwards decree an additional allowance to such children for the reason that the widow abandoned them without their receiving the benefit of any of the funds in her hands. *Davis v. Gower*, 85 Me. 167.

When the Personal Estate is Exhausted.—But after the widow has received the amount of the first allowance, and all the personal estate has been exhausted in the payment of debts and charges of administration, though within one year from the appointment of the administrator, no further allowance can be made to the widow, and no appeal can be taken by her, or allowed on her petition, from the decree making the first allowance. *Hale v. Hale*, 1 Gray (Mass.) 518.

4. Blassingame v. Rose, 34 Ga. 418.

5. Dale v. Hanover Nat. Bank, 155 Mass. 141.

6. Reduction of Allowance.—In *Baker v. Baker*, 51 Wis. 538, it was held that upon its being shown that the condition of the estate or of the family had changed since an order was made allowing the widow a certain sum, at certain intervals, for her support pending the settlement of the estate, the county judge might make an order diminishing such allowance for the future, at his discretion; but where, without proof of any such change, the judge set aside an order allowing a certain sum monthly until the estate should be settled, and made an order allowing a gross sum which would not only greatly diminish the

a judge of probate has no authority to revoke a decree, passed by himself, making an allowance to a widow, and pass a new decree giving her a less sum.¹

3. Discontinuance.—It has been held in some states that the amount of the allowance being a matter within the sound discretion of the court, the order therefor may be vacated at any time thereafter for cause arising since it was made;² and, in several states, it has been held that the allowance must be discontinued after one year, if the estate is insolvent.³

ALLUDE.—See REFER.

ALLUVION. (For a full treatment of the subject, see the title ACCRETION, vol. I, p. 467. See also the titles AVULSION; BOUNDARIES; RELICTION.)—By the common law, alluvion is the addition made to land by the washing of the sea, a navigable river, or other stream, whenever the increase is so gradual that it cannot be perceived in any one moment of time.⁴ In the light of the authorities, alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. It is different from reliction, and is the opposite of avulsion.⁵

ALMANAC. (See also the title JUDICIAL NOTICE.)—The court will take judicial notice of an almanac.⁶

allowance, but have a retroactive effect, it was held that this was an abuse of discretion.

Cannot Have Retroactive Effect.—Under the *Iowa* Code, an order reducing the allowance made to a widow for her support can only take effect upon the part of the former allowance unexpended by her at the time the petition for review of such allowance is filed; she cannot be required to account for any portion expended by her while the allowance is unquestioned. *Harshman v. Slonaker*, 53 *Iowa* 467.

1. *Pettee v. Wilmarth*, 5 *Allen* (Mass.) 144. See also *Miller v. Miller*, 82 *Ill.* 463.

2. *Ford v. Ford*, 80 *Wis.* 565.

After Subsequent Marriage of Widow.—It has been held in *California* that when a woman marries again she is no longer entitled to an allowance for her maintenance out of the estate of her deceased husband, and her allowance previously made terminates upon her remarriage, without further order of the court. *In re Hamilton's Estate*, 66 *Cal.* 576. See also *Carpenter v. Brownlee*, 38 *Miss.* 200.

3. *Montgomery's Estate*, 60 *Cal.* 648. See also *Pulling v. Durfee*, 88 *Mich.* 387.

4. *Lovington v. St. Clair County*, 64 *Ill.* 58, 16 *Am. Rep.* 516.

5. *St. Clair County v. Lovington*, 23 *Wall* (U. S.) 68; *Jefferis v. East Omaha Land Co.*, 134 *U. S.* 190.

Accretion and Alluvion Distinguished.—"Accretion to a land on a stream, navigable or unnavigable, belongs to the owner of the land; therefore, if appellee's contention that this bar has become a part of his land by accretion has been maintained, the judgment of the Circuit Court is correct. *Warren v. Chambers*, 25 *Ark.* 120, 91 *Am. Dec.* 538; *New Orleans v. U. S.*, 10 *Pet.* (U. S.) 662; *Jones v. Souldar*, 24 *How.* (U. S.) 41; *Saulet v. Shepherd*, 4 *Wall* (U. S.) 502; *AM. AND ENG. ENCYC. OF LAW* (1st ed.), vol. I, § 5, p. 137, and cases cited. Accretion is the increase of real estate, by the addition of portions of soil by gradual deposition, through the operation of natural causes, to that already

in the possession of the owner. The term *alluvion* is applied to the deposit itself, while accretion rather denotes the act. 3 *Wash.* on *Real Prop.* 60 and 61; *Bouvier's Law Dict.*, tit. *Accretion*; *Woolrych on Waters* (lateral p. 29)." *St. Louis, etc., R. Co. v. Ramsey*, 53 *Ark.* 323, 22 *Am. St. Rep.* 195.

Roman Law.—*Alluvion* is defined as an addition of soil to lands, by a river, so gradual that in a short period the change is imperceptible; or, to use a common expression, a latent addition. *Institutes of Gaius*, bk. 2, § 70; *Jefferis v. East Omaha Land Co.*, 134 *U. S.* 192.

"That is added by *alluvion* which is added so gradually, that no one can perceive how much is added at any one moment of time." *Justinian's Institutes*, bk. 2, tit. I, § 20; *Jefferis v. East Omaha Land Co.*, 134 *U. S.* 192.

Land Gained from the Sea by Alluvion.—Land gained from the sea by *alluvion* is land gained by the washing up of sand or earth, so as in time to make *terra firma*. *Dana v. Jackson St. Wharf Co.*, 31 *Cal.* 120, 89 *Am. Dec.* 164.

6. **Judicial Notice.**—*Wilson v. Van Leer*, 127 *Pa. St.* 372, 14 *Am. St. Rep.* 854; *Reed v. Wilson*, 41 *N. J. L.* 29; *People v. Cheek*, 61 *Cal.* 404; *Sprowol v. Lawrence*, 33 *Ala.* 674; *Reg. v. Dyer*, 6 *Mod.* 41; *Brough v. Perkins*, 6 *Mod.* 81.

See also (upon the point that courts will take judicial notice of the day of the week, year, etc.) *Sasscer v. Farmers Bank*, 4 *Md.* 409; *Kilgour v. Miles*, 6 *Gill & J.* (Md.) 274; *Finney v. Callendar*, 8 *Minn.* 41.

The *almanac*, in such cases, is used like a statute, not strictly as evidence, but for the purpose of refreshing the memory of the court and jury. *State v. Morris*, 47 *Conn.* 179.

The *almanac* is part of the law of England. *Tutton v. Darke*, 5 *H. & N.* 649; *Reg. v. Dyer*, 6 *Mod.* 41; *Brough v. Perkins*, 6 *Mod.* 81.

In *Munshower v. State*, 55 *Md.* 11, the court said: "It was conceded that it became material and competent for the state to prove at

ALMS.—Something given to relieve the poor.¹

ALMS-HOUSE. (See also HOSPITAL, and the title POOR AND POOR LAWS.)—An alms-house is a house devoted to the reception and support of the poor; appropriated for the use of the poor.²

ALONE.—See note 3.

what hour the moon rose on the night of Saturday, the 9th of August, 1879, and, for the purpose of proving this, the state offered in evidence Gruber's *Almanac* for the year 1879. The prisoner objected to its admissibility, but the court overruled the objection, and allowed the *almanac* to be offered for the purpose stated. To this ruling the prisoner excepted. This is all the exception states in regard to the *almanac* offered, and we must assume that it contained tables giving the periods of the rising and setting of the sun and moon on each day of the year, such as are usually found in such works. The prisoner did not propose to offer proof assailing or impeaching the accuracy of the astronomical calculations upon which the tables in the particular *almanac* in question were made, but his counsel contend that the *almanac* was not the best evidence, nor indeed any evidence as to when the moon rose on that night. The argument is, that it was a mere calculation made by some one, long anterior to the happening of the event, that the event would occur at a certain hour and minute; it was not evidence that the moon had risen at a certain hour, but the statement of a conjecture that it would do so. On the 2d of January, 1880, when this case was on trial, there were certainly better and surer means of proving when the moon did actually rise on the 9th of August, 1879, than by relying on the computation of an *almanac*-maker that it would or ought to rise at a given time that night; how is the fact that it did rise at a particular hour proved by tendering as evidence the conjecture or calculation of some one that it would do so? If Gruber's *Almanac* is evidence for this purpose, so then are all the other various ones published, because there is nothing in this one to make it more authentic than the others, and thus a fact susceptible of exact proof like any other event that has happened may be established by the unsworn conjecture of almanac-compilers. We do not propose to elaborate the question, nor to rely upon the fact that the statute of 24 Geo. 2, c. 23, is in force in this state. As has been well argued by the attorney-general in his brief, the precise period at which the sun and moon will rise or set at any particular period of twenty-four hours in the future is as absolutely certain and just as capable of exact mathematical ascertainment as the occurrence of the day in which such setting or rising will take place. Courts have received as evidence weather reports, reports of the state of the markets, prices current, and insurance tables tending to show the probable duration of human life, though these are records which are not capable of mathematical demonstration, which cannot be tested by any certain law, and which may or may not omit the record of changes which have actually taken place. But an *almanac* fore-

casts with exact certainty planetary movements. We govern our daily life by reference to the computations which they contain. No oral evidence or proof which we could gather as to the hours of the rising or setting of the sun or moon could be as certain or accurate as that which we may obtain from such a source. Why then should not these computations, which are, after all, but parts of the ordinary computations of the calendar, be admitted as evidence? As was said by Judge Cooley, in considering an analogous question, *Sisson v. Cleveland, etc., R. Co.*, 14 Mich. 497: 'Courts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon, and demand evidence of a less certain and satisfactory character.' There is clearly no error in the ruling in this exception."

1. Disqualifications.—*Alms*, in the clause of a statute disqualifying persons from holding office who have received "parochial relief or other *alms*," means parochial *alms*. *Reg. v. Lichfield*, 2 Q. B. 695, 42 E. C. L. 870. But where the disqualification from exercising the franchise arises "from the receipt of parochial relief or other *alms*, which, by law of Parliament, now disqualifies from voting," the disqualification is not confined to parochial *alms*, but the receipt of any *alms* will be sufficient. *Smith v. Hall*, 15 C. B. N. S. 485, 109 E. C. L. 485; *Harrison v. Carter*, L. R. 2 C. P. Div. 26; *Edwards v. Lloyd*, 20 Q. B. Div. 302; *Stroud's Law Dict.*

Begging Alms or Soliciting Charity.—The act of a cripple in passing along a sidewalk and silently holding out his hand and receiving money from passers-by, is "begging for *alms* or soliciting charity." The court said: "Every one whose diseased or crippled condition appeals to sympathy if he places himself in a position to attract attention, or passes along the street calling attention by sign, act, or look to his unhappy condition, and receives from those who observe him the charity which he is obviously seeking," is begging *alms* or soliciting charity. *Matter of Haller*, 3 Abb. N. Cas. (N. Y. Supreme Ct.) 65. See also **BEGGING**; and the title **VAGRANCY**.

2. Exemption from Taxation.—Webster's Dictionary, followed in *People v. Tax Com'rs*, 36 Hun (N. Y.) 313; and in that case it was held that a house devoted to the purpose of affording pecuniary and other relief to persons of Swiss origin in need of assistance, was an *almshouse* within a statute exempting property from taxation. See also *Colored Orphans Ben. Assoc. v. New York*, 104 N. Y. 581; *Matter of Curtis' Estate* (Surrogate Ct.), 25 N. Y. St. Rep. 1028; and the titles **EXEMPTIONS (TAXATION)**; **SUCCESSION TAXES**.

3. A Grant of Water Right.—In *Salem Capitol Flour Mills Co. v. Stayton Water Ditch*,

ALONG. (See also BY; ON; OVER.)—"Along" means "by," "on," "over."¹

etc., Co., 13 Sawy. (U. S.) 110, it was held that the grant of a water right to a trustee for the use of *A alone*, meant that the trustee took no right or privilege whatever, but that the grant was solely for the use of the beneficiary.

1. Church v. Meeker, 34 Conn. 425.

Along Equivalent to On—Averment in Declaration.—In *Nappanee v. Ruckman*, 7 Ind. App. 361, it was held that an allegation that the appellee was walking *along* the sidewalk, was equivalent to a statement that she was on the sidewalk when she was injured.

Same—Along a Street—Grant of Right of Way to Railroad. (See also the title RAILROADS.)—"The word *along*, used with reference to a street, could not in our statute mean 'along-side of' a street, because such meaning would confer no right whatever in respect to the street, but would leave the railroad to make its way through the adjoining land owned by private individuals, without the consent of the state, or any aid from this statute." *Arbenz v. Wheeling, etc., R. Co.*, 33 W. Va. 1, citing *Heath v. Des Moines, etc., R. Co.*, 61 Iowa 11, and *distinguishing* *Stevens v. Erie R. Co.*, 21 N. J. Eq. 259, 34 N. J. L. 532.

In an ordinance of the city of Des Moines, authorizing the defendant company to construct "on, over, and *along*" certain alleys, and *along* the alley in question, it was held that the word *along* was used synonymously with "on" and "over," and not in the sense of "by the side of." *Heath v. Des Moines, etc., R. Co.*, 61 Iowa 1. See also *Rex v. Morris*, 1 B. & Ad. 441, 20 E. C. L. 421.

Railroads—Casual Occupation.—Laws of *New York*, 1890, c. 565, § 4, permitting a railroad company to construct its road "across, *along*, or upon" any highway, contemplates only a casual or incidental occupation and use of the highways, and does not authorize a company to build its entire railway *along* a highway between two villages. *Burt v. Lima, etc., R. Co.* (Supreme Ct.), 21 N. Y. Supp. 482.

Railroads—Fires—Along its Route. (See also the title FIRES.)—A statute made a railroad company responsible for fires caused by the operation of its road, and gave the company an insurable interest in property exposed to danger from fires *along* its route. It was held that the words "*along* the route" applied to buildings near and adjacent to the railroad, as well as those immediately adjoining. The court said: "It is very manifest that a railroad company, under this provision, is not liable for an injury to property in which it has no insurable interest; and it has such interest in property only as lies *along* its route. Under the word *along*, and as an adverb in Webster's Dictionary, is the following: 'Sax. *and-lang* or *ond-lang*; Fr. *au-long*, *le-long*. See *long*. The Saxons always prefixed *and* or *ond*, and the sense seems to be, by the length, or opposite the length, or in the direction of the length.' The first definition given is, 'By the length; lengthwise; in a line with the length; as, the troops marched *along* the bank of the river, or *along* the highway.' The first definition given of the word

'long' is, 'Extended, drawn out in a line, or in the direction of length; opposed to 'short,' and contra-distinguished from 'broad' or 'wide.' Long is a relative term; for a thing may be long in respect to one thing, and short with respect to another.'

"It is not deemed reasonable, that the legislature should limit the liability of a railroad corporation to a fire caused by its engine in property upon land immediately adjoining the railroad track, when that upon a strip of land a few feet distant, owned by another proprietor, equally exposed, should be excluded. Under such a statute the security of an owner, where land was bounded upon the track, would be great or small according to the width of his lot, and the security, which would embrace the whole width, would not extend to his grantee, of a part of the same, most remote from the railroad." *Pratt v. Atlantic, etc., R. Co.*, 42 Me. 585.

Same—Within the Right of Way.—In *Grand Trunk R. Co. v. Richardson*, 91 U. S. 472, the court said: "The buildings were *along* the route of the railroad; though some of them were, in whole or in part, within the lines of the roadway. It is obvious to us that the phrase '*along* its route' means in proximity to the rails upon which the locomotive engines run. That the statute gave an insurable interest in the property, for the destruction of which the corporation was made liable, does not necessarily show that the only property intended was such as was outside the lines of the roadway. That, indeed, was comprehended; but property lawfully within the lines, which the company did not own, equally needed protection. The statute was designed to be a remedial one, and it is to be liberally construed." See also *Ingersoll v. Stockbridge, etc., R. Co.*, 8 Allen (Mass.) 438; *Hart v. Western R. Corp.*, 13 Met. (Mass.) 99, 46 Am. Dec. 719.

Along and Parallel—Telegraph Lines. (See also the title TELEGRAPH AND TELEPHONE COMPANIES.)—By the Code of *Virginia*, § 1287, telegraph companies are permitted to construct their lines *along* and parallel to any of the railroads of the state. It was held that this did not authorize the condemnation of the right of way of a railroad company by the telegraph company. The court drew a distinction between the terms *along* and "*along* and parallel," the former term having been used as to county roads. The court said: "The lexicographers' definition of *along* is 'by the length of,' as distinguished from 'across'; it is not ambiguous. 'The kine * * * went *along* the highway.' 1 Sam. vi. 12. 'And parallel to,' alone, without the word *along*, would bear a signification dependent on the context or subject matter, (1) 'extended in the same direction, and in all parts equidistant;' (2) 'having the same direction or tendency;' or (3) 'like,' 'similar.' But here the words are used with *along*, which plainly means 'by the length of,' not 'across.' And it is said of two lines, one line (the telegraph line) is to be run '*along* and

ALONGSIDE. (See also **ALONG.**)—See note 1.

parallel to' another line (the railroad line). 'By the length of the railroad line,' and 'parallel to' it. Does this mean in or upon the railroad line? Or is it intended to give the right to run the line lengthwise alongside, and not contiguous, but equidistant throughout? * * * If the first, the language as to the county roads would seem to have been quite sufficient, 'along the railroad,' and the words 'and parallel to' were unnecessary, and without significance, however they are employed, and must have their sense and signification accorded to them. They are not used at random, but appear to make a distinction of some sort. What is it? Where is this line to run, as to the already-ascertained line of the railroad strip of land? We think it is to run in the direction lengthwise of the first line, alongside of and equidistant from it throughout all its parts, so that neither shall meet or touch; not in nor upon the railroad strip." *Postal Tel. Cable Co. v. Norfolk, etc., R. Co., 88 Va. 926.*

Along the Street, Highway, Railroad or River, etc.—Whether Grantee Takes to the Centre. (See also the titles **BOUNDARIES**; **DEEDS**.)—In general, a conveyance of land described as *along* the street, highway, river, etc., carries a fee to the centre of such street, highway, or river, etc. *Hammond v. McLachlan, 1 Sandf. (N. Y.) 323*; *Van Buren v. Baker (Supreme Ct.), 12 N. Y. St. Rep. 209*; *Herring v. Fisher, 1 Sandf. (N. Y.) 344*; *Gouverneur v. National Ice Co., 134 N. Y. 355*; *Luce v. Carley, 24 Wend. (N. Y.) 451, 35 Am. Dec. 637*; *Buttenuth v. St. Louis Bridge Co., 123 Ill. 535, 5 Am. St. Rep. 545*; *Morgan v. Reading, 3 Smed. & M. (Miss.) 366*; *Moody v. Palmer, 50 Cal. 31*; *Fraser v. Ott, 95 Cal. 665.*

But this is a rule of construction only, and where the grantor does not own the fee on the highway, street, or railroad, the grantee takes only to the edge of such way. *Church v. Stiles, 59 Vt. 642*; *Dunham v. Williams, 37 N. Y. 251.*

And see for examples of descriptions only conveying title to the side of the way, river, etc., *Kings County F. Ins. Co. v. Stevens, 87 N. Y. 293, 41 Am. Rep. 361*; *Child v. Starr, 4 Hill (N. Y.) 369*; *Seneca Nation of Indians v. Knight, 23 N. Y. 498*; *Woodman v. Spencer, 54 N. H. 511*; *Howard v. Ingersoll, 13 How. (U. S.) 416.*

Land between high and low water mark is conveyed, where the property is situated on a sound and is described in the deed as running *along* the shore, even though the land under water is not in express terms conveyed. *Oakes v. Delancey, 71 Hun (N. Y.) 49, affirmed in 143 N. Y. 673.*

Along a River.—In *Stevens v. Erie R. Co., 21 N. J. Eq. 259, 34 N. J. L. 532*, it was held that a statute authorizing a railroad company to construct its road *along* a river, did not authorize it to construct its road in or upon the river, but alongside of it; that is, it did not confer the right to take the land of the state below high-water mark.

And in *Stevens v. Erie R. Co., 21 N. J. Eq. 259*, it was held that the established and only

proper meaning of the word is "beside" and "following the course" or "alongside." When the phrase "upon and *along* the road" is used, the word "upon" qualifies the meaning of *along*.

Along in the Sense of "in the Vicinity of"—Fences.—A statute requiring a railroad company to erect fences, stated that it was for the protection of farmers, etc., residing *along* the line of the railroad. It was held that the words "*along* the line of" must be construed to mean "in the vicinity of," and that the benefit of the statute was not to be confined to those owning land abutting upon the railroad. *Dunkirk, etc., R. Co. v. Mead, 90 Pa. St. 458.*

Along in the Sense of Adjoining.—*Along* is sometimes synonymous with "adjoining." *Walton v. St. Louis, etc., R. Co., 67 Mo. 58.*

Along in the Sense of "Up to," "Extending to," "Reaching to."—There being evidence as to the relative situation of a fence, which ran near the bank of a creek, and the line of high water on that side, a charge that the jury would "find the line on the west side of the creek *along* with the fence of W. H. Preston up to the line of Davidson at high-water mark," etc., was not error. The court said: "*Along* a line does not signify that an object must be on the line, but rather the reverse; *along*, in this sense, is used as the equivalent of up to, extending to, reaching to, and in this sense it is entirely consistent with the description contained in the deed from Pou to plaintiff and Newton." *Benton v. Horsley, 71 Ga. 619.*

Along a Wall.—Where the description in a deed said "*along* the south side of the brick wall," it was held that the outer surface of the brick wall was intended. *Cornes v. Minot, 42 Barb. (N. Y.) 60.*

Along the Bank.—"When banks of rivers were spoken of, those boundaries were meant which contain their waters at their highest flow." *Howard v. Ingersoll, 13 How. (U. S.) 415.*

Along the High-water Mark. (See also the title **ACCRETION**, vol. 1, p. 467.)—These words indicate a fixed boundary line, and under them a grantor is entitled to no accretions or land left dry. *Cook v. McClure, 58 N. Y. 437, 17 Am. Rep. 270.*

"Along with Other Sums," was construed as "in addition to," not as "including." *Pilkington v. Myers, 8 L. T. N. S. 720.*

Along the Line of Such Land—Sidewalk.—The *Massachusetts* Gen. Stat. provides that owners of land adjoining a highway may construct a sidewalk within the highway "*along* the line of such land." The court in construing this statute said: "The words '*along* the line of such land' do not necessarily import that the part of the sidewalk finished for travel must at all points touch or be parallel to the line of the land. It may happen that, owing to the peculiarities of the land, or because of the direction which public foot travel had before taken at this place, it would be more convenient and better to finish the footwalk, as was done in this case, in a direction not exactly parallel with the landowner's fence." *Com. v. Franklin, 133 Mass. 570.*

1. Defendants sold a cargo of coal to A,

ALREADY. (See also PENDING; and the title STATUTES.)—Before a certain time.¹

“Already” refers to present, not to future time.²

ALSO.—The word “also” means “in like manner,” “further,” “in addition to,” “too.”³

Wills. (See also ITEM; and the title WILLS.)—The words “also,” or “and also,” are usually read in wills as copulative, carrying on the sense of the preceding words, and being equivalent to “in like manner.” In this sense, the conditions attaching to the preceding disposition of property attach

and the latter sold to B, and gave a bill of lading specifying that the coal was to be delivered *alongside*. The boat was to be unloaded at the expense of B, by defendants’ stevedore. In such a case it is the custom of the port and of defendants for the captain to manage the guy rope. It was held that the general rule that carriers by water transporting property from port to port are bound to deliver the cargo upon the wharf, giving due notice to the consignee, was so affected by the stipulation to deliver *alongside*, and by the custom of the port, as to make defendants liable for the negligence of the captain in allowing a boy to manage the guy rope, by which plaintiff was injured. *Kilroy v. Delaware, etc., Canal Co.* (Ct. App.), 30 N. Y. St. Rep. 724.

Charter-party. (See also the title CHARTER-PARTY.)—Where a charter-party provided that “the cargo shall be brought *alongside* for shipment,” it was held that this meant that the charterer was to bring the cargo as near to the ship as practicable, and it was for the jury to say whether that had been done or not. *Holman v. Dasnières*, 2 T. R. 480-607. See also *Fletcher v. Gillespie*, 3 Bing. 635; *Trindade v. Levy*, 2 F. & F. 441; *Stroud’s Judicial Dict.*

1. Where a statute subjected persons to a penalty for practicing their profession after a certain date, except persons *already* in practice, it was held that it was necessary to show that they were practicing at the time the act went into operation; and that it was not sufficient to show that they were practicing when the bill received the royal assent. *Apothecaries’ Co. v. Roby*, 5 B. & Ald. 949.

Already Incurred.—A clause that nothing contained in the statute shall affect any penalty, etc., “*already* incurred,” saves from the operation of the statute any penalty incurred before it took effect, although after it was approved by the governor. *Com. v. Bennett*, 108 Mass. 30, 11 Am. Rep. 304.

The word *already* in § 8, Constitution of *West Virginia*, was held to refer to the date of adoption by the people. *List v. Wheeling*, 7 W. Va. 522.

Already Constructed.—See Now.

2. *Manufacturers Natural Gas Co. v. Douglass*, 130 Pa. St. 295.

Already Accrued.—A statute limiting the time for the commencement of actions, excepted rights of action which had *already* accrued. It was held that this exception applied not merely to the date of the original enactment, but to any subsequent amendment. *Goillotel v. New York*, 87 N. Y. 441.

3. *Webster’s Dict.*, followed in *Van Dusen v. Fridley*, 6 Dakota 322; *Worcester Dict.*, *Howell v. Com.*, 97 Pa. St. 335; *Panton v. Tefft*, 22 Ill. 367.

The word *also* implies something in addition to what has gone before. *McCurdy v. Alpha Min. Co.*, 3 Nev. 37; *Dalton v. Bowker*, 8 Nev. 191; *Panton v. Tefft*, 22 Ill. 367.

Also is a copulative and not a disjunctive word. *Farish v. Cook*, 6 Mo. App. 331.

In *Garland v. Harrison*, 8 Leigh (Va.) 368, it is said: “It is true that it is in general an adverb, and means *in like manner*; but Dr. Johnson tells us truly that it is sometimes nearly the same with the word *and*, only conjoining the members of the sentence. In the clause under consideration, it seems to me to be a mere word of connection; it conjoins dissimilar provisions, and is superfluous.”

“**May Also Reverse**”—In Addition to.—A *South Carolina* statute provided that the mayor should try offenders against the ordinances of the city in a summary manner, and gave the right to defendant to appeal to the city council; and further provided, that in all cases appealed, the mayor should preside, and the aldermen should “sit as a jury to try the facts involved, and may *also* reverse,” etc., the rulings of the mayor in the first place. It was held that in cases appealed, the trial must be *de novo*. The court said: “We do not think that the additional words, ‘and may *also* reverse, modify, or affirm any or all of the rulings of the mayor in the first trial of the case,’ can have the effect of qualifying the conclusion to which the previous words, ‘shall sit as a jury,’ manifestly point. On the contrary, these additional words show the purpose to confer upon the aldermen two different and distinct powers: (1) To try the facts involved sitting as a jury; (2) to reverse, affirm, or modify the law as ruled by the mayor. This is apparent from the use of the word *also*, ‘and may *also* reverse,’ etc., which shows that an additional power was intended to be conferred, and that the province of the aldermen was not to be confined merely to trying the facts involved, but that they should *also* have power to review the law as applied by the mayor, to which the word ‘rulings’ clearly points, as that is a word peculiarly applicable to a legal question, and is seldom, if ever, applied to a finding of fact. It seems to us that the language of the statute clearly indicates that the intention was, ‘in all cases appealed to the city council,’ that the whole case, both fact and law, should be retried *de novo*, and not heard as

also to the succeeding, or *vice versa*.¹ But "also" may be the beginning of a new sentence; in such case, no such construction would obtain.²

appeals usually are." *Anderson v. O'Donnell*, 29 S. Car. 355.

1. 8 Vin. Abr. 214 Q. a.; *Cole v. Rawlinson*, 1 Salk. 234; *Giles v. Melsom*, L. R. 6 H. L. 24; *Child v. Elsworth*, 2 De G. M. & G. 679; *Richards v. Baker*, 2 Atk. 321; *Leeke v. Bennett*, 1 Atk. 470; *Cheseman v. Partridge*, 1 Atk. 436; *Sherrill v. Echard*, 7 Ired. (N. Car.) 164; *Hyman v. Williams*, 12 Ired. (N. Car.) 92; *Allison v. Bates*, 6 B. Mon. (Ky.) 80; *Anonymous*, 2 Hayw. (N. Car.) 164.

Testator devised as follows: "I give unto J. C. all that my house and premises at P.; I also give unto J. C. all that my land, etc., to J. C., his heirs and assigns forever." It was held that J. C. took a fee in the house. *Fenny v. Ewestace*, 4 M. & S. 60.

A will contained the following: "Second, I give, devise and bequeath unto my beloved wife, Caroline Morgan, all my household goods and furniture, also one-third of the income or interest of my estate during her widowhood, in lieu of dower." It was held that also was equivalent to "in like manner," and that therefore the gift of household goods and furniture was during widowhood only. *Morgan v. Morgan*, 41 N. J. Eq. 235.

In *Van Houten v. Post*, 39 N. J. Eq. 51, the testator gave to his wife nine acres of land, definitely locating it, and also personal property "to be left to discharge my debts, and so much of my real property to discharge the remainder of my debts, if any wanting, and the remainder of my property of what nature soever, during her widowhood." It was held that the widow took the fee in the lot first named. In *Morgan v. Morgan*, 41 N. J. Eq. 235, the court says of *Van Houten v. Post*, 39 N. J. Eq. 51: "This, the testator must have intended, for he limits all the rest of the gift to the widow for life."

In *Sherman v. Wooster*, 26 Iowa 272, the testator said: "The residue of my estate, real and personal, I give, bequeath and dispose of as follows, to wit: to my wife, one half of my real estate also all my personal property during her natural life, and, at her decease, to be equally divided between my two daughters; the one-half of my real estate I bequeath to my two daughters and their heirs." It was held that the fee in the land passed by the devise, and that the words "during her natural life" were limited to the personal property. From this view, *Dillon, C. J., dissented*, and said that the wife took only a life estate in the land.

A testator bequeathed and devised certain specific articles of personal property and a pew in a meeting house to his wife for life, and in the same clause he made a further bequest, using the following language: "I also give and bequeath to my said wife, Betsey Loring, forty-five hundred dollars, to be paid to her in cash or in such personal securities as she may select from my estate." It was held that by this language the testator made an absolute gift to his wife of the sum of forty-five hundred dollars; and that the meaning of the

word also in this connection was "in addition" rather than "in like manner." *Loring v. Hayes*, 86 Me. 351.

Words importing a tenancy in common in one bequest will not be extended by implication to another bequest which is connected with the former by the term also. 2 Jarman on Wills (Bigelow's ed.) *257.

Same—Increase of a Slave.—A testator bequeathed to his daughter, a negro girl named M., "and her increase, if any; also one negro girl named B., to her heirs forever." It was held that the daughter did not take the increase of the girl named B. *Williamson v. Williamson*, 4 Jones Eq. (N. Car.) 286.

2. *Gower v. Towers*, 26 Beav. 81. See also *Doe v. Westley*, 4 B. & C. 667, 10 E. C. L. 440.

In *Evans v. Knorr*, 4 Rawle (Pa.) 67, the testator devised to his executor a certain tract of land in trust "only to and for the sole and separate use of A. E., the wife of W. S. E." "I also give and bequeath unto the said G. K. [the executor] the sum of one thousand dollars in trust for the use of her, the said A. E." It was held that the bequest of the one thousand dollars was not for the sole and separate use of the wife, but went to the husband. The court said: "But it has been contended that the clause giving the legacy of one thousand dollars is connected with the preceding clause by the word also, and as, in the preceding clause, the bequest of the goods, etc., is given expressly for the sole and separate use of Ann Evans, that the word also was used by testator to show that he gave the thousand dollars to be held in like manner, and that the clause ought to be read thus: 'I give and bequeath unto the said George Knorr the sum of one thousand dollars, in trust, in like manner, for the use of her, the said Ann Evans.' As authority for this construction, has been cited *Shepp. Touch.* 140, 141, where it is said: 'If one devise his land thus, I give Whiteacre to my eldest son and his heirs for his part; Item, Blackacre to my youngest son, for his part; by this devise the youngest son shall have the fee simple of Blackacre. So, if I give Whiteacre to I. S. Item, Blackacre to I. S. and his heirs; by this devise I. S. shall have the fee simple of Whiteacre also. Or if one devise Whiteacre to I. S. and then say Item, Blackacre to I. S. and the heirs of his body; by this devise he hath an estate tail in both Acres. For these several cases, there is no other reference than one in the margin to *Trin. 30 Eliz.* The rule of construction which was adopted in those cases is not given, nor have I met with any report of the same date, in which they are contained and explained. But by turning to some of the cases on this subject, all that has been set forth and quoted from *Shepp. Touch.* will be found in other cases, and the rule for the construction put on these sentences, so fully explained as to show that neither they nor yet any of the adjudications in respect to this matter, sustain the

ALTER, ALTERATION, ETC. (See also the title ALTERATION OF INSTRUMENTS.)—To alter means to make a thing different from what it was; to change.¹

Alteration, *ex vi termini*, means a change or substitution of one thing for another.²

construction contended for by the counsel for the plaintiffs. In the case now under consideration, the clause giving the one thousand-dollar legacy is an entirely distinct one from the preceding; and there certainly needs no reference or relation to it, in order to give it either meaning or effect, because it is complete and perfectly intelligible in itself. The word *also* which is prefixed to the sentence serves, as it most frequently does in wills, to point out the beginning of a new devise or a new bequest. It imports no more than 'Item' and is of the same signification in this place as 'moreover,' and cannot be construed to mean 'in like manner.' * * * Here we have this sentence in the will disposing of the land and the goods, which is perfect and complete; and the subsequent clause, which is the one giving the thousand-dollar legacy, is equally so. And this latter is in no wise dependent upon the first, to make it more complete and more intelligible than it would be without any such clause or sentence as the first being in the will at all. Now, it will be found upon reference to the authorities, that it is only where the first sentence is complete, and the second so imperfect, or *vice versa*, as not to be intelligible without referring to the first or the one that is perfect, in order to supply the defect, that the word *also* can ever have the meaning of the words 'in like manner,' given to it, or in causing the one clause to govern and direct the other. As in 1 Roll. Abr. 844, tit. Estate by Devise (M.), pl. 2: 'If a man devise Blackacre to one in tail, and also Whiteacre; the devisee shall have an estate tail in Whiteacre; for the whole is but one sentence, and so the words which make the limitation of the estate belong to both.' Trin. 40 Eliz. B. R., cited by Fenner, Just., to have been decided in bank. So in *Cole v. Rawlinson*, Holt. 744, Ld. Raym. 831, 1 Salk. 234, decided in B. R. 1 Anne, where the testator 'gave all his estate, right, title, and interest, which he then had, and all the term and terms of years which he then had or might have in his power to dispose of after his death, in whatever he held by lease from Sir John Freeman, and *also* the house called the Bell tavern to John Billingsley.' It was ruled by the three *puisne* justices, *contra*, Holt, C. J., that the devisee took a fee in the Bell tavern, 'because, as they say, it is but one sentence, coupled by the words "and *also*," and governed by one verb, whereby the preposition "in" is carried unto the Bell tavern, so that it is a devise of all the testator's leasehold estate, and also in the Bell tavern.' See *Cole v. Rawlinson*, 1 Salk. 234, 2 Ld. Raym. 831. In both these cases, the first clause, it will be observed, is perfect, but the second being altogether imperfect, rendered a reference of it to the first necessary, and becoming thus connected with it, they both

make a whole sentence and as such were construed. Again, in Moore 52, 53, pl. 153, as early as Pasch. 5 Eliz., this case is put by Dyer, Chief Justice, in the following form: 'Item. I give the manor of D. Item. I give the manor of S. to I. K. and his heirs.' Here, it will be observed that the first clause is the imperfect one, and to render it intelligible, a reference must necessarily be had to the second, which makes it complete. The first is defective in not giving the name of the devisee, and the word 'Item' is used as a copulative to connect it with the second clause, which gives the name of the devisee, and the quantity of estate intended for him, thus making the whole but one devise, and giving to the devisee a fee simple in both manors, as he said. Now it is plain that the cases cited from Shepp. Touch. fall directly within the principle of these cases just referred to, because the same imperfection appears in either the first or second clause of each of them, and renders it therefore necessary to refer to the one in order to make sense of the other. But if a man devise in this manner, 'Item. I give my manor of Dale to my second son. Item. I give my manor of Sale to my second son and his heirs,' the devisee shall only take an estate for life in the manor of Dale, but a fee in the manor of Sale. So held by Dyer, Chief Justice, and two of the *puisne* justices. Brown, Justice, *dissent*ed, Pasch. 5 Eliz.; Moore 52, 53, pl. 153, and considered the word 'Item' as merely indicating a new devise. So if 'I devise Blackacre to my daughter F. and to the heirs of her body engendered. Item. I devise unto my said daughter Whiteacre; she shall have an estate for life only in Whiteacre, for, as the court said, the word 'Item' is not equivalent to 'in the same manner.' Trin. B. R. 40, Eliz. *per curiam*; 1 Roll. Ab. 844, tit. Estate Devise (M.), pl. 1. See also 1 Mod. 100, and 1 Sid. 105, *per* Just. Windham, to the same effect. Here each clause is perfect and intelligible of itself, and must be construed according to the language employed by the testator in each. And the word 'Item' imports nothing more than 'moreover,' 'beside,' or 'in addition thereto,' and is used, as I have already said, to show that what follows it, is intended to be in addition to that which precedes, or otherwise, as Lord Hardwicke has said, 3 Atk. 438, 'is only made use of to distinguish the clauses in the will.'" See also *Spirit v. Bence*, Cro. Car. 368; *Hopewell v. Ackland*, 1 Salk. 239.

1. *Smith v. Brown*, 1 Wend. (N. Y.) 231; *Wallace v. Blair*, 1 Grant's Cas. (Pa.) 79; *People v. Sassovich*, 29 Cal. 484.

2. *Johnson v. Wyman*, 9 Gray (Mass.) 189.

To *alter* is to make different without destroying the identity; to vary without entire change. *Black River Imp. Co. v. Holloway*,

87 Wis. 590; *Davenport v. Magoon*, 13 Oregon 7, 57 Am. Rep. 1; *Heiple v. Clackamas County*, 20 Oregon 149.

Inspector's Brand.—To *alter* is to make a thing different from what it was. The erasing any letter, or the addition to the mark, is an *alteration*. *Rogers v. Jones*, 1 Wend. (N.Y.) 236, 19 Am. Dec. 493. That case was an action of debt for the penalty for *altering* a flour inspector's brand mark.

To Increase or Diminish.—The Constitution of *California* provided that the state should be divided into fourteen judicial districts "subject to *alteration*" by a two-thirds vote of the legislature. It was held that the legislature had power to increase or diminish the number of judicial districts, although it was contended that this was giving the verb to *alter* the sense of "to create," but the court said that the word *alter* was equivalent to "increase or diminish." *People v. Sassovich*, 29 Cal. 484. See also *Heiple v. Clackamas County*, 20 Oregon 148; *Hannibal v. Winchell*, 54 Mo. 172.

Altering Brand of Cattle—Putting On a New Brand. (See also the title BRANDS AND BRANDING.)—Putting a new brand on a cow already branded, without the consent of the owner, is an *altering* of the brand within the *Texas* statute, although the new brand does not interfere with the figuring on the old brand. The court said: "The words *altering* or defacing are not synonymous terms. Defacing would be obliterating; *altering* would be changing from what it was before into a different brand." *Linney v. State*, 6 Tex. 2, 55 Am. Rep. 756. See also *Slaughter v. State*, 7 Tex. App. 124.

Bridges.—The power to *alter* bridges was held to mean that the location could be *altered*, and that the old bridge might be discontinued. *State v. Wood County*, 33 W. V. 597.

Altering a Wharf.—The power to *alter* a wharf would seem to include a power to extend or diminish it. *Hannibal v. Winchell*, 54 Mo. 172.

Altering Streets or Road. (See also the titles HIGHWAYS; STREETS AND SIDEWALKS.)—An authority to *alter* a road gives the right or power to extend or diminish it. *Heiple v. Clackamas County*, 20 Oregon 148.

So, such an authority will confer the right to change the grade of a street. *Waddell v. New York*, 8 Barb. (N. Y.) 95.

So, the *alteration* of an old road was held to involve the discontinuance of that part of it which was *altered*. *Ponder v. Shannon*, 54 Ga. 187. See also *State v. Wood County*, 33 W. Va. 157; *Com. v. Westborough*, 3 Mass. 406.

But a power to "open, *alter*, abolish," etc., a street, would not authorize its entire occupation by a railroad company's tracks, to the exclusion of its use as a street. *Lackland v. North Missouri R. Co.*, 31 Mo. 187. See also the title RAILROADS.

Nor does *alteration* include the power to make an entirely new way. *Gloucester v. Essex County*, 3 Met. (Mass.) 375.

Same—Alter and Grade.—Where a railroad charter gave the company the power to *alter* and grade roads crossing their railroad so as

not to impede travel on such road, it was held that the company had no power to change the route of the road. *Warren R. Co. v. State*, 29 N. J. L. 353.

Same—Constitutional Provision.—A constitutional provision forbidding the *altering* of highways by special act was held to apply to *altering* their course, and not to prevent a change of grade. *Harrison v. Milwaukee County*, 51 Wis. 646.

Same—Massachusetts.—The *alteration* of a road is technical, and means the substitution of one line of way for another, the establishment of one, and the discontinuance of that for which it is substituted. *Com. v. Westborough*, 3 Mass. 406; *Com. v. Cambridge*, 7 Mass. 158.

Lease.—A lease provided for forfeiture should the lessee make any "*alteration* or addition in or to the building." It was held that a new building fell within this clause. *Whitwell v. Harris*, 106 Mass. 532.

The power to *alter* does not include the power to destroy. *Davenport v. Magoon*, 13 Oregon 3, 57 Am. Rep. 1.

To Alter a Water Trunk or Feeder.—A grant of a water right conferred on the grantee the privilege of entering the grantor's lands to *alter*, repair, or renew the trunk or feeder which carried the water from the pond to the mill. It was held that the grantee had not only the right to change the form, material, and size of the trunk, but also its location so far as might be necessary to give him the full benefit of the grant. *Jaqui v. Johnson*, 26 N. J. Eq. 327.

Altering Ballots.—See the title ELECTIONS.

Alter or Amend. (See also AMEND.)—The power to *alter* or amend a contract is to change it between the original parties and such others as are by mutual consent admitted into it. It does not give the power to compel one of the parties to operate in conjunction with others and share with them the privileges and benefits of the contract. *Sage v. Dillard*, 15 B. Mon. (Ky.) 359.

Building, Altering, Repairing, or Ornamenting—Mechanic's Lien.—These words do not include the furnishing materials and labor necessary to place a lightning rod on a house. *Dayhuff v. Dayhuff*, 81 Ill. 499.

Altering Bill. (See also BANK NOTES.)—An *altered* bill can neither be a counterfeit, a forged, nor a spurious bill, according to the twenty-second section of the *Ohio* statute. It must be an authentic and genuine bill, legitimately printed from the genuine plate, and truly signed by the officers of the bank, but *altered* in its denomination or in some other material part. *Kirby v. State*, 1 Ohio St. 185.

Cutting out "one dollar" from the body of a bank note, adjusting paper in the space so made, and substituting the figure five for the figure one, is *altering* a bank note within the meaning of the *Ohio* statute. *Haynes v. State*, 15 Ohio St. 455.

For cutting bank bills into slips with intent to paste the slips together and increase the number of the original bills, a person cannot be indicted under a statute to prevent the *altering* of bills. *Com. v. Hayward*, 10 Mass. 35.

ALTERATION OF INSTRUMENTS.

BY THEODOR MEGAARDEN.

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CROSS-REFERENCES.

For matters of PROCEDURE, see the titles NEGOTIABLE INSTRUMENTS; NON EST FACTUM, ENCYCLOPÆDIA OF PLEADING AND PRACTICE.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles: ALTERATION OF RECORDS; BILLS AND NOTES; BURDEN OF PROOF; DEEDS; ESTOPPEL; EXPERT AND OPINION EVIDENCE; FALSIFYING EVIDENCE; FORGERY; GUARANTY; HANDWRITING; PAROL EVIDENCE; PAYMENT; PRESUMPTIONS; QUESTIONS OF LAW AND FACT; REFORMATION OF INSTRUMENTS; RELEASE; SURETYSHIP; WILLS.

I. DEFINITION.—An alteration is an act done upon an instrument by which its meaning or language is changed either in a material or immaterial particular.¹

II. KINDS OF ALTERATIONS.—Alterations of instruments may be either material or immaterial.

1. *Alteration Defined.*—*Gloucester v. Essex County*, 3 Met. (Mass.) 375; *Bridges v. Winters*, 42 Miss. 135, 2 Am. Rep. 598, 97 Am. Dec. 443; *Moore v. Macon Sav.*

Bank, 22 Mo. App. 684; *Palmer v. Largent*, 5 Neb. 223, 25 Am. Rep. 479; *Oliver v. Hawley*, 5 Neb. 439; *Morrill v. Otis*, 12 N. H. 466.

Material Alterations.—A material alteration of an instrument is one “which causes it to speak a language different in legal effect from that which it originally spake.”¹

Immaterial Alterations.—An immaterial alteration is one which does not have the effect of changing the legal significance of the instrument.²

Spoliation.—An interlineation, erasure, or addition made in the instrument by a stranger to the contract, without the connivance or consent of any of the parties thereto, is not regarded, strictly speaking, as an alteration, but is termed a “spoliation.”³

III. EFFECT OF ALTERATIONS—1. In General.—The effect of an alteration in an instrument is, in *England* and in most of the *United States*, dependent on whether the alteration is or is not material; the modern rule of the English courts, which also prevails generally in the *United States*, is that only material alterations vitiate an instrument.⁴

2. Material Alterations—*a.* IN GENERAL.—And if the alteration is a material one, it is also important to inquire by whom it was made.⁵

***b.* BY GRANTEE OR PROMISEE—(1) In General.**—If the material alteration is wilfully made by the grantee or promisee, the only consideration which will prevent its having a vitiating effect, is that it was made with the consent of the grantor or promisor.⁶

(2) Without Consent of Grantor or Promisor—(a) On Executory Contracts—*aa.* GENERAL RULE.—The general rule is that a material alteration of a written instrument, made after its execution by the party claiming thereunder, or with such party's privity, without the authority or consent of the other party or parties to the writing, invalidates the instrument in the hands of the party responsible for the alteration, and his assigns, as to all the nonconsenting parties, so that no recovery can be had on its executory provisions in either its altered or original form.⁷ He will not be per-

1. Material Alteration.—*Murray v. Klinzing*, 64 Conn. 78; *Wheelock v. Freeman*, 13 Pick. (Mass.) 168, 23 Am. Dec. 674; *Oliver v. Hawley*, 5 Neb. 439; *Morrill v. Otis*, 12 N. H. 466; *Reeves v. Pierson*, 23 Hun (N. Y.) 185.

2. Immaterial Alteration.—It has been said that alterations in instruments are deemed immaterial where neither the rights nor interests, duties nor obligations, of either of the parties are in any manner affected or changed. *Smith v. Crooker*, 5 Mass. 538; *Arnold v. Jones*, 2 R. I. 345.

3. Alteration and Spoliation Distinguished.—1 *Greenl. Ev.*, § 566; *Bridges v. Winters*, 42 Miss. 135, 2 Am. Rep. 598, 97 Am. Dec. 443; *Medlin v. Platte County*, 8 Mo. 235, 40 Am. Dec. 135.

4. 2 Chitty Contr. (11th Am. ed.) 1167; *Pars. Contr.*, pp. 716-720. See also *infra*, this title and division, subd. *Immaterial Alterations*.

5. 2 Min. Inst. 663.

6. See *infra*, this title, subdivision, *By Consent of Grantor or Promisor*; division, *Ratification of Alterations*.

7. Executory Contracts—General Rule.—*Shep. Touch.* 69; *Bish. Contr.*, § 746; 2 Min. Inst. 662. *England.*—*Pigot's Case*, 11 Coke 27; *Gardner v. Walsh*, 5 El. & Bl. 83, 85 E. C. L. 83; *Lowe v. Fox*, L. R. 12 App. Cas. 206.

United States.—*Angle v. North-Western Mut. L. Ins. Co.*, 92 U. S. 330.

Alabama.—*Toomer v. Rutland*, 57 Ala. 379, 29 Am. Rep. 722; *Green v. Sneed*, 101 Ala. 205.

Indiana.—*Cochran v. Nebeker*, 48 Ind. 459, *Schnewind v. Hackett*, 54 Ind. 248; *Dietz v. Harder*, 72 Ind. 208.

Iowa.—*Knoxville Nat. Bank v. Clark*, 51 Iowa 264, 33 Am. Rep. 129.

Louisiana.—*Louisiana State Bank v. Fuselier*, 9 Rob. (La.) 26.

Massachusetts.—*Boston v. Benson*, 12 Cush. (Mass.) 61; *Wheelock v. Freeman*, 13 Pick. (Mass.) 165, 27 Am. Dec. 674; *Citizens' Nat. Bank v. Richmond*, 121 Mass. 110; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 206, 25 Am. Rep. 67.

Michigan.—*Osborne v. Van Houten*, 45 Mich. 444; *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661.

Mississippi.—*Oakey v. Wilcox*, 3 How. (Miss.) 330.

Missouri.—*King v. Hunt*, 13 Mo. 97; *Hord v. Taubman*, 79 Mo. 101.

New Hampshire.—*Haines v. Dennett*, 11 N. H. 188.

New York.—*Tillou v. Clinton*, etc., *Mut. Ins. Co.*, 7 Barb. (N. Y.) 564; *Kennedy v. Crandell*, 3 Lans. (N. Y.) 1.

North Carolina.—*Nunnery v. Cotton*, 1 Hawks (N. Car.) 222; *Davis v. Coleman*, 7 Ired. (N. Car.) 424.

Ohio.—*Williams v. Van Tuyl*, 2 Ohio St. 337; *Huntington v. Finch*, 3 Ohio St. 445.

Oregon.—*Cline v. Goodale*, 23 Oregon 406, quoting 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 502.

mitted to establish the contract by other evidence.¹

bb. NONESSENTIAL ELEMENTS—(*aa*) *Prejudice to Grantor or Promisor*.—If the alteration is material, the question of whether it is or is not prejudicial to the obligor is of no importance; a material alteration, even though it may apparently operate to the benefit of the obligor, avoids the instrument.²

Sureties.—More particularly is this so when the objection is urged by a surety; for, when a person occupies the position of a surety, the rule is especially strict, that he may insist on the very terms of his contract.³

(*bb*) *Actual Fraud*.—With reference to the effect of a material alteration on the validity of the instrument, the intent with which the alteration was made is, according to the generally prevailing rule, wholly immaterial; the preponderance of authority supports the proposition that an unauthorized material alteration of a writing by the grantee or promisee avoids the instrument, although, in making the alteration, no actual fraud is intended.⁴ The existence

Pennsylvania.—Neff *v.* Horner, 63 Pa. St. 327, 3 Am. Rep. 555.

South Carolina.—Mills *v.* Starr, 2 Bailey (S. Car.) 359; Powell *v.* Pearlstine, 43 S. Car. 403.

Tennessee.—McDaniel *v.* Whitsett (Tenn. 1896), 33 S. W. Rep. 567, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 502; Taylor *v.* Taylor, 12 Lea (Tenn.) 714; Crockett *v.* Thomason, 5 Sneed (Tenn.) 342.

Texas.—Texas Printing, etc., Co. *v.* Smith (Tex. App. 1889), 14 S. W. Rep. 1074, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 502.

Virginia.—Newell *v.* Mayberry, 3 Leigh (Va.) 250, 23 Am. Dec. 261.

Washington.—Murray *v.* Peterson, 6 Wash. 418, quoting 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 502.

Alteration of Instrument Referred to in Parol Agreement.—Where a farm was originally let by the plaintiff to the defendant from year to year by parol agreement, and the defendant afterwards signed an agreement containing certain terms and stipulations as to the mode of tillage, it was held, when this agreement, on being produced, appeared to contain an erasure and interlineation as to the term of years mentioned in the *addendum*, that it might be introduced in evidence without any explanation of the alteration, the term of years being immaterial as to the parol contract between the parties to hold from year to year, subject only to the terms of the agreement as to the cultivation of the land. Parke, Baron, in effect said that the holding here was under a parol agreement, only incorporating so much of the written instrument as was applicable to a yearly holding; that the rule of law by which a material alteration avoids an instrument applies where the obligation is by reason of the instrument; but where the obligation, as in this case, was by reason of the parol contract of the parties, quite independent of the subscription of that paper, and rising from the occupation of the land upon all the terms of that instrument which were applicable to a tenancy from year to year, an alteration in the term of years was wholly immaterial. Falmouth *v.* Roberts, 9 M. & W. 469.

1. Powell *v.* Divett, 15 East 29; Whitmer *v.* Frye, 10 Mo. 348; Martendale *v.* Follet, 1

N. H. 95; Blade *v.* Noland, 12 Wend. (N. Y.) 173, 27 Am. Dec. 126; Wallase *v.* Harmstad, 44 Pa. St. 492; Newell *v.* Mayberry, 3 Leigh (Va.) 250, 23 Am. Dec. 261.

2. *Need Not Be Prejudicial to Promisor or Grantor*—*England*.—Gardner *v.* Walsh, 5 El. & Bl. 83, 85 E. C. L. 83.

Alabama.—Montgomery *v.* Crossthwait, 90 Ala. 553.

Arkansas.—Chism *v.* Toomer, 27 Ark. 108.

Connecticut.—Mahaiwe Bank *v.* Douglass, 31 Conn. 181.

Indiana.—Bowers *v.* Briggs, 20 Ind. 139; Coburn *v.* Webb, 56 Ind. 96, 26 Am. Rep. 15; Johnston *v.* May, 76 Ind. 293; Weir Plow Co. *v.* Walmsley, 110 Ind. 242.

Maine.—Hewins *v.* Cargill, 67 Me. 554.

Nebraska.—Brown *v.* Straw, 6 Neb. 537.

New Hampshire.—Humphreys *v.* Guillion, 13 N. H. 385, 38 Am. Dec. 499.

New York.—Woodworth *v.* Bank of America, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239; McVean *v.* Scott, 46 Barb. (N. Y.) 379; Mount Morris Bank *v.* Lawson, 10 Misc. Rep. (N. Y. C. Pl.) 359.

Contra.—Union Bank *v.* Cook, 2 Cranch (C. C.) 218.

3. *Sureties*.—Sturges *v.* Williams, 9 Ohio St. 443, 75 Am. Dec. 473. See *infra*, this title and division, subd. *As to Sureties*. See also the title SURETYSHIP.

4. *Actual Fraud Unnecessary*—*England*.—Hirschfield *v.* Smith, L. R. 1 C. P. 340; Hirschman *v.* Budd, L. R. 8 Exch. 171; Mollatt *v.* Wackerbarth, 5 C. B. 181, 57 E. C. L. 181.

Alabama.—Toomer *v.* Rutland, 57 Ala. 379, 29 Am. Rep. 722; Glover *v.* Robbins, 49 Ala. 219, 20 Am. Rep. 272; Green *v.* Sneed, 101 Ala. 205, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 518, 520.

Delaware.—Warpole *v.* Ellison, 4 Houst. (Del.) 322.

Indiana.—Richmond Mfg. Co. *v.* Davis, 7 Blackf. (Ind.) 412.

Iowa.—Murray *v.* Graham, 29 Iowa 520; Hall *v.* McHenry, 19 Iowa 521, 87 Am. Dec. 451; Eckert *v.* Pickel, 59 Iowa 545.

Kansas.—Davis *v.* Eppler Co., 38 Kan. 629. *Massachusetts*.—Fay *v.* Smith, 1 Allen (Mass.) 477, 79 Am. Dec. 752; Boston *v.* Benson, 12 Cush. (Mass.) 61; Wheelock *v.* Freeman, 13 Pick. (Mass.) 165, 27 Am. Dec. 674.

of a fraudulent intent may, however, affect the right to resort to the original indebtedness.¹

cc. REASON FOR THE RULE.—There can be no recovery on the instrument as altered, for the very evident reason that the identity of the writing is destroyed by a material alteration; as altered, the writing does not set forth the contract of the nonconsenting party.² And the policy of the rule, so far as it prevents a recovery on the writing as it read before the alteration, is to discountenance the tampering with written instruments.³ It has also been said that the material alteration of a written instrument invalidates the writing for the reason that “no man shall be permitted to take the chance of committing a fraud without running any risk of losing by the event when it is detected.”⁴

dd. APPLICATION OF RULE—(*aa*) *In General.*—Although this doctrine was first applied to sealed instruments, it is by no means confined to such writings, but applies as well to all written instruments.⁵

Missouri.—Washington Sav. Bank *v.* Ecky, 51 Mo. 272; Springfield First Nat. Bank *v.* Fricke, 75 Mo. 178.

New Jersey.—Vanauken *v.* Hornbeck, 14 N. J. L. 178; Lewis *v.* Schenck, 18 N. J. Eq. 459, 90 Am. Dec. 631.

New York.—Booth *v.* Powers, 56 N. Y. 22. *Ohio.*—Harsh *v.* Klepper, 28 Ohio St. 204; Boalt *v.* Brown, 13 Ohio St. 364.

Pennsylvania.—Marshall *v.* Gougler, 10 S. & R. (Pa.) 164; Miller *v.* Gilleland, 1 Am. L. Reg. 672.

South Carolina.—Porter *v.* Doby, 2 Rich. Eq. (S. Car.) 49.

Tennessee.—McDaniel *v.* Whitsett, (Tenn. 1896) 33 S. W. Rep. 568, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 520.

Wisconsin.—Schwalm *v.* McIntyre, 17 Wis. 232.

See also Long *v.* Mason, 84 N. Car. 15. But compare Adams *v.* Frye, 3 Met. (Mass.) 103.

Maine.—In Maine the rule has been adopted that if a material alteration in a writing, though unauthorized, was made innocently, without any fraudulent or improper motive, it will not vitiate the instrument. Thornton *v.* Appleton, 29 Me. 298; Milbery *v.* Storer, 75 Me. 69, 46 Am. Rep. 361; Crosswell *v.* Labree, 81 Me. 44, 10 Am. St. Rep. 238.

New Hampshire.—It has been said that the New Hampshire cases are to the effect that a material alteration, to avoid an instrument, must be actually fraudulent (1 Sm. L. Cas., pt. 2, p. 1312, note), and the case of Bowers *v.* Jewell, 2 N. H. 543, was by Mr. Justice Lowrie, in a dissenting opinion delivered in Miller *v.* Gilleland, 1 Am. L. Reg. 672, cited in support of this proposition. But that was a case where the alteration of a note consisted of the correcting of a mistake, and the assent of the maker thereto was held to be presumed (see *infra*, this title, subd. *Correction of Mistakes*), and it has been so understood by the courts of that state. See Cole *v.* Hills, 44 N. H. 227.

Fraud Presumed from Material Alteration.—But aside from whether the intent with which the alteration is made is or is not of importance, whenever a material alteration has been made in an instrument, a presumption of

fraud arises and remains until rebutted. Crosswell *v.* Labree, 81 Me. 44, 10 Am. St. Rep. 238; Long *v.* Mason, 84 N. Car. 15.

1. See *infra*, this title, subd. *On Right to Recover on Original Consideration.*

2. *Reason for Rule—Identity of Writing Destroyed.*—Wood *v.* Steele, 6 Wall. (U. S.) 80; Mersman *v.* Werges, 112 U. S. 139; Sudler *v.* Collins, 2 Houst. (Del.) 538; Mount Morris Bank *v.* Lawson, 10 Misc. Rep. (N. Y. C. Pl.) 359; Patterson *v.* McNeeley, 16 Ohio St. 348; Bery *v.* Marietta, etc., R. Co., 26 Ohio St. 673; Harsh *v.* Klepper, 28 Ohio St. 200.

3. Waterman *v.* Vose, 43 Me. 504; Foote *v.* Hambrick, 70 Miss. 157.

As is said by Mr. Justice Swayne, in Wood *v.* Steele, 6 Wall. (U. S.) 80: “To prevent and punish such tampering, the law does not permit the plaintiff to fall back upon the contract as it was originally. In pursuance of a stern but wise policy, it annuls the instrument as to the party sought to be wronged.”

In Wallace *v.* Jewell, 21 Ohio St. 163, 8 Am. Rep. 48, White, J., says that the policy of the general rule of the law that an unauthorized material alteration of a written instrument by the holder, or with his consent, vitiates it as to nonconsenting parties, is “to preserve the integrity of legal instruments by taking away the temptation of tampering with them.”

4. Lord Kenyon in Master *v.* Miller, 4 T. R. 329, 1 Anstr. 255, 2 H. Bl. 141, *quoted approvingly* in White *v.* Hass, 32 Ala. 430, 70 Am. Dec. 548; Waterman *v.* Vose, 43 Me. 504; Foote *v.* Hambrick, 70 Miss. 157; McDaniel *v.* Whitsett (Tenn. 1896), 33 S. W. Rep. 568; Newell *v.* Mayberry, 3 Leigh (Va.) 250, 23 Am. Dec. 261.

5. *Doctrine Applicable to Written Instruments Generally.*—Master *v.* Miller, 4 T. R. 320; Lord Denman in Davidson *v.* Cooper, 11 M. & W. 778; Vanauken *v.* Hornbeck, 14 N. J. L. 182; Newell *v.* Mayberry, 3 Leigh (Va.) 250, 23 Am. Dec. 261.

In Arnold *v.* Jones, 2 R. I. 345, Haile, J., said: “There is no substantial reason why this rule should not be applied to notes and to all other written contracts as well as to deeds; for all such instruments are the evidence of the contracts between the parties, and whatever alteration, therefore, changes

(bb) *Deeds*.—An unauthorized material alteration in a deed, made after its execution by a party claiming a benefit thereunder, renders the instrument void,¹ so that not only is the instrument inoperative as altered,² but there can be no enforcement of the executory provisions of the original instrument.³

(cc) *Mortgages*.—A material alteration made in a mortgage after its execution, and without the consent of the mortgagor, either by the mortgagee or a third person at his instance, has the effect of annulling the instrument as a lien upon the property⁴ and likewise of

the legal effect of the instrument makes it another and not the same contract, and it should no longer in law bind the party, because it is not the contract by which he agreed to be bound."

Recognizances.—The rule has been applied to recognizances. *Grant v. State*, 8 Tex. App. 432.

In *Starr v. Lyon*, 5 Conn. 538, Peters, J., after showing that the material alteration of a bond or a deed, even a simple contract, vitiates the writing, says: "*A fortiori* does it avoid an instrument more solemn than either."

Powers of Attorney.—It has been held that the unauthorized material alteration of a power of attorney to confess judgment on a note made by the payee of the note avoids the instrument, and the judgment entered by confession under it is also void. *Burwell v. Orr*, 84 Ill. 465.

Simple Contracts in Writing.—The doctrine is applicable to any simple contract in writing. *Boston v. Benson*, 12 Cush. (Mass.) 61.

Contract of Guaranty.—So a material alteration of a contract of guaranty will discharge the guarantor. *Davidson v. Cooper*, 11 M. & W. 778; *Weir Plow Co. v. Walmsley*, 110 Ind. 242; *Wilde v. Armsby*, 6 Cush. (Mass.) 314; *Osborne v. Van Houten*, 45 Mich. 444.

Bought and Sold Notes.—The principle is applicable to bought and sold notes. A material alteration in a sold note, made by the buyer without the knowledge or consent of the seller, prevents the former from suing on the contract, notwithstanding the duty of the latter may not be varied by the alteration. *Mollett v. Wackerbarth*, 5 C. B. 181, 57 E. C. L. 181. And a material alteration in a sale note, by the broker, after the bargain made, at the instance of the seller, without the consent of the purchaser, has been held to annul the instrument so as to preclude the seller from recovering upon the contract evidenced by the instrument so altered by him. *Powell v. Divett*, 15 East 29.

Charter Parties.—The material alteration of a charter party, after it is signed, by one of the parties without the knowledge or consent of the other, is fatal to its validity. 1 Pars. Ship. & Adm. 274; *Pew v. Laughlin*, 3 Fed. Rep. 39.

Bills of Lading.—An unauthorized material alteration avoids a bill of lading. *Lehman v. Central R., etc., Co.*, 12 Fed. Rep. 595.

But when an action brought against the owner of a vessel, for not delivering goods pursuant to the bill of lading, is founded on the breach of duty as a carrier, the fact that the plaintiff has made an alteration in the bill of lading is immaterial, since it cannot affect the

question of the wrongful breach of duty. *Benbury v. Hathaway*, 6 Ired. (N. Car.) 303.

Petition for a Road.—If a petition for a road is altered, after signature, in a part not material nor affecting the general object sought by the petitioners, though without the knowledge of one of them, this one is not discharged from his liability to contribute to the expenses for which he would otherwise be liable. But he will be discharged if the alteration is material, so that the party is thereby injuriously affected or his expectations defeated. *Jewett v. Hodgdon*, 3 Me. 103; *Patridge v. Ballard*, 2 Me. 50; *Jewett v. Cornforth*, 3 Me. 107; *Irvin v. Susquehanna, etc., Turnpike Co.*, 2 P. & W. (Pa.) 466, 23 Am. Dec. 53.

1. Alterations in Deeds.—Doctor Leyfield's Case, 10 Coke 92; *Vanhorne v. Dorrance*, 2 Dall. (U. S.) 304; *Robbins v. Magee*, 76 Ind. 381; *Den v. Wright*, 7 N. J. L. 175; *Deem v. Phillips*, 5 W. Va. 168.

2. Interlineation of Description of Additional Property.—So an alteration in the description of property embraced in a deed, which makes the instrument cover property different from that originally embraced, whether or not it destroys the validity of the instrument as a conveyance of the property originally described, cannot have the effect of giving it validity as a conveyance of the property of which the new description is inserted. To give the deed such effect, it should be re-executed, reacknowledged, and redelivered; in other words, a new conveyance should be made. *Moelle v. Sherwood*, 148 U. S. 21.

Change in Grantees.—Where a deed is altered by the substitution of grantees, it cannot support a claim to the land conveyed by the deed asserted by the person whose name is substituted. *Hollis v. Harris*, 96 Ala. 288; *Hill v. Nisbet*, 58 Ga. 586; *Wilds v. Bogan*, 55 Ind. 331.

3. No Enforcement of Executory Provisions of Original Instrument.—*Withers v. Atkinson*, 1 Watts (Pa.) 236; *Wallace v. Harmstad*, 15 Pa. St. 462, 53 Am. Dec. 603.

Estate Not Destroyed by Alteration.—But while the effect of an alteration of a deed is to invalidate the instrument, it is not to be understood that such alteration has the effect of divesting the estate which is conveyed by the instrument. See *infra*, this title and section, subd. *On Executed Contracts*.

4. Cloud on Title.—It has been held that an action will lie by a mortgagor to remove the apparently valid lien of a mortgage which has been materially altered, on the ground that the mortgage constitutes a cloud upon the title of the mortgagor. *Smith v. Fellows*, 41 N. Y. Super Ct. 36.

preventing proceedings for the foreclosure of the same.¹

(dd) *Bonds*.—A material alteration of a bond after its execution, intentionally made by the obligee, vitiates the instrument as against the nonconsenting obligors.²

(ee) *Insurance Policies*.—The principle has been applied to insurance policies; so that a material alteration of a policy of insurance made by the insured, without the consent or authority of the insurer, invalidates the policy.³

(ff) *Leases*.—The doctrine has also been applied to leases. A material alteration of a lease, after its execution, made by the lessee without the consent of the lessor, vitiates the instrument.⁴

Altered Mortgage Not an Incumbrance.—In the case of *McIntyre v. Velte*, 153 Pa. St. 350, it appeared that the defendant agreed to purchase certain property from the plaintiff, and that the suit was instituted to determine whether a mortgage of record against the property was a valid incumbrance or not. The facts showed that the mortgage, since its execution and delivery, had been altered in a material part by the mortgagee. The court was of the opinion that the law was with the plaintiff, for the reason that this alteration avoided the mortgage absolutely.

1. Preventing Foreclosure of Mortgage—England.—*Harrison v. Owen*, 1 Atk. 520, under the title *Harris v. Owen*, West's Ch. Rep. 527.

Iowa.—*Cutler v. Rose*, 35 Iowa 456.

Kansas.—*Johnson v. Moore*, 33 Kan. 90.

Minnesota.—*Coles v. Yorks*, 28 Minn. 464. See *Russell v. Reed*, 36 Minn. 376.

Nebraska.—*Pereau v. Frederick*, 17 Neb. 117.

New York.—*Waring v. Smyth*, 2 Barb. Ch. (N. Y.) 119, 47 Am. Dec. 299; *Marcy v. Dunlap*, 5 Lans. (N. Y.) 365.

South Carolina.—*Powell v. Pearlstine*, 43 S. Car. 403.

Alteration of Chattel Mortgage.—So, where a chattel mortgage is materially altered by the holder thereof, it is rendered void. Hence, where the holder of such altered instrument seized the mortgaged property for the purpose of foreclosure, it was held that the seizure was wrongful, and that the mortgagor was entitled to recover the property in an action of replevin. *Hollingsworth v. Holbrook*, 80 Iowa 151, 20 Am. St. Rep. 411.

2. Alterations in Bonds.—*England*.—*Pigot's Case*, 11 Coke 27.

United States.—*Martin v. Thomas*, 24 How. (U. S.) 315; *Smith v. U. S.*, 2 Wall. (U. S.) 219.

Iowa.—*State v. Craig*, 58 Iowa 238.

Kentucky.—*Rucker v. Howard*, 2 Bibb (Ky.) 168.

Maine.—*Dover v. Robinson*, 64 Me. 183.

Massachusetts.—*Adams v. Frye*, 3 Met. (Mass.) 103; *Draper v. Wood*, 112 Mass. 315, 17 Am. Rep. 92.

Missouri.—*Briggs v. Glenn*, 7 Mo. 572.

North Carolina.—*Davis v. Campbell*, 1 Ired. (N. Car.) 482; *Davis v. Coleman*, 7 Ired. (N. Car.) 424; *Long v. Mason*, 84 N. Car. 15.

Pennsylvania.—*Nordstrom's Petition*, 127 Pa. St. 542; *Smith v. Weld*, 2 Pa. St. 54;

Barrington v. Washington Bank, 14 S. & R. (Pa.) 405.

South Carolina.—*Commissioners of Poor v. Hanion*, 1 Nott & M. (S. Car.) 554.

Vermont.—*Dewey v. Bradbury*, 1 Tyl. (Vt.) 186.

Virginia.—*Dobyns v. Rawley*, 76 Va. 537.

Appeal Bonds.—It has been held that if there is an interlineation in a material part of an appeal bond, which is not noted at the foot thereof, the bond will be defective, and the appeal may rightly be dismissed. *Sutphin v. Hardenbergh*, 10 N. J. L. 288; *Shinn v. White*, 11 N. J. L. 187.

Single Bill.—The doctrine that an unauthorized material alteration of a writing vitiates it, has been applied to single bills. *Marshall v. Gongler*, 10 S. & R. (Pa.) 164; *M'Kee v. Hicks*, 2 Dev. (N. Car.) 379.

3. Alterations in Policies of Insurance.—*Campbell v. Christie*, 2 Stark. 64, 3 E. C. L. 318; *Forshaw v. Chabert*, 3 Brod. & B. 156, 7 E. C. L. 389, 6 Moore 369; *Tillou v. Clinton*, etc., Mut. Ins. Co., 7 Barb. (N. Y.) 564. See *Martin v. Tradesmen's Ins. Co.*, 101 N. Y. 498.

Policy Embracing Several Contracts with Different Individuals.—*Lord Abinger*, in *Davidson v. Cooper*, 11 M. & W. 778, says: "We may add that the doctrine of *Pigot's Case*, 11 Coke 27, has been applied to policies of assurance, though its operation has been, it may be said, eluded by considering a policy as a peculiar instrument, embracing several contracts with different individuals. The case has not been distinguished on the ground that the doctrine was limited to deeds and instruments of a similar character, such as bills of exchange and promissory notes."

As illustrating the case of an alteration of a policy of insurance which contains several contracts between different individuals, see *Robinson v. Phoenix Ins. Co.*, 25 Iowa 430, where it was held that a policy of insurance and indorsements thereon, constituting a contract of insurance with the insured, will not be avoided by even a material alteration of a contract between the company and another party indorsed on the same policy.

4. Alterations in Leases.—*Lewis v. Payn*, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427; *Wright v. Kelley*, 4 Lans. (N. Y.) 57; *Burgwin v. Bishop*, 91 Pa. St. 336; *Bliss v. McIntyre*, 18 Vt. 466, 46 Am. Dec. 165. See *infra*, this title and division, subd. *Where Estate Lies in Grant* also subd. *By the Grantor or Promisor*.

(*gg*) *Negotiable Instruments—General Rule.*—With respect to the effect of material alterations of negotiable instruments, the same general rule is applicable as governs in the case of the unauthorized material alteration of deeds and other written contracts.¹ Indeed, such are the constant and essential uses to which negotiable instruments are put, that it has been considered that even more dangerous consequences would flow from a leniency towards alterations in bills and notes than in deeds.² Accordingly it may be said, speaking generally, that a material alteration in any negotiable instrument by the promisee or holder, without the consent of the promisors, extinguishes all liability on the instrument as against the nonconsenting promisors.³

Promissory Notes.—So the material alteration of a promissory note by any of the parties claiming thereunder, discharges from liability thereon all the parties bound thereby who do not consent to or authorize the alteration.⁴

Material Alteration by Payee—Effect upon Maker and Sureties.—A material alteration of a promissory note by the payee or at his instance, without the authority

1. **Alterations in Negotiable Instruments.**—*Gardner v. Walsh*, 5 El. & Bl. 83, 85 E. C. L. 83; *Letcher v. Bates*, 6 J. J. Marsh. (Ky.) 524, 22 Am. Dec. 92; *Johnson v. U. S. Bank*, 2 B. Mon. (Ky.) 311; *Vanauken v. Hornbeck*, 14 N. J. L. 182.

2. As the court in *U. S. Bank v. Russel*, 3 Yeates (Pa.) 391, said: "More dangerous consequences would result from permitting alterations on bills and notes than on deeds, the former being more readily susceptible of alteration than the latter, to which the names of witnesses are uniformly subscribed."

3. Chit. Bills 182.

United States.—*Wood v. Steele*, 6 Wall. (U. S.) 80.

Illinois.—*Pankey v. Mitchell*, 1 Ill. 383; *Hodge v. Gilman*, 20 Ill. 437.

Indiana.—*Dietz v. Harder*, 72 Ind. 208; *Holland v. Hatch*, 11 Ind. 497, 71 Am. Dec. 363; *Schnewind v. Hackett*, 54 Ind. 248.

Iowa.—*Robinson v. Reed*, 46 Iowa 219.

Kentucky.—*Stout v. Cloud*, 5 Litt. (Ky.) 205; *Limestone Bank v. Penick*, 5 T. B. Mon. (Ky.) 25.

Maine.—*Farmer v. Rand*, 14 Me. 225.

Maryland.—*Mitchell v. Ringgold*, 3 Har. & J. (Md.) 159, 5 Am. Dec. 433.

Massachusetts.—*Wheelock v. Freeman*, 13 Pick. (Mass.) 165, 27 Am. Dec. 674; *Wade v. Withington*, 1 Allen (Mass.) 561.

Mississippi.—*Oakey v. Wilcox*, 3 How. (Miss.) 330.

Missouri.—*Scotland County Nat. Bank v. O'Connel*, 23 Mo. App. 165; *Trigg v. Taylor*, 27 Mo. 245, 72 Am. Dec. 263.

New Hampshire.—*Humphreys v. Guillow*, 13 N. H. 385, 38 Am. Dec. 499.

North Carolina.—*Davis v. Coleman*, 7 Ired. (N. Car.) 424.

Pennsylvania.—*Neff v. Horner*, 63 Pa. St. 327, 3 Am. Rep. 555; *Stephens v. Graham*, 7 S. & R. (Pa.) 508, 10 Am. Dec. 485.

Alteration by Holder, upon Payment, before Delivery to Payer.—Where the holder of a bill or note is required by an indorser or drawer to deliver it up on payment to the former of the amount, he ought to deliver it up in such

a state as not to prejudice the right of the payer to proceed on the security against the prior parties, though he might undoubtedly cancel his own name so as to prevent the possibility of the bill being ever again available against himself or subsequent indorsers. *Chitty on Bills*, p. 192.

Where the plaintiff in an action against the acceptor was ordered by rule of court generally to deliver up the bill upon payment of debt and costs, it was decided that he had complied with such rule, though before the bill was delivered up he had rendered it a nullity by considerable erasures. *Tomlins v. Lawrence*, 6 Bing. 376, 19 E. C. L. 105.

4. **Material Alterations in Promissory Notes—England.**—*Fitch v. Jones*, 5 El. & Bl. 238, 85 E. C. L. 238.

Alabama.—*Montgomery v. Crossthwait*, 90 Ala. 553.

Illinois.—*Gillett v. Sweat*, 6 Ill. 489.

Maine.—*Smith v. Frye*, 14 Me. 457; *Farmer v. Rand*, 14 Me. 225; *Buck v. Appleton*, 14 Me. 284; *Waterman v. Vose*, 43 Me. 504; *Sheridan v. Carpenter*, 61 Me. 83; *Hewins v. Cargill*, 67 Me. 554.

Massachusetts.—*Wade v. Withington*, 1 Allen (Mass.) 561; *Cape Ann Nat. Bank v. Burns*, 129 Mass. 596.

Michigan.—*Wait v. Pomeroy*, 20 Mich. 425, 4 Am. Rep. 395; *Miller v. Finley*, 26 Mich. 249, 12 Am. Rep. 306.

Missouri.—*Barnett v. Nolte*, 55 Mo. App. 184.

Nebraska.—*Palmer v. Largent*, 5 Neb. 225, 25 Am. Rep. 479; *Courcamp v. Weber*, 39 Neb. 533.

New York.—*Bruce v. Westcott*, 3 Barb. (N. Y.) 374; *Clute v. Small*, 17 Wend. (N. Y.) 238; *Woodworth v. Bank of America*, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239; *Nazro v. Fuller*, 24 Wend. (N. Y.) 374; *Benedict v. Cowden*, 49 N. Y. 396, 10 Am. Rep. 382.

Ohio.—*Sturges v. Williams*, 9 Ohio St. 443, 75 Am. Dec. 473.

Pennsylvania.—*Southwark Bank v. Gross*, 35 Pa. St. 80.

or consent of the maker, renders it wholly void as against him¹ and his surety.²

Effect upon Bona Fide Indorsee.—And the alteration has this invalidating effect on the instrument, not only as to the holder, who is responsible for the alteration, but also in the hands of a *bona fide* indorsee without notice.³

Bills of Exchange.—The doctrine was, at an early day, applied to bills of exchange.⁴ Thus a material alteration of a bill of exchange, after acceptance, and while in the hands of the payee, avoids the instrument, so that no action can afterwards be brought upon it by the payee,⁵ or even by an innocent transferee.⁶

Checks.—A material alteration of a check, after execution and before payment, destroys its validity. And the payment of such altered check by the bank on which it is drawn does not entitle the bank to debit the drawer with the amount,⁷ even though it was made to a *bona fide* holder.⁸ Nor can the

1. *Alabama*.—White v. Haos, 32 Ala. 430, 70 Am. Dec. 548.

Arkansas.—Lemay v. Williams, 32 Ark. 166.

Illinois.—Pankey v. Mitchell, 1 Ill. 383.

Indiana.—Harper v. Stat., 7 Blackf. (Ind.) 61; Nicholson v. Combs, 90 Ind. 315, 46 Am. Rep. 229; Shanks v. Albert, 47 Ind. 461; Bowers v. Briggs, 20 Ind. 139.

Maine.—Lee v. Starbird, 1 M. 491.

Massachusetts.—Fay v. Smith, 1 Allen (Mass.) 477, 79 Am. Dec. 752.

Mississippi.—Oakley v. Wilcox, 3 How. (Miss.) 330.

Missouri.—Washington Sav. Bank v. Ecky, 51 Mo. 272.

New York.—Nizro v. Fuller, 24 Wend. (N. Y.) 374.

2. Hart v. Clouser, 30 Ind. 210; Kountz v. Hart, 17 Ind. 329; Locknane v. Emmerson, 11 Bush (Ky.) 69.

3. See *infra* this title and division, subd. As to Innocent Third Persons.

4. **Material Alterations in Bills of Exchange.**—Mahaiwe Bank v. Douglass, 31 Conn. 181; Master v. Miller, 4 T. R. 320. In the same case in the Exchequer Chamber, in error, Eyre, C. J., said: "A bill [of exchange] is more easily altered than a deed; if, therefore, courts of justice were not to insist on bills being strictly and faithfully kept, alterations in them highly dangerous might take place, such as the addition of a cipher in a bill for one hundred pounds, by which the sum might be changed to one thousand pounds, and the holder having failed in attempting to recover the one thousand pounds, might afterwards take his chance of recovering the one hundred pounds as the bill originally stood. But such a proceeding would be intolerable." Master v. Miller, 2 H. Bl. 141.

5. **Payee may Not Sue upon the Altered Bill.**—Alderson v. Langdale, 3 B. & Ad. 660, 23 E. C. L. 155; Paton v. Winter, 1 Taunt. 420. See also Fontaine v. Gunter, 31 Ala. 258.

6. See *infra*, this title and division, subd. As to Innocent Third Persons.

7. **Checks—Alteration of Date.**—The plaintiff on the 20th of April, intending to be absent from his place of business for a few days, drew his check on the defendant, dated April 22d, for seven hundred dollars, payable to his clerk, for the purpose of enabling him to pay wages becoming due to the drawer's employees on the 22d. The check was left in

the drawer's check book in his safe, with instructions to the clerk, who had the key to the safe, to take the check on the 22d, draw the money, and deliver it to the foreman to pay out to the employees, in case the drawer did not return before noon of that day. The plaintiff did not return until after the time appointed. But on the 21st the clerk took the check, and, having altered the date to the 21st, drew the money from the bank, and absconded with the funds on the same day. It was held that the check as drawn conferred no authority on the bank to pay it before its date, and such payment did not, therefore, justify the bank in charging the check to the plaintiff. Crawford v. West Side Bank, 100 N. Y. 50, 53 Am. Rep. 152.

Charging Drawer with Correct Amount When Alteration Consists in Raising Check.—There is some authority for the proposition that a banker, after payment, has the right to hold the maker of a check, which has been altered by increasing the amount, for the amount for which it was originally drawn. Hall v. Fuller, 5 B. & C. 750; Susquehanna Valley Bank v. Loomis, 85 N. Y. 207; Redington v. Woods, 45 Cal. 406, 13 Am. Rep. 190. But in Crawford v. West Side Bank, 100 N. Y. 50, 53 Am. Rep. 152, Ruger, C. J., referring to these cases, says: "In these cases, however, the checks had received a legal inception upon their delivery to holders for value, and, as thus delivered, authorized their drawees to pay them and debit the makers with the sum originally specified therein. Such instruments not only conferred authority to pay their true amount upon their drawees, but also created a legal liability in case of non-payment against their drawers for the repayment of that amount, and the right to enforce such power or liability would, no doubt, pass as an incident to the transfer of the check to any holder in good faith." 2 Parsons on Bills and Notes 582. The court held that this principle had no application to the case at hand, where the facts were that the plaintiff's clerk had wrongfully changed the date of the check, so as to make it payable at a date earlier than as drawn by the maker, and obtained the amount of the check from the defendant bank.

8. Redington v. Woods, 45 Cal. 406, 13 Am. Rep. 190; Belknap v. National Bank of North America, 100 Mass. 376; St. Louis Third Nat.

purchaser of such check recover thereon against the drawer.¹ So also the material alteration of a check after its indorsement by the payee, without such indorser's consent, vitiates it as to him.²

Certified Check.—Where a check is materially altered by the drawer after its certification by the bank, the alteration will relieve the bank from liability to the drawer or his assignee.³

(hh) *Assignments of Contracts.*—The general principle by which an instrument is avoided by a material alteration is, of course, applicable to written assignments of contracts.⁴ But it has been said that the question of a material alteration in a written assignment of a contract more nearly concerns the actual parties to the assignment than the parties to the contract.⁵

(ii) *Instruments of Merely Evidential Character.*—The doctrine that a material alteration avoids an instrument is applicable not only to such instruments as are depended upon as the security for the performance of a contract, to which class the instruments above mentioned belong, but also to instruments such as bills of sale and receipts, which serve only the purpose of standing evidences of a contract or transaction. But there is this distinction, that, in the case of the alteration of instruments of the latter class, the question of whether the contract set forth in the writing is avoided by the falsification of the security does not arise; the only question is as to the effect of an alteration on their evidential character.⁶

ec. AS TO SURETIES.—The doctrine that a material alteration of a written instrument renders it void applies *a fortiori* in favor of a surety.⁷

ff. AS TO INNOCENT THIRD PERSONS.—The doctrine that an unauthorized material alteration of a writing prevents a recovery thereon is applicable even where the instrument has passed into the hands of an innocent assignee for value.

Bona Fide Assignee of Mortgage.—A material alteration of a mortgage, after its execution, made by the mortgagee or with his privity, but without the consent of the mortgagor, vitiates the instrument so as to prevent its foreclosure even by an innocent assignee.⁸

Bank v. Allen, 59 Mo. 310; *National Park Bank v. Ninth Nat. Bank*, 55 Barb. (N. Y.) 87.

It was held in *Vance v. Lowther*, 1 Exch. Div. 176, where the date of a check had been altered from March 2d to March 26th, and, as thus altered, was attempted to be enforced against the drawer by one who had paid value for it to an unlawful holder, that such alteration vitiated the check, and no recovery could be had thereon.

1. *Frydyce v. Kosminski*, 49 Ark. 40, 4 Am. St. Rep. 18. In *Flannagan v. Dover Nat. Bank* (City Ct.), 18 N. Y. St. Rep. 826, it was held that the fraudulent raising of a check precludes a purchaser who has paid the raised amount from recovering from the maker even the original amount.

2. *National Ulster County Bank v. Madden*, 114 N. Y. 280, 11 Am. St. Rep. 633.

3. **Certified Checks.**—*In re Commercial Bank*, 10 Manitoba Rep. 171; *Abrams v. Union Nat. Bank*, 31 La. Ann. 61.

Alteration of Certified Check by Drawee.—Where the bank teller, on the presentation of a certified check, wrote across its face the words "Payment stopped," and returned it to the payee, who erased those words, placed a revenue stamp over the erasure, and then passed it to a bona fide holder for value, it was held that the bank was liable; it had no right to make such indorsement, and the payee

had the right to erase it. *Nassau Bank v. Broadway Bank*, 54 Barb. (N. Y.) 236.

4. **Assignment of Bond.**—Where an assignment of a bond to convey land appeared to have been materially altered after execution and registration, it was held inadmissible in evidence to establish title in the plaintiff. *Park v. Glover*, 23 Tex. 469.

5. *Minert v. Emerick*, 6 Wis. 355. It was accordingly held in this case that a material alteration in the assignment which, unless explained, might affect it as between the parties thereto, will not necessarily affect it as between the assignee and the contractor.

6. **Alterations in Instruments of Evidential Nature.**—*Babb v. Clemson*, 10 S. & R. (Pa.) 419, 13 Am. Dec. 684; *Davis v. Loftin*, 6 Tex. 489. See *infra*, this title and division, subd. *On Instrument as Evidence*.

7. **Material Alterations—Rule as to Sureties.**—2 Pars. B. & N. 561–562; *Smith v. U. S.*, 2 Wall. (U. S.) 219; *Miller v. Stewart*, 4 Wash. (U. S.) 26; *Martin v. Thomas*, 24 How. (U. S.) 315; *Reese v. U. S.*, 9 Wall. (U. S.) 13; *Mackay v. Dodge*, 5 Ala. 388; *State v. Churchill*, 48 Ark. 426; *State v. Findley*, 101 Mo. 368; *Batchelder v. White*, 80 Va. 103. See the title SURETYSHIP.

8. **Assignee of Mortgage.**—*Coles v. Yorks*, 28 Minn. 464; *Pereau v. Frederick*, 17 Neb. 117; *Waring v. Smyth*, 2 Barb. Ch. (N. Y.) 119, 47 Am. Dec. 299.

Bona Fide Purchasers of Negotiable Instruments—Of Promissory Notes.—So where a promissory note is materially altered by the payee or a transferee, not only is it vitiated and destroyed in the hands of the party responsible for the alteration, but there can be no recovery thereon against the maker, or any indorser prior to the one who is responsible for the alteration, by a person into whose hands it has come after the change was made, even though he be a *bona fide* indorsee for value without notice of the alteration.¹ But the alteration will not impair the liability of a subsequent indorser to such *bona fide* indorsee.²

Of Bills of Exchange.—And where a bill of exchange, after acceptance, has been materially altered by the payee without authority, there can be no recovery thereon, even in the hands of a *bona fide* indorsee for value.³

Of Checks.—Likewise, a check materially altered after its execution and delivery is avoided thereby, even in the hands of a *bona fide* purchaser for value.⁴

Where Instrument is Negligently Drawn.—If, however, a bill, note, or check is negligently drawn, so as to facilitate its alteration without detection, the maker will, according to an important line of cases be liable on the altered instrument in the hands of a *bona fide* purchaser without notice of the alteration.⁵

Laches.—But in *Gest v. Flock*, 2 N. J. Eq. 108, it was held that it is too late to object to a mortgage on account of an alteration therein, ten years after a decree of foreclosure has established its validity, and as against a *bona fide* purchaser.

1. Bona Fide Transferee of Promissory Notes—Arkansas.—*Fordyce v. Kosminski*, 49 Ark. 40, 4 Am. St. Rep. 18; *Overton v. Matthews*, 35 Ark. 143, 37 Am. Rep. 9.

Delaware.—*Sudler v. Collins*, 2 Houst. (Del.) 538.

Illinois.—*Burwell v. Orr*, 84 Ill. 465.

Iowa.—*Knoxville Nat. Bank v. Clark*, 51 Iowa 64, 33 Am. Rep. 129; *Scofield v. Ford*, 56 Iowa 370; *Critton v. Reed*, 61 Iowa 166; *Laub v. Paine*, 46 Iowa 550, 26 Am. Rep. 163.

Kansas.—*Hann v. City Bank*, 32 Kan. 518.

Massachusetts.—*W. de V. Withington*, 1 Allen (Mas.) 561; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 198, 25 Am. Rep. 67.

Michigan.—*Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661.

Mississippi.—*Simmons v. Atkinson*, etc., Co., 69 Miss. 862.

Missouri.—*Washington Sav. Bank v. Ecky*, 51 Mo. 272; *Capital Bank v. Armstrong*, 62 Mo. 5.

Nebraska.—*State Sav. Bank v. Shaffer*, 9 Neb. 1, 31 Am. Rep. 394; *Brown v. Straw*, 6 Neb. 536; *Davis v. Henry*; 13 Neb. 497; *Hurlbut v. Hall*, 39 Neb. 88.

New York.—*Waring v. Smyth*, 2 Barb. Ch. (N. Y.) 119, 47 Am. Dec. 29; *Bruce v. Westcott*, 3 Barb. (N. Y.) 574; *Kennedy v. Crandell*, 3 Lans. (N. Y.) 1.

North Dakota.—*Decorah First Nat. Bank v. Laughlin*, 4 N. Dak. 391, citing 1 A. C. AND ENG. ENCYC. OF LAW (1st ed.) 502, note 1.

Pennsylvania.—*Stephens v. Graham*, 7 S. & R. (Pa.) 508, 10 Am. Dec. 485; *Gettysburg Nat. Bank v. Chisolm*, 169 Pa. St. 564.

In an Action on a Negotiable Promissory Note by a *bona fide* holder for value against the maker, where it appeared that after execution and before transfer to the plaintiff, the note had been materially altered by an intermediate indorsee, in that the words "with interest"

were interpolated, the court, in *Mount Morris Bank v. Lawson*, 7 Misc. Rep. (N. Y. City Ct.) 228, made a distinction between the case of a suit by a *bona fide* holder on an altered note against an accommodation indorser, and the case in hand, which was an action against the maker for value, and gave judgment for the principal sum; but on appeal the Court of Common Pleas reversed this decision, and held that an unauthorized and fraudulent alteration of a negotiable note by any indorsee avoids it in the hands of a *bona fide* holder for value as against the maker. *Mount Morris Bank v. Lawson*, 10 Misc. Rep. (N. Y. C. Pl.) 359.

England.—But the English Bills of Exchange Act, 1882, 45 & 46 Vict. c. 61, § 64 (1), provides, in effect, that an altered bill in the hands of a holder in due course may be enforced according to its original tenor, if the alteration is not apparent.

2. Washington Sav. Bank v. Ecky, 51 Mo. 272. See the title **BILLS AND NOTES**.

3. Bona Fide Transferee of Bill of Exchange.—*Master v. Miller*, 4 T. R. 320, 2 H. Bl. 141; *Burchfield v. Moore*, 3 El. & Bl. 683, 77 E. C. L. 683, 25 Eng. L. & Eq. 123. In the last case cited, *Campbell, C. J.*, in effect said that in such case the remedy of the holder is confined to a right to recover on the consideration of the bill as between himself and the party from whom he received it; a similar remedy may be resorted to till the party is reached through whose fraud or laches the alteration was made; he ought to suffer.

4. Bona Fide Indorsee of Check.—*Fordyce v. Kosminski*, 49 Ark. 40, 4 Am. St. Rep. 18; *Redington v. Woods*, 45 Cal. 406, 13 Am. Rep. 190; *Belknap v. National Bank of North America*, 100 Mass. 376; *St. Louis Third Nat. Bank v. Allen*, 59 Mo. 310; *National Park Bank v. Ninth Nat. Bank*, 55 Barb. (N. Y.) 87; *Flannagan v. Dover Nat. Bank (City Ct.)*, 18 N. Y. St. Rep. 826.

5. Instrument Negligently Made—Liability of Maker.—*Harvey v. Smith*, 55 Ill. 224; *Seibel v. Vaughan*, 69 Ill. 257; *Blakey v. Johnson*, 13 Bush (Ky.) 199, 26 Am. Rep. 254; *Iron Mountain Bank v. Murdock*, 62 Mo. 70; *Capital*

But this proposition has been denied in a number of recent cases.¹

gg. ALTERATION MUST BE MADE AFTER EXECUTION OF INSTRUMENT—(aa) In General.
—Lord Coke states that in ancient times an erasure or interlineation would make a deed invalid at whatever time it was made.² But this is not the law now, and was not even in the days of Lord Coke. It is a self-evident proposition, applicable to all writings, that an interlineation, erasure, or other alteration in a written instrument cannot, as a general rule, affect its validity unless the alteration was made after execution and delivery.³

(bb) Alteration of Instrument while in Course of Execution.—Very often a document may require the signature of several successive parties before its completion, and if so, an alteration may be made without invalidating it, at any time before its final delivery, provided this does not affect the rights of persons who have executed it before the alteration.⁴ But it may be otherwise if the

Bank v. Armstrong, 62 Mo. 59; *Brown v. Reed*, 79 Pa. St. 370, 21 Am. Rep. 75. See also *Trigg v. Taylor*, 27 Mo. 245, 72 Am. Dec. 263.

1. *Lehman v. Central R., etc., Co.*, 4 Woods (U. S.) 560, 12 Fed. Rep. 595, 26 Alb. L. J. 389; *Fordyce v. Kosminski*, 49 Ark. 40, 4 Am. St. Rep. 18; *Simmons v. Atkinson, etc., Co.*, 69 Miss. 862. For a full treatment of this matter, see the title *BILLS AND NOTES*.

2. *Co. Litt.* 225*b*.

3. *Alteration must Be after Execution of Instrument—England.*—*Matson v. Booth*, 5 M. & S. 223.

United States.—*Bingham v. Reddy*, 5 Ben. (U. S.) 266.

Alabama.—*Raviesies v. Alston*, 5 Ala. 297.

Colorado.—*Hochmark v. Richler*, 16 Colo. 263.

Florida.—*Stewart v. Preston*, 1 Fla. 10, 44 Am. Dec. 621.

Illinois.—*Cairo, etc., R. Co. v. Parrott*, 92 Ill. 194; *Sargent v. Evanston*, 154 Ill. 268.

Maryland.—*Wickes v. Caulk*, 5 Har. & J. (Md.) 36.

Michigan.—*Lockwood v. Bassett*, 49 Mich. 546.

New York.—*Fanning v. Vrooman* (Supreme Ct.), 12 N. Y. St. Rep. 393.

South Carolina.—*Pope v. Chafee*, 14 Rich. Eq. (S. Car.) 69.

See also *Haywood v. Perrin*, 10 Pick. (Mass.) 228, 20 Am. Dec. 518; *Whitmore v. Nickerson*, 125 Mass. 496, 28 Am. Rep. 27.

Illustrations.—Where an alteration is made in a promissory note by the maker, prior to its delivery to the payee, and with the authority of the surety, the alteration does not invalidate the note as against either surety or maker. *Prather v. Zulauf*, 38 Ind. 155.

Where the plaintiffs, who had agreed to sell and convey to the defendant all their right, title, and interest in certain lots of ground, had tendered to the defendant deeds executed by themselves which contained erasures, it was held that as the erasures were proved on the trial to have been made before execution, and the fact was so stated on the face of the deeds, this was not a sufficient objection. *Britton v. Stanley*, 4 Whart. (Pa.) 114.

Alterations in a sheriff's deed, if proven to have been made before acknowledgment, are no objection to its admissibility in evidence.

Grambs v. Lynch, 20 W. N. C. (Pa.) 376, 4 Penny. (Pa.) 243.

Words in a deed, over which a crooked line is drawn with a pencil, as if for cancellation or erasure, but which are not actually canceled or erased, form part of the deed, and if the purchaser accepts it and has it recorded, he is bound, notwithstanding he insisted that such words should not be put in, and was told by the grantor that they had been canceled. *Rosenkrans v. Snover*, 19 N. J. Eq. 420, 97 Am. Dec. 668.

Where a note signed by husband and wife was secured by a mortgage upon the homestead, and the husband, when about to deliver the note and mortgage to the mortgagee, changed "date" to "due" in the note and mortgage, but upon being detected in his act by the mortgagee, corrected the note so as to read "with interest from date," as originally signed, and the mortgagee accepted the note and mortgage, with the understanding that both read "with interest from date," and loaned his money thereon, it was held, as the note was corrected before delivery, so as to read as originally signed and as the mortgage was intended to secure said note, and the word "date" was changed to "due" fraudulently, without the knowledge of the mortgagee or the wife, that the mortgagee was entitled to recover thereon, as the note was no material alteration in the note, and the fraud of the husband, in attempting to change the mortgage, could not defeat the foreclosure thereof. *Osborn v. Andree*, 37 Kan. 301.

4. *Alteration of Instrument while in Course of Execution.*—In other words, an alteration after A, B, and C have signed, though made without their consent, may be good as to E and F, subsequent signers, whom it materially affects, and good also as to A, B, and C, prior signers, whom it does not materially affect. *Doe v. Bingham*, 4 B. & Ald. 672, 6 E. C. L. 648; *Hall v. Chandless*, 4 Bing. 123, 13 E. C. L. 369; *Davidson v. Cooper*, 11 M. & W. 778, by Lord Abinger; *Burlingame v. Brewster*, 79 Ill. 515, 22 Am. Rep. 177.

So it has been held that where there are several parties to an instrument, some of whom have executed it, and in the progress of the transaction it is altered as to some who have not signed it, without the knowledge of the first signers, but not in a part affecting the liability of the latter, and is then executed

alteration materially affects the rights of such persons. If, after a bond has been signed by some of the sureties, it is materially altered by the principal obligor and the obligee, without the knowledge or consent of the sureties, and is then signed by other sureties who have no notice of the alteration, although the bond is binding upon the principal, all the sureties are discharged.¹

by the others, the contract is good as to the first signers according to the terms agreed upon by them, and is good as to the subsequent signers in its altered terms. *Davis v. Shafer*, 50 Fed. Rep. 764.

And it has been held that where a Mortgagor Altered a Mortgage after it was signed by his comortgagor, without the latter's knowledge or consent, by inserting therein a description of other property, the mortgage was valid as to both. It was good as to the first mortgagor as to the property described therein when he signed it, and it bound the second mortgagor as to the additional as well as to the other property. *Van Horn v. Bell*, 11 Iowa 465.

Alteration of Charter Party after Signature by Both Parties, but before Delivery.—A charter party, signed by the captain, was afterwards forwarded to the charterers, who signed it and sent it to their agent for delivery to the captain's brokers. The agent, without authority from the charterers, and without the knowledge of the captain or owners, but with the knowledge of the captain's brokers, made a material alteration. It was held that the charterers could not enforce the charter party. *Pew v. Laughlin*, 3 Fed. Rep. 39. In delivering the opinion, Butler, D. J., said: "It is urged that the alteration was not made until after the instrument had been fully executed, and that being then made without authority from, or fault of, the libellant, it does not affect the contract as entered into by the parties. It is true that such an alteration (or, more accurately speaking, spoliation) would not affect the contractual relations of the parties. *1 Green. Ev.*, § 566. But, unfortunately for the libellant, this alteration, as already suggested, did not occur after the execution of the instrument had been completed. * * * The alteration was not made after the instrument was fully executed; it is not a case of spoliation such as is referred to by the authorities cited, but, on the contrary, the parties did not execute the same instrument, did not agree to the same thing, and consequently had no contract to which they were mutually bound."

1. Alteration of Official Bond by Principal and Approving Officer after Execution by Part of Sureties, and before Approval.—Where a probate bond, executed by a principal and two sureties, was altered by the judge of probate, with the consent of the principal, but without the knowledge of the sureties, by increasing the penal sum, and was then executed by two additional sureties who did not know of the alteration, and was approved by the judge of probate, it was held that the bond was binding upon the principal but not upon the sureties. *Howe v. Peabody*, 2 Gray (Mass.) 556.

And where the County Court accepted the bond of a tax collector, knowing that the name

of a responsible surety had been erased therefrom, and that of another substituted without the knowledge or consent of the other sureties, it was held that the alteration discharged them from their obligation. *State v. McGonigle*, 101 Mo. 353, 20 Am. St. Rep. 609. See *infra*, this title and section, subd. *By a Stranger to the Contract—Public Officer Required to Approve Bond*.

In *State v. Churchill*, 48 Ark. 426, it was held that the material alteration of an official bond, but before presentation for approval, avoided the instrument as to the nonconsenting obligors, where the alteration was ordinarily observable.

Alteration of Bond by Principal, after Signature by Sureties and before Delivery, without Privity of Obligee.—In *Hall v. Weaver*, 34 Fed. Rep. 104, it was held that the unauthorized attestation of a surety's signature to a bond, made while the bond was in the hands of the principal before delivery, will not vitiate the bond. In delivering the opinion of the court, Deady, J., said: "No alteration of a writing before execution, which includes delivery, affects its character or value as an instrument of evidence. Alterations before delivery are presumed to be made with mutual consent. The very act of delivering and receiving the writing implies so much. This is the doctrine of the common law. * * * Weaver and his co-obligors, who signed this bond and left it with the principal therein to deliver to the plaintiffs, thereby constituted the latter their agent for that purpose. *Belloni v. Freeborn*, 63 N. Y. 383. Before the delivery was made, this alteration took place. It consisted of an attestation which, for aught that appeared, was authorized and genuine. So far as the plaintiffs [the obligees] are concerned, it was the act of Weaver and his cosureties acting through the agent and co-obligor, Owens, prior to the delivery to them of the writing."

And in *King County v. Ferry*, 5 Wash. 536, 34 Am. St. Rep. 880, it was held that where the principal obligor in an official bond is intrusted with the instrument for delivery to the obligee, he is the agent of the sureties thereon; and where there is nothing upon the face of the bond to show that it has been altered or changed, and some one has to suffer by reason of the alteration, it should be the sureties.

But in *People v. Kneeland*, 31 Cal. 288, though it does not appear that the alteration was made with the knowledge of the approving officer, it was held that where, after an official bond was signed by some of the sureties, and before its approval and delivery, it was altered by increasing the penal sum and was then signed by other sureties, who had no notice of the alteration, all the sureties were discharged.

(cc) *Accommodation Paper Altered before Negotiation*.—Also limiting the general rule stated above is the doctrine, now well supported by authority, that a person who has put his name to a bill or note for the accommodation of another, will be discharged by an unauthorized material alteration of the instrument by the latter party after the accommodation party has signed it and before its negotiation,¹ although the negotiation be to a *bona fide* holder without notice of the alteration.²

1. *Illustrations*.—To illustrate the rule: A material alteration of a promissory note by the maker after its indorsement by a surety, and without his authority and consent, but before its delivery to the payee, discharges the indorser, so as to prevent a recovery on the note against him by the payee. *Wood v. Steele*, 6 Wall. (U. S.) 80; *Montgomery v. Cross-thwait*, 90 Ala. 553; *Ætna Nat. Bank v. Winchester*, 43 Conn. 391; *Draper v. Wood*, 112 Mass. 315, 17 Am. Rep. 92; *Ivory v. Michael*, 33 Mo. 398; *Britton v. Dierker*, 46 Mo. 591, 2 Am. Rep. 553; *Robinson v. Berryman*, 22 Mo. App. 509; *Brown v. Straw*, 6 Neb. 536; *Goodman v. Eastman*, 4 N. H. 455; *Ohio Valley Bank v. Lockwood*, 13 W. Va. 392.

Where a person executes his note to another for his accommodation, and the payee, without the knowledge or consent of the maker, materially alters and then transfers the note to a third person, it is void as against the maker in the hands of such transferee. *Trigg v. Taylor*, 27 Mo. 245, 72 Am. Dec. 263; *U. S. Bank v. Russel*, 3 Yeates (Pa.) 391.

Where a note is signed by the maker and indorsed by the payee for his accommodation, and the maker afterwards, and before its delivery to the indorsee, materially alters its terms, this renders the note invalid as against the indorser in the hands of the transferee. *Aldrich v. Smith*, 37 Mich. 468, 26 Am. Rep. 536; *Woodworth v. Bank of America*, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239; *McGrath v. Clark*, 56 N. Y. 34, 15 Am. Rep. 372.

Alteration of Accommodation Paper by Maker and Payee's Agent after Delivery to Payee.—A, prior to the execution and delivery of a note, indorsed his name and signature upon the back thereof and delivered it in blank to B, who, together with his wife, afterwards signed and delivered it to C in trust for the complainant. The complainant, being dissatisfied with the form of the note, returned it to C, with instructions to procure and obtain the execution and delivery by the makers, B and wife and A, of a different note. But while the note was in C's possession it was materially altered by B and a member of C's firm, without the knowledge or consent of the complainant. It was held that this alteration discharged A, the accommodation indorser. *Ruby v. Talbott* (N. Mex. 1889), 21 Pac. Rep. 72. But in an elaborate *dissenting* opinion, Long, C. J., contends that this case should be governed by the same principle as is applicable when the alteration is made either by a stranger or by an agent without authority (*citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 505), and that, under the circumstances of this case, the alteration should not be held to discharge the accommodation indorser.

2. *Canada*.—*Halcrow v. Kelly*, 28 U. C. C. P. 551; *Meredith v. Culver*, 5 U. C. Q. B. 218.

United States.—*Wood v. Steele*, 5 Wall. (U. S.) 80.

Connecticut.—*Ætna Nat. Bank v. Winchester*, 43 Conn. 391.

Indiana.—*Hert v. Oehler*, 80 Ind. 83.

Kentucky.—*Lisle v. Rogers*, 18 B. Mon. (Ky.) 528; *Blakey v. Johnson*, 13 Bush (Ky.) 197, 26 Am. Rep. 254.

Maryland.—*Mitchell v. Ringgold*, 3 Har. & J. (Md.) 159, 5 Am. Dec. 433.

Massachusetts.—*Agawam Bank v. Sears*, 4 Gray (Mass.) 95; *Fay v. Smith*, 1 Allen (Mass.) 477, 79 Am. Dec. 752; *Stoddard v. Penniman*, 108 Mass. 366, 11 Am. Rep. 363; *Draper v. Wood*, 112 Mass. 315, 17 Am. Rep. 92.

Michigan.—*Aldrich v. Smith*, 37 Mich. 468, 26 Am. Rep. 536; *Bradley v. Mann*, 37 Mich. 1.

Missouri.—*Haskell v. Champion*, 30 Mo. 136; *Trigg v. Taylor*, 27 Mo. 245, 72 Am. Dec. 263; *Britton v. Dierker*, 46 Mo. 591, 2 Am. Rep. 553; *Ivory v. Michael*, 33 Mo. 398; *Robinson v. Berryman*, 22 Mo. App. 509.

New Hampshire.—*Goodman v. Eastman*, 4 N. H. 455; *Haines v. Dennett*, 11 N. H. 180.

New York.—*McGrath v. Clark*, 56 N. Y. 34, 15 Am. Rep. 372; *Weyerhauser v. Dun*, 100 N. Y. 150, *reversing* 16 N. Y. Wkly. Dig. 412; *Woodworth v. Bank of America*, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239, *reversing* *Bank of America v. Woodworth*, 18 Johns. (N. Y.) 315.

Pennsylvania.—*U. S. Bank v. Russel*, 3 Yeates (Pa.) 391.

West Virginia.—*Ohio Valley Bank v. Lockwood*, 13 W. Va. 392.

See also *U. S. v. Linn*, 1 How. (U. S.) 104. But see *Bingham v. Reddy*, 5 Ben. (U. S.) 266.

Iowa.—It seems that the doctrine stated in the text does not prevail in Iowa. Where R, the defendant, signed a note as surety, and before it was delivered H, the principal maker, obtained the signature of F as a second surety, and G, the payee, then accepted the note, it was held that there was no delivery of the note until it was accepted, and no contract until delivered, and the signing of the second surety before delivery was not an alteration of the contract which would relieve the defendant of liability of the note. *Graham v. Rush*, 73 Iowa 451. See also the case of *Murray v. Graham*, 29 Iowa 520, and the criticisms thereof in *Marsh v. Griffin*, 42 Iowa 403.

Negligent Execution.—As to the rule which is applicable where the instrument is so negligently executed as to facilitate the alteration, see the title *BILLS AND NOTES*. See also *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67; *Blakey v. Johnson*, 13

If the Transferee Has Knowledge of the Alteration, there can be no question but that the instrument is avoided as against the accommodation party.¹

(b) **On Executed Contracts**—*aa. In General.*—An important distinction is made between the effect of the alteration of written instruments which evidence executory contracts and those which evidence contracts executed, such as conveyances of property.² Where a material and unauthorized alteration of a written instrument is made therein by a party claiming under it, the writing is, as has already been shown, avoided so far as it relates to what is executory, and the contract cannot be established by other evidence. But so far as the contract evidenced by the writing has, before the alteration, been executed and is ended, an alteration, however fraudulent, does not undo what has been done.³

bb. CONVEYANCES OF PROPERTY—(*aa. In General.*)—So, generally speaking, where an instrument conveying property has fully accomplished the purpose for which it was executed, before the alteration is made, the interest it transferred is not affected by the alteration.⁴

Bush (Ky.) 197, 26 Am. Rep. 254; Trigg v. Taylor, 27 Mo. 245, 72 Am. Dec. 263.

1. Alteration by Party Accommodated and Transferee.—If the note is altered by the maker with the knowledge of the payee, the accommodation indorser, who had no hand in, or knowledge of, the alteration, is of course discharged.

Alabama.—Glover v. Robbins, 49 Ala. 219, 20 Am. Rep. 272.

Delaware.—Newark Bank v. Crawford, 2 Houst. (Del.) 282.

Georgia.—Hanson v. Crawley, 41 Ga. 303.

Indiana.—Schnewind v. Hackett, 54 Ind. 248; Coburn v. Webb, 56 Ind. 96, 26 Am. Rep. 15; Franklin L. Ins. Co. v. Courtney, 60 Ind. 134; Johnston v. May, 76 Ind. 298.

Iowa.—McCramer v. Thompson, 21 Iowa 244; Marsh v. Griffin, 42 Iowa 403.

Maine.—Waterman v. Vose, 43 Me. 504.

Minnesota.—Flanigan v. Phelps, 42 Minn. 186.

Nebraska.—Brown v. Straw, 6 Neb. 536; Erickson v. Oakland First Nat. Bank, 44 Neb. 622.

New York.—Dewey v. Reed, 40 Barb. (N. Y.) 16.

Ohio.—Patterson v. McNeeley, 16 Ohio St. 348; Thompson v. Massie, 41 Ohio St. 307; Boalt v. Brown, 13 Ohio St. 364; Harsh v. Klepper, 28 Ohio St. 200.

Pennsylvania.—Neff v. Horner, 63 Pa. St. 327, 3 Am. Rep. 555; Hartley v. Corboy, 150 Pa. St. 23.

Tennessee.—Crockett v. Thomason, 5 Sneed (Tenn.) 342; McVey v. Ely, 5 Lea (Tenn.) 438.

Here the case is, in all material respects, the same as if the alteration had been made by the payee himself. So a material alteration in a promissory note by the maker, without the knowledge or consent of the accommodation payee, but in the presence and with the knowledge of the transferee, renders the note unenforceable by the assignee as against such indorsee. Sturges v. Williams, 9 Ohio St. 443, 75 Am. Dec. 473.

If the Note is Altered by the Payee with the Consent of the Maker, but without the Knowledge of the Indorser, the latter is discharged by the alteration, Warpole v. Ellison, 4 Houst. (Del.)

322; Benedict v. Miner, 58 Ill. 19; Pahlman v. Taylor, 75 Ill. 629; Bell v. State Bank, 7 Blackf. (Ind.) 456; Owen v. Hall, 70 Ind. 97; Fulmer v. Seitz, 68 Pa. St. 237, 8 Am. Rep. 172, criticising Kountz v. Kennedy, 63 Pa. St. 187, 3 Am. Rep. 541; even in the hands of a *bona fide* transferee, Henry v. Coats, 17 Ind. 161; Townsend v. Star Wagon Co., 10 Neb. 615, 35 Am. Rep. 493. This is simply the case of an alteration of a note by the payee with the consent of some only of the promisors. See *infra*, this title, subd. *By Consent of Grantor or Promisor—Consent of Some Only of Parties.*

Alteration by Principal Maker and One of Several Joint Payees.—It has been held that a material alteration of a note by the principal and one of several joint payees, who is the custodian of the note, avoids it as to sureties who had signed the same for the accommodation of the principal maker. Thompson v. Massie, 41 Ohio St. 307.

2. See 2 Min. Inst., pp. 662-666; Kendall v. Kendall, 12 Allen (Mass.) 92; Cochran v. Nebeker, 48 Ind. 459; Chappell v. Spencer, 23 Barb. (N. Y.) 586.

3. Bish. Contr., § 758.

An alteration in a material part, made by a party beneficially interested, in a bond given by a trustee to evidence the interest of his *cestui que trust*, without the knowledge of the trustee, and subsequently to its execution, will destroy the bond, but will not operate to destroy an estate which existed before and independently of the bond. Williams v. Van Tuyl, 2 Ohio St. 337.

Alteration of Judgment Note.—It has been held that the alteration of a judgment note by the parties after the entry of judgment thereon, though an improper act, will not affect the validity of the judgment; the note is *functus officio*, being merged in the judgment. Kimmel's Appeal, 91 Pa. St. 471.

4. Alterations in Conveyances.—Agriculturist Cattle Ins. Co. v. Fitzgerald, 15 Jur. 489, 4 Eng. L. & Eq. 211; Hollingsworth v. Holbrook, 80 Iowa 151, 20 Am. St. Rep. 411, citing 1 Am. AND ENG. ENCYC. OF LAW (1st ed.) 502.

In Chessman v. Whittemore, 23 Pick. (Mass.) 231, Morton, J., in delivering the

(bb) *Where Estate Conveyed does Not Lie Wholly in Grant.*—Where the estate conveyed by the writing is one which does not lie wholly in grant, but may exist without a deed, it is not divested by a material alteration of the instrument made by the grantee.¹

Estate in Fee Simple.—Thus while a material alteration in a deed conveying the fee simple estate in lands, made by the grantee, will disable him from bringing an action upon its covenants,² it will not have the effect of divesting the title.³

opinion of the court, said: "There is a manifest distinction between executory contracts and conveyances of property. When deeds of conveyance of real, or bills of sale of personal, property are completed, and possession delivered under them, so far as the change of ownership depends on them, they are executed, and the property passes and vests in the grantee. The instruments may become invalid, so that no action can be maintained upon the covenants contained in them, and yet the titles which have been acquired under them remain unaffected. When a person has become the legal owner of real estate, he cannot transfer it or part with his title except in some of the forms prescribed by law. The grantee may destroy his deed, but not his estate. He may deprive himself of his remedies upon the covenants, but not of his right to hold the property. This distinction has existed from the earliest times. See Viner's Abr. Fait, x. 2."

Bill of Sale.—Thus where a bill of sale was altered by the insertion of another name as maker after delivery and after possession of the property taken by the vendee, it was held that such an alteration would not divest him of the right of possession. *Ransier v. Vandersdol*, 50 Iowa 130. See *Green v. Attenborough*, 3 H. & C. 468.

Deed of Assignment for Benefit of Creditors.—In an action of trover for a deed of assignment of certain leasehold premises to the plaintiff by way of mortgage, the defendants claimed to be entitled to the deed under a certain assignment for the benefit of creditors between the plaintiff of the first part, the defendants of the second part, and "the several other persons whose names and the amount of whose debts were set out in a schedule thereunto annexed, being creditors of the plaintiff," of the third part. There was no schedule to the deed of assignment at the time of its execution by the plaintiff, and the only schedule to the deed on its being produced in evidence consisted of the signatures of the creditors themselves, some of which had been erased, while others had no sums set against them. It was contended for the plaintiff that the deed was avoided by these erasures. There was a verdict for the defendants, but leave being reserved to the plaintiff to move to enter a verdict for himself if the court should think the objections to the deed well founded, the plaintiff moved accordingly. On this hearing, it was held that the fact that there was no schedule to regulate the trust, did not prevent the property from passing. And *Alderson, B.*, said: "Here, at the time when the deed was executed by the plaintiff, the

property passed; what is there to revest it?" *West v. Steward*, 14 M. & W. 47.

1. See *Jackson v. Jacoby*, 9 Cow. (N. Y.) 125.

2. **Material Alterations by Grantee—He may Not Sue upon the Covenants.**—2 Pars. Contr. 724; *Woods v. Hilderbrand*, 46 Mo. 284, 2 Am. Rep. 513; *Withers v. Atkinson*, 1 Watts (Pa.) 236; *North v. Henneberry*, 44 Wis. 306.

3. **Material Alterations by Grantee—Title Not Divested**—*England*.—*Doe v. Hirst*, 3 Stark. 60, 14 E. C. L. 162.

Alabama.—*Sharpe v. Orme*, 61 Ala. 263.

Maine.—*Barrett v. Thorndike*, 1 Me. 73.

Massachusetts.—*Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67; *Kendall v. Kendall*, 12 Allen (Mass.) 92; *Chessman v. Whittemore*, 23 Pick. (Mass.) 231.

Missouri.—*Alexander v. Hickox*, 34 Mo. 496, 86 Am. Dec. 118; *Woods v. Hilderbrand*, 46 Mo. 284, 2 Am. Rep. 513; *Donaldson v. Williams*, 50 Mo. 407.

New Hampshire.—*Chesley v. Frost*, 1 N. H. 145.

New York.—*Smith v. McGowan*, 3 Barb. (N. Y.) 404; *Jackson v. Gould*, 7 Wend. (N. Y.) 364; *Jackson v. Jacoby*, 9 Cow. (N. Y.) 125; *Herrick v. Malin*, 22 Wend. (N. Y.) 388; *Frost v. Peacock*, 4 Edw. Ch. (N. Y.) 678.

Pennsylvania.—*Rifener v. Bowman*, 53 Pa. St. 318; *Withers v. Atkinson*, 1 Watts (Pa.) 236.

Wisconsin.—*North v. Henneberry*, 44 Wis. 306.

See *Walls v. M'Gee*, 4 Harr. (Del.) 108.

Where Fraudulent Attempts were Made to Enlarge the Quantity of Land Granted in a Mexican grant, by erasures and interlineations, after California was ceded to the United States, it was held that such alterations could not take away from the wife and children of the grantee their claim to the original grant. *U. S. v. West*, 22 How. (U. S.) 315.

Alteration of Deed after Delivery but before Registration.—Since the recording of the deed is not, under the recording acts which have been adopted in most of the states, necessary to the vesting of the title in the grantee (see the title *RECORDING ACTS*), the general rule is that an erasure or alteration in a deed after delivery, whether recorded or not, does not reinvest the title in the grantor or abrogate or annul the title of the grantee. *Stanley v. Epperson*, 45 Tex. 645.

Registration of Altered Deed.—But if a deed is materially altered, as by the substitution of grantees, after execution and delivery, the registration of the altered deed will not prevent a subsequent conveyance by the grantor from passing the title to the grantee. *Respass v. Jones*, 102 N. Car. 5.

(cc) *Where Estate Lies in Grant.*—But where the estate conveyed lies in grant, and cannot have existence but by deed, and the deed creating the estate is materially altered by the grantee, not only is the deed void as to any remedy in favor of the party making the alteration, but the estate which he derived under it is also gone.¹

Rents.—Hence where the grantor, in a deed conveying land with the reservation of ground rents, materially alters the clause reserving the rents, the alteration not only destroys the instrument, but, as the rent cannot exist independently of the deed, there can be no recovery of the rent.²

Leasehold Estate.—And if a lease is materially altered by the lessee, he thereby loses all his subsequent rights under the lease, either to retain possession or to preclude the lessor from entering upon the premises.³

(dd) *Mortgages.*—Although there seems to be some authority for the proposition that the material alteration of a mortgage of land by the mortgagee does not divest the estate which passed by the mortgage,⁴ it has been held, even in a

Cancellation or Destruction of Deeds.—As an alteration in a deed does not affect the title to the thing passed by it, it follows that no alteration, as the tearing off of a seal or the signature, not even the cancellation or destruction of the deed, can act as a reconveyance. Co. Litt. 225b, note 136.

England.—Harrison v. Owen, 1 Atk. 520; Clavering v. Clavering, Prec. Ch. 235; Miller v. Manwaring, Cro. Jac. 399; Bolton v. Bishop of Carlisle, 2 H. Bl. 263.

Canada.—Fraser v. Fraser, 14 U. C. C. P. 70; Fraser v. Fralick, 21 U. C. Q. B. 343.

Alabama.—Gimon v. Davis, 36 Ala. 589; Fawcetts v. Kimmey, 33 Ala. 261; King v. Crocheron, 14 Ala. 822.

Arkansas.—Strawn v. Norris, 21 Ark. 80.

Georgia.—Jordan v. Pollock, 14 Ga. 145.

Illinois.—King v. Gilson, 32 Ill. 348, 83 Am. Dec. 269.

Missouri.—Woods v. Hilderbrand, 46 Mo. 284, 2 Am. Rep. 513; Tibeau v. Tibeau, 19 Mo. 78, 59 Am. Dec. 329.

New York.—Fonda v. Sage, 46 Barb. (N. Y.) 109; Parshall v. Shirts, 54 Barb. (N. Y.) 99; Jackson v. Gould, 7 Wend. (N. Y.) 364; Raynor v. Wilson, 6 Hill (N. Y.) 469.

North Carolina.—Linker v. Long, 64 N. Car. 296.

Pennsylvania.—Arrison v. Harmstead, 2 Pa. St. 191; Miller v. Gilleland, 19 Pa. St. 119.

South Carolina.—Flinn v. Brown, 6 S. Car. 209.

Texas.—Stanley v. Epperson, 45 Tex. 644.

Wisconsin.—Parker v. Kane, 4 Wis. 1, 65 Am. Dec. 283; Wilke v. Wilke, 28 Wis. 296.

But it seems that in some States the destruction or return of an unrecorded deed reconveys the estate. Mussey v. Holt, 24 N. H. 248, 55 Am. Dec. 234; Dodge v. Dodge, 33 N. H. 487; Sawyer v. Peters, 50 N. H. 143; Thompson v. Thompson, 9 Ind. 323, 68 Am. Dec. 638; Parker v. Kane, 22 How. (U. S.) 1. However, on this question, see the title DEEDS.

Alteration of Deed Which is Avoided by Non-performance of Condition.—If a deed containing a condition, by the nonperformance of which it has become void, is altered by the destruction of the condition, and then recorded in its altered form, the deed of the grantee can

give no title to a third person. Marr v. Hobson, 22 Me. 321.

1. *Where Estate Lies in Grant.*—7 Nels. Abr. 625; Wallace v. Harmstad, 44 Pa. St. 492; Wright v. Kelley, 4 Lans. (N. Y.) 57; Lewis v. Payn, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427.

2. *Rents.*—In Arrison v. Harmstead, 2 Pa. St. 191, and Wallace v. Harmstad, 15 Pa. St. 462, 53 Am. Dec. 603, it was held that by reason of a fraudulent alteration by the grantor of deeds reserving a ground rent, by materially changing the clause reserving the rents, neither an action of debt nor covenant would lie on the deeds for recovery of the rents, nor would they be recoverable in an action on the verbal contract under which possession was obtained, nor in any action for use and occupation of the premises. And in Wallace v. Harmstad, 44 Pa. St. 492, it was held that the rents could not be recovered by distress.

3. *Leasehold Estates.*—Bliss v. McIntyre, 18 Vt. 466, 46 Am. Dec. 165.

Alteration of One of Duplicate Copies of Lease.

—Where, however, a lease is executed in duplicate, and a copy is in the possession of each party, the alteration by the lessee of the instrument in his possession does not divest him of the estate; the valid deed in the possession of the grantor will still support the estate granted to the lessee. Jones v. Hoard, 59 Ark. 42; Lewis v. Payn, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427. See also Boston Block Co. v. Bufington, 39 Minn. 385.

4. *Mortgages—England.*—In England, where a mortgage in fee transfers the legal title to the land, it has been said that, if a mortgagee cancels a mortgage, it is as much a release as cancelling a bond; but it will not reconvey or revert the estate in the mortgagor, for that must be done by some deed. Harrison v. Owen, 1 Atk. 520. See same case, more at length, under the name Harris v. Owen, West's Ch. Rep. 527.

Massachusetts.—And in the case of Kendall v. Kendall, 12 Allen (Mass.) 92, where it was held that a mortgage is not rendered invalid by the grantee's fraudulently adding the name of the mortgagor's wife in release of dower, there seems to have been a disposition on the part of the court to apply to mortgages

jurisdiction where the mortgagee is regarded as holding the legal title, that, although a mortgage is in form a conveyance of title, it is in reality but a security for the payment of money, and a material alteration of the mortgage by the mortgagee not only destroys the instrument, but divests him of all interest in the property.¹

And in those states where the mortgagor is, for most purposes, considered the legal as well as the equitable owner of the mortgaged premises previous to foreclosure, this question cannot arise.²

(c) **On Right to Recover on Original Consideration.**—*aa. IN GENERAL.*—Although the material alteration of a written instrument may avoid the same, it does not necessarily prevent a recovery by the person entitled thereto on the original consideration.³

Intent.—But the right to such recovery is dependent on whether the alteration was innocently made, without any intent to defraud, or was made for a fraudulent purpose.⁴

bb. WHERE ALTERATION IS MADE WITHOUT FRAUDULENT INTENT—(*aa*) *General Principles.*—Where a written instrument is altered without any fraudulent intent, although the writing is avoided, the promisee may recover upon the original consideration.⁵

Illustrations.—Hence where a promissory note is given for the purchase price of goods, or for money lent, or for any precedent indebtedness which is not extinguished by, and exists independently of, the writing,⁶ and the payee innocently makes a material alteration therein, although the note itself is avoided, and, since the liability of the surety exists solely by virtue of the writing, there can therefore be no recovery against him,⁷ there may nevertheless

the general rule which is applicable to the alteration of deeds; *i. e.*, that the material alteration of a deed by the grantee does not divest his title to the land. In delivering the opinion of the court in this case, Dewey, J., does not make any distinction between deeds conveying the fee to, and mortgages of, land, but says generally that the title to the property passes and vests in the grantee by the execution of the deed, and the subsequent alteration or destruction of the instrument does not affect his title. See Jones on Mortgages (4th ed.), par. 95.

1. *McIntyre v. Velte*, 153 Pa. St. 350.

Chattel Mortgage.—In *Hollingsworth v. Holbrook*, 80 Iowa 151, 20 Am. St. Rep. 411, which was an action by the mortgagor to recover the possession of certain personal property which had been taken by the defendant, the mortgagee, under a chattel mortgage which had been materially altered before possession had been delivered to the mortgagee by the latter's agent acting within the line of his authority, it was held that the alteration destroyed the right of the mortgagor to take the property on foreclosure, for the reason that the right to take possession and to sell the property and pay the mortgage debt depended upon the covenants of the mortgage.

2. See *Russell v. Reed*, 36 Minn. 376; *Warren v. Smyth*, 2 Barb. Ch. (N. Y.) 119, 47 Am. Dec. 299.

3. **Effect on Right to Recover on Original Consideration.**—In *Powell v. Pearlstine*, 43 S. Car. 403, it was said that it does not follow necessarily that because a mortgage is a nullity, the debt intended to be secured thereunder is extinguished.

4. **Importance of Motive of Alteration.**—Although the commonly accepted view is, as appears from the cases cited in the two next succeeding sections, that the right to recover on the original indebtedness for which the instrument was given is dependent on whether or not the alteration was fraudulently made, there are a few cases in which this distinction is not expressly recognized. See *Gladstone v. Dew*, 9 U. C. C. P. 439; *Warren v. Layton*, 3 Harr. (Del.) 404; *Whitmer v. Frye*, 10 Mo. 348; *Bigelow v. Stilphen*, 35 Vt. 521.

5. **Innocent Alterations.**—2 Pars. Contr. 721. See *Green v. Sneed*, 101 Ala. 205, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 520.

While the Material Alteration of the Date of a Written Authority given by one person to another to draw a draft upon him will discharge him from liability as acceptor under such authority, the alteration will not of itself release him on the common counts for money received and retained by him knowing it to have been the proceeds of the draft. *Lewis v. Kramer*, 3 Md. 265.

Jurisdiction.—It would seem that the recovery of the indebtedness for which the altered writing was executed can only be had in a court of law, unless equitable relief is in some degree necessary to establish the claim. *Lewis v. Schenck*, 18 N. J. Eq. 459, 90 Am. Dec. 631. See *Sharpe v. Bagwell*, 1 Dev. Eq. (N. Car.) 115.

6. On the question of when the giving of a written security extinguishes a debt, see the title PAYMENT.

7. **Effect upon Sureties.**—*Sullivan v. Rudisill*, 63 Iowa 158; *Owen v. Hall*, 70 Md. 97; *Johnson v. Johnson*, 66 Mich. 525; *Miller v. Stark*, 148 Pa. St. 164.

be a recovery by the payee against the maker on the original indebtedness.¹ So also if a material alteration in a bill of exchange is made in good faith by the drawer after acceptance, it will not prevent a recovery by him against the acceptor, on the original consideration,² unless it was taken in satisfaction of the debt.³

(bb) *Alteration by Indorsee of Negotiable Instrument.*—But while an alteration by the drawer and payee of a bill, or the payee of a note, avoids the instrument but does not necessarily extinguish the debt, a material alteration by an indorsee not only avoids the security as against all the parties, but also extinguishes the debt due to the indorsee from the indorser.⁴

(cc) *Return of Writing.*—And it has been held that where a note is avoided by a material alteration, the holder cannot maintain a suit on the original indebtedness for which it was given without returning or offering to return the note.⁵

1. Recovery against Maker—England.—Sutton v. Toomer, 7 B. & C. 416, 14 E. C. L. 66.

Illinois.—Vogle v. Ripper, 34 Ill. 100, 85 Am. Dec. 208; Elliott v. Blair, 47 Ill. 343; Wallace v. Wallace, 8 Ill. App. 69; Springfield First Nat. Bank v. Ryan, 31 Ill. App. 271.

Iowa.—Clough v. Seay, 49 Iowa 111; Morrison v. Huggins, 53 Iowa 76; Eckert v. Pickel, 59 Iowa 545; Sullivan v. Rudisill, 63 Iowa 158.

Maryland.—Owen v. Hall, 70 Md. 97.
Michigan.—Port Huron First Nat. Bank v. Carson, 60 Mich. 432.

Nebraska.—State Sav. Bank v. Shaffer, 9 Neb. 1; 31 Am. Rep. 394. See also Courcamp v. Weber, 39 Neb. 533.

New Jersey.—Lewis v. Schenck, 18 N. J. Eq. 459, 90 Am. Dec. 631; Hunt v. Gray, 35 N. J. L. 227, 10 Am. Rep. 232; York v. Janes, 43 N. J. L. 332.

New York.—Booth v. Powers, 56 N. Y. 22.
Ohio.—Merrick v. Boury, 4 Ohio St. 60.

Pennsylvania.—Miller v. Stark, 148 Pa. St. 164.

Wisconsin.—Gorden v. Robertson, 48 Wis. 493; Matteson v. Ellsworth, 33 Wis. 488, 14 Am. Rep. 766.

Alteration to Conform Instrument to Intention of Parties.—It has been so held where the alteration was innocently made under a mistaken belief of right and for the purpose of making the writing conform to the real intention of the parties. Murray v. Graham, 29 Iowa 520; Johnson v. Johnson, 66 Mich. 525; Lewis v. Schenck, 18 N. J. Eq. 459, 90 Am. Dec. 631; Clute v. Small, 17 Wend. (N. Y.) 238; Otto v. Half (Tex. Civ. App. 1895), 32 S.W. Rep. 1052.

Alteration by Stranger.—The material alteration of a writing by a stranger to the contract does not prevent a recovery on the original consideration. Morrison v. Welty, 18 Md. 169; Hunt v. Gray, 35 N. J. L. 227, 10 Am. Rep. 232.

Alteration of Note Given for Purchase Price of Land.—Where notes given for the purchase price of land, of which the purchaser was in possession, were materially altered by the payee, it was held that while the vendor could not, in the face of the alteration, enforce his notes as a lien upon the land, yet the purchaser could not be allowed to hold it without payment; he must elect either to rescind the contract of purchase upon equitable terms, or submit to the enforcement of the lien. Singleton v. McQuerry, 85 Ky. 41.

2. Bill of Exchange—Innocent Alteration by Drawer.—Hervey v. Harvey, 15 Me. 357. See Sloman v. Cox, 1 C. M. & R. 471, 5 Tyr. 174.

In the case of Atkinson v. Hawdon, 2 Ad. & El. 628, 29 E. C. L. 169, 4 N. & M. 409, 1 H. & W. 77, which was an action of assumpsit by the vendor against the vendee, the declaration contained two counts, one upon a bill of exchange that had been given by the vendee for the price of the goods, and the other for goods sold and delivered. The bill had been materially altered by the drawer, the vendor, without the privity or assent of the drawee, the vendee. It was held that the bill was thereby vitiated, but that the plaintiff was entitled to recover upon a common count. While the distinction between the effect of alterations innocently and those fraudulently made is not expressly recognized in this case, the question arose upon demurrer, and there was nothing to show that the alteration was fraudulently made; there was no allegation of fraud. See comments on the case in Clute v. Small, 17 Wend. (N. Y.) 238, by Cowen, J.; in Meyer v. Huneke, 55 N. Y. 413; and in Smith v. Mace, 44 N. H. 553.

3. When Taken in Satisfaction of the Debt.—M'Dowall v. Boyd, 17 L. J. Q. B. 295, 6 D. & L. 149, 2 B. C. Rep. 298, 12 Jur. 980.

4. Alteration by Indorsee of Negotiable Paper.—Chitty on Bills 221; Alderson v. Langdale, 3 B. & Ad. 660, 23 E. C. L. 155.

Reasons for the Rule.—"It would," says a writer of recognized authority on the subject of bills and notes, "be unjust that the indorsee should compel the indorser to pay his debt when the indorsee has destroyed the instrument on which alone, in some cases, and on which preferably in all cases, the indorser should sue. To make the indorser liable on the consideration and give him a cross-action against the indorsee for the alteration, would be to oblige him to rely on the indorsee instead of the antecedent parties, and to prove a fact of which he might have no evidence. It would, besides, introduce a needless circuitry of action." Wood's Byles on Bills and Notes 328. See also article on Alteration of Negotiable Instruments, 2 S. & L. Rev. 664.

5. Return of Note a Condition of Right to Sue.—Eckert v. Pickel, 59 Iowa 545; Morrison v. Welty, 18 Md. 169; Glenn v. Smith, 2 Gill

cc. WHERE ALTERATION IS FRAUDULENT.—Where the holder of a written security, or evidence of debt, has, with intent to defraud his debtor, altered the instrument in a material respect, no recovery can be had on the original consideration.¹ Hence a fraudulent, as well as material, alteration of a promissory note by the payee will prevent him from recovering on either the note or the original consideration.²

dd. EFFECT ON MORTGAGE OF ALTERATION OF MORTGAGE NOTE—*Innocently Made*.—If there is a precedent indebtedness which was not extinguished by, and exists independently of, the note,³ and the note is materially altered, but the alteration is made without any fraudulent design, so that there may be a recovery on the original indebtedness, such alteration does not have the effect of defeating a mortgage given to secure the note.⁴

Fraudulently Made.—But the material alteration of a mortgage note, if made with fraudulent intent, discharges the mortgage.⁵

& J. (Md.) 493, 20 Am. Dec. 452; *Booth v. Powers*, 56 N. Y. 22. See *Owen v. Hall*, 70 Md. 97. See also the title PAYMENT.

1. *Fraudulent Alteration of Contract for Advertising*.—In *Trow v. Glen Cove Starch Co.*, 1 Daly (N. Y.) 280, a written order for advertising had been altered by raising the price to be paid. The court found that the alteration had been made with a fraudulent intent, and held that the plaintiff was not entitled to recover for the work.

2. *Fraudulent Alteration of Promissory Note*.—*Alabama*.—*White v. Hass*, 32 Ala. 430, 70 Am. Dec. 548; *Toomer v. Rutland*, 57 Ala. 379, 29 Am. Rep. 722; *Green v. Sneed*, 101 Ala. 205, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 520.

Illinois.—*Black v. Bowman*, 15 Ill. App. 166; *Wallace v. Wallace*, 8 Ill. App. 69.

Indiana.—*Ballard v. Franklin L. Ins. Co.*, 81 Ind. 239.

Minnesota.—*Warder, etc., Co. v. Willyard*, 46 Minn. 531.

New Hampshire.—*Smith v. Mace*, 44 N. H. 553.

New York.—*Booth v. Powers*, 56 N. Y. 22; *Kennedy v. Crandell*, 3 Lans. (N. Y.) 1.

In *Blade v. Noland*, 12 Wend. (N. Y.) 173, 27 Am. Dec. 126, the plaintiff sued for work and labor and on a note which had been given therefor, alleging that the note had been lost, but it appeared that he had intentionally destroyed it, and it was held that he was not remitted to the original consideration. Although it has sometimes been supposed that it was held in this case that a payee who materially alters a note cannot recover on the original indebtedness without regard to whether or not the alteration was made for a fraudulent purpose, in the later case of *Clute v. Small*, 17 Wend. (N. Y.) 238, Cowen, J., reviewing this decision, regards it as turning upon the fact that the destruction was made under circumstances from which a fraudulent intent might be inferred.

Fraudulent Alteration of Certificate of Deposit.—The material and fraudulent alteration of a certificate of deposit, made therein by the person to whom it is issued, defeats a recovery by a transferee, either on the certificate or on the claim for the amount deposited. *Woodworth v. Anderson*, 63 Iowa 503.

3. *Where Note Operates as Payment of Debt*.—Of course, if the giving of the promissory note had the effect of extinguishing the original indebtedness, so that the only liability which exists is on the note, a material alteration of the note by the promisee, without the consent of the promisor, whether fraudulent or not, since it has the effect of invalidating the note for all purposes, must also discharge the mortgage by which it is secured. *Tate v. Fletcher*, 77 Ind. 102.

4. *Where There Is No Fraud*.—*Elliott v. Blair*, 47 Ill. 342; *Vogle v. Ripper*, 34 Ill. 100, 85 Am. Dec. 298; *Clough v. Seay*, 49 Iowa 111; *Gillette v. Smith*, 18 Hun (N. Y.) 10; *Cheek v. Nall*, 112 N. Car. 370; *Gillet v. Powell*, Spears Eq. (S. Car.) 142; *Heath v. Blake*, 28 S. Car. 406.

It has been held that the wife of the maker of a note, who, for the purpose of releasing her interest, joins in a mortgage of the lands of the husband given to secure the payment of the note, cannot be heard to complain of an alteration in the mortgage note made with the consent of the husband in order to have it conform to the contract and to the condition of the mortgage. *Brock v. Brock*, 29 Ill. App. 334.

Alteration of One of Two Contracts Secured by Mortgage.—Where a surety gives a mortgage to secure the performance of a contract, and also to secure the payment of a note in nowise connected with the contract, an alteration of the contract discharging the mortgage as to it, will not discharge it as to the note. *Parke, etc., Co. v. White River Lumber Co.*, (Cal. 1896) 43 Pac. Rep. 202.

5. *Where There Is Fraud*.—*Walton Plow Co. v. Campbell*, 35 Neb. 173. And see *Bowman v. Mitchell*, 79 Ind. 84.

South Carolina.—But in the case of *Plyler v. Elliott*, 19 S. Car. 267, where a material alteration had been fraudulently made in a note by the plaintiff, the payee, it was held by the majority of the court that the alteration did not avoid a contemporaneous mortgage executed by the principal debtor to the plaintiff to secure the payment of the note. Mr. Justice McIver, however, in a dissenting opinion, contends for what appears to be the better rule. He says: "It appears to me that the question as to what effect the alteration of a

cc. WHERE ALTERED WRITING CONSTITUTES THE ONLY OBLIGATION.—Where a writing constitutes in itself the only obligation existing against the promisor, all remedies thereon are lost by its material alteration; the law refuses to create a new contract to supply the place of the one destroyed.¹

Bond.—So in the case of a bond, if there was no precedent liability, then the bond created the only liability that ever existed, and, that being avoided by a material alteration, there is no original consideration to fall back upon, and there can be no recovery.²

Merger.—Where a verbal contract is merged in a new contract in writing, a material alteration of the latter will prevent a resort to the original contract.³ Therefore, since a simple contract debt is extinguished by the acceptance of a specialty,⁴ after a material alteration of the latter there can be no recovery upon the former contract.⁵

ff. RECOVERY BY ASSIGNEE OF INSTRUMENT.—In the absence of privity between the holder of the altered instrument and the party sued, the former cannot recover for the original consideration.⁶ Hence, on the ground that the only privity which exists between the indorsee and the acceptor or maker is by means of the bill or note which is destroyed by the alteration, it has been held that there cannot, in the absence of an assignment of the original indebtedness, be a recovery thereon by an indorsee against the drawee of a bill⁷ or the maker of a note.⁸

note, secured by a mortgage, has upon the right to foreclose a mortgage, depends altogether upon whether such alteration was fraudulently made by the plaintiff. If it was, then the plaintiff not only loses his right of action on the note, but also his right to the aid of the court in enforcing the collection of his debt in any form. This is the penalty which he incurs for his fraud. The court withholds the use of its process to enforce the collection of a debt which may be due to a person who has, for the purpose of committing a fraud upon his debtor, made an alteration in any one of the evidences of such debt. If, however, the alteration is not shown to have been done fraudulently by the plaintiff, then the only effect is to deprive the plaintiff of the right of action upon the note or other evidence of debt which has been altered, but does not affect his right of action for the debt if he can establish it by any other evidence. He cannot sue upon the altered note, because that is not the contract into which the defendant entered; but he still may sue for the debt, and will be permitted to establish such debt by any other evidence than that afforded by the altered note which it may be in his power to produce. * * * It seems to me that any other rule would destroy the distinction between a fraudulent and an innocent alteration of a note. The latter destroys the right of action on the note, but does not impair the right of action on the original consideration for which such note was given, and if the former did no more it would be placing the guilty in no worse position than the innocent. Upon the same principle, it seems to me that where a note secured by a mortgage has been fraudulently altered by the plaintiff, he not only loses his right of action on the note, but also on the mortgage." But the decision in *Plyler v. Elliott*, 19 S. Car. 263, was *approved and followed* in the later case of *Smith v. Smith*, 27 S. Car. 166, 13 Am. St. Rep. 633, so

that the view of the majority of the judges in that case seems to be the settled law in South Carolina.

1. **Altered Writing the Only Obligation—General Rule.**—*Crawford v. West Side Bank*, 100 N.Y. 58, 53 Am. Rep. 152; *Tate v. Fletcher*, 77 Ind. 102. See *Matteson v. Ellsworth*, 33 Wis. 488, 14 Am. Rep. 766.

2. **Bonds.**—*Whitmer v. Frye*, 10 Mo. 348. See *Merrick v. Bourry*, 4 Ohio St. 70.

3. **Verbal Contract Merged in Written Contract—Alteration of Latter.**—*Newell v. Mayberry*, 3 Leigh (Va.) 250, 23 Am. Dec. 261.

A Parol Promise by a Purchaser of Land to pay for the same is merged in the note given for the consideration at the time of the agreement, and where the note becomes void by reason of alteration, the holder cannot recover upon the original consideration. *Wheelock v. Freeman*, 13 Pick. (Mass.) 165, 23 Am. Dec. 674.

4. See the title PAYMENT.

5. **Merger of Simple Contract in Specialty—Alteration of Latter.**—*Whitmer v. Frye*, 10 Mo. 348; *Mills v. Starr*, 2 Bailey (S. Car.) 359. See also *Merrick v. Bourry*, 4 Ohio St. 70; *Matteson v. Ellsworth*, 33 Wis. 488, 14 Am. Rep. 766.

6. *Chitty on Bills* 183.

7. *Long v. Moore*, cited in 3 Esp. 155. See *Master v. Miller*, 4 T. R. 320.

8. *Samson v. Yager*, 4 U. C. Q. B. O. S. 3; *Burwell v. Orr*, 84 Ill. 465; *Cason v. Wallace*, 4 Bush (Ky.) 388; *Mount Morris Bank v. Lawson*, 10 Misc. Rep. (N. Y. C. Pl.) 359.

But it has been held that the assignment by the payee of an altered note transfers to the assignee all the rights of the assignor to the original cause of action. *State Sav. Bank v. Shaffer*, 9 Neb. 1, 31 Am. Rep. 394.

Sufficiency of Assignment.—For a case where the assignment of a non-negotiable instrument was held sufficient to transfer the claim

(d) **On Instrument as Evidence**—*aa. IN GENERAL.*—Since a material and unauthorized alteration of a written instrument containing an executory contract has the effect of preventing a recovery thereon, in either its altered or its original form, and the contract itself is, therefore, not provable, the question of the admissibility of the writing to establish such contract can hardly arise. But such instrument is admissible to defeat a claim on the ground of fraud, or to convict a party of a crime.¹

bb. TO PROVE COLLATERAL FACTS.—It has been held that an instrument which has been avoided by a material alteration may be given in evidence to prove a collateral fact.²

cc. TO PROVE TITLE.—In *England* it seems to be established that, since an unauthorized and material alteration in a deed by the grantee does not divest him of the title which it conveyed, such deed may be given in evidence by him to prove the title.³ And in some of the *United States* this view has been adopted as the more reasonable and the sounder in principle.⁴ But in others of the states the courts have taken the view that, while a grantee does not divest himself of title to land by an unauthorized alteration in a material respect of the deed by which it was conveyed to him, yet he cannot adduce the altered deed in evidence to prove the conveyance and the existence of title in himself, but must prove the conveyance by other evidence.⁵

dd. TO PROVE ORIGINAL CONTRACT.—Although there is some authority for the proposition that the altered writing may, in an action to recover on the original consideration, be given in evidence to establish the original contract,⁶ the correctness of the principle has been denied, and it has been held that a materially altered instrument cannot be received in support of the money counts.⁷

of the payee to the original indebtedness, see *Port Huron First Nat. Bank v. Carson*, 60 Mich. 432.

1. *Chitty on Bills* 191; *Low v. Merrill*, 1 Pin. (Wis.) 340.

2. **Altered Instrument to Prove Collateral Facts.**—See *Gould v. Coombs*, 1 C. B. 543, 50 E. C. L. 543. In *Hutchins v. Scott*, 2 M. & W. 809, by an agreement between the plaintiff and the defendant, a house, number 38, was let to the plaintiff. After the agreement was executed and delivered to the plaintiff, it was altered by writing number 35 instead of 38 on an erasure. The house occupied by the plaintiff under the agreement was in fact number 35. It was held that the altered agreement might be given in evidence in an action for an excessive distress, in which the demise was admitted on the record to show the terms of the holders.

Where, in an action of debt for calls, under 7 and 8 Vict., c. 110, § 55, it appeared that the deed of settlement of the company had been executed by the defendant as a shareholder, but there was an unexplained erasure of the name of another person who had signed it as a shareholder, it was held that the deed might be given in evidence to prove the fact of the defendant being a shareholder. *Agriculturist Cattle Ins. Co. v. Fitzgerald*, 20 L. J. Q. B. 244, 15 Jur. 489, 4 Eng. L. & Eq. 211.

To Prove Facts Recited in Altered Instrument.—It has been held that where an instrument is offered in evidence against the party signing it, to prove the facts recited therein, it will not be rendered inadmissible by reason of an erasure upon it, whether material or

not, the suit not being based upon the paper. *Parker v. Moore*, 29 Mo. 218.

3. **Altered Deed as Proof of Title—England.**—*Elph. Interp. of Deeds* 19; *Doe v. Hirst*, 3 Stark. 60, 14 E. C. L. 162. See also *Agriculturist Cattle Ins. Co. v. Fitzgerald*, 15 Jur. 489, 4 Eng. L. & Eq. 211.

4. **Altered Deed as Proof of Title—United States.**—*Alabama State Land Co. v. Thompson*, 104 Ala. 570; *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67; *Burnett v. McCluey*, 78 Mo. 676. See *Woods v. Hilderbrand*, 46 Mo. 284, 2 Am. Rep. 513; *North v. Henneberry*, 44 Wis. 306.

The cases of *Jackson v. Gould*, 7 Wend. (N. Y.) 364, and *Lewis v. Payn*, 8 Cow. (N. Y.) 71, 18 Am. Dec. 427, tend to support the same view. And see *Herrick v. Malin*, 22 Wend. (N. Y.) 388.

5. **Altered Deed Not Competent Evidence of Title in Some Jurisdictions.**—*Chesley v. Frost*, 1 N. H. 145; *Withers v. Atkinson*, 1 Watts (Pa.) 236; *Bliss v. McIntyre*, 18 Vt. 466, 46 Am. Dec. 165; *Batchelder v. White*, 80 Va. 103. See *Miller v. Luco*, 80 Cal. 257; *Rifener v. Bowman*, 53 Pa. St. 313.

But a **Doubtful Alteration in a Deed** does not warrant its exclusion from evidence. *Davis v. Fuller*, 12 Vt. 178, 36 Am. Dec. 334.

6. **Altered Instrument as Evidence of Original Contract.**—*Sutton v. Toomer*, 7 B. & C. 416, 14 E. C. L. 66; *Pattinson v. Luckley*, L. R. 10 Exch. 330.

7. *Chitty on Bills*, p. 191; *Low v. Merrill*, 1 Pin. (Wis.) 340. See *Smith v. Frye*, 14 Me. 457; *Courcamp v. Weber*, 39 Neb. 533.

In *Morrison v. Huggins*, 53 Iowa 76, it was said that where a party may legally recover

ee. BILLS OF SALE AND RECEIPTS.—The material alteration of an instrument, such as a bill of sale or receipt, which serves only to evidence a fact or transaction, has the effect of preventing it from being adduced in proof of the matter which it purports to evidence.¹

(3) *By Consent of Grantor or Promisor*—(a) *In General.*—Generally speaking, even a material alteration, made in an instrument by the grantee or obligee after execution, does not avoid the writing if the other party has consented to the change.² This principle has, in some cases, been applied without reference to whether the instrument under consideration was or was not under seal.³

(b) *Unsealed Instruments.*—And certainly where the instrument is not under seal, an alteration therein, even in a material respect, made by the common consent of the parties, will not avoid the writing, but will be binding on the consenting parties in its altered form.⁴

on the original consideration for which the altered instrument was given, he may establish such consideration by any evidence which he may have, either written or oral, which has not been vitiated by the alteration.

1. *Bill of Sale.*—In *Babb v. Clemson*, 10 S. & R. (Pa.) 419, 13 Am. Dec. 684, it was held that, where a bill of sale had been wilfully altered by the vendee for the purpose of covering property from execution, such altered instrument is not competent evidence of the sale.

Receipts.—If a receipt is materially altered by the party holding it, or by the procurement of such party, it is thereby vitiated as an instrument of evidence. *Goodfellow v. Inslee*, 12 N. J. Eq. 355; *Elgin v. Hall*, 82 Va. 680. See *Caldwell v. Fifield*, 24 N. J. L. 150; *Burrows v. Stoddard*, 3 Conn. 163.

2. *Alteration Must Conform to Terms of Consent.*—Where consent to make an alteration has been given by the parties concerned, the alteration must be made according to the specific terms of the consent, and not be extended beyond it. *Coburn v. Webb*, 56 Ind. 96, 26 Am. Rep. 15; *Ex p. Decker*, 6 Cow. (N. Y.) 59; *Swift v. Barber*, 28 Mich. 503; *Toomer v. Rutland*, 57 Ala. 379, 29 Am. Rep. 722.

Whether Consent and Alteration must Be Contemporaneous.—It has been held that the consent to an alteration of a promissory note must be had when the alteration is actually made, and that an alteration cannot be made a considerable period of time after the consent is given. *Swift v. Barber*, 28 Mich. 503. In this case, *Graves, C. J.*, said: "When the holder of negotiable paper assumes to alter it in a material part, in the absence and without the knowledge of the party liable upon the paper, it ought not to be maintained as a lawful alteration, except upon very clear proof that when actually made it had the assent of the party to be charged." But in *Wardlow v. List*, 41 Ohio St. 414, it was held that a material alteration in a note, made in accordance with an agreement between the maker and payee, does not avoid the note as to the maker, although the change was made some time after the agreement and without knowledge on the part of the maker that the agreement had been made effective by the actual alteration of the note

Withdrawal of Consent.—Parties who have given their consent to an alteration will not be permitted to withdraw it after obligations or rights have accrued under the instrument as altered. *Lemay v. Johnson*, 35 Ark. 225.

3. *Substitution of Property in Chattel Mortgage.*—Where a chattel mortgage was altered after execution and delivery and before registration by the mortgagee, with the consent of the mortgagor, by erasing the description of the property and writing in the description of other and different property, it was held that the instrument was a valid mortgage of the property so added, and would support an action of replevin for such property. *Holland v. Griffith*, 13 Neb. 472.

In *Alabama* a mortgage of personalty is not valid "unless in writing and subscribed by the mortgagor" (*Alabama Code*, § 1731); yet if the parties, by subsequent agreement, substitute one animal for another, by interlineation entered in the mortgage, such substitution is valid as between themselves, and an action of detinue will lie by the mortgagee for the substituted animal. *Winslow v. Jones*, 88 Ala. 496.

Substitution—Third Parties.—In *Williams v. Crook*, 63 Miss. 9, it was held that there could be no exchange or substitution of other property in lieu of that described in the deed of trust, even by agreement of the parties, so as to render the deed of trust a lien upon the substituted property as against third persons having no actual notice of the agreement and substitution.

Severance of Memorandum from Obligation by Consent.—A memorandum torn from the foot of the obligation by the obligee, with the assent of the obligor, does not destroy the obligation. *Price v. Cockran*, 1 Bibb (Ky.) 570.

Erasure of Name of Subscriber to Articles of Association by Consent of Parties.—In an action for a subscription to the capital stock of a corporation, the erasure from the articles of the name of a co-subscriber, made with the knowledge of the defendant, is no defense. *Rensselaer, etc., Plank Road Co. v. Wetsel*, 21 Barb. (N. Y.) 56.

4. *Instruments Not under Seal*—*Boston v. Benson*, 12 Cush. (Mass.) 61; *Kilkelly v. Martin*, 34 Wis. 525.

Negotiable Paper.—Hence material alterations of negotiable paper do not invalidate it as against the parties consenting to the alteration.¹

Where a Promissory Note has been **Materially Altered** by consent of the maker, the alteration will not prevent a recovery thereon.²

A **Guarantor or Surety** is not released by a material alteration in the note made with his consent.³

And a **Bill of Exchange** is not vitiated by a material alteration made therein with the consent of all the parties.⁴

Before Acceptance, and with the Consent of the Previous Parties, a bill of exchange may be materially altered without vitiating it.⁵

If the Acceptance of a Bill of Exchange is Altered with the consent of the acceptor, he remains liable thereon.⁶

(c) **Specialties—In General.**—With regard to the alteration of writings under seal by consent of the parties, there seems to have been some conflict in the

Lease.—Where a lease not under seal was altered by the insertion of a new provision, with the consent of both parties, it was held that such provision became a part of the lease, and that it was not necessary that it should be again signed or re-executed. *Vidvard v. Cushman*, 35 Hun (N. Y.) 18.

1. Negotiable Paper—Decisions under English Stamp Acts.—There are a number of English cases which hold that bills and notes are vitiated by a material alteration, even though made by consent of the parties, but these cases were decided under the English Stamp Acts. The doctrine of these cases is that as soon as the instrument is issued, the stamp has filled its function, and any change afterwards virtually makes it a new contract requiring a new stamp. *Bayley on Bills* (2d Am. ed.) 90; *Wilson v. Justice*, *Bayley* (6th ed.) 118; *Bowman v. Nichol*, 5 T. R. 537, 1 Esp. 81; *Perring v. Hone*, 4 Bing. 28, 13 E. C. L. 328; *Bathe v. Taylor*, 15 East 412; *Downes v. Richardson*, 5 B. & Ald. 674, 7 E. C. L. 227.

2. Instances of Alteration of Note by Consent.—*Hochmark v. Richler*, 16 Colo. 263, where the alteration consisted of the attaching of an additional signature to the note; *Hollis v. Vandergrift*, 5 Houst. (Del.) 521, in which case the alteration consisted of the erasure, with the consent of all the makers, of the words “& Co.” immediately following the name and signature of the principal maker; *Willard v. Clarke*, 7 Met. (Mass.) 435, where the alteration consisted of procuring a person to sign the note as an attesting witness; *Wilson v. Jamieson*, 7 Pa. St. 126, where the words “attest this 9th of October, 1846,” were added at the end of the note.

If a married woman signs a promissory note in the usual form, and authorizes the payee to add anything which should be necessary to make it legal, the addition of a sentence charging her separate estate does not vitiate the instrument. *Taddiken v. Cantrell*, 69 N. Y. 597, 25 Am. Rep. 253.

It has been held that when, without any change in the form of the note, an additional promisor signed it, the jury may still find it to be the act and deed of the first signer upon very slight evidence of even a subsequent assent on his part. *Pulliam v. Withers*, 8 Dana (Ky.) 99, 33 Am. Dec. 479.

If the holder of a note, signed by the principal debtor and sureties, by an agreement with the principal, suffers the signature of one of the sureties to be erased, the note is still valid as against the principal. *People v. Call*, 1 Den. (N. Y.) 120, 43 Am. Dec. 655.

Alteration of Rate of Interest in Note by Consent.—Where the alteration of a note consisted in changing the rate of interest, the party consenting thereto has been held bound by the note in its altered form. *Canon v. Grigsby*, 116 Ill. 151, 56 Am. Rep. 769; *Brock v. Brock*, 29 Ill. App. 334; *Nelson v. White*, 61 Ind. 139; *Bowman v. Mitchell*, 97 Ind. 155; *Grimsted v. Briggs*, 4 Iowa 559; *Myers v. Nell*, 84 Pa. St. 369.

3. Consent of Surety.—*Gardiner v. Harback*, 21 Ill. 129; *Knoebel v. Kircher*, 33 Ill. 308; *Voiles v. Green*, 43 Ind. 374; *Stewart v. Port Huron First Nat. Bank*, 40 Mich. 348.

New Consideration Not Necessary.—An alteration in the date and amount of a promissory note by the payee, with the assent of the surety, does not avoid the note as to the surety, even though there is no new consideration. *Pelton v. Prescott*, 13 Iowa 567.

4. Bill of Exchange Altered with Consent of All the Parties.—*Kershaw v. Cox*, 3 Esp. 246.

5. Langton v. Lazarus, 5 M. & W. 629; *Ward v. Allen*, 2 Met. (Mass.) 53, 35 Am. Dec. 387.

The Acceptor of a Bill may Alter the Date before He Accepts, and if this be concurred in by the other parties, it will bind them. *Ratcliff v. Planters' Bank*, 2 Sneed (Tenn.) 425.

Under Stamp Acts.—Nor does such alteration necessitate a new stamp under the requirements of the Stamp Acts. *Peacock v. Murrell*, 2 Stark. 558, 3 E. C. L. 529; *Upstone v. Marchant*, 2 B. & C. 10, 9 E. C. L. 7.

6. Alteration of Acceptance with Consent of Acceptor.—*Stevens v. Lloyd*, 1 M. & M. 292, 22 E. C. L. 310. And see *Kershaw v. Cox*, 3 Esp. 246.

Where the drawee, with the consent of the holder, materially alters a bill of exchange presented to him for acceptance, he vitiates the bill in the hands of the holder as against the drawer and prior indorsers, but it remains a good bill as between the holder and acceptor. *Paton v. Winter*, 1 Taunt. 420.

early cases.¹ But it has been said that the weight of authority is that consent will give validity even to a deed, *i. e.*, a writing sealed and delivered, which has after execution been altered in a material respect.²

Deeds.—And, while there is respectable authority to the contrary,³ it has been held that a deed of land is not invalidated by a material alteration after its execution, if the alteration is made with the knowledge and consent of the grantor.⁴

1. In 2 Roll. Abr. 29, *U*, pl. 5, it is stated that if a material alteration is made in a deed by the obligor, with the consent of the obligee, it is still void. But when this authority was cited in *Master v. Miller*, 4 T. R. 323, Lord Kenyon said that there had been contrary decisions since; and in *Markham v. Gonaston*, as reported in Moore 547, *overruling* the decision of the same case in Cro. Eliz. 626, a subsequent and contrary decision is stated to have been made in the King's Bench. In the case of *Zouch v. Clay*, 2 Lev. 35, 1 Vent. 185, this decision in Moore is cited by Sir Matthew Hale and the whole court as correctly reported; and the court there established the doctrine that an alteration of a bond in a material part, by consent of all the parties, did not vitiate the instrument.

Filling Blanks in Specialties by Consent.—On the question of the sufficiency of parol authority to fill blanks left in specialties, see *infra*, this title, div. *Filling Blanks*.

2. **Sealed Bill.**—*Richmond Mfg. Co. v. Davis*, 7 Blackf. (Ind.) 412, in which case the alteration was made in a sealed bill.

Bill of Sale of Ship.—In *Woolley v. Constant*, 4 Johns. (N. Y.) 54, 4 Am. Dec. 246, it is contended that a deed may be altered in a material part with the consent of both parties, and hence it was held that a bill of sale of a ship might be altered by the insertion of a recital of the registry without invalidating the instrument, where it was done with the consent of the parties.

Agreement for Submission to Arbitration.—Where the name of one of the parties to an agreement for the submission of a question to arbitrators, executed under the hands and seals of the parties, was struck out by drawing a line through it, it was held that this did not vitiate the instrument if the change was made with the consent of the parties. *Penny v. Corwithe*, 18 Johns. (N. Y.) 499.

3. *Thorne v. Williams*, 13 Ont. Rep. 577.

4. *North v. Henneberry*, 44 Wis. 306.

Where a Deed is Altered after Execution, by filling in the date and consideration, it will not be avoided if the addition was made with the authority and consent of the grantor. *Doe v. McArthur*, 2 Hawks (N. Car.) 33, 11 Am. Dec. 738.

In an *Alabama* case, it is said that alterations or interlineations in a deed, in the handwriting of the grantor, made before or concurrently with its execution, do not affect its validity or operation; alterations made by him, or by his authority, after acknowledgment but before delivery, are inoperative without a new acknowledgment when their effect is to enlarge the estate or premises conveyed, but when their effect is to limit or

restrict the estate or premises conveyed, and they are made by the grantor in pursuance of an intention expressed at the time of the signature and acknowledgment, they take effect from the subsequent delivery of the deed, and a second acknowledgment is not necessary. *Webb v. Mullins*, 78 Ala. 111.

Redelivery after Alteration.—It has been held that where a grant of land, issued and delivered, is subsequently altered and the quantity granted increased, by direction of the grantor on the application of the grantee, and is then redelivered to the grantee, such redelivery is in legal effect a re-execution of the grant. *De Malarin v. U. S.*, 1 Wall. (U. S.) 282.

Where a man sold the undivided half of a lot, and some time afterwards, the deed not being recorded, sold the other half to the same party, and struck out of the deed the words "one undivided half of" and redelivered the deed, it was held to be a good conveyance. *Bassett v. Bassett*, 55 Me. 125.

It has been held that if a deed is altered after its execution, acknowledgment, and delivery, by the insertion of additional tracts of land, with the consent of the grantor, and he, after the alteration, takes the deed and has it recorded as altered, this will amount to a second delivery, and will render it valid as to such grantor. *Prettyman v. Goodrich*, 23 Ill. 330.

Where Statutes Make Attestation and Acknowledgment Essential to Validity of Deed.—But in *Coit v. Starkweather*, 8 Conn. 289, there is a dictum to the effect that, since it is a positive requirement of the *Connecticut* laws that all deeds of lands shall be attested by two witnesses and acknowledged before a magistrate, no such deed can be valid without a compliance with these requisites, and that it follows that if the alteration of a deed be material, it is fatally defective without a new attestation and acknowledgment. And in *Sharpe v. Orme*, 61 Ala. 263, it is said that material alterations of a deed, after its delivery, can be made operative only by a new attestation or acknowledgment. And where interlineations were made in a deed of the words "six township" at the end of the description of the land, and changing the number of acres from "760, more or less," to "840, more or less," it was held that if they were made subsequently to the execution of the deed, though by the grantor with the consent of the grantee, the legal estate in the lands, the description of which these changes perfected, would not pass by the added words without a new acknowledgment or the attestation of the fact by a witness in the mode prescribed by statute. See also *Moore v. Bickham*, 4 Binn. (Pa.) 1.

Bonds.—So also it has been adjudged that an alteration of a bond by the obligee, after execution and in a material respect, does not avoid the instrument, if the change was made with the consent of the obligor.¹

Mortgages.—It has likewise been held that a mortgage of land is not avoided by a material alteration made therein with the consent of the mortgagor.²

(d) **Consent of Some Only of Parties.**—In connection with the general proposition that even a material alteration does not avoid the instrument if the change is made by the consent of the obligor or grantor, it is to be observed that this is true only as to the consenting parties; an instrument materially altered by consent of some only of the parties, while enforceable as against the consenting parties,³ will nevertheless be void as against the parties who do not give their consent to the alteration.⁴

1. Alteration in Bonds—Consent of Obligor.—*Coke v. Brummell*, 8 Taunt. 439, 4 E. C. L. 157; *U. S. v. Nelson*, 2 Brock. (U. S.) 64; *Gibbs v. Frost*, 4 Ala. 720; *Berry v. Berry*, 7 J. J. Marsh. (Ky.) 487; *Hale v. Russ*, 1 Me. 334; *Penny v. Corwith*, 18 Johns. (N. Y.) 499; *Barrington v. Washington Bank*, 14 S. & R. (Pa.) 405. See *Dewey v. Bradbury*, 1 Tyler (Vt.) 186. *Contra*, *Martin v. Hanning*, 26 U. C. Q. B. 80.

Instances.—It has been held that the name of an obligor may be erased from a bond and a new obligor inserted, by consent of all the parties, without making the bond void. *Speake v. U. S.*, 9 Cranch (U. S.) 28, *Livingston, J., dissenting*. So also it has been held that a several bond of one might be executed by another party, and corresponding alterations made in the body of the instrument, and, if the change was made by consent of the party who first executed it, the bond became the obligation of both. *Camden Bank v. Hall*, 14 N. J. L. 583. Where an additional surety was added to a bond, with the consent of the first surety, the bond was held valid. *Tiernan v. Fenimore*, 17 Ohio 545.

The change of an instrument from a bond to a note, made after its execution, by or with the knowledge or consent of the obligee, does not avoid the instrument. *Conner v. Fleschman*, 4 W. Va. 603.

Where A and B sealed and delivered a bond to C, and afterwards the name and addition of D was interlined, and he also sealed and delivered the obligation with the consent of all parties, it was held to be a good obligation of all three. *Zouch v. Clay*, 2 Lev. 35, 1 Vent. 185; *Pigot's Case*, 11 Coke 27a.

2. Alteration in Mortgage—Consent of Mortgagor.—*Stiles* signed, sealed, and acknowledged a mortgage on certain land to Probst on January 6, 1862, which was duly recorded December 1, 1863. This mortgage, as drawn, contained the name of *Stiles's* wife as joint grantor with him, and apt words to release her dower in the premises, but was not executed by her until July 21, 1871, when she did in fact execute and acknowledge the instrument, which was then delivered by the officer taking her acknowledgment, to Probst, with the consent of *Stiles*. It was held that, even assuming that the mortgage was complete before execution by the wife, as such execution was made with the consent of *Stiles*, it did not avoid the mortgage, but it

became a new deed, taking effect from the date of the alteration. *Stiles v. Probst*, 69 Ill. 382.

Trust Deed.—C. executed a deed of trust, conditioned to secure one thousand eight hundred dollars, then loaned him by H., and this deed was recorded. Subsequently H. loaned him three hundred dollars, and, to secure this, these words were, by the consent of the parties, introduced in the deed, "also for one note of three hundred dollars, due March the 24th, A. D. 1873." C. duly acknowledged the execution of the interlineation, and a like interlineation was made by the clerk in the record of the deed. It was held that the interlineation had no effect upon the original instrument, but it remained valid as a security for one thousand eight hundred dollars. *Collins v. Collins*, 51 Miss. 311, 24 Am. Rep. 632.

3. Spivey v. Grant, 96 N. Car. 214.

Where an agreement signed by three persons was afterwards altered, by the consent of two of them, by adding seals to the names of the signers and interlining the words "jointly and severally," and was afterwards delivered by those two, it was held that the alteration did not vitiate the instrument with regard to them; but that they were bound by the instrument in its altered form. *Warring v. Williams*, 8 Pick. (Mass.) 322.

Where One of the Indorsors of a Note Agreed to a Material Alteration therein by the holder, with a view to its immediate discount, with the provision that the consent of another party, then absent, should be afterwards obtained, it was held that, although such consent was not obtained, the alteration did not render the note so negotiated invalid as against the consenting party. *Stoddard v. Penniman*, 113 Mass. 386.

4. Consent of Some Only of Underwriters to Alteration of Insurance Policy.—A policy of insurance from Calmar to Portsmouth was altered with the consent of some of the underwriters by inserting the words "or Weymouth" after "Portsmouth." It was held that the plaintiff could not recover on the altered policy against an underwriter who had not consented thereto. *Campbell v. Christie*, 2 Stark. 64, 3 E. C. L. 318.

Bonds.—Where a bond, jointly executed by five obligors, was materially altered with the consent of four of them, it was held that the nonconsenting obligor was discharged, while the four consenting obligors remained bound

Negotiable Instruments.—Hence if a note is altered in a material part by consent of one maker, it is still binding on him, but not on his comaker.¹ Nor will it be enforceable against a person who signed as indorser.²

So if the alteration of a bill of exchange is made with the consent of the drawer and acceptor after indorsement, the indorser will be discharged.³

(e) **Consent by Personal Representative.**—It has been held that a material alteration of a promissory note, with the consent of the surety's administrator, will not relieve the surety's estate, although such administrator is also the principal maker.⁴

(f) **What Consent Necessary.**—The consent of the parties to the alteration of an instrument may be express,⁵ or it may be implied either from custom⁶ or the acts of the parties,⁷ as by leaving blank spaces in the

by the instrument; instead of being the joint bond of five, it became the joint bond of four. *Barrington v. Washington Bank*, 14 S. & R. (Pa.) 424.

Deeds.—Where a deed had been materially altered by consent of some only of the grantors, it was held that a purchaser of the land was not bound to accept such deed. *Moore v. Bickham*, 4 Binn. (Pa.) 1.

And where a deed of the husband's land, executed by the husband and wife, is altered after delivery by consent of the grantor, but without the knowledge of the wife, though it may be valid as to him, it is void as a release of the wife's right of dower. *Prettyman v. Goodrich*, 23 Ill. 330.

1. **Alteration of Note with Consent of One of the Makers.**—*Perring v. Hone*, 4 Bing. 28, 13 E. C. L. 328, 2 C. & P. 401, 12 E. C. L. 189; *Schnewind v. Hackett*, 54 Ind. 248; *Fay v. Smith*, 1 Allen (Mass.) 477, 79 Am. Dec. 752; *Blary v. Haines*, 4 Whart. (Pa.) 17; *Craighead v. McLoney*, 99 Pa. St. 211; *McVey v. Ely*, 5 Lea (Tenn.) 438; *Broughton v. Fuller*, 9 Vt. 373. See *Canon v. Grigsby*, 116 Ill. 151, 56 Am. Rep. 769.

Consent of One of Two Partners.—In *Horn v. Newton City Bank*, 32 Kan. 518, it was held that where two makers of a note were associated together in a nontrading partnership, the consent of one of the partners to the alteration of their joint note did not bind the other. It was, however, said in this case that if the makers "had been associated together in a trading partnership, then either member of the firm might have bound his copartner by executing a promissory note in the name and on behalf of the firm in any transaction pertaining to their partnership business, and we suppose, under such circumstances, the material alteration of a note executed by the firm, with the knowledge and consent of one partner, would bind his copartner, if the note had been given within the apparent scope of the business of the firm, as it is a general principle relating to trading partnerships that each partner is the lawful agent in the partnership in all matters within the scope of the business." See *Perring v. Hone*, 4 Bing. 28, 13 E. C. L. 328, 2 C. & P. 401, 12 E. C. L. 189.

Where a note, executed for money to be loaned to a firm, was signed by one of the partners as maker and by the other two as indorsers, and the partner who signed as

maker at the time of negotiating the note consented to a material alteration therein, and thereupon received a check for the loan, payable to the firm, it was held that the maker, as partner of the guarantors, had implied authority to give his consent to the alteration, and that, therefore, the guarantors were not discharged by the alteration so made without their actual knowledge. *Pahlman v. Taylor*, 75 Ill. 629. To the same effect, see *Taylor v. Taylor*, 12 Lea (Tenn.) 714.

Where promissory notes, executed by the two members of a firm for a partnership indebtedness, as written did not draw interest until maturity, and the notes were altered by consent of one of the makers, so as to make them bear interest from date, it was held that, as there was testimony tending to show that the notes were to draw interest from date, and that the makers were partners, the alteration was binding upon the firm. *Mace v. Heath*, 30 Neb. 620.

2. *Bell v. State Bank*, 7 Blackf. (Ind.) 456; *Berryman v. Manker*, 56 Iowa 150; *Stephens v. Graham*, 7 S. & R. (Pa.) 505, 10 Am. Dec. 485; *Crockett v. Thomason*, 5 Sneed (Tenn.) 342.

3. *Chitty Bills and Notes* 215; 3 Rand. Com. Paper 885; *Outhwaite v. Luntley*, 4 Campb. 179.

4. **Alteration by Consent of Personal Representative.**—*Voiles v. Green*, 43 Ind. 374.

5. **Express Consent.**—*Gibbs v. Frost*, 4 Ala. 720; *U. S. v. Nelson*, 2 Brock. (U. S.) 64.

Parol Consent.—An indorser's consent to the alteration of a promissory note need not be in writing. *Stewart v. Port Huron First Nat. Bank*, 40 Mich. 348.

Whether a verbal statement made by the maker to the holder of a promissory note, during negotiation, after maturity, for an extension of time for payment, directing him to "make the note ten per cent." imported an authority to actually alter the note as to the rate of interest, *quære*. *Swift v. Barber*, 28 Mich. 503.

6. **Consent Implied from Custom.**—See *Woodworth v. Bank of America*, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239.

7. **Consent Implied from Conduct.**—*Bowers v. Jewell*, 2 N. H. 543. See *Clute v. Small*, 17 Wend. (N. Y.) 238; *Barrington v. Washington Bank*, 14 S. & R. (Pa.) 424. But in *U. S. v. Nelson*, 2 Brock. (U. S.) 64, Marshall, C. J., reached the conclusion that a bond

instrument for the insertion of words.¹

(g) Changes to Conform Instrument to Intention of Parties—*aa.* IN GENERAL—According to Some Authorities, may be Done Only in Equity.—It sometimes happens that an instrument as written, by reason of some mistake or omission, fails to express the intention of, and real contract between, the parties. Courts of excellent authority, deeming it unwise to permit the correction of such mistakes or the supplying of such omissions by an interested party, *i. e.*, the grantee or promisee, have adopted the not unreasonable view, that, unless the parties mutually consent to such reformation, it can be effected only through the aid of a court of equity, and have held that a material alteration vitiates an instrument, even though it is made with an honest intent and to conform the writing to the actual agreement of the parties.²

might be altered by the express authority of the parties to be bound thereby, but that such consent could not be implied.

Instances of Implied Consent.—Where a surety stands by and sees an alteration made in a note and says nothing, but by his silence and conduct induces a lender to part with his money on the faith of the surety's approval of the alteration by the principal of the rate of interest stipulated in the note, the surety's consent is implied, and he cannot afterwards rely upon such alteration as a discharge of his liability. *Sanders v. Bagwell*, 37 S. Car. 145. See also *Sanders v. Bagwell*, 32 S. Car. 238. And see *Price v. Cockran*, 1 Bibb (Ky.) 570.

If the law would have supplied words omitted and afterwards inserted by the party holding an instrument, his own insertion of them will not vitiate the writing, for the assent of the maker, grantor, or obligor to the alteration will, in such cases, be presumed. *Burnham v. Ayer*, 35 N. H. 351; *Doe v. Houghton*, 1 M. & R. 208, 17 E. C. L. 242.

Acts Insufficient to Give Consent.—The fact that a surety allows the principal to take the note for the purpose of having it discounted, does not give the principal authority to alter the note and thereby bind the surety. *Agawan Bank v. Sears*, 4 Gray (Mass.) 95. See *supra*, this title, *Accommodation Paper Altered before Negotiation*.

Nor will any authority to alter the amount of a note after its execution, by an accommodation indorser, be implied from the previous indorsement by him of a series of renewal notes. *Etna Nat. Bank v. Winchester*, 43 Conn. 391.

1. Consent Implied from the Leaving of Blanks.—See *infra*, this title, div. *Filling Blanks*.

2. View that Correction must Be in Equity.—*Kelly v. Trumble*, 74 Ill. 429; *Evans v. Foreman*, 60 Mo. 449; *Capital Bank v. Armstrong*, 62 Mo. 59. See also *Murray v. Graham*, 29 Iowa 520; *Smith v. Smith*, 27 S. Car. 166, 13 Am. St. Rep. 633. But compare *Ryan v. Springfield First National Bank*, 148 Ill. 349. See the title REFORMATION OF INSTRUMENTS.

Note Payable without "Defalcation"—Insertion of Words "or Discount."—In *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232, the note as drawn was payable without "defalcation" merely, but had been materially altered by the insertion of the words "or discount." It was contended by counsel that the alteration of the

note was in furtherance of the original agreement, and that therefore it was unobjectionable. The rule claimed was that a party holding a written contract could legally alter it so as to make it conform to the real understanding between the contracting parties. *Beasley, C. J.*, in denying the correctness of this rule, said: "This was certainly, in this case, good ground for believing that both of these parties understood that the note to be given for the price of the horse sold should be one of complete negotiability, and the probability is that the instrument in its changed form did, in point of fact, effectuate the real intention. But still such act, on the plainest grounds, was manifestly illegal. * * * To maintain that a party may reform a written instrument by his own act is, in reality, to convert all contracts into oral contracts; the written instrument would no longer be the depositary of the intention of the parties, but either party could make it accord with the remembrance of the bystanders. This would be to allow the party to do what the court cannot do at the trial; that is, to resort to evidence *aliunde* to ascertain what was meant. If the writing does not hit the real design of the parties to it, the error must be corrected in a court of equity. The application of these familiar principles at once refutes the proposition that the agent of the plaintiff could lawfully alter this note for the purpose specified. The law prohibits a party from altering a written contract *ex mero motu*, whatever his design may be, whether good or bad. The alteration of the note in this case destroyed it, if such alteration, in legal intentment, is to be ascribed to the plaintiff."

Change in Date.—In *Pennsylvania* it was held that where a payee of a note which was executed on the 24th day of September, 1838 but was dated "1836," before bringing suit on the note changed the figure 6 in the year to 8, the change in the date avoided the note as to the surety who had not given his express consent to the change. *Miller v. Gilleland*, 19 Pa. St. 119. But in a dissenting opinion filed in this case by Mr. Justice Lowrie, which was concurred in by Mr. Justice Woodward, it was contended that as this alteration was honestly made for the purpose of correcting a mistake, it did not vitiate the note. See *Hoffman v. Miller*, 1 Am. L. Reg. N. S. 676, where this opinion is to be found.

According to Some Authorities, may be Done with Consent of Parties.—However, there are decisions of respectable authority, in both *England* and the *United States*, in which the view is taken that the assent of the parties to the alteration of an instrument by the correction of mistakes or the supplying of an accidental omission, in furtherance of the intention of the parties, is to be implied, and that an alteration of this kind by the grantee or promisee, even though it is in a material respect, will not vitiate the instrument.¹

bb. CORRECTION OF MISTAKES.—So the alteration of a note by the payee, correcting a mistake and having the effect of conforming the note to the intention of the parties, has been held not to vitiate the note.² And this rule has been

Correction of Mistake in Note by Payee's Clerk.—Bates agreed to execute his note of hand to Letcher to the amount of an open account, and that the note should be dated on the 18th of December, 1828. Letcher's clerk, in drawing the note, through mistake dated it 18th of December, 1829, and it was signed and delivered by Bates. Afterwards, when the mistake was discovered by the clerk, he, without the knowledge, privity, or consent of Letcher or Bates, changed the 9 into an 8 so as to make the date of the note correspond with the agreement of the parties. Underwood, J., in delivering the opinion of the court, after asserting that the alteration of the note by any person whomsoever except the obligor avoided it, said: "It has been attempted to support the note and its alteration upon the ground of an implied authority in Letcher's clerk to make the alteration. We perceive nothing on which a presumption of that kind can rest. The note, when executed and delivered, bore the date of 1829. It became the act and deed of Bates, binding him to pay interest from that date. The clerk had done all he was requested to do, to wit, wrote the note, although he placed an erroneous date. Bates adopted it as written by signing and delivering it, and gave no authority, express or implied, to make any alteration in it increasing his liability." *Letcher v. Bates*, 6 J. J. Marsh. (Ky.) 524, 22 Am. Dec. 92.

Recovery on Original Consideration.—Although such alteration may have the effect of avoiding the writing, it has been held that it will not prevent a recovery upon the original indebtedness. See *supra*, this title and division, subd. *On Right to Recover on Original Consideration—Where Alteration is Made without Fraudulent Intent*.

1. View that Correction may be Made with Consent of Parties.—Chitty on Bills 184; *Sill v. Reese*, 47 Cal. 294. *Foot v. Hambrick*, 70 Miss. 157, in which case the question is discussed at length.

In *London*, etc., *Bank v. Roberts*, 22 W. R. 402, it was held that, where a bill was drawn payable to the drawer's order, accepted, and transferred to the defendant, who indorsed it to the plaintiff, by whom the name of the drawer was then inserted as an indorser, the alteration was immaterial, as made solely for the purpose of carrying out the intention of the parties.

2. Correction of Mistake in Note by Payee.—*Chamberlain v. Wright* (Tex. Civ. App.

1896), 35 L. W. Rep. 707. See *Ryan v. Springfield First Nat. Bank*, 148 Ill. 349; *Fitch v. Kelly*, 44 U. C. Q. B. 578.

Correcting Statement of Consideration.—It was so held in a case where a note which had been given for the purchase price of land did not correctly describe the land, and the payee, some months after the execution of the note, took it to the person who had acted as draughtsman for both parties in drawing it, and procured him to interline and alter it so as to properly describe the land. *McRaven v. Crisler*, 53 Miss. 542.

Correction of Date.—So it has been held that the alteration of the date of a note, made by the promisee or his indorsee without the knowledge or express consent of the promisor, but without any fraudulent intent, and merely to correct a mistake and make the note such as both parties intended that it should be, does not invalidate the instrument. *Duker v. Franz*, 7 Bush (Ky.) 273, 3 Am. Rep. 314; *Ames v. Colburn*, 11 Gray (Mass.) 390, 71 Am. Dec. 723; *Bowers v. Jewell*, 2 N. H. 543; *Jessup v. Dennison*, 2 Disney (Ohio) 150. See also *Johnson v. Johnson*, 66 Mich. 525; *Merchants' Bank v. Stirling*, 13 Nova Scotia 439.

Correction of Amount.—Where the amount of a note was written correctly in the margin, but by mistake it was written a few dollars less in the body of the note, it was held that the holder might correct the amount in the body of the note. *Busjahn v. McLean*, 3 Ind. App. 281.

Correcting Mistake in Name of Payee.—It has been held that a mistake in the name of the payee may be corrected without vitiating the note. *Derby v. Thrall*, 44 Vt. 413, 8 Am. Rep. 389. See *Cole v. Hills*, 44 N. H. 227.

Proving Mistake in Action on Note.—For like considerations, where the name of one of several payees was inserted by mistake, the indorsee of the other payees might, it was held, prove the fact in a suit to recover against his indorsers, in order to show that such payee's indorsement was unnecessary to pass title to him. *Pease v. Dwight*, 6 How. (U. S.) 190. And it has been said that as such payee's name was not intended to be there, its erasure would be authorized to correct the mistake. *Thomson on Bills* (Wilson's ed.) 114.

Decisions under English Stamp Act.—So in decisions under the English Stamp Act, it has been held that the alteration of the date of a bill of exchange, made in furtherance of the original intention of the parties, and to

declared applicable to mortgages¹ and bonds.²

Must be to Conform to Intention of All the Parties, and Not of One Only.—But an alteration made to correct a mistake must be such as will make the instrument conform to what all the parties agreed or intended it should be, and not to what only one party intended.³

cc. SUPPLYING OMISSIONS—FILLING BLANKS.—And it has also been held that an alteration of an instrument which merely supplies an omission therein and conforms it to the intention of the parties, will not vitiate the writing,⁴

correct a mistake, did not make it a new bill. *Jacob v. Hart*, 6 M. & S. 142, 2 Stark. 45, 3 E. C. L. 310. And see *Bathe v. Taylor*, 15 East 412; *Cole v. Parkin*, 12 East 471; *Robinson v. Touray*, 1 M. & S. 217, 3 Campb. 160; *Webber v. Maddocks*, 3 Campb. 1; *Byrom v. Thompson*, 11 Ad. & El. 31, 39 E. C. L. 19, 3 P. & D. 71.

Correction of Mistake in Bill by Agent of Both Drawer and Acceptor.—A bill of exchange, after it was drawn and accepted, was given to B, who was the agent both of the drawer and acceptor, to deliver to the indorsee. B discovered that the date was January, 1822, instead of January, 1823; without again seeing the drawer or acceptor, and before he delivered the bill to the indorsee, he altered the figure 2 to 3. It was held that if it was originally the intention of the parties to the bill that it should have been dated 1823, and that the figure 2 was inserted by mistake, the alteration did not vitiate the bill. *Brutt v. Picard*, R. & M. 37, 21 E. C. L. 376.

1. Correction of Mistakes in Mortgages.—*Foote v. Hambrick*, 70 Miss. 157. In this case a mortgage made by a man and wife was altered, after delivery, by correcting the description of the land. The change was made with the consent of the husband, but without authority from the wife. It was held that since the alteration was made in good faith to correct a mistake and to conform the instrument to the intention of the parties, it did not render the mortgage void.

Correction of Date in Discharge of Mortgage.—Where the date in a discharge of a mortgage was changed by the mortgagee's agent, and the alteration was not, under the circumstances, material, and the instrument as altered displayed truly what was intended by the parties thereto, it was held that the alteration did not prevent the discharge from being operative. *Sayles v. Brown*, 28 Grant's Ch. (U. C.) 10.

2. Correction of Mistake in Bonds.—Where a bond, intended to be for the sum of one hundred and fifty thousand dollars, was by mistake written one hundred and fifty dollars, it was held that if the sureties signed the bond with the knowledge and understanding that the bond must be for the larger amount, the adding on the face of the bond the word "thousand" by the principal and payee was not an alteration, since a mere reduction to writing of what was in fact the agreement of both principal and securities would not be a change of the contract. *Jackson v. Johnson*, 67 Ga. 167.

Where a bond was by mistake made payable to the sheriff instead of to the party in-

tended to be protected by it, and after the mistake was discovered the name of the sheriff was erased and that of the party inserted, it was held that the alteration did not invalidate the bond. *Turner v. Billagram*, 2 Cal. 520.

3. Hervey v. Harvey, 15 Me. 357; *Dobyns v. Rawley*, 76 Va. 537. And see *Busjahn v. McLean*, 3 Ind. App. 281; *Duker v. Franz*, 7 Bush (Ky.) 273, 3 Am. Rep. 314.

4. Supplying Omissions.—See *Merchants' Bank v. Stirling*, 13 Nova Scotia 439.

Inserting Terms Showing upon Whose Account Bill is Drawn.—The supplying of an omission such as stating on whose account the bill was drawn, there being no dispute as to the facts, has been held not to invalidate a bill. *Commercial Bank v. Paton*, Thomson on Bills 113.

Inserting Terms Making Note Payable in Gold.—The case of *Hanson v. Crawley*, 41 Ga. 303, was an action upon a promissory note which had been changed by the principal at the suggestion of the payee after its execution, without the knowledge of the surety, by inserting a clause making it payable in gold coin. The surety filed a plea of *non est factum*, relying upon the alteration to release him. The payee claimed that the change was made to correct a mistake and conform the instrument to the agreement of the parties. The court said: "Had the fact been that the original contract was a specie contract, and the security knew it, and he came security with that understanding, the mere fact that, under a mistake of law, they left certain words out of the contract, which were afterwards put in by the principal, would not release the surety."

Making Amount in Body of Note Conform to True Amount in Margin.—In the case of *Clute v. Small*, 17 Wend. (N. Y.) 238, the court, by Cowen, J., seems to incline to the opinion that where a debtor certifies to a balance as owing by him, and then draws a note, stating in the margin the amount in figures, inserting in the body an amount a few dollars less than the true sum, as three hundred dollars instead of three hundred and thirty-four dollars, the creditor may, without any express authority, insert the words omitted and make the note conform to the original intent.

Where the Surname of the Payee of a Note was Interlined after delivery, but it was proved that the note was originally given to the payee, whose name was inserted, it was held that the alteration did not vitiate the note. *Mouchet v. Cason*, 1 Brev. (S. Car.) 307.

Insertion of Words of Negotiability.—In *Kershaw v. Cox*, 3 Esp. 246, suit was brought on a bill of exchange drawn by Collier & Son in favor of Cox, the defendant in the suit, and indorsed by Cox and delivered to Kershaw,

especially if a naked blank is left for the insertion of the omitted words.¹

c. BY A STRANGER TO THE CONTRACT—(1) *Rule in England*—*Early Rule*.—In one of the earliest of the reported cases on the subject of the alteration of instruments, it is broadly stated that a material alteration of a deed avoids the instrument, even if it is made by a stranger.²

Modern Rule.—While there seems to have been some relaxation of the rule as thus stated,³ the English courts have, on the principle that a party who has the custody of an instrument made for his benefit is bound to preserve its integrity,⁴ established the doctrine that if, while the instrument is in the custody of a party, a stranger makes in it a material alteration, it is thereby avoided.⁵

son of one of the plaintiffs, and he, being indebted to the plaintiffs, remitted the bill to them in payment of this debt. The day following, the bill was sent back by the plaintiffs on discovering that the words "or order" were wanting, so that it could not be negotiated by indorsement. On receiving it back, Kershaw the son applied to the defendant and indorser, who referred him to Collier, the drawer, who inserted the words "or order," giving negotiability to the bill. On trial, it was contended for defendant that, without the defendant's consent, there had been a material alteration by the insertion of the words "or order," but the contention was disallowed, Mr. Justice Le Blanc intimating an implied assent to the alteration by defendant, and also saying that the alteration was not in a material part. Referring to this decision in the later case of *Knill v. Williams*, 10 East 431, the same judge said: "The opinion which I delivered in *Kershaw v. Cox*, 3 Esp. 246, can only be supported on the ground that the alteration there made in the bill the day after it was negotiated was merely the correction of a mistake made by the drawer of it in having omitted the words 'or order,' which it was intended at the time should be inserted, for the alteration there made was a very material one." And see *Bathe v. Taylor*, 15 East 412.

1. *Where Blank Left for Omitted Words*.—*Hunt v. Adams*, 6 Mass. 519. See *Clute v. Small*, 17 Wend. (N. Y.) 238. And see *infra*, this title, div. *Filling Blanks*.

Illustrations.—Where a note promised to pay to the order of the payee "eight — for value received," etc., it was held that if it was the intention of the parties that the words "hundred dollars" should have been inserted after the word "eight," the insertion of those words by the maker after its indorsement for his accommodation, though without the assent of the indorser, did not invalidate the note. *Boyd v. Brotherson*, 10 Wend. (N. Y.) 93.

So where a note read "twenty-four after date," not saying whether days, months, or years were intended, it was said that the holder might insert the time intended, and which had been omitted by mistake; such alteration would not vitiate the instrument. *Conner v. Routh*, 7 How. (Miss.) 176, 40 Am. Dec. 59.

2. *Rule in Pigot's Case*.—The second resolution of the court in *Pigot's Case*, 11 Coke 26, was as follows: "When any deed is altered in a point material by the plaintiff himself, or by any stranger without the privity of the

obligee, be it by interlineation, addition, rasing, or by the drawing [with] a pen of a line through the midst of any material word, the deed thereby becometh void."

3. *Modification of the Rule as Stated in Pigot's Case*.—There seems at one time to have been an inclination on the part of the English courts to relax the rule declared in *Pigot's Case*, 11 Coke 26. Thus in *Henfree v. Bromley*, 6 East 309, it was held that an award altered by the umpire after it was made up ready for delivery, and notice given to the parties, was not entirely vitiated thereby, but that the original award, being still legible, was good, the same as if such alteration had been made by a mere stranger without the privity or consent of the party interested. The same inference may be drawn from *Hutchins v. Scott*, 2 M. & W. 809. There, by an agreement between the plaintiff and the defendant, a house, No. 38, was let to plaintiff. After the agreement was executed and delivered to the plaintiff, it was altered (it was not proved by whom) by writing 35 instead of 38, on an erasure. The house occupied by the plaintiff under the agreement was in fact No. 35. It was held that the altered agreement might be given in evidence in an action for an excessive distress (in which the demise was admitted on the record) to show the terms of the holding. 2 Pars. on Contr. 716.

4. *Reason for the Rule in Pigot's Case*.—It was, in effect, said by Dallas, C. J., in *Sanderson v. Symonds*, 1 Brod. & B. 426, 5 E. C. L. 134, that where a stranger alters the instrument, it is avoided upon the ground that the alteration may raise a doubt as to its identity. But in the later case of *Davidson v. Cooper*, 13 M. & W. 343, it was laid down that the strictness of the rule in *Pigot's Case* can be explained only on the principle that a party who has the custody of an instrument made for his benefit is bound to preserve it in its original state; and that the party who may suffer has no right to complain, since there cannot be an alteration except with fraud or laches on his part. See *Burchfield v. Moore*, 3 El. & Bl. 683, 77 E. C. L. 683.

5. *Modern English Doctrine*.—*Master v. Miller*, 4 T. R. 320, 2 H. Bl. 141; *Davidson v. Cooper*, 11 M. & W. 778, 13 M. & W. 343; *Burchfield v. Moore*, 3 El. & Bl. 683, 77 E. C. L. 683; *Croockewit v. Fletcher*, 1 H. & N. 893, 40 Eng. L. & Eq. 415, 26 L. J. Exch. 153; *Hindustan Bank v. Smith*, 36 L. J. C. P. 241, 16 L. T. 518; *Pattinson v. Luckley*, L. R. 10 Exch. 330. But see opinion by Lord

(2) *Rule in the United States—English Rule Disapproved.*—In this country it was early doubted whether the act of a stranger should prejudice a party, even though the alteration be in a material respect,¹ and the English rule has been subjected to much adverse criticism.²

Alteration by Stranger Merely a Spoliation.—And with the exception of a very few early cases, which have since been overruled,³ the decisions in the *United States* are unanimous in declaring the law to be that a material alteration of an instrument by a stranger to the contract, without the privity of the grantee or obligee, is merely a spoliation, and, even though made without the consent of the party bound by the writing, does not prevent a recovery on the instrument as it read before the alteration, provided only its original tenor can be clearly shown.

Rule Applicable Alike to Sealed and Unsealed Instruments.—This doctrine is applicable not only to all simple contracts in writing,⁴ including negotiable instruments,⁵

Herschell, Lowe v. Fox, L. R. 12 App. Cas. 206.

Scotland.—The like view prevails in Scotland. Robinson's Pract. (new ed.) 137; Byles on Bills (Sharsw. ed.), top p. 472; Murchie v. Macfarlane, cited in Thomson on Bills 110.

Ireland.—The strict rule of Pigot's Case, 11 Coke 26, as to the effect of alterations in instruments by a stranger, has been rejected by the Irish courts. Thus in *Swincy v. Barry*, Jones Exch. R. 109, it was held that an alteration in a material part of a deed by a stranger does not avoid it, and a court will look at the deed as it was before it was altered; therefore, if, upon oyer, the deed is set out as it was before it was altered, it is no variance.

1. *Adams v. Frye*, 3 Met. (Mass.) 103; Platt, J., in *Jackson v. Malin*, 15 Johns. (N. Y.) 297.

2. *Disapproval of English Rule.*—See *Bigelow v. Stilphen*, 35 Vt. 521.

In *U. S. v. Spalding*, 2 Mason (U. S.) 478, Justice Story very strongly condemned the old doctrine that every material alteration of a deed, even by a stranger, and without privity of either party, avoided the deed. He considered that "a doctrine so repugnant to common sense and justice, which inflicts on an innocent party all the losses occasioned by mistake, by accident, by the wrongful acts of third persons, or by the providence of Heaven, ought to have the unequivocal support of unbroken authority before a court of law is bound to surrender its judgment to what deserves no better name than a technical quibble."

3. *New Jersey.*—In *Den v. Wright*, 7 N. J. L. 175, instructions to the jury by the court below to the effect that if a deed "be altered by a stranger, that is, a person to whose custody it may have been committed, or into whose hands it may have come, in a material part, such alteration avoids the deed," were sustained. But in the later case of *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232, which was an action upon a promissory note, the American rule is adopted as the correct doctrine. And upon the authority of this case, the same rule was, in *Force v. Elizabeth*, 28 N. J. Eq. 403, applied to an alteration of a bond by a person who had stolen it from the owner. See also *Goodfellow v. Inslee*, 12 N. J. Eq. 355.

Kentucky.—The Kentucky case of *Letcher v. Bates*, 6 J. J. Marsh. (Ky.) 524, 22 Am. Dec. 92, was overruled in *Lee v. Alexander*, 9 B. Mon. (Ky.) 25, 48 Am. Dec. 412, and in *Terry v. Hazlewood*, 1 Duv. (Ky.) 104.

4. *Unsealed Instruments—Connecticut.*—*Nichols v. Johnson*, 10 Conn. 192.

Iowa.—*Andrews v. Burdick*, 62 Iowa 714.

Kentucky.—*Lee v. Alexander*, 9 B. Mon. (Ky.) 25, 48 Am. Dec. 412, overruling *Letcher v. Bates*, 6 J. J. Marsh. (Ky.) 524, 22 Am. Dec. 92.

Nebraska.—*Consaul v. Sheldon*, 35 Neb. 247.

See *State v. Manhattan Silver Min. Co.*, 4 Nev. 318; *Alexander v. Bailey*, 2 Lea (Tenn.) 636; *Bellows v. Weeks*, 41 Vt. 590.

Receipt.—It has been held that a mutilation of a receipt made by a stranger, without the participation of the party holding it, is a mere spoliation, and so long as the receipt remains legible does not change its legal operation. *Goodfellow v. Inslee*, 12 N. J. Eq. 355.

5. *Promissory Notes—Alabama.*—*Brown v. Jones*, 3 Port. (Ala.) 422.

Arkansas.—*Andrews v. Calloway*, 50 Ark. 358.

Florida.—*Orlando v. Gooding*, 34 Fla. 244, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 505.

Illinois.—*Bledsoe v. Graves*, 5 Ill. 382.

Indiana.—*Cochran v. Nebeker*, 48 Ind. 459; *Collins v. Makepeace*, 13 Ind. 448; *Piersol v. Grimes*, 30 Ind. 129, 95 Am. Dec. 673; *State v. Berg*, 50 Ind. 496; *Brooks v. Allen*, 62 Ind. 401; *Eckert v. Louis*, 84 Ind. 99.

Massachusetts.—*Nickerson v. Swett*, 135 Mass. 514.

Mississippi.—*Croft v. White*, 36 Miss. 455; *Bridges v. Winters*, 42 Miss. 135, 2 Am. Rep. 598; *Clopton v. Elkin*, 49 Miss. 95.

Missouri.—*Lubbering v. Kohlbrecher*, 22 Mo. 596.

New Jersey.—*Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232.

New Mexico.—*Long, C. J.*, in *Ruby v. Talbott* (N. Mex. 1889), 21 Pac. Rep. 72, quoting 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 505.

New York.—*Van Brunt v. Eoff*, 35 Barb. (N. Y.) 501.

Oregon.—*Whitlock v. Manciet*, 10 Oregon 166.

but also to writings under seal of every description,¹ such as deeds,² and mortgages³ of land, and bonds.⁴

Where Obligee Privy to Alteration.—Of course, if the alteration, though by a stranger to the contract, is made with the privity of the obligee, the latter must be taken to have adopted the alteration as his own act, and the instrument is avoided.⁵

(3) *Who is to be Considered a Stranger*—(a) **In General.**—It cannot be said that the alteration of a note by a maker, after its indorsement for his accommodation and before negotiation, is the act of a stranger.⁶

(b) **Public Officer Having Custody of Official Bond.**—The alteration of an official bond by a public officer, or the deputy of such officer, who is by law made the custodian of the bond, is the act of a stranger, and does not affect the validity of the instrument.⁷

Vermont.—Bigelow v. Stilphen, 35 Vt. 521.
Washington.—Murray v. Peterson, 6 Wash. 418, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 505.

Wisconsin.—Union Nat. Bank v. Roberts, 45 Wis. 373.

See Major v. Hansen, 2 Biss. (U. S.) 195; Morrison v. Welty, 18 Md. 169; Gordon v. Robertson, 48 Wis. 493.

Where the Signature of a Note had been Torn Off and pasted on again, the note was not avoided, it being proved that the mutilation was the innocent act of a child. Frazer v. Boss, 66 Ind. 1. See also Rhoades v. Frederick, 8 Watts (Pa.) 448.

Party Signing His Name as Attesting Witness to Note.—Where a person drew a note for the parties thereto, and after its signature by the maker, but before delivery, without the procurement or knowledge of either party, signed his name as an attesting witness, it was held that this alteration would not vitiate the note, and that the alteration, being unauthorized and no part of the contract as understood or intended by either party, might be stricken out. Church v. Fowle, 142 Mass. 12.

A Note was Materially Altered in the Amount, and the holder, who could neither read nor write, proved that, to his knowledge, the note had never been out of his possession, and testified that the alteration was made neither by himself nor by his agent, nor by the knowledge or consent of either of them. It was held that he could recover the original amount. Drum v. Drum, 133 Mass. 566.

Drafts.—Langenberger v. Kroeger, 48 Cal. 147, 17 Am. Rep. 418.

1. Sealed Instruments Generally.—*Illinois.*—Condict v. Flower, 106 Ill. 105; Rose Clare Lead Co. v. Madden, 54 Ill. 260.

Missouri.—Medlin v. Platte County, 8 Mo. 235, 40 Am. Dec. 135.

New York.—Dinsmore v. Duncan, 57 N. Y. 573, 15 Am. Rep. 534; Rees v. Overbaugh, 6 Cow. (N. Y.) 746.

Ohio.—Fullerton v. Sturges, 4 Ohio St. 530.

Tennessee.—Boyd v. McConell, 10 Humph. (Tenn.) 68.

See U. S. v. Spalding, 2 Mason (U. S.) 478; Smith v. McGowan, 3 Barb. (N. Y.) 404.

2. Deeds.—Wickes v. Caulk, 5 Har. & J. (Md.) 36. See Moore v. Ivers, 83 Mo. 29; Chesley v. Frost, 1 N. H. 145.

Insertion of Additional Grantee.—The insertion by another of the name of an additional grantee, without the consent of the original grantee, is a mere spoliation which does not affect the rights of the latter, even as against a bona fide purchaser from the person whose name was so inserted, unless the real grantee has been guilty of fraud or negligence whereby the purchaser was misled. John v. Hatfield, 84 Ind. 75.

3. Mortgages.—Gleason v. Hamilton, 138 N. Y. 353; Robertson v. Hay, 91 Pa. St. 242.

4. Bonds.—*United States.*—U. S. v. Linn, 1 How. (U. S.) 104; U. S. v. Hatch, 1 Paine (U. S.) 336.

Alabama.—Anderson v. Bellenger, 87 Ala. 334, 13 Am. St. Rep. 46.

Kentucky.—Terry v. Hazlewood, 1 Duv. (Ky.) 104.

New Jersey.—Force v. Elizabeth, 28 N. J. Eq. 403.

New York.—Solon v. Williamsburgh Sav. Bank, 114 N. Y. 122.

North Carolina.—Evans v. Williamson, 79 N. Car. 86; Mathis v. Mathis, 3 Dev. & B. (N. Car.) 60.

See Bingham v. Shadle, 45 Neb. 82; Colson v. Arnot, 57 N. Y. 253, 15 Am. Rep. 496; Casoni v. Jerome, 58 N. Y. 315; Waring v. Smyth, 2 Barb. Ch. (N. Y.) 119.

5. Alteration Made with Privity of Obligee.—Woodworth v. Anderson, 63 Iowa 503.

6. Lisle v. Rogers, 18 B. Mon. (Ky.) 528.

Alteration of Collector's Bond by Selectmen of Town.—It has been held that the alteration of a collector's bond, increasing the penal sum, made therein without the knowledge and consent of the sureties, but with the knowledge and consent of the selectmen of the town having custody of the bond, could not be deemed a spoliation by a stranger, and that the alteration discharged the sureties. Dover v. Robinson, 64 Me. 183.

7. Alteration of Official Bond by Custodian.—State v. Berg, 50 Ind. 496; Terry v. Hazlewood, 1 Duv. (Ky.) 109; Pemiscot County v. Scott, 104 Mo. 26.

An Alteration in a Bond by a Clerk in the Customhouse, after its execution, for the purpose of correcting it, but not affecting its construction, was held to be the act of a stranger and immaterial, and not to avoid the bond. U. S. v. Hatch, 1 Paine (U. S.) 336.

Alteration of Bail Bond by Sheriff.—In Wegner

(c) **Public Officer Required to Approve Bond.**—The authority of a public officer who is appointed by law to approve official bonds, or bonds required in the course of judicial proceedings, is exhausted when he accepts the bond, and any subsequent alteration by him is but the act of a stranger, and will not impair its validity.¹

Alteration at Time of Approval.—But where a bond is altered by such official at the time of the approval, it is not a case of mere spoliation.²

d. **BY AGENT OF GRANTEE OR OBLIGEE**—In *England*.—Since a written instrument is by the English law avoided by a material alteration made therein, even by a stranger to the contract, it would seem that in that country a material alteration of a writing by an agent of the grantee or obligee avoids the instrument without regard to whether there existed any authority in the agent, express or implied, to make the change.³

In the *United States*—**Agent with Authority.**—But in the *United States* the effect of an alteration by such agent is dependent on whether the act is or is not within his express or implied authority. If the agent acts within the line of his authority in making the alteration, it will have the same effect in invalidating the instrument as if made by the party claiming thereunder himself.⁴

v. State, 28 Tex. App. 419, it was held that a material alteration in a bail bond by the sheriff discharged the nonconsenting obligors.

1. **Alteration of Official Bond by Judge Required to Approve.**—It was so held where the bond of an executive officer was materially altered, after acceptance, by a judge who was required by law to approve such bonds. *Harris v. Bradford*, 4 Ala. 214.

Alteration of Statutory Claim Bond by Sheriff.—In *Alabama* it has been held that since, after a statutory claim bond has been accepted and approved by the sheriff, it is his duty to return it at once to the court from which the process issued, his acceptance thereafter of the signature of an additional surety is merely the act of a stranger, and does not affect the liability of the original sureties. *Anderson v. Bellenger*, 87 Ala. 334, 13 Am. St. Rep. 46.

2. **When Altered at Time of Approval.**—*Bracken County v. Daum*, 80 Ky. 388; *State v. McGonigle*, 101 Mo. 353, 20 Am. St. Rep. 609; *State v. Findley*, 101 Mo. 368. See *infra*, this title and section, subd. *By the Grantor or Promisor*.

3. **Alteration by Agent of Grantee or Obligee—English Rule.**—In *Croockewit v. Fletcher*, 26 L. J. Exch. 153, the defendants signed a charter party and handed it to the plaintiff's agents, who forwarded it to the plaintiff for signature. The plaintiff signed it and returned it to his agents, one of whom then added the clause "wind and weather permitting, with cargo or in ballast for ship's benefit," and took the document back to the defendants, telling one of them he had made the addition, which he said did not affect the contract. The defendant did not agree to this, and said he did not know if he would then accept the charter. The agent offered to strike out the addition, which he had made on his own responsibility, and not by the orders of his principal. The defendant said he would see a party who was jointly interested with him, and let the agent know what was said. The defendants subsequently

rejected the contract on the ground of the alteration. The plaintiff sued on the charter party, treating it as unaltered, but the court held that the addition, or alteration, was a fatal objection, and added: "It is, no doubt, apparently a hardship that where what was the original charter party is perfectly clear and indisputable, and where the alteration or addition was made without any fraudulent intention, and by a person not a party to the contract, that a perfectly innocent man should thereby be deprived of a beneficial contract; but, on the other hand, it must be borne in mind that to permit any tampering with written documents would strike at the root of all property, and that it is of most essential importance to the public interest that no alteration whatever should be made in written contracts, but they should continue to be and remain in exactly the same state and condition as when signed and executed, without addition, alteration, erasure, or obliteration."

4. **Alteration by Agent with Authority.**—*Eckert v. Louis*, 84 Ind. 99; *Hamilton v. Hooper*, 46 Iowa 515, 26 Am. Rep. 161; *Hollingsworth v. Holbrook*, 80 Iowa 151, 20 Am. St. Rep. 411; *Gettysburg Nat. Bank v. Chisolm*, 169 Pa. St. 564; *Bowser v. Cole*, 74 Tex. 222; *Sherwood v. Merritt*, 83 Wis. 233. See also *Crockett v. Thomason*, 5 Sneed (Tenn.) 342.

The case of *Morrison v. Welty*, 18 Md. 169, has been cited as a case departing from the rule stated in the text. See the note in 17 Am. Rep. 101, where it is said that in this case "an alteration made by the payee's wife, without his consent, was held fatal—a rather violent stretch of the doctrine of agency." The case, however, does not, it has been well said, seem to go that length. See note, 10 Am. Dec. 269. The action was brought, not on the notes, but for the recovery of the money lent. Expressly waiving the consideration of the effect of the alteration on the validity of the notes, the court held that the effect of the change should be limited to the notes alone, and that at most it could only destroy them as binding obligations from defendant to the plaintiff without

Agent without Authority.—But if, on the other hand, the agent has no authority whatever, either express or implied, to make the alteration, it is simply a spoliation by a stranger to the contract, and does not impair the validity of the instrument as it originally stood.¹

e. BY THE GRANTOR OR PROMISOR—(1) *In General.*—On the principle that no one can take advantage of his own wrong, an alteration of an instrument by the grantor or promisor does not affect the validity thereof as against the party making the alteration.²

(2) *By Obligor in a Bond.*—So a bond which has been materially altered by the obligor, without the assent of the obligee, is still enforceable against the obligor who made the alteration.³

(3) *By Grantor in Deed or Lease.*—And a deed of land is not defeated by an alteration therein made by the grantor after its delivery to the grantee.⁴

Effect on Covenants in Favor of Grantor.—But it has been held that a material alteration of a deed by the grantor, after execution and delivery, renders it void as respects the covenants in favor of the grantor.⁵

(4) *By Promisor in Note.*—An alteration in a promissory note by the maker, without the consent of the promisee, does not vitiate the instrument.⁶

impairing his right to recover the original debt. See *supra*, this title, *Effect of Alterations—Material Alterations—On Right to Recover on Original Consideration.*

1. Alterations by Agent without Authority—Connecticut.—*Ætna Nat. Bank v. Winchester*, 43 Conn. 391.

Indiana.—*Brooks v. Allen*, 62 Ind. 401; *Ballard v. Franklin L. Ins. Co.*, 81 Ind. 239; *Kingan v. Silvers* (Ind. App. 1894), 37 N. E. Rep. 413.

Kansas.—*McLennan v. Wellington*, 48 Kan. 756, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 505.

Massachusetts.—*Nickerson v. Swett*, 135 Mass. 514.

Michigan.—*White Sewing Mach. Co. v. Dakin*, 86 Mich. 581, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 505.

Minnesota.—*Ames v. Brown*, 22 Minn. 257.

Missouri.—*Lubbering v. Kohlbrecher*, 22 Mo. 596.

New Jersey.—*Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232.

New York.—*Rees v. Overbaugh*, 6 Cow. (N. Y.) 746.

Vermont.—*Bigelow v. Stilphen*, 35 Vt. 521.

Wisconsin.—*Jesup v. City Bank*, 14 Wis. 331. See also *Lawson v. Chicago, etc.*, 1 R. Co., 64 Wis. 455, 54 Am. Rep. 634.

See also opinion by Long, C. J., in *Ruby v. Talbott* (N. Mex. 1889), 21 Pac. Rep. 72, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 505.

2. Alteration by Grantor or Promisor.—*Natchez v. Minor*, 9 Smed. & M. (Miss.) 544, 48 Am. Dec. 727; *De Camp v. Crane*, 19 N. J. Eq. 166; *Martin v. Tradesmen's Ins. Co.*, 101 N. Y. 498; *Letcher v. Bates*, 6 J. J. Marsh (Ky.) 524, 22 Am. Dec. 92.

By Assignor of Contract.—The assignment of a contract is not avoided by an alteration of the assignment by the assignor. *Block v. Walker*, 2 Ark. 4.

3. Alteration in Bond by Obligor.—*Cutts v. U. S.*, 1 Gall. (U. S.) 69; *Robinson v. State*, 60

Ind. 26; *Pequawket Bridge v. Mathes*, 8 N. H. 139; *Rhoads v. Frederick*, 8 Watts (Pa.) 448; *Harrison v. Turbeville*, 2 Humph. (Tenn.) 242. See *Cheek v. Nall*, 112 N. Car. 370.

If an Obligor Tears Off the Seal or Cancels a Bond in consequence of fraud and imposition practiced by the obligor, he may declare on such mutilated bond as the deed of the party, and set forth the special facts in profert. *U. S. v. Spalding*, 2 Mason (U. S.) 478.

4. Alteration in Conveyance of Land by Grantor.—*Fitzgerald v. Wynne*, 1 App. Cas. (D. C.) 107.

It has been held in *Alabama* that an alteration in a deed after acknowledgment and before delivery, reducing the quantity of the land originally described therein, cannot defeat the entire conveyance and prevent title from passing to any part of the land, where the alteration is made by the grantor, or by his authority, for the purpose of carrying out his especial intentions at the time of the acknowledgment. The same effect should be given to such conveyance, and it should take effect as the grantor intended when he delivered it. *Webb v. Mullins*, 78 Ala. 111.

5. Where a deed conveying land, with a reservation of rent to the grantor, was materially altered by the grantor after delivery, it was held that the title passed to the grantee discharged of the covenants for rent. *Arrison v. Harmstead*, 2 Pa. St. 191; *Wallace v. Harmstad*, 15 Pa. St. 462, 53 Am. Dec. 603; *Wallace v. Harmstad*, 44 Pa. St. 492, 3 Phila. (Pa.) 227.

6. *Green v. Beckner*, 3 Ind. App. 39. See *Hughes v. Littlefield*, 18 Me. 400.

By Transferee of Note.—In an action by the transferee of a note against his transferor, it was held that an alteration consisting of the addition of the words "without recourse," written at the end of the transfer of the note by the transferor who had obtained possession after the transfer, did not alter the rights of the parties. *Martin v. McMasters*, 14 La. 420.

(5) *By Part Only of Grantors or Promisors—General Rule.*—For the same reason that a material alteration of a writing by a stranger to the contract, without the privity of the party claiming thereunder, or by an agent of such party without authority, does not affect the right of the grantee or promisee to enforce the contract as it read before the alteration, it would seem that where a material alteration is made in the instrument by some only of the parties bound thereby, without the privity of the others, such alteration cannot, if the grantee or promisee had no hand therein, prevent recovery by him upon the instrument as it originally stood.¹ There are, however, a number of cases in which the rule expressed in this proposition seems not to have been recognized,² or to have been somewhat modified.³

With Consent of Grantee or Promisee.—If the alteration by part only of the parties bound by an instrument is made with the consent of the party claiming thereunder, it becomes the act of the latter as well as of the party actually making the change, and the writing is avoided as to the grantor or promisor, who does not know of, or consent to, the alteration. Thus where a promissory note,

1 **Erasure of His Name by One of Several Parties to Contract.**—The erasure of the name of one of six acceptors of a written proposition, by himself, without the consent of the other parties thereto, was held not to affect the validity of the contract or cancel his liability. *Burton v. Shotwell*, 13 Bush (Ky.) 271.

Alteration of Note by Part Only of Promisors.—Where a promissory note was materially altered after delivery to the payee, without the knowledge or consent of either his surety or the payee, it was held that the alteration was a mere spoliation, and did not affect the payee's right to recover on the note against the surety as it existed before the spoliation. *Bucklen v. Huff*, 53 Ind. 474. See also *Daniel v. Daniel*, *Dudley* (Ga.) 239.

Where the principal maker of several notes payable to another as guardian for minor heirs succeeded the payee in the guardianship, and thereby got possession of the notes, and while they were thus in his possession cut the names of the sureties from the notes, without the knowledge or consent of the parties beneficially entitled to the proceeds thereof, it was held that the mutilation did not relieve the sureties from liability thereon. *Williams v. Moseley*, 2 Fla. 306.

In *Murray v. Graham*, 29 Iowa 520, it was held that the material alteration of a promissory note made by one of the makers thereof assuming to have authority so to do, without the express, though with the implied, authority of the holder, for the purpose of making the note conform to the original intention of the parties, will not prevent a recovery by the holder against all the makers in an action upon a note in the form originally delivered.

Alteration of Bond by Some Only of Obligor.—And it has been held that a material alteration of a bond by one of the obligors does not affect the validity of the obligation as against the sureties. *Orlando v. Gooding*, 34 Fla. 244; *Wilmington, etc., R. Co. v. Kitchin*, 91 N. Car. 39; *Barrington v. Washington Bank*, 14 S. & R. (Pa.) 405; *Rhoads v. Frederick*, 8 Watts (Pa.) 448.

None of the sureties on an appeal bond, approved by a justice of the peace, are released by the erasure by some of the sureties of their

names therefrom, where the obligee does not know of, or consent to, such change. *Bingham v. Shadle*, 45 Neb. 82.

Where an administrator procured his bond from the clerk's office, and struck out the name of one of the co-obligors and inserted instead the name of another person, it was held that the person whose name was so stricken out was still, in equity, a party to the bond and bound by its obligations, and that the erasure did not affect the liability of the co-obligors. *Harrison v. Turbeville*, 2 Humph. (Tenn.) 242.

Exception to the Rule.—What seems to be an exception to the rule stated in the text is the well-established principle that a promisor, who has signed a note as surety merely, will be discharged by an unauthorized material alteration of a note after the surety signed it, and before delivery to, and without the consent of, the payee. See *supra*, this title, *Effect of Alterations—On Executory Contracts—Accommodation Paper Altered before Negotiation*.

2. Thus it has been held that a material alteration of a bond by one of the obligors, without the consent of his co-obligors and without the privity of the obligee, though it does not affect the liability of the party making the change, discharges the other obligors. *Renville County v. Gray* (Minn. 1895), 63 N. W. Rep. 635.

3. **Alteration before Delivery to Obligee or Promisee.**—It has been held that a bond executed by a woman and her husband, and intrusted to the latter for delivery to the obligee, is void as to the wife if the husband before delivery, though without the obligee's knowledge, alters it by raising the amount. *Cheek v. Nall*, 112 N. Car. 370.

So also it has been held that a material alteration of a promissory note, made by one of the promisors before delivery to the payee, avoids the note as against the other promisors, although the alteration is made without the knowledge of the payee. *Chism v. Toomer*, 27 Ark. 108; *Draper v. Wood*, 112 Mass. 315, 17 Am. Rep. 92. And see *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67.

executed by several promisors, is materially altered by one of them, by procurement of the payee, but without the consent of the other promisors, the instrument is avoided as to the promisors who did not consent to the alteration.¹ And if a bond is altered by one of several obligors with the assent of the obligee, while the obligor making the change remains bound, the other obligors are discharged by the alteration.²

Consent of Approving Officer.—If a bond which is required to be approved by a public officer has been materially altered by some of the obligors, and the official who is appointed by law to pass upon the bond has knowledge of the alteration when he gives his approval, the obligors who had no hand in the change are released from their obligation.³

f. BY AGENT OF GRANTOR OR PROMISOR.—Where an instrument is altered by the agent of the party bound thereby, though without authority from his principal, if the alteration is made without the participation of the party claiming thereunder, it cannot, at least in the jurisdictions where it is held

1. *Schnewind v. Hackett*, 54 Ind. 248; *Flanigan v. Phelps*, 42 Minn. 186; *Crockett v. Thomason*, 5 Sneed (Tenn.) 342.

Where the maker, a short time before the maturity of a note, upon the payee insisting on the payment of ten per cent. interest for such time as the note should run after maturity, altered the interest clause so that it bore interest at ten per cent. instead of eight per cent., and the payee, who was unable to write or read writing, and did not have any knowledge of the alteration so made, and did not assent thereto, received the note again from the maker, and retained it after maturity, and also received the increased rate of interest from the maker without knowledge of the alteration or assenting thereto, it was held that the payee could not be regarded as guilty of such negligence as would deprive him of the right to recover against the surety. *Bucklen v. Huff*, 53 Ind. 474.

2. *State v. Van Pelt*, 1 Ind. 304.

3. **Alterations in Bonds with Consent of Approving Officer.**—See *State v. Craig*, 58 Iowa 238.

Delivery Bond.—The case of *Martin v. Thomas*, 24 How. (U. S.) 315, was a suit upon a delivery bond executed to a marshal in a replevin suit. After the bond had been executed by the principal and three sureties, the principal, with the consent of the marshal, and without the consent of the sureties, erased his name. This erasure, it was held, constituted a variation of the contract of the sureties, and discharged them from all liability on the bond.

Marshal's Bond.—The case of *Smith v. U. S.*, 2 Wall. (U. S.) 219, was a suit upon a bond given by Pine as marshal, the bond having been approved by the district judge. Smith, one of the sureties, defended on the ground that the bond was not his deed. The evidence showed that Smith, Hoyne, and others had signed the bond as cosecurities for Pine. Hoyne became dissatisfied, and requested Pine to erase his name, which was done, but by whom did not appear. The name of Hoyne was erased when the bond was presented to the judge for approval, and the judge had been told by Hoyne that he wanted his name erased. The remaining sureties,

except Smith, appeared before the judge and acknowledged the execution of the bond. Smith did not acknowledge it, and did not know that Hoyne's name had been erased. It was held that the sureties who acknowledged the bond after the erasure were estopped from interposing the alteration as a defense; but as to Smith, it was held that the erasure was a material alteration of the obligation to which he became a party, and that he was therefore discharged.

Sheriff's Bond.—In the case of *Bracken County v. Daum*, 80 Ky. 388, the suit was based upon a sheriff's bond, and the defense was *non est factum*. Ten persons signed a power of attorney authorizing the county clerk to sign their names to the bond. At least two of the names were erased before the power of attorney was delivered to the clerk. It was held that if the names were erased without the knowledge or consent of the other sureties, and with the knowledge or by the direction of the county judge, whose duty it was to take and approve the bond, then the plaintiff could not recover. The court said, in substance, that it was the duty of officers, intrusted with authority to take and approve official bonds, to use ordinary care and prudence to protect the sureties as well as to protect the public.

A Collector's Bond, when first presented to the county court for its approval, was a completed bond. At the time of the presentment, one of the sureties appeared before the court and asked to have his name taken off the bond. The matter was talked over in the presence of the court, and his name was erased in the presence of all the judges, the surety whose name was erased, and the principal in the bond, but in the absence of, and without the knowledge or consent of, any of the other sureties. The presiding justice then told the principal that he must procure other sureties. Thereupon the principal took the bond, and in one or two days again presented it to the court with the name of another person signed thereto as surety, and the court then approved the bond. The alteration was held to be a defense to an action on the bond against the sureties. *State v. McGonigle*, 101 Mo. 353, 20 Am. St. Rep. 609.

that an alteration by a stranger does not vitiate a writing, affect the validity of the instrument.¹

g. BY A TRUSTEE.—It has been held that an alteration in a material part of a deed of trust, by the trustee, does not impair the rights of the *cestui que trust*.²

3. Immaterial Alterations—*a. BY GRANTEE OR PROMISEE.*—In *England* it was at one time thought that an unauthorized alteration of a writing by the party claiming thereunder avoided the instrument, even though it was in an immaterial respect.³ But the strictness of this rule has been relaxed, and the present English rule is that an alteration to avoid a writing must be material.⁴

In the United States—**In Several States Strict Rule Obtains.**—The courts of at least two of the states of the Union have adopted the strict rule that even an immaterial alteration made in a writing by the party claiming thereunder, without the consent of the other contracting party, invalidates the instrument.⁵

1. Alteration by Agent of Vendor of Contract to Convey Land.—Where a contract to convey land, made between the vendor by his agent and the vendee, was altered by the agent, after the power authorizing him to make the contract had been revoked, but without the privity of the vendee, it was held that the alteration was no defense on the part of the vendor to a bill for specific performance. *Young v. Wright*, 4 Wis. 144, 65 Am. Dec. 303.

Alteration of Insurance Policy by Agent of Insurer.—Where an insurance policy appeared to have been altered, proof that the alteration had been made by an agent of the company, who took the insurance and gave the renewal receipt, was held to be sufficient to permit the policy to go to the jury as evidence. *German F. Ins. Co. v. Gerber*, 4 Ill. App. 222.

Alteration of Note by Agent of Maker in Presence of Payee.—The alteration of the date of a promissory note, made by the agent of the maker in the absence of his principal, under the supposition that he had authority to make the change, was held not to render the note void, although the alteration was made in the presence of the payees. If there was no authority to make the alteration, the note would still be a subsisting obligation as it was before it was altered. *Van Brunt v. Eoff*, 35 Barb. (N. Y.) 501.

2. Alterations by Trustees.—*Flinn v. Brown*, 6 S. Car. 209. But it has been held that equity will not establish a mortgage canceled fraudulently by a trustee, to the prejudice of subsequent mortgagees without notice. *Trenton Banking Co. v. Woodruff*, 2 N. J. Eq. 117.

3. Early English Rule—Instrument Vitiating by Immaterial Alteration.—It was laid down in *Pigot's Case*, 11 Coke 27*a*, that "if the obligor himself altereth the deed, * * * although it be in words not material, yet the deed is void." But it was found a fact in this case that the alteration, which was not a material one, was made by a stranger, and judgment was given for the plaintiff, so that the case itself is not a decision upon the point in question. And so it is said in *Shepp. Touch.* 69, that "if the alteration be made by the party himself that owneth the deed, albeit it be in a place not material, and that it tend to the advantage of

the other party and to his own disadvantage, yet the deed is hereby become void."

4. Present English Rule—Alteration must Be Material to Vitate Instrument.—*Trapp v. Spearman*, 3 Esp. 57; *Farquhar v. Southey*, 1 M. & M. 14, 22 E. C. L. 234; *Sanderson v. Symonds*, 1 Brod. & B. 426, 5 E. C. L. 134; *Lowe v. Fox*, L. R. 12 App. Cas. 206; *Marson v. Petit*, cited in note to 1 Campb. 82; *Walter v. Cubley*, 2 C. & M. 151, 4 Tyr. 87. See also *Falmouth v. Roberts*, 9 M. & W. 469.

Immaterial Alteration Expressing Legal Effect of Instrument.—In *Aldous v. Cornwall*, L. R. 3 Q. B. 573, the court of Queen's Bench expressly dissented from the doctrine in *Pigot's Case*, 11 Coke 27*a*, and held that a promissory note which originally did not express any time of payment, but which, while it was in possession of the payee, had been altered by him without the assent of the maker by the addition of the words "on demand," was not thereby vitiated, inasmuch as the alteration only expressed the legal effect of the note as originally framed, and was therefore immaterial.

5. Strict Rule—Missouri.—In the Missouri cases there was, at one time, a considerable conflict on the question of the effect of immaterial alterations.

The courts have in a number of cases expressed their approval of the rule that even an immaterial alteration of a writing made therein, without authority, by the person claiming thereunder, avoids the instrument. Thus in *Haskell v. Champion*, 30 Mo. 136, Judge Scott, in delivering the opinion, used this language: "The law, in dealing with the subject of the alteration of written instruments, looks further than to the materiality or immateriality of the alteration. Aware of the danger of countenancing the most trifling change, it has not permitted those intrusted with such instruments to alter them and afterwards defend their conduct by alleging the immateriality of the alteration." In this case the alteration consisted of the addition of the words "& Co." to the name of the maker of the note. In *Evans v. Foreman*, 60 Mo. 449, the doctrine that even an immaterial alteration in an instrument avoids it, seems to be favored. But in this case it was not pretended

And *Dicta to This Effect* are to be found in a number of early cases.¹

Prevailing Rule.—But the rule which prevails in the *United States* generally, with the exception above noted, is the more reasonable one that a writing is not avoided by an immaterial alteration therein,² and this even though the

that the alteration, which consisted of the addition of the words "after due, ten per cent.," was immaterial.

In the case of *Western Bldg., etc., Assoc. v. Fitzmaurice*, 7 Mo. App. 283, the St. Louis Court of Appeals squarely held that an immaterial alteration of a bond did not have the effect of discharging the sureties. *Lewis, P. J.*, in delivering the opinion in this case, reviews the two cases cited above, and arrives at the conclusion that the expressions of the judges therein favorable to the stricter rule are mere *dicta*, and refers to the case of *State v. Dean*, 40 Mo. 464, as a case where the question was directly before the court. In this last cited case the name of the claimant mentioned in an indemnifying bond had been altered from "Francis" to "Franklin," and it was held that the alteration was immaterial, and therefore did not avoid the instrument as to principal or sureties.

But in the later case of *Springfield First Nat. Bank v. Fricke*, 75 Mo. 178, where the alteration was said to be palpably material, it was said that the remarks of *Scott, J.*, quoted above, could not, considering that it was contended that the added words were immaterial, be regarded as mere *obiter*, since they were necessary to a proper determination of the case in all its aspects. While expressly holding that the alteration in this case was material, the rule that a written contract is avoided by an immaterial alteration is strongly favored. And there are a number of other Missouri cases which contain *dicta* favoring the rule that an immaterial alteration will have this effect, however innocently it may have been made. *German Bank v. Dunn*, 62 Mo. 79; *Moore v. Hutchinson*, 69 Mo. 429; *Morrison v. Garth*, 78 Mo. 434; *Moore v. Macon Sav. Bank*, 22 Mo. App. 684; *Allen v. Dornan*, 57 Mo. App. 288.

And it seems that the law is now settled in accordance with this view. *Kingston Sav. Bank v. Bosserman*, 52 Mo. App. 269; *Hord v. Taubman*, 79 Mo. 101.

See criticisms of this doctrine in 9 Cent. L. J. 173.

New Jersey.—In New Jersey this doctrine is at least applicable to immaterial alterations in deeds; it is the settled law of this state that if a deed is altered by the party to whom it belongs, even though in an immaterial part, such alteration avoids the deed as a consequence. *Den v. Wright*, 7 N. J. L. 175; *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232; *Jones v. Crowley* (N. J. 1895), 30 Atl. Rep. 871. See *Vanauken v. Hornbeck*, 14 N. J. L. 179; *White v. Williams*, 3 N. J. Eq. 376.

1. *Herdman v. Bratten*, 2 Harr. (Del.) 396; *Taylor v. Johnson*, 17 Ga. 521; *Barrett v. Thorndike*, 1 Me. 73; *Johnson v. U. S. Bank*, 2 B. Mon. (Ky.) 310; *Lewis v. Payn*, 8 Cow. (N. Y.) 73, 18 Am. Dec. 427; *Nunnery v. Cotton*, 1 Hawks (N. Car.) 222; *Smith v.*

Weld, 2 Pa. St. 54; *Morris v. Vanderen*, 1 Dall. (Pa.) 64.

In *Jackson v. Malin*, 15 Johns. (N. Y.) 293, it is held that an alteration, whether material or immaterial, made in a deed or will by a person claiming under it, renders it void.

2. **Prevailing Rule—Immaterial Alteration does Not Vitiate.**—2 Pa. Contr. 718-720.

California.—*Humphreys v. Crane*, 5 Cal. 173; *Oakland First Nat. Bank v. Wolff*, 79 Cal. 69.

Connecticut.—*Nichols v. Johnson*, 10 Conn. 192.

Illinois.—*Reed v. Kemp*, 16 Ill. 445; *McKibben v. Newell*, 41 Ill. 461; *Ryan v. Springfield First Nat. Bank*, 148 Ill. 349.

Indiana.—*Cochran v. Nebeker*, 48 Ind. 459; *State v. Berg*, 50 Ind. 496; *Shuck v. State*, 136 Ind. 63.

Iowa.—*Briscoe v. Reynolds*, 51 Iowa 673; *Rowley v. Jewett*, 56 Iowa 492.

Kentucky.—*Shelton v. Deering*, 10 B. Mon. (Ky.) 405; *Terry v. Hazlewood*, 1 Duv. (Ky.) 109; *Commonwealth Bank v. McChord*, 4 Dana (Ky.) 191, 29 Am. Dec. 398; *Jones v. Shelbyville F., etc., Ins. Co.*, 1 Metc. (Ky.) 60.

Maine.—*Cushing v. Field*, 70 Me. 50, 35 Am. Rep. 293; *Eddy v. Bond*, 19 Me. 461, 36 Am. Dec. 767; *Hale v. Russ*, 1 Me. 334.

Massachusetts.—*Smith v. Crooker*, 5 Mass. 540; *Hunt v. Adams*, 6 Mass. 519; *Hatch v. Hatch*, 9 Mass. 307, 6 Am. Dec. 67; *Homer v. Wallis*, 11 Mass. 309, 6 Am. Dec. 169; *Granite R. Co. v. Bacon*, 15 Pick. (Mass.) 239; *Adams v. Frye*, 3 Met. (Mass.) 103.

Michigan.—*Goodenow v. Curtis*, 33 Mich. 505.

Minnesota.—*Herrick v. Baldwin*, 17 Minn. 209, 10 Am. Rep. 161.

Mississippi.—*Gordon v. Sizer*, 39 Miss. 805; *Bridges v. Winters*, 42 Miss. 135, 2 Am. Rep. 598.

Nebraska.—*Fisherdict v. Hutton*, 44 Neb. 122; *Palmer v. Largent*, 5 Neb. 223, 25 Am. Rep. 479.

New Hampshire.—*Bowers v. Jewell*, 2 N. H. 543; *Pequawket Bridge v. Mathes*, 8 N. H. 139; *Morrill v. Otis*, 12 N. H. 466; *Burnham v. Ayer*, 35 N. H. 354; *Cole v. Hills*, 44 N. H. 227.

New York.—*Flint v. Craig*, 59 Barb. (N. Y.) 319; *Knapp v. Maltby*, 13 Wend. (N. Y.) 587.

Ohio.—*Huntington v. Finch*, 3 Ohio St. 445.

Pennsylvania.—*Morey v. Dotter*, 4 Phila. (Pa.) 136; *Latshaw v. Hildebeitel*, 2 Penny. (Pa.) 263; *Gardinier v. Sisk*, 3 Pa. St. 326; *Miller v. Reed*, 27 Pa. St. 244, 67 Am. Dec. 459; *Burkholder v. Lapp*, 31 Pa. St. 322; *Robertson v. Hay*, 91 Pa. St. 242.

South Carolina.—*Pope v. Chafee*, 14 Rich. Eq. (S. Car.) 69.

Tennessee.—*Blair v. State Bank*, 11 Humph. (Tenn.) 84.

Texas.—*Gragg v. State*, 18 Tex. App. 295.

Vermont.—*Langdon v. Paul*, 20 Vt. 217.

alteration may have been made with a fraudulent intent.¹ Certainly, if it was innocently made, it should not have the effect of invalidating the instrument.²

b. BY A STRANGER TO THE CONTRACT.—An immaterial alteration made in a writing by a stranger to the contract, without the privity of the party claiming thereunder, will not vitiate the instrument.³

IV. MATERIALITY OF ALTERATIONS.—1. Constituent Elements of Material Alterations—*a.* IN GENERAL.—An alteration, to be material, must be in a material part of the instrument, and affect the rights and liabilities of the parties thereto.⁴

b. MUST CHANGE LEGAL EFFECT OF INSTRUMENT—(1) *In General.*—To constitute what is really an alteration of an instrument, some word must be added or stricken out, or there must be such a change as really amounts to a substitution of words.⁵ And unless the alteration changes the legal effect of

Wisconsin.—Kronskop *v.* Shontz, 51 Wis. 204, 37 Am. Rep. 817.

Shipping Articles.—In *The Schooner Eagle*, Olcott Adm. 232, it was held that U. S. Stat. 1840, c. 48, § 4, 5 U. S. Stat. at Large 395, providing that all interlineations, erasures, or alterations in shipping articles are presumed to be fraudulent, unless satisfactorily explained, applied only to such alterations as would vary the effect of the shipping articles in regard to the seamen, and not to immaterial erasures.

1. Immaterial Alterations Made with Fraudulent Intent.—If an alteration is wholly immaterial, it matters not with what intent it was made; it will not avoid an instrument even though made with a fraudulent intent. Article on Alteration of Negotiable Instruments by John W. Daniel, 2 So. L. Rev. 643, 665; *Magers v. Dunlap*, 39 Ill. App. 618; *Robinson v. Phoenix Ins. Co.*, 25 Iowa 430; *Com. v. Emigrant Industrial Sav. Bank*, 98 Mass. 12, 93 Am. Dec. 126; *Moye v. Herndon*, 30 Miss. 110; *Fuller v. Green*, 64 Wis. 159, 54 Am. Rep. 600.

But there are cases in which it is intimated that an immaterial alteration will avoid an instrument if it was made with a fraudulent intent. *Turner v. Billagram*, 2 Cal. 520; *Lubbering v. Kohlbrecher*, 22 Mo. 598; *Crockett v. Thomason*, 5 Sneed (Tenn.) 342.

2. Immaterial Alteration Innocently Made.—2 Min. Inst. 663; *Montgomery R. Co. v. Hurst*, 9 Ala. 513; *Rowley v. Jewett*, 56 Iowa 492; *Granite R. Co. v. Bacon*, 15 Pick. (Mass.) 239; *Rhoades v. Castner*, 12 Allen (Mass.) 130; *Dunn v. Clements*, 7 Jones (N. Car.) 58. And see *Crockett v. Thomason*, 5 Sneed (Tenn.) 342.

3. Immaterial Alteration by Stranger.—*Pigot's Case*, 11 Coke 27a; *Shep. Touch.* 68; *Trew v. Burton*, 1 Crompt. & M. 533; *Waugh v. Bussell*, 5 Taunt. 707; *U. S. v. Hatch*, 1 Paine (U. S.) 336; *Casoni v. Jerome*, 58 N. Y. 315; *Van Brunt v. Van Brunt*, 3 Edw. Ch. (N. Y.) 14; *Malin v. Malin*, 1 Wend. (N. Y.) 625; *Yeager v. Musgrave*, 28 W. Va. 90. See *Oneale v. Long*, 4 Cranch (U. S.) 60.

4. Essentials of Material Alterations.—*Arkansas.*—*English v. Breneman*, 5 Ark. 377, 41 Am. Dec. 96; *Lemay v. Williams*, 32 Ark. 166.

California.—*Humphreys v. Crane*, 5 Cal. 173.

Indiana.—*Schnewind v. Hacket*, 54 Ind. 248; *Coburn v. Webb*, 56 Ind. 96, 26 Am. Rep. 15.

Massachusetts.—*Fay v. Smith*, 1 Allen (Mass.) 477, 79 Am. Dec. 752; *Wheelock v. Freeman*, 13 Pick. (Mass.) 165, 23 Am. Dec. 674; *Draper v. Wood*, 112 Mass. 315, 17 Am. Rep. 92.

Michigan.—*White Sewing Mach. Co. v. Dakin*, 86 Mich. 581, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 505.

Missouri.—*Evans v. Foreman*, 60 Mo. 449; *German Bank v. Dunn*, 62 Mo. 79; *Moore v. Hutchinson*, 69 Mo. 429.

Nebraska.—*State Sav. Bank v. Shaffer*, 9 Neb. 1, 31 Am. Rep. 394.

New York.—*Booth v. Powers*, 56 N. Y. 22.

Tennessee.—*Kincannon v. Carroll*, 9 Yerg. (Tenn.) 11, 30 Am. Dec. 391; *Blair v. State Bank*, 11 Humph. (Tenn.) 89.

Virginia.—*Newell v. Mayberry*, 3 Leigh (Va.) 250, 23 Am. Dec. 261.

Missouri and New Jersey Decisions.—In connection with the subject of the materiality of alterations, it should be remembered that in Missouri the courts have established the doctrine that a written instrument is vitiated by even an immaterial alteration, and have applied the doctrine apparently without regard to the nature of the writing. In New Jersey this doctrine prevails, at least as to deeds. See *supra*, this title, division *Effect of Alterations*, subd. *Immaterial Alterations*.

As a consequence, the cases decided by the courts of these states can hardly be looked to as decisions on the question of materiality of alterations, although there are a number of cases which contain *dicta* on this subject. See *Allen v. Dornan*, 57 Mo. App. 288, as to the addition of the name of a maker to a note; *Williams v. Jensen*, 75 Mo. 681, as to the addition of the signature of a married woman.

5. Obliteration with Lead Pencil.—It seems to have been held that the obliteration and defacement of a policy of insurance will not amount to an alteration. *Chase v. Washington Mut. Ins. Co.*, 12 Barb. (N. Y.) 595.

Interlineation of Words without Erasure of Corresponding Clause.—A note payable to "A or order," and indorsed on the back by C, was altered by A, without the maker's knowledge, by writing the words "to the order of

the instrument, *i. e.*, makes it express a contract different from that which was entered into by the parties thereto, it will not be material.¹

C" above the words "A or order," but no words were erased. This was held to be not a material alteration. *Granite R. Co. v. Bacon*, 15 Pick. (Mass.) 239. In delivering the opinion of the court in this case, Shaw, C. J., said: "No word was added or struck out. Certain words were inserted between two lines which, taken with the original words, and as an addition to them, would be wholly senseless and inoperative. The name of the original payee was not erased, and it cannot be considered that the name of another payee was inserted. The most that can be inferred is, that it was a proposal to insert the name of another payee, never acceded to, and so the note was not altered."

Attachment of Memorandum to Writing.—It has been held that a contract by which the plaintiff agreed to drill a gas well and lay a pipe along a proposed line, within fifty feet of the house of each subscriber thereto, who was to pay the plaintiff a certain amount when this was done, is not changed by the plaintiff's attaching thereto, after the defendant had signed it, a slip signed by the plaintiff agreeing that no part of the product of the well should be piped to, or marketed in, certain places, such attachment not making it part of the contract, and it not being an alteration of the terms of the contract. *Current v. Fulton*, 10 Ind. App. 617.

Insertion of Words.—Where a bond was given to pay the obligee "one hundred dollars, to be paid in twenty-five dollars a year, * * * with interest * * * on the whole," and the holder inserted the last three words, the court said: "The holder imprudently attempted to remove what he supposed to be an ambiguity, but he did not disturb the legal effect of the note, and consequently did not avoid it." *Gardinier v. Sisk*, 3 Pa. St. 326; *Burkholder v. Lapp*, 31 Pa. St. 322.

Indorsement of Agreement on Back of Note.—It has been held that the indorsement upon the back of a note of an agreement between the principal and holder for the extension of the time of payment is not an alteration of the note. *Moore v. Macon Sav. Bank*, 22 Mo. App. 684.

1. General Rule—Alteration must Change Legal Effect of Instrument—England.—*Sanderson v. Symonds*, 1 Brod. & B. 426, 5 E. C. L. 134; *Doe v. Bingham*, 4 B. & Ald. 672, 6 E. C. L. 648.

California.—*Humphreys v. Crane*, 5 Cal. 173.

Connecticut.—*Nichols v. Johnson*, 10 Conn. 192.

Illinois.—*McKibben v. Newell*, 41 Ill. 461.

Indiana.—*Foote v. Bragg*, 5 Blackf. (Ind.) 363.

Iowa.—*Rowley v. Jewett*, 56 Iowa 492.

Maryland.—*State v. Miller*, 3 Gill (Md.) 335.

Massachusetts.—*Rhoades v. Castner*, 12 Allen (Mass.) 130.

Mississippi.—*Gordon v. Sizer*, 39 Miss. 818; *Bridges v. Winters*, 42 Miss. 135, 2 Am. Rep. 598.

New Hampshire.—*Pequawket Bridge v. Mathes*, 8 N. H. 139; *Morrill v. Otis*, 12 N. H. 466; *Cole v. Hills*, 44 N. H. 227.

New York.—*Martin v. Tradesmen's Ins. Co.*, 101 N. Y. 498.

Pennsylvania.—*Hocker v. Jamison*, 2 W. & S. (Pa.) 438; *Robertson v. Hay*, 91 Pa. St. 242.

Rhode Island.—*Manufacturers, etc., Bank v. Follett*, 11 R. I. 92, 23 Am. Rep. 418.

Miscellaneous Instances of Immaterial Alterations.—The following alterations have been held immaterial: the removal by the assignee from a written assignment of a claim of a clause negating any purpose on the assignor's part to guarantee the payment of the claim, where no such intention is deducible from the agreement as altered, *Prudden v. Nester*, 103 Mich. 540; the insertion in a note of words which may be omitted without affecting its sense, *Houghton v. Francis*, 29 Ill. 244; the insertion of the word "and" between the signatures of two parties to a note, *Martin v. Good*, 14 Md. 398, 74 Am. Dec. 545; the addition of an X to the signature of the maker of a promissory note, *King v. Rea*, 13 Colo. 69; the addition to a bill of exchange of the words "without any relief from valuation or appraisal laws," *Holland v. Hatch*, 15 Ohio St. 464; the erasure of the words "renewed" or "renewed by another note," which it appeared were at one time written across the note, *Marrow v. Richardson* (Tex. 1887), 6 S. W. Rep. 763; the insertion in the bond of an administratrix, with the will annexed, after the word "administratrix," of the words "with the will annexed," *Casoni v. Jerome*, 58 N. Y. 315; the insertion in the bond of a liquor dealer of a description, by block and lot, of the place where his business is to be conducted, *Starr v. Blatner*, 76 Iowa 356; striking the word "commissioned" from the bond of a county auditor, *Shuck v. State*, 136 Ind. 63; striking out the word "February" and inserting "March" in a bond given by the proprietor of a tobacco warehouse in Louisville, under the act regulating the inspection and sale of tobacco, *Terry v. Hazlewood*, 1 Duv. (Ky.) 106.

Where the matter indorsed on a note is too indefinite to constitute a modification of the note, an alteration of such indorsement which leaves it as indefinite as before is immaterial. *Krouskop v. Shontz*, 51 Wis. 204, 37 Am. Rep. 817.

Where in a sealed instrument, which stated that the defendant had "signed" certain promissory notes, the words "and executed" were added, it was held that such an alteration was immaterial. *Langdon v. Paul*, 20 Vt. 217.

Inserting words intended to express a waiver of the benefits of a specific act of the assembly in a mortgage, which act had been repealed before the mortgage was executed, does not affect the mortgage, and is immaterial. *Robertson v. Hay*, 91 Pa. St. 242.

In *Brown v. Pinkham*, 18 Pick. (Mass.) 172,

Change of Phraseology—Correction of Spelling—Retracing Indistinct Words.—Thus it has been held an immaterial alteration of an instrument to merely change its phraseology,¹ to correct the spelling of a word,² or to retrace indistinct words so as to make them more legible.³

An Alteration will Be Material if it changes the legal effect of the instrument.⁴

it was held that in a deed of a parcel of land on which were a well and pump, an interlineation of the words "and the pump and well of water," after the description of the land by metes and bounds, was an immaterial alteration, inasmuch as the effect of the deed would be the same without those words.

Where, pending a suit upon a note, an agreement was entered into that the holder should credit fifty dollars on the note if the balance was paid at a certain date, and a payment of fifty dollars was indorsed on the note, but where the maker failed to pay at the appointed time, and the indorsement of credit was erased, it was held not to avoid the note. *Chamberlin v. White*, 79 Ill. 549.

Adding the words "ten dollars and fifty interest" immediately after the words "value received" in a promissory note is not a material alteration; such words would be construed to mean that a portion of the value received by the makers consisted of ten dollars and fifty cents for interest. *Gardiner v. Harback*, 21 Ill. 129.

Duplicate Subscription List—Attaching All Names to One Paper.—It has been held that where subscriptions to stock are signed on different printed papers, and the names on all the papers are cut off and pasted together on one of them, such mutilation is not a material alteration which will release the subscribers from their liability. *Sodus Bay, etc., R. Co. v. Hamlin*, 24 Hun (N.Y.) 390.

And in *Davis v. Campbell* (Iowa 1895), 61 N. W. Rep. 1053, it was held that a subscription contract was not invalidated by the attachment thereto of certain names subscribed to a contract precisely similar, with the exception that it contained the words "the amount set opposite our names."

1. Change in Phraseology.—*U. S. v. Hatch*, Paine (U. S.) 336; *State v. Riebe*, 27 Minn. 315; *Holland v. Hatch*, 15 Ohio St. 464.

A note payable to order bearing the indorsement, "This note is subject to a contract made Nov. 13, 1874," was subsequently altered so as to read, "This note is subject of a contract made Nov. 13, 1874." This was held an immaterial alteration. *Cushing v. Field*, 70 Me. 50, 35 Am. Rep. 293.

Where a contract for the purchase of goods contained a clause stating that the delivery of the same was "subject to countermand by June 15th, 1886," and after execution the word "by" was erased and the word "before" interlined, it was held that this change in no way altered the terms of the contract, and was not a material alteration. *Express Pub. Co. v. Aldine Press*, 126 Pa. St. 347.

2. Correction of Spelling.—*Leonard v. Wilson*, 2 Crompt. & M. 589.

3. Retracing Indistinct Words.—Retracing a faded name in clear ink has been held immaterial, even although in going over the name

it was slightly misspelled, but not so as to alter the sound. *Dunn v. Clements*, 7 Jones (N. Car.) 58. So also it seems that where a note is written in pencil, to go over it with ink is not a material alteration. *Reed v. Roark*, 14 Tex. 329, 65 Am. Dec. 127. See *Donnell Mfg. Co. v. Jones*, 49 Ill. App. 327.

4. Dobyns v. Rawley, 76 Va. 537.

Indorsement on Note of Pretended Partial Payment.—An indorsement on a note of a pretended partial payment, before or at the time of its delivery to the payee, was held to be a material alteration which discharged the surety. *Johnston v. May*, 76 Ind. 293.

Insertion of Price per Volume and Kind of Binding in Subscription for Book.—The insertion, in a subscription for books issued in parts, of the word "cloth" in the blank space after the words "bound in," and the figures "\$6.25" in the blank space before the printed words "per volume," was held a material alteration which avoided the contract. *Osgood v. Stevenson*, 143 Mass. 399.

Change of Time for Appearance of Principal in Bail Bond.—Where it appeared upon the face of a bail bond that the principal was originally held to appear before the July term, 1881, of the court, a term not provided for by law, and the word "July" appeared to have been erased in the bond, and the word "October" substituted, this was held to be a material alteration of the bond, which released the sureties. The alteration made binding an obligation which, without such alteration, would have been a nullity. *Heath v. State*, 14 Tex. App. 213.

It has likewise been held a material alteration of a bail bond which was executed in 1891, to change the date for the appearance of the principal, originally written at a certain date in 1890, to the same date in 1891. *Butler v. State*, 31 Tex. Crim. Rep. 63.

And the unauthorized alteration by the sheriff of a bail bond which obligated the principal to appear at the next term of court "A. D. 188," so as to make it read "1889," is material, and discharges the obligors. *Wagner v. State*, 28 Tex. App. 419.

Insertion in Mortgage of Specific Period for Default.—It has been held that where the number of days allowed for default in the scire facias clause of a mortgage as originally drawn was left blank, the insertion of a particular period, after the provision as to default, is a material alteration, and absolutely avoids the mortgage and destroys its effect as a lien or incumbrance upon the premises. *McIntyre v. Velte*, 153 Pa. St. 350.

Change of Proposed Course of Road in Petition for Highway.—Where the subscribers to a petition for a highway, in which the particular courses between the *termini* were expressly described, appointed an agent to take charge of the petition, agreeing to pay for his

Thus the insertion in a contract of conveyance of words which pass the right to immediate possession constitutes a material alteration of the instrument.¹

And the Wilful Destruction of a Note will of course prevent a recovery thereon.²

(2) *Changes which Enlarge Liability of Party.*—Unquestionably any change in a written instrument which has the effect of enlarging the liability of the party bound thereby is a material one.³

Change Whereby Liability is Reduced.—But it does not necessarily follow that an alteration is material only when it increases the liability of such party; an alteration may be material even though it lessens his burden.⁴

Test.—The test is not whether an alteration increases or reduces a party's liability, but whether the instrument expresses the same contract—whether it will have the same legal effect and operation after the alteration as before.⁵

(3) *Addition of Special Clauses or New Terms.*—It is a material alteration of an instrument to insert therein a special clause or additional term.⁶

services and expenses, after which the petition was amended by striking out all the intermediate courses, and praying for the location of a road between the same *termini*, in such manner as the locating committee should deem expedient, it was held that such alteration absolved from the contract those petitioners whose private interests it might injuriously affect. *Jewett v. Hodgdon*, 3 Me. 103. See *Irvin v. Susquehanna, etc., Turnpike Co.*, 2 P. & W. (Pa.) 466, 23 Am. Dec. 53.

1. *Kelly v. Trumble*, 74 Ill. 428.

2. *Destruction of Note.*—*Blade v. Noland*, 12 Wend. (N. Y.) 173, 27 Am. Dec. 126.

3. *Change Extending Liability.*—*Rudesill v. Jefferson County*, 85 Ill. 446; *White v. Johns*, 24 Minn. 387; *Craighead v. McLoney*, 99 Pa. St. 211.

Addition of Clause Waiving Notice and Protest.—Writing the words "demand and notice waived," over the name of an indorser of a note, has, for the reason that it enlarges the liability of the indorser, been held a material alteration. *Andrews v. Simms*, 33 Ark. 771. See *infra*, this title and division, subd. *Addition of Words Waiving Notice and Protest.*

Alteration of Contract of Agency by Change Increasing Agent's Liability.—A guarantor upon a contract of agency is discharged by an alteration of the contract which has the effect of enlarging the agent's liability, as by requiring him to become responsible for more property or less salable property than was contemplated by the contract. *Weir Plow Co. v. Walmsley*, 110 Ind. 242; *Osborne v. Van Houten*, 45 Mich. 444.

Change in Official Bond Increasing Duties of Principal.—Where, after the execution of a bond by the principal and surety conditioned for the performance by the former of his duties as collector in certain townships, the name of another township was added with the consent of the principal, but without that of the surety, it was held that the latter was discharged from all obligation, because the duties imposed by the instrument in its altered state were not those for the performance of which he had made himself responsible, and that the defect could not be cured by declaring on the condition as it originally stood. *Miller v. Stewart*, 9 Wheat. (U. S.) 702.

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4. *Change Decreasing Liability of Party.*—*Coburn v. Webb*, 56 Ind. 96, 26 Am. Rep. 15; *Franklin L. Ins. Co. v. Courtney*, 60 Ind. 134. See *supra*, this title, division *Effect of Alterations*, subd. *Prejudice to Grantor or Promisor.*

5. *Test of Materiality.*—*Gardner v. Walsh*, 5 El. & Bl. 83, 85 E. C. L. 83; *Johnston v. May*, 76 Ind. 293; *Wheelock v. Freeman*, 13 Pick. (Mass.) 165, 23 Am. Dec. 674; *Herrick v. Baldwin*, 17 Minn. 209, 10 Am. Rep. 161; *Renville County v. Gray* (Minn. 1895), 63 N. W. Rep. 635; *Craighead v. McLoney*, 99 Pa. St. 211. See *supra*, this title, division *Effect of Alterations*, subd. *Prejudice to Grantor or Promisor.*

6. *Special Clauses—New Terms.*—*Powell v. Divett*, 15 East 29; *Mollett v. Wackerbarth*, 5 C. B. 181, 57 E. C. L. 181.

Provision Relinquishing Right of Set-off.—On the ground that the right of set-off may be waived by agreement (see the title SET-OFF, RECOUPMENT, AND COUNTERCLAIM), it has been held that the addition of the words "without defalcation or set-off" is a material alteration and avoids a note. *Davis v. Carlisle*, 6 Ala. 707.

Interlineation of Acceptance of Contract over Indorsement on a Written Proposal.—The interlineation over the indorsement of a party, on a written proposal of a publishing company to furnish him certain advertising matter, of the words, "All terms and conditions included in above approved, read, and agreed," was held a material alteration. *American Pub. Co. v. Fisher*, 10 Utah 147.

Adding Clause Charging Note on Separate Estate of Wife.—It has been held that inserting words making a note a charge upon the separate estate of a married woman avoids it. *Reeves v. Pierson*, 23 Hun (N. Y.) 185; *Taddiken v. Cantrell*, 69 N. Y. 597, 25 Am. Rep. 253.

But since the enactment of the statute providing that the separate estate of a married woman shall be liable for her contracts, and that in no case shall a charge on her separate estate be necessary (New York Laws 1884, c. 381), it has been held that it is not a material alteration of a note to write over the indorsement of a married woman words charging her separate estate. *Clapp v. Collins* (City Ct.), 26 N. Y. St. Rep. 95, 7 N. Y. Supp. 98.

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(4) *Addition of Words Waiving Notice and Protest.*—The writing of words waiving notice and protest on the back of a note over the signature of an indorser has been uniformly held to constitute a material alteration of the instrument.¹

(5) *Addition or Removal of Condition.*—An alteration in an instrument will be material if it consists of the insertion of a condition in the contract,² or if it has the effect of changing a conditional to an absolute promise.³

(6) *Insertion of Matter Which Law would Supply.*—It has been held that where the law would have supplied the matter introduced into a writing, the insertion cannot be deemed to constitute a material alteration of the instrument.⁴

(7) *Inserting Name of Signer in Body of Instrument.*—Thus, where it is considered that it is not necessary to the validity of a bond or deed that the name of the grantor or obligor should appear in the body thereof,⁵ the insertion in the body of the instrument of the name of a person who has signed and executed it, will not constitute a material alteration.⁶

c. MUST BE IN MATERIAL PART OF INSTRUMENT.—(1) *In General.*—It is obvious that an alteration in a writing does not change its legal effect, unless it

1. *Andrews v. Simms*, 33 Ark. 771; *Davis v. Eppler*, 38 Kan. 629; *Farmer v. Rand*, 14 Me. 225; *Buck v. Appleton*, 14 Me. 284.

Basis of the Decisions.—But while the authorities are agreed that the addition of such words constitutes a material alteration, they do not all base the decision upon the same grounds. Thus it has been said that such an alteration is a material one, for the reason that it changes the contingent liability of the indorser into an absolute liability. *Davis v. Eppler*, 38 Kan. 629; *Farmer v. Rand*, 14 Me. 225. And another decision seems to turn on the ground that the addition would enlarge the liability of the indorser. *Andrews v. Simms*, 33 Ark. 771.

2. **Addition of Condition to Contract of Guaranty.**—Thus it is a material alteration to insert in a contract of guaranty a condition that it shall only attach when a certain contract is performed. *Hemming v. Trenery*, 9 Ad. & El. 926, 36 E. C. L. 324.

3. **Changing Conditional to Absolute Promise.**—Where a note provided for the payment of attorney's fees "if suit be instituted," it was held that striking out these words, whereby the conditional promise to pay attorney's fees was changed to an absolute promise, constituted a material alteration of the note. *Tate v. Fletcher*, 77 Ind. 102.

So it has been held that since the effect of writing words waiving notice and protest on the back of a note over the signature of an indorser is to change his contingent liability into an absolute one, the addition of such words amounts to a material alteration of the instrument. *Davis v. Eppler*, 38 Kan. 629; *Farmer v. Rand*, 14 Me. 225. See *supra*, this title and division, subd. *Addition of Words Waiving Notice and Protest*.

Removal of Condition Attached to Bond.—A party signed a bond with a condition, and the condition was afterwards detached without the knowledge or consent of the obligor, so as to make his undertaking to pay appear absolute. It was held to be a material altera-

tion which avoided the bond, even in the hands of a *bona fide* holder. *Longwell v. Day*, 1 Mich. (N. P.) 286.

4. **When the Law would Supply the Matters Inserted.**—*Waugh v. Bussell*, 5 Taunt. 707, 1 Marsh. 311, 15 Rev. Rep. 624; *Aldous v. Cornwell*, L. R. 3 Q. B. 573; *Hunt v. Adams*, 6 Mass. 519; *Burnham v. Ayer*, 35 N. H. 351; *Kinney v. Schmitt*, 12 Hun (N. Y.) 521. See *Doe v. Houghton*, 1 M. & R. 208, 17 E. C. L. 242.

Insertion in Bond of Provision Requiring Payment of Costs.—The interlineation in a bond of words which change its conditions only by providing that costs as well as the judgment should be paid, was held immaterial, for the reason that costs, being incident to the judgment, would have been included in the conditions of the bond without the interlineation, and their being provided for therein, in no manner changed the legal effect of the bond. *Kleeb v. Bard*, 12 Wash. 140.

Interlineation in One Part of Words Occurring Elsewhere in Deed.—Interlining in a deed an important clause, which is also found in another part of the deed, was held to be an immaterial alteration. *Gordon v. Sizer*, 39 Miss. 818.

Where in a bond the words "are held and firmly bound" are inserted, when there are words to the same effect already in the bond, it is not material. *Western Bldg., etc., Assoc. v. Fitzmaurice*, 7 Mo. App. 283.

Where specifications calling for glazed doors were expressly made a part of a building contract, it was held that the insertion of the word "glazed" in the contract as descriptive of the doors was immaterial, and did not avoid the contract or release the sureties on the contractor's bond. *Consaul v. Sheldon*, 35 Neb. 247.

5. See the titles **BONDS and DEEDS**.

6. *Cotten v. Williams*, 1 Fla. 42; *Dedge v. Branch*, 94 Ga. 37; *Smith v. Crooker*, 5 Mass. 538; *Pequawket Bridge v. Mathes*, 8 N. H. 140. See *Briscoe v. Reynolds*, 51 Iowa 673; *Bird v. Bird*, 40 Me. 398.

is in a material part of the instrument. Hence an alteration, to have the effect of invalidating an instrument, must be in a material part thereof.¹

(2) *Change in Marginal Figures.*—The marginal notations commonly employed in negotiable paper do not form any part of the instrument proper. Therefore, a change in the marginal figures of a bill or note does not constitute a material alteration of the instrument.²

(3) *Removal or Addition of Memoranda*—*Collateral or Reference Memoranda.*—A memorandum which is collateral to, or independent of, the contract or promise forms no part of it, whether written on the same paper or not.³ And the removal of a mere memorandum written upon a bill or note, and not constituting any part of the writing, does not amount to a material alteration thereof.⁴

A promissory note is not materially altered by writing thereon a memorandum which is purely collateral to, and independent of, the promise or

1. Alteration must Be in Material Part of Instrument.—*Heath v. Blake*, 28 S. Car. 406; *Robinson v. Phoenix Ins. Co.*, 25 Iowa 430. See *Morris v. Cude*, 57 Tex. 337.

Alteration in Affidavit of Justification to Bond.—On the ground that the affidavit of justification is no part of a bond, it has been held that an alteration of an affidavit of justification made by the surety and principal to a bond of indemnity, which consisted of changing the statement that the principal was worth, in property, the sum of ten thousand dollars to the statement that he was worth five thousand dollars, could not be treated as a material, or any, alteration of the bond. *Ludekens v. Pscherhofer*, 76 Hun (N. Y.) 548.

Alteration of Property Statement Indorsed on Note.—Where, on a promissory note of a husband and wife for one hundred and forty dollars, there was an indorsement showing that the wife owned a farm worth four thousand dollars, and personal property worth six hundred dollars, a subsequent and unauthorized change of the last figures to one thousand dollars, made by the holders, was considered an immaterial alteration. *Krouskop v. Shontz*, 51 Wis. 204.

An Alteration in the Recitals of a Bond made after its execution by the attorney of the obligee, without any wrongful or fraudulent purpose, which does not in any manner prejudice the obligors or affect their rights or obligations, is immaterial, and will not destroy the bond. *Crawford v. Dexter*, 5 Sawy. (U. S.) 201.

Where a bail bond recited that the indictment against the principal in the bond was presented and filed in court "on the 29th day of December, 180," and this recital was so altered that it read "on the 29th day of December, A. D. 1880," it was held that the alteration did not affect the validity of the bond. The court considered that it was not necessary to state in the bail bond the date of the presentment or filing of the indictment, and that such statement was surplusage and immaterial. *Cragg v. State*, 18 Tex. App. 295.

Alteration of Immaterial Recital in Assignment of Sheriff's Certificate.—Where an assignment of a sheriff's certificate, which assignment was annexed to the certificate, incorrectly described the land as situate in Portland, but the certificate itself contained a full descrip-

tion of the premises, and stated that they were located in Westfield, it was held that the erasure of the word "Portland" and the substitution of the word "Westfield" was an immaterial alteration, and the whole sentence in the assignment which described the land was regarded as mere surplusage, and it was considered that it could in no manner affect the validity of the assignment or the interest conveyed, or attempted to be conveyed, in the lands sold and described in the certificate, for, whether they lay in Portland, Westfield, or any other town, the assignee of the certificate would have been entitled under it and the assignment to the lands or interest in them in whatsoever town they were situated. *People v. Muzzy*, 1 Den. (N. Y.) 239.

Alteration in Indorsement of a Partial Payment.—The addition of a date to an indorsement of a partial payment on the back of a note is not an alteration of the instrument. *Howe v. Thompson*, 11 Me. 152.

Alteration in Acknowledgment of Deed.—It has been said that an interlineation or erasure in the acknowledgment of a deed affects only the proof of execution, and cannot avoid the deed itself. *Devinney v. Reynolds*, 1 W. & S. (Pa.) 328. See the title **ACKNOWLEDGMENTS**, vol. 1, p. 483.

Cutting Off or Obliterating Receipt Written on Margin of Bond.—The cutting off a receipt written on the margin of a bond is not a mutilation of the instrument itself. *Goodfellow v. Inslee*, 12 N. J. Eq. 355.

And the obliteration by the holder of a bond of a payment indorsed on it does not destroy the validity of the bond. Such an entry is no more than a receipt, and constitutes no part of the bond. *Simms v. Paschall*, 5 Ired. (N. Car.) 276. See also *Bryan v. Dyer*, 28 Ill. 188.

2. Change in Marginal Figures of Bill or Note.—*Horton v. Horton*, 71 Iowa 448; *Schryver v. Hawkes*, 22 Ohio St. 308; *Johnston Harvester Co. v. McLean*, 57 Wis. 258. See *Woolfolk v. Bank of America*, 10 Bush (Ky.) 513; *Fisk v. McNeal*, 23 Neb. 726, 8 Am. St. Rep. 162.

3. See the title BILLS AND NOTES.

4. Memorandum on Note Directing Credit of Proceeds.—Hence where the last indorser of an accommodation bill made a memorandum at the foot of the paper directing the proceeds

contract which it contains.¹ And the placing of a mere reference memorandum on a promissory note will not constitute a material alteration of the instrument.² Thus it has been held not to be a material alteration to note the residence of the drawers and indorsers of a bill after their names.³ Writing in the margin of a note a statement of the fact that it is secured by a mortgage, has been held not material.⁴ And it has been held that noting a memorandum at the foot of a note, to the effect that it is payable at a particular place, is not a material alteration.⁵

Memoranda Forming Part of Instrument.—Generally speaking, every indorsement or memorandum attached to a writing, with the knowledge of the parties at the time of its execution, is as much a part of such writing as if it had been contained in the body of the instrument.⁶ Hence where a note has a memorandum or contract of this kind, which qualifies its terms, written upon or attached to it, the obliteration or severance of such memorandum or contract is a material alteration of the note.⁷ And so it would seem that

to be credited to the drawer, it was held that the memorandum was no part of the bill, and its removal was of no consequence. *Hubbard v. Williamson*, 5 Ired. (N. Car.) 397.

1. Change Affecting Some Only of Parties.—One of the makers of a joint note which did not state the rate of interest, although it contained the clause "on demand with interest," added, after delivery, the following memorandum: "Interest on above note to be nine per cent. G. W. C." It was held that this was not a material alteration as far as the other maker was concerned. It being signed by G. W. C. only, shows that the parties did not intend to change the joint promise, but to treat it as an independent undertaking by him. *Littlefield v. Coombs*, 71 Me. 110. See *Price v. Tallman*, 1 N. J. L. 511.

It has been held that the addition to the body of a promissory note, after its indorsement by an accommodation indorser, of the words, "Payable before maturity, and interest on unexpired term refunded, if I so elect," does not change the contract of the indorser, and, though made without his knowledge or consent, will not discharge him. *Herrick v. Baldwin*, 17 Minn. 209, 10 Am. Rep. 161.

2. Reference Memorandum.—*Maness v. Henry*, 96 Ala. 454; *Carr v. Welch*, 46 Ill. 88; *White v. Johns*, 24 Minn. 387; *Oliver v. Hawley*, 5 Neb. 439. See *Walter v. Cubley*, 4 Tyr. 87, 2 Crompt. & M. 151.

Instances.—An entry in red ink, below the figures in the left-hand corner of a note, of the amount of interest and the total, and of a check mark at the bottom of the note, was held not to be a material alteration. *Yost v. Watertown Steam-Engine Co.* (Tex. Civ. App. 1894), 24 S. W. Rep. 657.

Where the drawer, who held a bill indorsed in blank by the payee, wrote under his signature the words, "Left with Mr. B. [the plaintiff] as collateral," it was held that this did not constitute an alteration of the original note. *Bachelor v. Priest*, 12 Pick. (Mass.) 399.

In *Current v. Fulton*, 10 Ind. App. 617, the attachment to a subscription contract of a slip of paper containing a writing which purported to add new conditions to the contract, was held not to constitute a material alteration of the instrument.

Indorsement of Performance of Condition.—Where the principal maker of a note, payable on conditions, indorsed upon the note the fact of the performance of the conditions, it was held not such a material alteration as would discharge the surety. *Jackson v. Boyles*, 64 Iowa 428.

3. Struthers v. Kendall, 41 Pa. St. 214, 80 Am. Dec. 610.

4. Yost v. Watertown Steam-Engine Co. (Tex. Civ. App. 1894), 24 S. W. Rep. 657.

5. Adding Memorandum of Place of Payment.—*Nugent v. Delhomme*, 2 Martin (La.) 307; *American Nat. Bank v. Bangs*, 42 Mo. 450, 97 Am. Dec. 349. See *Exon v. Russell*, 4 M. & S. 505; *Williams v. Waring*, 10 B. & C. 2, 21 E. C. L. 11; *Trapp v. Spearman*, 3 Esp. 57.

6. 2 Min. Inst. 664; Heywood v. Perrin, 10 Pick. (Mass.) 228, 20 Am. Dec. 518. See the title **BILLS AND NOTES**.

7. Memorandum Constituting Part of Instrument—Indiana.—*Cochran v. Nebeker*, 48 Ind. 459.

Iowa.—*State v. Stratton*, 27 Iowa 420, 1 Am. Rep. 282; *Scofield v. Ford*, 56 Iowa 370.

Maine.—*Johnson v. Heagan*, 23 Me. 329.

Michigan.—*Wait v. Pomeroy*, 20 Mich. 425, 4 Am. Rep. 395.

Nebraska.—*Palmer v. Largent*, 5 Neb. 223, 25 Am. Rep. 479; *Davis v. Henry*, 13 Neb. 497.

New Hampshire.—*Gerrish v. Glines*, 56 N. H. 9, 16 Am. L. Reg. N. S. 274.

New York.—*Benedict v. Cowden*, 49 N. Y. 396, 10 Am. Rep. 382.

Texas.—*Meade v. Sandidge* (Tex. Civ. App. 1895), 30 S. W. Rep. 245.

Canada.—*Campbell v. McKinnon*, 18 U. C. Q. B. 612.

Instances.—Thus where a bargain was made as to the terms of payment for land, and a note was thereupon written, payable on demand, and the promisor objected that it was not according to the bargain, and a memorandum was then written on the same paper according to the bargain, it was held that cutting off this memorandum was a material alteration that avoided the note. *Wheelock v. Freeman*, 13 Pick. (Mass.) 165, 23 Am. Dec. 674.

Where a note is written at the foot of a settled account and expresses the settlement

a bond is materially altered by the tearing off a writing attached to it.¹

A promissory note has been held to have been materially altered by the writing of an additional provision in its margin.² And the indorsement of a pretended payment on the back of a note has been held a material alteration thereof.³

2. Change in Respect to Parties—*a*. IN GENERAL.—Any change in the personality, number, or relations of the parties to an instrument is, as a general rule, a material alteration.⁴

***b*. SUBSTITUTION OF PARTIES—Grantors, Promisors—Grantees, Promisees.**—It is a material alteration of a writing to erase the name of a party to the contract and replace it with that of another person. Thus an instrument is materially altered by the substitution of grantors or promisors,⁵

as its consideration, to separate the note from the account, strike out the reference to the consideration, and prefix the words "on demand," alters it materially. *Benjamin v. McConnell*, 9 Ill. 536, 46 Am. Dec. 474.

Severance of Note and "Stub" Containing Qualifying Conditions.—So the detachment from a negotiable promissory note, by the payee or his agent, of a "stub" on which is written, as part of the note, a condition for the maker's benefit, is a material alteration of the note. *Stephens v. Davis*, 85 Tenn. 271.

A testator left in his note-book a note for twenty thousand dollars, payable to his grandson. On the stub was, besides the date, the amount, and the name of the payee, the following memorandum: "To make the amount the same as C. W. C." The grandson tore off the stub and negotiated the note. It was held that the tearing off of the memorandum was not a material alteration, it being proved that C. W. C. had also received a present of twenty thousand dollars. *Cowee v. Cornell*, 75 N. Y. 91, 31 Am. Rep. 428.

Obliterating or Placing Memorandum on Back of Note.—Technical indorsements on the back of a note, or a memorandum annexing a condition to the payment, which was shown to have been on the instrument when delivered, form a substantial part of it, and an erasure of them will avoid the note. *Mechanics Bank v. Valley Packing Co.*, 70 Mo. 643; *McElroy v. Caldwell*, 7 Mo. 587; *Blake v. Coleman*, 22 Wis. 415, 99 Am. Dec. 53.

But words on the back of a note are not *prima facie* a part of the body thereof, but are presumed to be written after the note is completed; and it has been held that any alteration in such memorandum need not be explained in a suit on the note, unless it is shown that they form part thereof. *Bay v. Shrader*, 50 Miss. 326; *Krouskop v. Shontz*, 51 Wis. 204, 37 Am. Rep. 817; *Com. v. Ward*, 2 Mass. 397.

A memorandum made on the back of a note by the holder in pursuance of an agreement with the maker, but without the knowledge of a surety, to the effect that the rate of interest after a specified day will be less than provided in the note, is not an alteration and does not discharge the surety. *Cambridge Sav. Bank v. Hyde*, 131 Mass. 77, 41 Am. Rep. 193.

As to Bona Fide Purchasers.—It has been held that if a memorandum is so attached to a note that it can easily be separated without defacing

the note, the note will not be avoided as to a *bona fide* holder. *Zimmermann v. Rote*, 75 Pa. St. 188; *Noll v. Smith*, 64 Ind. 511, 31 Am. Rep. 131; *Cornell v. Nebeker*, 58 Ind. 425. But compare *Wait v. Pomeroy*, 20 Mich. 425, 4 Am. Rep. 395; *Benedict v. Cowden*, 49 N. Y., 396, 10 Am. Rep. 382; *Gerrish v. Glines*, 56 N. H. 9. See the title *BILLS AND NOTES*.

Detachment of Memorandum Containing No Qualifying Terms.—The maker of a promissory note after signing, but before delivery, added the words "upon condition." The payee afterwards detached the words. It was held that the words were immaterial and void of legal meaning, and that the alteration was also immaterial. *Palmer v. Largent*, 5 Neb. 223, 25 Am. Rep. 479.

1. *Price v. Tallman*, 1 N. J. L. 511.

2. **Addition of Memoranda.**—Thus where the words "Interest at six per cent. per annum" were written on the corner of a note after its execution, it was said: This forms part of the contract. It would clearly have been so if it had been written in the body of the note, and we think a memorandum of this kind written in the corner of the note is equally part of the contract, because the contract must be collected from the four corners of the document, and no part of what appears there must be excluded. *Warrington v. Early*, 2 El. & Bl. 763, 75 E. C. L. 763.

So where the maker of a note, payable generally, wrote on the margin, "Payable at the Bank of America," it was held vitiated as to the indorser. *Woodworth v. Bank of America*, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239.

Words added upon the margin of a note and above the signature of the promisors, by an arrangement between the payee and principal maker after the delivery of the writing, are to be deemed a part of the instrument, and if added without the consent of the sureties, and their liability is thereby increased, the sureties are released. *Warren v. Fant*, 79 Ky. 1.

3. *Johnston v. May*, 76 Ind. 293.

4. **Change in Personality, Number, or Relations of Parties to Instrument.**—2 *Daniel on Neg. Instr.*, § 1387; *Texas Printing, etc., Co. v. Smith* (Tex. App. 1889), 14 S. W. Rep. 1074, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 506; *Donkle v. Milem*, 88 Wis. 33, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 506.

5. **Substitution of Grantor or Promisor.**—It has

or of grantees or promisees.¹

And the Erasure of the Name of the Original Surety, and the substitution of the name of another person, constitute a material alteration of a bond or note which will discharge the nonconsenting sureties.²

Indorsee.—Where the name of a person to whom a promissory note is indorsed is erased from the indorsement, and that of another person inserted, this constitutes an alteration of the note which will prevent a recovery against the indorser.³

c. CHANGING PERSONALITY OF PARTIES BY ADDITION OR ERASURE OF WORDS.—The addition of words after the name of a party to a written contract constitutes a material alteration of the instrument if it has the effect of changing the personality of the party.⁴

The Addition of the Word "Cashier" after the name of a payee of a promissory note, who is the cashier of a bank, has, on the ground that it makes the note payable to the bank, been held an alteration of this character.⁵

Changing Individual Contract to Partnership Contract.—And if the addition or erasure has the effect of changing the instrument from the individual contract of the party to the contract of a partnership of which he is a member, the alteration is a material one.⁶

been held to be a material alteration to cut the name of one maker from a promissory note and substitute another, *Davis v. Coleman*, 7 Ired. (N. Car.) 424; or to erase the name of an obligor in a bond and replace it with the name of another person, *Smith v. Weld*, 2 Pa. St. 54.

1. Substitution of Grantee or Promisee.—The substitution of the name of a different grantee in a deed is a material alteration. *Steele v. Spencer*, 1 Pet. (U. S.) 552; *Peugh v. Mitchell*, 3 App. Cas. (D. C.) 321, 22 Wash. L. Rep. 332.

Erasing the name of the mortgagee and inserting that of another person is a material alteration of a mortgage. *Smith v. Fellows*, 41 N. Y. Super. Ct. 36.

And an alteration of a bond which consists of the substitution of obligees is material. *Dolbier v. Norton*, 17 Me. 307.

Changing the payee in a note is a material alteration. *Sneed v. Sabinal Min., etc., Co.*, 71 Fed. Rep. 493; *Bell v. Mahin*, 69 Iowa 408; *Horn v. Newton City Bank*, 32 Kan. 518; *Erickson v. Oakland First Nat. Bank*, 44 Neb. 622; *Davis v. Bauer*, 41 Ohio St. 257. *Compare* *Ryan v. Springfield First Nat. Bank*, 148 Ill. 349.

While a note originally drawn payable "to the order of myself" was in this form, it was indorsed by the defendant as an accommodation indorser. The word "myself" was afterwards erased from the note, and the name of the plaintiff to whom it was discounted inserted in its stead. This was held a material alteration which discharged the indorser. *Stoddard v. Penniman*, 108 Mass. 366, 11 Am. Rep. 363.

In the *Missouri* case of *Robinson v. Berryman*, 22 Mo. App. 510, it was said that changing a note by erasing the original and inserting a different payee is a material alteration. But with reference to the *Missouri* cases on the question of the materiality of alterations, it is to be observed that the cases in that state can hardly be decisions on the question of the materiality of alterations, since it is the settled

doctrine of these courts that even immaterial alterations will vitiate an instrument. See *supra*, this title, the division *Effect of Alterations*, subd. *Material Alterations*.

2. Substitution of Sureties in Bond.—*Smith v. U. S.*, 2 Wall. (U. S.) 219; *State v. Van Pelt*, 1 Ind. 304; *State v. Polke*, 7 Blackf. (Ind.) 27; *Kiser v. State*, 13 Tex. App. 201.

Substitution of Sureties in Note.—*Davis v. Coleman*, 7 Ired. (N. Car.) 424. See *Gould v. Coombs*, 1 C. B. 543, 50 E. C. L. 543. But *compare* *Jones v. Shelbyville F., etc., Ins. Co.*, 1 Metc. (Ky.) 58.

3. Substitution of Indorsees.—*Grimes v. Piersol*, 25 Ind. 246. See also *Piersol v. Grimes*, 30 Ind. 129, 95 Am. Dec. 673.

4. Addition of Word "Junior" to Name of Party.—The addition of the word "junior" to the name of the payee in a promissory note is a material alteration, where such added word is not merely descriptive of the original payee, but causes the note as altered to be payable to a different person. *Broughton v. Fuller*, 9 Vt. 373.

But the insertion of the word "junior" after the name of the grantee in a deed, was held immaterial. *Coit v. Starkweather*, 8 Conn. 289. It appears that in this case the added word was merely descriptive of the person with whom the bargain was made, and to whom the deed was delivered.

5. Hodge v. Farmers' Bank, 7 Ind. App. 94, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 506.

6. Addition of Words "& Co." to Name of Principal in Contract of Guaranty.—The insertion in a written guaranty of payments by a certain person of the words "& Co." after the name of the person whose payments are guaranteed, constitutes a material alteration of the contract. *Wilde v. Armsby*, 6 Cush. (Mass.) 314.

Addition of Words "& Co." to Name of Maker of Note.—A executed his individual note, and, after obtaining the signature of an accommodation indorser, added the words "& Co." to

Changing Capacity in Which Party is Interested.—Or if, what is essentially the same thing as a complete substitution of parties, the addition or erasure of words changes the capacity in which a party shall be deemed to be interested in the contract, it will be material.¹

d. ADDITION OR ERASURE OF WORDS DESCRIPTIO PERSONÆ.—But if the words added or erased are merely *descriptio personæ*, the change does not fall within the category of material alterations.² So also it seems to have

his own signature, thus making it payable by a firm of which he was a member. This was held a material alteration. *Montgomery v. Cross-thwait*, 90 Ala. 553.

B. F. C. C., a member of the firm of C. & Co., executed a promissory note in his own name, and procured the signatures of two persons thereon as his indorsers. Subsequently, before procuring sale of the note, without their knowledge he added to his signature the words "& Co.," thus making it B. F. C. C. & Co.; and the indorsers were held discharged, although it was contended that the words "& Co." did not vary the contract, as there was no such firm in existence, and that the added words might be treated as a flourish, meaning nothing. *Haskell v. Champion*, 30 Mo. 136.

Words "& Co." Added to Name of Payee in Note.—But in *Elliott v. Blair*, 47 Ill. 342, it was said that an alteration, consisting of the addition of the words "& Co." after the name of the payee, by which a note is made payable to a firm of which the person who was payee, as it was originally drawn, is a partner, is not material as to the maker, his liability not being affected. However, what was said in this case is merely *obiter*; the decision of the case did not turn on this point.

Erasure of Words "& Co." after Names of Drawees of Bill.—Where a bill was addressed to A, B, & Co., and the acceptance was by A & B, and the address of the bill was afterwards, by striking out the words "& Co.," altered to correspond with the acceptance, it was held that as the acceptors would be liable after the alteration was immaterial. *Farquhar v. Southey, M. & M.* 14, 2 C. & P. 497, 12 E. C. L. 232.

1. Addition or Erasure of Words Indicating Representative Capacity of Party.—It has been held to be a material alteration to change the signature of a person subscribing for stock in a corporation to be formed, from "The Fort Worth Printing House, M., Manager," so as to make it the personal subscription of M. Texas Printing, etc., Co. *v. Smith* (Tex. App. 1889), 14 S. W. Rep. 1074.

Where a note signed "A B, Treasurer of St. Paul's Parish," was altered by making the word "of" in the signature into the word "for," and adding after the word "parish" the words "duly authorized," it was held that since the note before the alteration made the maker personally liable, but as altered bound the parish, the alteration was material. *Sheridan v. Carpenter*, 61 Me. 83.

Where the president of a corporation indorsed a note in blank, adding the word "Pres't" to his signature, and the note was afterwards filled up and such word erased, the erasure was held a material alteration

which avoided the note as to one who received it for a precedent debt with knowledge of the representative character of the indorser. *Sharpe v. Bellis*, 61 Pa. St. 69, 100 Am. Dec. 618. Compare *Thackaray v. Hanson*, 1 Colo. 365.

And where a deed, executed by one having a power of attorney to convey land, and in form his personal deed, is so altered as to make it purport to be the deed of his principal by him, the alteration is a material one. *North v. Henneberry*, 44 Wis. 306.

Addition of Word "Agent" after Maker's Name.—The addition of the word "agent" after the signature of the maker of a promissory note, there being no evidence that such maker's principals were accustomed to pay notes drawn in this form, was held to be an entirely immaterial alteration. *Manufacturers', etc., Bank v. Follett*, 11 R. I. 92, 23 Am. Rep. 418.

Addition of Word "Collector" after Payee's Name.—Where it appeared that the payee of a promissory note had designedly altered it after delivery to him, and without the maker's consent or knowledge, by writing in the body of the note after his own name the word "collector," and this disclosure was made before the note was offered in evidence, it was held that it was correctly refused admission in the case on the ground that it was an altered instrument. *York v. Janes*, 43 N. J. L. 332. But it is to be observed that this decision is apparently controlled by the case of *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232, where it is said that even immaterial alterations are fatal to the validity of an instrument.

2. Where the Words Are Descriptio Personæ.—*Coit v. Starkweather*, 8 Conn. 289.

The alteration of a joint note signed by A, B, C, and D, which had the words "Trustees of the First Universalist Church, of Pierceton, Indiana," attached to it and following the names of the makers, by erasing the words quoted, was held immaterial, for the reason that these words constituted merely a description of the persons of the makers, without in any manner affecting the legal character of the note itself. *Hayes v. Matthews*, 63 Ind. 412, 30 Am. Rep. 226; *Hayes v. Brubaker*, 65 Ind. 27.

A note purporting by its terms to be the personal promise of the makers was signed by A, B, and C, "as trustees of First Universalist Society," a blank being left for the signature of D, a fourth trustee; and the note was delivered to the payee to obtain that signature, which he did after tearing off, without D's knowledge, the descriptive words. It was held that, as the note made the trustees personally liable, the tearing off of the descriptive words was an immaterial alteration.

been held that where the addition merely extends the description and makes it more exact, there is no material alteration.¹

e. FORMAL CHANGES IN NAME OF PARTY.—It seems that, as a general rule, alterations or additions which have only the effect of perfecting the name of a party to a written contract, are not material.² Where both names designate the same party, the changing of the name of a party to an instrument has been held immaterial.³

f. ADDITION OF PARTIES—General Rule.—It has been laid down as a general rule that if a note has been fully executed and delivered, without any agreement that further signatures thereto shall be obtained, and another person signs the same without the knowledge or consent of the previous signers, this is such a material alteration as relieves the previous signers from liability.⁴

Burlingame v. Brewster, 79 Ill. 515, 22 Am. Rep. 177.

1. Addition of Name of Bank after Word "Cashier."—It has been held that it is immaterial to add the name of the bank after the word "cashier" on a note which was given to bind the bank. *Folger v. Chase*, 18 Pick. (Mass.) 63; *Genesee Bank v. Patchin Bank*, 13 N. Y. 309.

2. Correcting Name of Party.—Where a contract signed "D. & R., the first party, per B., special agent," on its face showed the first party to be "D. & R. Bldg. & Manfg. Co.," and the agent B., after the signature of the contract by the parties of the second part, added the words "Bldg. & Manfg. Co." to the signature after the names D. & R., the alteration was held immaterial. *Davis, etc., Bldg., etc., Co. v. Dix*, 64 Fed. Rep. 406.

In *Derby v. Thrall*, 44 Vt. 413, 8 Am. Rep. 389, it was held that a change in the Christian name of the payee of a note from "Franklin" to "Francis E.," the latter being the true name of the person to whom the note was intended to be given, was not a material alteration.

And it has been held that where the Christian name of the payee of a note was by mistake written Catharine, the substitution of the name Rebecca, which was the name of Catharine's sister, and of the true lender of the money, was held an immaterial alteration. *Latshaw v. Hildebeitel*, 2 Penny. (Pa.) 257.

The interlineation of the surname of the payee of a note, it being proved that the note was originally given to the person whose name was inserted, has been held immaterial. *Mouchet v. Cason*, 1 Brev. (S. Car.) 307.

The erasure of the middle initial of the name of the payee in a note, originally written Benjamin R. Cole, was held immaterial, the note being intended by both parties to be made payable to Benjamin Cole. *Cole v. Hills*, 44 N. H. 227. And see *Banks v. Lee*, 73 Ga. 25. See *supra*, this title, division *Effect of Alterations*, subd. *Changes to Conform Instrument to Intention of Parties*.

Retracing Name of Party.—Where the obligee in a bond attempted to retrace part of the obligor's name, which had been blotted with ink and obscured, and in doing so misspelled it, but not so as to alter the sound, the alteration was held immaterial. *Dunn v. Clements*, 7 Jones (N. Car.) 58.

3. The running of a pen through the words, "The Providence Steam Pipe and Gas Com-

pany," which was one of the names of the partnership to which the note as originally drawn was payable, and inserting above these words the style of the firm in the partnership names, was held an immaterial alteration. *Arnold v. Jones*, 2 R. I. 345.

Addition of Individual Names of Partners to Bill Signed in Firm Name.—Where a bill as originally drawn was signed by the firm name of the partners, the addition, after acceptance of the bill, of the individual names of the partners, was held to constitute an immaterial alteration. *Blair v. State Bank*, 11 Humph. (Tenn.) 84.

4. Addition of Parties—General Rule.—*Bowers v. Briggs*, 20 Ind. 139; *Nicholson v. Combs*, 90 Ind. 515, 46 Am. Rep. 229; *Browning v. Gosnell* (Iowa 1894), 59 N. W. Rep. 340; *Limestone Bank v. Penick*, 5 T. B. Mon. (Ky.) 25; *Shipp v. Suggett*, 9 B. Mon. (Ky.) 8; *Singleton v. McQuerry*, 85 Ky. 41. See *Ex p. Yates*, 2 De G. & J. 191; *Pulliam v. Withers*, 8 Dana (Ky.) 98, 33 Am. Dec. 479.

New York Decisions.—In New York there is some conflict in the decisions on the question of whether the addition of the name of a promisor to a note constitutes a material alteration. In the case of *Chappell v. Spencer*, 23 Barb. (N. Y.) 584, the holder of a note, upon negotiating and obtaining money upon it, had, instead of indorsing it, signed his name to the note under the names of the makers, adding to his name the word "surety." This was held a material alteration.

But in the case of *McCaughy v. Smith*, 27 N. Y. 39, there seems to be a tendency to limit, if not to subvert, the rule enunciated in the above-cited case of *Chappell v. Spencer*, 23 Barb. (N. Y.) 584. In that case, one Hungerford signed the several note of one Hall after it was made and delivered and indorsed by Smith. Smith defended and set up the alteration as a defense. Judge Emott admits the rule as to the alteration of promissory notes as the same was held in *Chappell v. Spencer*, 23 Barb. N. Y. 584. He says: "It is certainly the result of the later authorities that the addition of another maker to a note made by one or more parties is a material alteration of the contract." He put the reversal of the decision of the court below, so far as his view of the case is expressed in the opinion, upon the ground that Hungerford was guarantor of the note and not a maker, and four judges concur with him in reversing the judgment below, as

As to the Original Sureties.—Certainly, as to the original sureties, the addition of the signature of another person as maker or surety is a material alteration of a note.¹ And the execution of a bond by another surety has been held to be such a material alteration as would release the prior sureties.²

As to the Original Makers.—The addition of another signature to a promissory note has, in cases where it does not appear whether the added party really signed as maker or only as surety, been held to be such a material alteration as discharges the original maker who has not consented thereto.³ And it has even been expressly held that this will be a material alteration as to the original maker, notwithstanding that the person who thus signed the note ostensibly as maker, in fact signed it only as surety.⁴ But in other authorities the

the reporter says, "without passing upon the question as to the character of Hungerford's liability." Three of the judges *dissented* from the decision.

In *Brownell v. Winnie*, 29 N. Y. 400, 86 Am. Dec. 314, it was said that although the addition of another maker might vitiate a joint and several note, it would not have that effect on a several note. This case, however, is not a decision on the materiality of such an alteration. The facts were that the note was made by one Swinton, for a good consideration, and was a valid note in the hands of Winnie. The alteration consisted in Winnie's adding his name to the note as another maker. Winnie alone made defense, and set up and urged his own alteration of the note as his defense, but he was held liable.

These two cases are, in *McVean v. Scott*, 46 Barb. (N. Y.) 379, subjected to severe criticism. It is pointed out that the case of *Brownell v. Winnie*, 29 N. Y. 400, 86 Am. Dec. 314, does not turn on the materiality of the alteration. And it is shown that the case of *McCaughy v. Smith*, 27 N. Y. 39, was decided by a hopelessly divided court necessarily without asserting any principle, and the decision is declared to be clearly erroneous. The court gives its unqualified approval to the rule stated in *Chappell v. Spencer*, 23 Barb. (N. Y.) 584, and holds that the addition of the signatures of two persons as sureties on a joint and several note constitutes a material alteration, and is fatal to the validity of the note as against the original parties.

But in *Card v. Miller*, 1 Hun (N. Y.) 504, the court considered itself bound by the two decisions in the court of appeals, and held that the signing of a note by an additional maker under the name of the original maker was not a material alteration such as would release the latter. And the same position is taken in *Denick v. Hubbard*, 27 Hun (N. Y.) 347.

Addition of Signature of Wife to Mortgage.—A mortgage was executed and delivered as a complete and perfect instrument by the husband alone, with the intention and understanding that his wife should not sign it. The mortgagee fraudulently procured the wife to sign and acknowledge it, and having thus obtained her signature, did, without the knowledge or consent and against the will and wish of the husband, so alter the mortgage and acknowledgment as to make it a mortgage by two persons instead of one, whereby it would

become a lien upon the homestead as well as the other land described in it. It was held that the alteration was material. *Cutler v. Rose*, 35 Iowa 456.

But it has been held that a mortgage was not materially altered by the addition by the grantee of the name of the grantor's wife as a party signing the same for the purpose of releasing dower. *Kendall v. Kendall*, 12 Allen (Mass.) 92.

1. Addition of Other Makers or Sureties—Effect upon Original Sureties.—*Henry v. Coats*, 17 Ind. 161; *Houck v. Graham*, 106 Ind. 195, 55 Am. Rep. 727; *Hall v. McHenry*, 19 Iowa 521, 87 Am. Dec. 451; *Berryman v. Manker*, 56 Iowa 150; *Sullivan v. Rudisill*, 63 Iowa 158; *Browning v. Gosnell* (Iowa 1894), 59 N. W. Rep. 340; *Wallace v. Jewell*, 21 Ohio St. 163, 8 Am. Rep. 48. See *Crandall v. Auburn First Nat. Bank*, 61 Ind. 349.

But in *Bowser v. Rendell*, 31 Ind. 128, the holders of a note, executed by one Childs as maker and Rendell as his surety, attempted to discount it at a bank, but the bank made it a condition to its discount that they should add their signatures to it as makers. To procure its discount they did so, but with the express understanding between them and the bank that they signed it as sureties for both the other makers and not as cosureties with Rendell for Childs. It was held that this was not such an alteration of the note as would discharge Rendell.

2. Oneale v. Long, 4 Cranch (U. S.) 60, *reversing Long v. Oneale*, 1 Cranch (C. C.) 233; *Harper v. State*, 7 Blackf. (Ind.) 61; *People v. Brown*, 2 Dougl. (Mich.) 9.

3. Additional Parties to Note—Effect upon Original Maker.—*Gardner v. Walsh*, 5 El. & Bl. 83, 85 E. C. L. 83, *overruling Catton v. Simpson*, 8 Ad. & El. 136, 35 E. C. L. 355; *Reid v. Humphrey*, 6 Ont. App. Rep. 403; *Dickerman v. Miner*, 43 Iowa 508; *Hamilton v. Hooper*, 46 Iowa 515, 26 Am. Rep. 161; *Sullivan v. Rudisill*, 63 Iowa 158; *Lunt v. Silver*, 5 Mo. App. 186; *Harper v. Stroud*, 41 Tex. 367. *Compare Cason v. Wallace*, 4 Bush (Ky.) 388.

4. Additional Surety—Effect upon Original Promisor.—*Ford v. Cameron First Nat. Bank* (Tex. Civ. App. 1896), 34 S. W. Rep. 684. In this case, Special Chief Justice Browne, referring to the case of *Mersman v. Werges*, 112 U. S. 139, a leading case on this question, cited and quoted from in the next succeeding note, says: "To follow it, however,

addition of the name of a surety to a promissory note is not regarded as such an alteration as will discharge the maker.¹

Liability of the Additional Promisor.—The general rule is that the person who thus signs a note as an additional maker or surety will be bound as upon a new contract.²

Addition of Payee.—It has been held a material alteration of a note which is payable to one person only, to add the name of another person thereto as an additional payee.³

g. ERASURE OF NAMES OF PARTIES—**Name of Principal.**—Cutting off the name of one of the makers of a note is a material alteration.⁴ And the erasure or

would virtually do away with the rule established in this state, and the great majority of the others to which we have referred, because in almost every case it could be shown that the additional signer meant only to secure or guarantee the payment of the note. The case at bar furnishes an apt illustration of this fact. Of course, if the additional signature is placed upon the note as a surety or as a warrantor, this does not alter the instrument; it remains intact. The reason why the addition of a name to a note, as a joint maker, after its issuance, materially alters it, is because it changes the number of parties and their relative rights; it changes the rate of contribution, and it changes the character and description of the instrument. The original obligor may thereby be subjected to a suit in a county other than that of his residence and suffer inconvenience and injury, as was done in this very case. If it is deemed expedient to obtain an additional name to a note to make it more secure, and not for the purpose of obtaining some undue advantage, the holder could easily obtain the consent of the maker. We believe that the rule which requires that the integrity and identity of this class of paper shall be maintained, presents no hardship, and is founded on sound policy."

In *England*, if a note is signed by A, and subsequently by B as a surety for A, unless such signature of B is in virtue of a previous agreement it will be void without an additional stamp. *Clerk v. Blackstock*, Holt 474. But it is otherwise if the addition was afterwards made in accordance with the prior agreement of the parties. *Ex p. White*, 2 Deac. & Ch. 334.

1. *Mersman v. Werges*, 112 U. S. 139; *Montgomery R. Co. v. Hurst*, 9 Ala. 513; *Ives v. McHard*, 2 Ill. App. 176; *Stone v. White*, 8 Gray (Mass.) 589; *Miller v. Finley*, 26 Mich. 249, 12 Am. Rep. 306; *Gano v. Heath*, 36 Mich. 441; *Barnes v. VanKeuren*, 31 Neb. 165. And see *Hochmark v. Richler*, 16 Colo. 263; *Babcock v. Murray*, 58 Minn. 385. But compare *Ward v. Hackett*, 30 Minn. 159, 44 Am. Rep. 187.

In the above-cited case of *Mersman v. Werges*, 112 U. S. 139, Mr. Justice Gray, in delivering the opinion of the court, says: "The addition of a new person as a principal maker of a promissory note, rendering all the promisors apparently jointly and equally liable, not only to the holder, but also as between themselves, and so far tending to lessen the ultimate liability of the original maker or

makers, has been held in the courts of some of the states to be a material alteration. However that may be, yet where the signature added, although in form that of a joint promisor, is in fact that of a surety or guarantor only, the original maker is, as between himself and the surety, exclusively liable for the whole amount, and his ultimate liability to pay that amount is neither increased nor diminished; and, according to the general current of the American authorities, the addition of the name of a surety, whether before or after the first negotiation of the note, is not such an alteration as discharges the maker."

2. **Liability of Additional Maker or Surety.**—*Crandall v. Auburn First Nat. Bank*, 61 Ind. 349; *Favorite v. Stidham*, 84 Ind. 423; *Dickerman v. Miner*, 43 Iowa 508; *Sullivan v. Rudisill*, 63 Iowa 158; *Browning v. Gosnell*, 91 Iowa 448; *Rhoades v. Leach* (Iowa 1895), 61 N. W. Rep. 988, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 506; *Partridge v. Colby*, 19 Barb. (N. Y.) 248. See also *McVean v. Scott*, 46 Barb. (N. Y.) 379. And see the title **BILLS AND NOTES**.

3. **Additional Payee.**—*Aldrich v. Smith*, 37 Mich. 468, 26 Am. Rep. 536.

Inserting Name of Assignee in Assignment of Bond.—Where an assignment of a bond as originally written did not contain the name of any assignee, the insertion of the name of an assignee was held a material alteration of the assignment. "As it was originally written, it had no legal effect; it spoke no language at all. By the addition of these words, a distinct legal effect was given to it; it was made to speak effectually and clearly." *Park v. Glover*, 23 Tex. 469.

Addition of Acceptor.—It has been held that, after a bill has been accepted by the parties to whom it is addressed, and the bill is perfected, the writing of an additional name across the face of the paper as acceptor, even with the knowledge of the party, and discounting it, without the consent of the indorser, does not vitiate the paper. *Smith v. Lockridge*, 8 Bush (Ky.) 423.

4. **Erasure of Name of Principal.**—*Gillett v. Sweat*, 6 Ill. 479. See *Nicholson v. Revill*, 6 N. & M. 192, 4 Ad. & El. 675, 31 E. C. L. 166, 1 H. & W. 756.

Erasure of Name of Infant Comaker.—It has been held that the maker of a joint note will not be discharged by the erasure of the name of an infant comaker, after the contract has been repudiated and rescinded by him. *Young v. Currier*, 63 N. H. 419.

excision of the name of one of the principal obligors in a bond is a material alteration thereof which vitiates it as to the other obligors,¹ especially the sureties.²

Name of Surety.—The erasure of the name of one of the sureties on a bond is a material alteration of the instrument which vitiates it as to the other sureties.³ So also the erasure of the name of a surety on a promissory note or bill of exchange is a material alteration as to the other sureties which will discharge them from liability on the instrument.⁴ But the erasure of the name of a surety on a promissory note, by agreement between the surety and payee, has been held not to be such an alteration as will invalidate the instrument as against the principal.⁵

Name of Indorser.—Striking off the name of an indorser of a promissory note, by the holder, has been held to prevent a recovery by him against subsequent indorsers.⁶

h. CHANGES AFFECTING THE RELATION OF THE PARTIES.—Striking out the word “surety,” written after the name of one of the signers of a promissory note, is a material alteration of the note which discharges the surety.⁷

Striking Name of Guarantor from Instrument of Guaranty.—It has been held to be a material alteration if an instrument of guaranty is executed by several parties, and the party guaranteed strikes out the name of each on payment by him of his proportion. *Bank of Hindostan v. Smith*, 36 L. J. C. P. 241.

Erasure of Name of Subscriber for Stock from Subscription Paper.—Erasing from a subscription paper the name of a previous subscriber to the stock of a corporation does not affect the liability of a subsequent subscriber. Such alteration of the subscription list is deemed immaterial, as each subscription forms a separate contract with the company, and, in the absence of proof, there could be no presumption that the party was induced to subscribe because previous subscribers had done so. *Whittlesey v. Frantz*, 74 N. Y. 456. See *Landwerlen v. Wheeler*, 106 Ind. 523.

1. *Love v. Shoape*, Walk. (Miss.) 508; *Briggs v. Glenn*, 7 Mo. 572; *Piercy v. Piercy*, 5 W. Va. 199.

2. *Martin v. Thomas*, 24 How. (U. S.) 315.

3. **Erasure of Name of One of Several Sureties in a Bond.**—*Smith v. U. S.*, 2 Wall. (U. S.) 219; *State v. Craig*, 58 Iowa 238; *Barrington v. Washington Bank*, 14 S. & R. (Pa.) 405; *Davis v. State*, 5 Tex. App. 48.

4. **Erasure of Name of Surety on Note.**—*McCramer v. Thompson*, 21 Iowa 244; *Hall v. McHenry*, 19 Iowa 521, 87 Am. Dec. 451. See *Mason v. Bradley*, 11 M. & W. 590.

5. **Erasure of Name of Surety by Agreement between Him and Payee.**—*Broughton v. West*, 8 Ga. 248. See *Huntington v. Finch*, 3 Ohio St. 445.

The plaintiff had written his name across the back of a note made by the defendant, and had subsequently paid it. In a suit by him against the maker, it was held that the erasure of his indorsement by a pen-mark drawn through his signature was not a material alteration as between the parties to the suit, and that the liability of the maker was not affected thereby. *Tutt v. Thornton*, 57 Tex. 35.

Where the payee of notes, intending to negotiate them, signed the notes as security, but,

upon being informed that they were not in proper form for negotiation, erased his signature and indorsed them, this was held not to be a material alteration affecting the liability of the maker, which rendered them void in the hands of the indorsee. *Lynch v. Hicks*, 80 Ga. 200.

6. *Curry v. Mobile Bank*, 8 Port. (Ala.) 360.

7. **Erasure of Word “Surety” after Name of Signer of Note.**—*Laub v. Paine*, 46 Iowa 550, 26 Am. Rep. 163; *Rogers v. Tapp*, Tex. Comrs. of Appeal, Dec. 5, 1881, 14 Cent. L. J. 38.

In a *California* case, where a memorandum had been made upon a note to the effect that certain parties who had signed it were sureties, and the memorandum was torn off by the holder, it was held that the alteration was not material. The court said: “The defendants were liable to the plaintiff whether they signed as principals or sureties, and it is well settled that an alteration which does not vary the meaning, the nature, or subject-matter of the contract, is immaterial. *Humphreys v. Crane*, 5 Cal. 173.”

But the correctness of this decision has been questioned by an eminent authority on negotiable instruments. See 2 *Daniel Negotiable Instruments*, par. 1387. And in the case of *Laub v. Paine*, 46 Iowa 550, 26 Am. Rep. 163, *Adams, J.*, in delivering the opinion of the court, said of this case: “In our opinion, the court in that case erred in assuming that the alteration did not vary the meaning, nature, or subject-matter of the contract. It is true the holder of a promissory note may recover the whole amount of a surety and as speedily as of the principal. The meaning and nature of the contract, so far as liability to the holder is concerned, is not changed by an alteration like the one in question; but the meaning and nature of the contract as between the surety and principal is greatly changed, and this is sufficient to make the alteration a material one.” Elsewhere in the opinion delivered in this case, it is said that by the erasure of the word “surety” after the name of one of the signers of a note “he became liable to be subjected to the necessity of showing by parol,

3. Change in Joint or Several Nature of Contract.—An addition or alteration of words in a writing, which has the effect of changing a joint promise to one joint and several, or *vice versa*, has been held a material alteration.¹

4. Change in Place of Execution.—It is a material alteration of an instrument to change the place of execution expressed therein,² or to insert the name of a place other than the true one when none is expressed.³

Insertion of Name of Actual Place of Execution.—It has been held, however, that if the payee adds to a note the name of the actual place of execution, this does not in any way alter the contract or impart to it any effect that it did not before possess, and is not a material alteration of the instrument.⁴

5. Change in Date.—An alteration in the date of a negotiable instrument is

as between him and the principal, what his true relation to the instrument was, whereas before the alteration it appeared upon its face. Nor is this a trifling matter. The evidence when wanted might not be obtainable. If the rule contended for by the appellee is correct, whoever signs a note as surety is exposed to hazards far beyond what his contract imports.”

Changing Indorser of Note into Guarantor.—Where the payee in a promissory note sold it and placed his name in blank upon the back, and a guaranty was written over his signature, this was held to be a material alteration. *Belden v. Hann*, 61 Iowa 42.

Changing Indorser to Payee.—Where the maker of a note which had been indorsed for his accommodation by the payee and by another person inserted the name of the second indorser as payee in the body of the note, it was held that the alteration released both indorsers. *Aldrich v. Smith*, 37 Mich. 468, 26 Am. Rep. 536.

Addition of Word “Security” after Name of Indorser of Note.—Where the defendant, at the time of the execution of the note in suit and at the payee’s request, had written his name across the back of the instrument, and the word “security” had afterwards, without his knowledge or consent, been written over his signature, it was held that, since by the *Iowa* statutes a blank indorsement of a promissory note by a person not a payee, indorsee, or assignee thereof, creates a contract of guaranty, and since the contract of a guarantor under the statutes of this state differs in many respects from that of a surety, the addition, as it changed the defendant’s liability from that of a guarantor to that of a surety, was a material alteration as to the defendant, and prevented a recovery against him. *Robinson v. Reed*, 46 Iowa 219.

1. Changing Words “I Promise” to “We Promise.”—Converting a joint and several note into one which is merely joint, as by changing the words “I promise” to “We promise,” has been held a material alteration. *Eckert v. Louis*, 84 Ind. 99; *Humphreys v. Guillo*, 13 N. H. 385, 38 Am. Dec. 499.

But in *Eddy v. Bond*, 19 Me. 461, 36 Am. Dec. 767, it was held that where a note which, as originally drawn and signed, read, “I promise,” was altered to read, “We promise,” the alteration was not material. The grounds for this decision are not clear. The court, by Shepley, J., said: “As first drawn, the signers

were jointly and severally bound. The alteration limited their liability to the holder, and did not change their legal rights in relation to each other. It was not made by the holder, but by a party to the note before it was negotiated.”

Changing Several to Joint Indorsement.—It has been held that the holder of a negotiable note, severally indorsed in blank by two or more persons, has no right to fill up one indorsement over the signatures, so as to make the assignment to him the joint act of all those whose names are thus written upon it. *Morrison v. Smith*, 13 Mo. 234, 53 Am. Dec. 145.

Changing Joint Note into One Joint and Several.—An alteration having the effect of changing a joint note into a joint and several note has been held to be material. *Samson v. Yager*, 4 U. C. Q. B. O. S. 3. See *Perring v. Hone*, 4 Bing 28, 13 E. C. L. 328, 12 Moore 135, 2 C. & P. 401, 12 E. C. L. 189.

In *Miller v. Reed*, 27 Pa. St. 244, 67 Am. Dec. 459, it was held that, since the common-law distinctions between instruments joint and those joint and several were extinguished by the *Pennsylvania* statutes, the insertion of the words “or either of us,” in a note executed by two persons, is not such a material alteration as will avoid the instrument.

Instrument Signed by Only One Person.—The substitution of “we” for “I” in a note signed by only one maker is immaterial. *Morey v. Dotter*, 4 Phila. (Pa.) 136.

Where a written guaranty, which read, “We hereby guarantee,” etc., was signed by only one person, the striking out of the word “we” and inserting the word “I” in lieu thereof, so as to make the instrument read, “I hereby guarantee,” is not a material alteration. *Kline v. Raymond*, 70 Ind. 271.

2. Changing Place of Execution.—*McQueen v. McIntyre*, 30 U. C. C. P. 426; *Mahaive Bank v. Douglass*, 31 Conn. 170.

3. Addition of False Place of Execution.—An addition by the payee of the word and letters “Washington, D. C.,” to the signature of the maker of a note, without his consent, and with the intent to use that word and those letters as a part of the date of the note, which was really made in Perryopolis, in Pennsylvania, with intent to make it negotiable according to the laws then in force in the District of Columbia, is a material alteration of the note, and makes it void. *Commercial, etc., Bank v. Patterson*, 2 Cranch (C. C.) 346.

4. Houston v. Potts, 64 N. Car. 33.

material, without regard to whether such change affects the time of payment of the paper or not, or hastens or postpones it; suffice it to say, it is not the contract into which the parties have entered.¹

Date of Indorsement.—It has been held, however, that an indorsement being no part of the original obligation, an addition of, or a change in, a date thereto is not a material alteration of the instrument.²

6. Change in Amount of Principal.—Any alteration in the amount of the principal of an instrument conditioned for the payment of money is material,

1. Rule as to Change in Date—England.—*Cock v. Coxwell*, 2 Crompt. M. & R. 291; *Outhwaite v. Luntley*, 4 Campb. 179; *Walton v. Hastings*, 4 Campb. 223; *Master v. Miller*, 4 T. R. 320; *Hirschman v. Budd*, L. R. 8 Exch. 171; *Parry v. Nicholson*, 13 M. & W. 778; *Bowman v. Nichol*, 5 T. R. 537.

Canada.—*Gladstone v. Dew*, 9 U. C. C. P. 439; *Meredith v. Culver*, 5 U. C. Q. B. 218.

United States.—*Wood v. Steele*, 6 Wall. (U. S.) 80.

Arkansas.—*Lemay v. Williams*, 32 Ark. 166.

Delaware.—*Warren v. Layton*, 3 Harr. (Del.) 404.

Illinois.—*Wyman v. Yeomans*, 84 Ill. 403.

Indiana.—*Hamilton v. Wood*, 70 Ind. 306.

Kansas.—*Fraker v. Cullum*, 21 Kan. 555.

Kentucky.—*Miles v. Major*, 2 J. J. Marsh. (Ky.) 154; *Commonwealth Bank v. McChord*, 4 Dana (Ky.) 191; *Stout v. Cloud*, 5 Litt. (Ky.) 206; *Letcher v. Bates*, 6 J. J. Marsh. (Ky.) 524, 22 Am. Dec. 92; *Lisle v. Rogers*, 18 B. Mon. (Ky.) 528.

Maine.—*Hervey v. Harvey*, 15 Me. 357.

Maryland.—*Mitchell v. Ringgold*, 3 Har. & J. (Md.) 159, 5 Am. Dec. 433.

Missouri.—*Aubuchon v. McKnight*, 1 Mo. 312; *King v. Hunt*, 13 Mo. 97; *Owings v. Arnot*, 33 Mo. 406; *Britton v. Dierker*, 46 Mo. 591, 2 Am. Rep. 553.

Nebraska.—*Brown v. Straw*, 6 Neb. 536, 29 Am. Rep. 369.

New Hampshire.—*Bowers v. Jewell*, 2 N. H. 543.

New York.—*Rogers v. Vosburgh*, 87 N. Y. 228.

Pennsylvania.—*Hocker v. Jamison*, 2 W. & S. (Pa.) 438; *U. S. Bank v. Russel*, 3 Yeates (Pa.) 391; *Mechling v. Hartzell*, 4 Penny. (Pa.) 500; *Stephens v. Graham*, 7 S. & R. (Pa.) 505, 10 Am. Dec. 485; *Kennedy v. Lancaster County Bank*, 18 (Pa.) St. 347; *Miller v. Gilleland*, 19 Pa. St. 119; *Getty v. Shearer*, 20 Pa. St. 12; *Heffner v. Wenrich*, 32 Pa. St. 425.

Tennessee.—*Taylor v. Taylor*, 12 Lea (Tenn.) 714.

Wisconsin.—*Low v. Merrill*, 1 Pin. (Wis.) 340.

But see *Union Bank v. Cook*, 2 Cranch (C. C.) 218. Compare *Merchants' Bank v. Stirling*, 13 Nova Scotia 439; *State v. Miller*, 3 Gill (Md.) 335.

Change of Date in Instructions to Draw.—Where a party gave a written authority by letter to draw a draft upon him at ninety days from the 10th of April, an alteration of this letter to read, "ninety days from the 16th

April," without the knowledge or consent of the writer, will discharge him from liability as an acceptor by virtue of such authority. *Lewis v. Kramer*, 3 Md. 265.

Change of Date of Check.—The plaintiff on April 20th, intending to be absent from his place of business for a few days, drew his check on the defendant, dated April 22d, payable to M., his clerk, which he left in charge of M., with directions to draw the money on the 22d, in case he did not return before noon of that day, and deliver the same to the foreman to be used in paying his employees. M. altered the date of the check to the 21st, and on that day drew the money thereon and absconded. The plaintiff did not return until after the time appointed. In an action to recover the alleged balance on deposit, it was held that the defendant was not entitled to charge to the plaintiff's account the amount of the check. *Crawford v. West Side Bank*, 100 N. Y. 50, 53 Am. Rep. 152.

A clerk intrusted with a check by the payee to pay into a bank, absconded with it, and, after altering the date from the 2d of March to the 26th of March, passed it to the plaintiff for value. Payment of the check was countermanded at the bank, and on presentation payment was refused. In an action brought by the plaintiff against the drawer of the check, it was held that the alteration was material, and invalidated the check. *Vance v. Lowther*, 1 Exch. Div. 176.

Change of Dates in Lease.—Where a lease of land is made, to commence at a future date, to one already in possession thereof, a subsequent alteration by the lessee, of certain dates in said lease referring to the time when the lease was made, will not affect the lessee's right to the possession of said premises. *Lee v. Lee*, 83 Iowa 565.

Insertion of Date in Deed of Personal Property.—A deed of conveyance for slaves having been signed, sealed, and delivered, with a blank left for the date, the donee afterwards inserted the date. It was held that the insertion did not vitiate the deed, the date not being a material part thereof. *Whiting v. Daniel*, 1 Hen. & M. (Va.) 391.

2. Griffith v. Cox, 1 Overt. (Tenn.) 210.

Addition of Date to an Indorsement of a Partial Payment.—An indorsement of a partial payment on the back of a note forms no part of the original instrument, and the addition of a date to this indorsement can have no effect upon the legal validity of the instrument. It is not a material alteration of the note, and can neither destroy its efficacy nor give it force. *Howe v. Thompson*, 11 Me. 153.

whether such alteration increases¹ or decreases² the amount.

Provision for Attorney's Fees.—Thus it has been considered a material alteration of an instrument to insert therein,³ or erase therefrom,⁴ a provision for the payment of attorney's fees in the case of suit brought, or to change the amount of the fee which is provided for in such clause.⁵

7. Change in Interest—Alteration of Rate.—It is a material alteration of a bill

1. Increasing Amount of Principal—*Alabama*.—Green v. Snead, 101 Ala. 205.

Connecticut.—*Etna Nat. Bank v. Winchester*, 43 Conn. 391.

Delaware.—*Newark Bank v. Crawford*, 2 Houst. (Del.) 282.

Indiana.—*Collier v. Waugh*, 64 Ind. 456.

Iowa.—*Knoxville Nat. Bank v. Clark*, 51 Iowa 264, 33 Am. Rep. 129.

Kansas.—*Johnson v. Moore*, 33 Kan. 90.

Kentucky.—*Woolfolk v. Bank of America*, 10 Bush (Ky.) 504.

Massachusetts.—*Wade v. Withington*, 1 Allen (Mass.) 561; *Cape Ann Nat. Bank v. Burns*, 129 Mass. 596; *Greenfield Sav. Bank v. Stowell*, 123 Mass. 196, 25 Am. Rep. 67.

New Hampshire.—*Goodman v. Eastman*, 4 N. H. 455.

North Carolina.—*Cheek v. Nall*, 112 N. Car. 370.

South Carolina.—*Mills v. Starr*, 2 Bailey (S. Car.) 359.

Virginia.—*Batchelder v. White*, 80 Va. 103.

Wisconsin.—*Matteson v. Ellsworth*, 33 Wis. 488, 14 Am. Rep. 766.

And see *Harris v. Bradford*, 4 Ala. 214; *Worrall v. Gheen*, 39 Pa. St. 388.

Change Increasing Amount of Bond.—Where, in an action against the sureties upon a collector's bond, it appeared that after the bond had been executed and approved it had been altered without the knowledge or consent of the sureties, but with the knowledge and approval of the selectmen of the town, by changing the penal sum from twenty-five hundred dollars to twenty-five thousand dollars, it was held that the alteration was material, and the sureties were released. *Dover v. Robinson*, 64 Me. 183.

2. Decreasing Amount of Principal.—*Chism v. Toomer*, 27 Ark. 108; *Johnston v. May*, 76 Ind. 293; *Hewins v. Cargill*, 67 Me. 554; *Doane v. Eldridge*, 16 Gray (Mass.) 254; *State Sav. Bank v. Shaffer*, 9 Neb. 1; *Portage County Branch Bank v. Lane*, 8 Ohio St. 405; *Stephens v. Graham*, 7 S. & R. (Pa.) 505, 10 Am. Dec. 485.

Alteration of Amount by Credit Indorsement.—A surety signed a note for eleven hundred dollars for the purpose of permitting his principal to take up and cancel three unmatured notes aggregating a like amount, and of releasing a mortgage given to secure them. One of the notes having been misplaced by the payee, the principal retired the other two only, and the value of the third note was calculated and indorsed as a credit on the back of the new note. One of the notes being outstanding, the mortgage was not released. This arrangement was made without the knowledge or consent of the surety. It was held that the credit indorsement decreasing the amount of the note was a material alteration

and released the surety. *Johnston v. May*, 76 Ind. 293.

Erasure of Indorsement Affecting Amount.—During the pending of a suit for the collection of a note, the plaintiff made a proposition that, if the defendant would agree to pay the note on the first of January next, he would allow him a credit of fifty dollars thereon, and dismiss the suit at his own cost. The defendant accepted the proposition, and the credit of fifty dollars was indorsed on the note and the suit dismissed. The defendant failing to pay the note at the time agreed upon, the plaintiff erased the credit, and brought suit for the original amount. The erasure was held not to be a material alteration of the note. *Chamberlin v. White*, 79 Ill. 549.

Alteration in Amount of Official Bonds.—A tax collector gave his bond conditioned for the faithful collection and return of an assessment of taxes, which were to be returned to the county treasurer according to amounts and dates set forth in the bond. The assessors afterwards, discovering that the assessment was illegal, reassessed the tax, reducing the amount of it, and, without notice to the tax collector or his sureties, altered the amounts in the bond to conform to the new assessment. In an action against the sureties on this bond, it was held that these alterations were material, and avoided it. *Doane v. Eldridge*, 16 Gray (Mass.) 254.

3. Insertion of Provision for Attorneys' Fees.—The addition to a note of a clause providing for the payment of twenty dollars attorneys' fees, in case suit should be necessary to enforce its collection, is a material alteration, and will avoid it. *Monroe v. Paddock*, 75 Ind. 422.

After a mortgage had been executed by husband and wife, the words, "and the further sum of fifty dollars solicitor's fees in case of foreclosure," were inserted in the mortgage by the husband, with the knowledge and consent of the mortgagee, and in his presence, but without the knowledge of the wife. It was held that such an insertion was a material alteration of the mortgage, and, as to her, was void. *Coles v. Yorks*, 28 Minn. 464.

4. Erasure of Provision for Attorneys' Fees.—The erasure from a note of a clause "agreeing to pay all expenses incurred, by a suit or otherwise, in attempting the collection of this note, including reasonable attorneys' fees," is a material alteration, and avoids the note. *Decorah First Nat. Bank v. Laughlin*, 4 N. Dak. 391.

5. Change in Amount of Attorneys' Fees.—It has been held a material alteration of a note to increase the amount of the attorneys' fees expressed therein from three dollars to three hundred dollars. *Burwell v. Orr*, 84 Ill. 465.

or note to change the rate of interest expressed therein, and this without regard to whether the rate thus altered is increased¹ or decreased.² It is likewise material if, when no rate is expressed in an interest-bearing security, a rate differing from the legal interest is inserted;³ but an insertion of the legal rate has been held otherwise, since the legal effect of the instrument is unchanged.⁴

Insertion of Interest Clause.—The insertion of words or figures in a bill or note, making it bear interest when it originally did not, is a material alteration.⁵

Erasure of Interest Clause.—And the erasure of an interest clause is equally material.⁶

Alteration of Time from Which Interest to Run.—It is also a material alteration of

1. Increasing Rate of Interest.—*District of Columbia.*—Lewis v. Shepherd, 1 Mackey (D. C.) 46.

Indiana.—Shanks v. Albert, 47 Ind. 461; Schneewind v. Hacket, 54 Ind. 248.

New Mexico.—Ruby v. Talbott (N. Mex. 1889), 21 Pac. Rep. 72.

Ohio.—Harsh v. Klepper, 28 Ohio St. 200.

South Carolina.—Heath v. Blake, 28 S. Car. 406; Sanders v. Bagwell, 32 S. Car. 238.

Virginia.—Dobyns v. Rawley, 76 Va. 537.

2. Decreasing Rate of Interest.—Little v. Fowler, 1 Root (Conn.) 94; Post v. Losey, 111 Ind. 74, 60 Am. Rep. 677; Whitmer v. Frye, 10 Mo. 348.

3. When No Rate Expressed.—Insertion of Rate Other than Legal Rate.—Warrington v. Early, 2 El. & Bl. 763, 75 E. C. L. 763; Hoopes v. Collingwood, 10 Colo. 107, 3 Am. St. Rep. 565; Draper v. Wood, 112 Mass. 315, 17 Am. Rep. 92; Holmes v. Trumper, 22 Mich. 427, 7 Am. Rep. 661.

4. Insertion of Legal Rate.—Port Huron First Nat. Bank v. Carson, 60 Mich. 432.

5. Adding Interest Clause.—*Alabama.*—Brown v. Jones, 3 Port. (Ala.) 420; Glover v. Robbins, 49 Ala. 219, 20 Am. Rep. 272; Lamar v. Brown, 56 Ala. 157.

Arkansas.—Little Rock Trust Co. v. Martin, 57 Ark. 277.

Delaware.—Warpole v. Ellison, 4 Houst. (Del.) 322.

Georgia.—Gwin v. Anderson, 91 Ga. 827; Baugh v. Anderson, 91 Ga. 831.

Indiana.—Kountz v. Hart, 17 Ind. 329; Hart v. Clouser, 30 Ind. 210; Bowman v. Mitchell, 79 Ind. 84; Palmer v. Poor, 121 Ind. 135.

Iowa.—Woodworth v. Anderson, 63 Iowa 503; Grand Haven First Nat. Bank v. Hall, 83 Iowa 645.

Kentucky.—Locknane v. Emmerson, 11 Bush (Ky.) 69.

Maine.—Waterman v. Vose, 43 Me. 504; Lee v. Starbird, 55 Me. 491.

Maryland.—Owen v. Hall, 70 Md. 97.

Massachusetts.—Fay v. Smith, 1 Allen (Mass.) 477, 79 Am. Dec. 752.

Michigan.—Bradley v. Mann, 37 Mich. 1.

Missouri.—Lubbering v. Kohlbrecher, 22 Mo. 596; Ivory v. Michael, 33 Mo. 398; Presbury v. Michael, 33 Mo. 542; Evans v. Foreman, 60 Mo. 449; Capital Bank v. Armstrong, 62 Mo. 59; Iron Mountain Bank v. Murdock, 62 Mo. 70; Washington Sav. Bank v. Ecky, 51 Mo. 272.

Nebraska.—Davis v. Henry, 13 Neb. 497; Hurlbut v. Hall, 39 Neb. 889.

New York.—Kennedy v. Crandell, 3 Lans. (N. Y.) 1; Mount Morris Bank v. Lawson, 10 Misc. Rep. (N. Y. C. Pl.) 359; McGrath v. Clark, 56 N. Y. 34, 15 Am. Rep. 372; Meyer v. Huneke, 55 N. Y. 412; Schwarz v. Oppold, 74 N. Y. 307; Meise v. Doscher, 83 Hun (N. Y.) 580; Weyerhauser v. Dun, 100 N. Y. 150.

North Carolina.—Long v. Mason, 84 N. Car. 15.

Ohio.—Jones v. Bangs, 40 Ohio St. 139, 48 Am. Rep. 664; Thompson v. Massie, 41 Ohio St. 307.

Pennsylvania.—Craighead v. McLoney, 99 Pa. St. 211; Boustead v. Cuyler, 116 Pa. St. 551; Gettysburg Nat. Bank v. Chisolm, 169 Pa. St. 564.

South Carolina.—Plyler v. Elliott, 19 S. Car. 257.

Tennessee.—McVey v. Ely, 5 Lea (Tenn.) 438.

Wisconsin.—Kilkelly v. Martin, 34 Wis. 525.

Canada.—Halcrow v. Kelly, 28 U. C. C. P. 551.

Where a note payable on November 1, 1889, provided that if it was paid at maturity interest should be paid "at — per cent. from November 1, 1889, but if not paid when due, interest at — per cent. per annum from date until paid," an alteration of the note by the insertion of the word "eight" in the first blank is material and avoids the note; since, after allowing grace, the note as executed, if paid at maturity, bore no interest, but as altered bore eight per cent. interest from November 1 to November 4, 1889. Little Rock Trust Co. v. Martin, 57 Ark. 277.

Change of Interest in Certificate of Deposit.—Where a certificate of deposit was given, "payable thirty days after date, with — per cent. per annum," and there was no agreement to pay ten per cent., and the holder, when about to sell it to the plaintiff, and to aid such sale, represented that the agreement was for ten per cent., and that the blank was left by mistake, whereupon, in his presence and that of the plaintiff, the latter's agent inserted the figures "10" in the blank, and the plaintiff took the certificate, the alteration was held to be fraudulent and to avoid the certificate. Woodworth v. Anderson, 63 Iowa 503.

6. Erasure of Interest Clause.—Moore v. Hutchinson, 69 Mo. 429.

a note to change the time from which interest is to begin to run, either by the insertion, alteration, or erasure of words, whether such alteration accelerates¹ or delays² the time.

Alteration in Periods of Payment.—And the same is true of alterations in the periods at which interest is payable.³

8. Change in Medium of Payment.—It is a material alteration of a note or bill to change the medium of payment by the addition,⁴ substitution,⁵ or erasure⁶ of any words denoting the kind of currency in which it is payable.

The same principle applies where the amount is payable in merchandise. Any alteration in the description of the goods is material and will invalidate the instrument,⁷ though it has been held that the mere insertion of a word which does not alter the import of the description cannot have this effect.⁸

9. Change in Time of Payment.—A change in the time of payment of a bond

1. Accelerating Time of Interest.—*Benedict v. Miner*, 58 Ill. 19; *Brooks v. Allen*, 62 Ind. 401; *Dietz v. Harder*, 72 Ind. 208; *Hert v. Oehler*, 80 Ind. 83.

2. Delaying Time of Interest.—*Coburn v. Webb*, 56 Ind. 96, 26 Am. Rep. 15; *Franklin L. Ins. Co. v. Courtney*, 60 Ind. 134.

3. Alteration in Periods of Payment of Interest.—An alteration of the periods at which interest is payable is material; thus inserting "payable annually" when no period of payment is expressed, *Marsh v. Griffin*, 42 Iowa 403; *Smith v. Mace*, 44 N. H. 553; *Boalt v. Brown*, 13 Ohio St. 364; *Kennedy v. Moore*, 17 S. Car. 464; or inserting "semi-annually," *Blakey v. Johnson*, 13 Bush (Ky.) 197, 26 Am. Rep. 254; *Dewey v. Reed*, 40 Barb. (N. Y.) 16; *Neff v. Horner*, 63 Pa. St. 327, 3 Am. Rep. 555; *Fulmer v. Seitz*, 68 Pa. St. 237, 8 Am. Rep. 172; or altering "annually" to "semi-annually," *Waring v. Smyth*, 2 Barb. Ch. (N. Y.) 119, 47 Am. Rep. 299; or "annually" to "quarterly," *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754.

Insertion of Word "Annually" after Interest Clause.—Where to the interest clause of a note payable in less than two years, the word "annually" was added, the addition was held not to be a material alteration. *Cooley, J.*, concurring in the decision of the court, said: "I am inclined to think that, in a note to run less than two years, the words specifying the rate of interest to be paid annually must be understood as naming only the rate to be paid for the yearly period, and not as requiring an instalment to be paid when the first year was completed. If so, the supposed alteration of the note in suit did not at all affect its legal meaning, and might have been innocently added to show that the ten per centum interest was to be earned yearly, and was not all that was to be paid for the whole period the note was to run." *Leonard v. Phillips*, 39 Mich. 182, 33 Am. Rep. 370.

Inserting Word "Paid" before "Annually" in Interest Clause.—In *Patterson v. McNeeley*, 16 Ohio St. 348, where, in a promissory note made payable one year after date, there was the following clause, "The above to be at ten per cent. interest annually," it was held that the word "annually" in this connection is to be understood as relating to and defining the rate of interest, and is equivalent to the words "per annum," and that the clause is not a stipula-

tion for the annual payment of interest, consequently the interlining of the word "paid" before the word "annually," in the above clause, is a material alteration of the note.

Insertion of Words "On the Whole" after Statement of Amount of Interest.—Where a bond was given to pay one hundred dollars in instalments of twenty-five dollars a year, the first payment to be at a time seventeen months after date, with interest, the interlineation of the words "on the whole" after the word "interest" was held not to vary the legal effect of the instrument, and consequently was immaterial. *Gardinier v. Sisk*, 3 Pa. St. 326.

4. Addition of Words Denoting Kind of Currency.—The addition of the words "in gold" or "in specie," to a promissory note payable in dollars, is a material alteration. *Bogarh v. Breedlove*, 39 Tex. 561; *Wills v. Wilson*, 3 Oregon 308; *Darwin v. Rippey*, 63 N. Car. 318.

See also *Langenberger v. Kroeger*, 48 Cal. 147, 17 Am. Rep. 418; *Hanson v. Crawley*, 41 Ga. 303.

But see *Bridges v. Winters*, 42 Miss. 135, 97 Am. Dec. 443.

5. Substitution of Currency.—To change an order for money, payable in "drafts to the order of" the maker, to read payable in "current funds," is a material alteration. *Angle v. Northwestern L. Ins. Co.*, 92 U. S. 330.

6. Erasure of Words Denoting Kind of Currency.—It is a material alteration to erase the words "in gold or its equivalent" from a note. *Church v. Howard*, 17 Hun (N. Y.) 5.

7. Merchandise as Medium of Payment—Change in Description.—A contract, signed by R. and M., to deliver to the plaintiff a certain quantity of wood, was altered by R. at the plaintiff's request, after execution, by inserting the words, "It is to be good hard wood." It was held that the alteration was material, and that the instrument could not be read in evidence against M. *Schwalm v. McIntyre*, 17 Wis. 232.

In a note for merchantable neat stock, an insertion of the word "young" after "merchantable" was held to be a material alteration. *Martendale v. Follet*, 1 N. H. 95.

8. Thus it has been held that the insertion of "good" before the words "merchantable wool" in a note does not affect it and is not material. *State v. Cilley*, cited in 1 N. H. 97.

or negotiable instrument is a material alteration, and it does not matter whether such change delays¹ or accelerates² the maturity of the paper.³

10. Change in Place of Payment.—The alteration of a promissory note or bill of exchange by changing the place of payment thereof, either by substituting one place for another or by inserting some particular place when none is expressed, is a material alteration of the instrument.⁴

1. Delaying Time of Payment.—Paton v. Winter, 1 Taunt. 420; Stayner v. Joice, 82 Ind. 35; Davis v. Jenney, 1 Met. (Mass.) 221; Flanigan v. Phelps, 42 Minn. 186; Henderston v. Wilson, 6 How. (Miss.) 65.

Contra.—Drexler v. Smith, 30 Fed. Rep. 754.

2. Accelerating Time of Payment.—England.—Clifford v. Parker, 2 M. & G. 909, 40 E. C. L. 687; Alderson v. Langdale, 3 B. & Ad. 660, 23 E. C. L. 155.

Canada.—Meredith v. Culver, 5 U. C. Q. B. 218; Westloh v. Brown, 43 U. C. Q. B. 402.

Indiana.—Bell v. State Bank, 7 Blackf. (Ind.) 456.

New York.—Waring v. Smyth, 2 Barb. Ch. (N. Y.) 119, 47 Am. Dec. 299.

Pennsylvania.—Hartley v. Corboy, 150 Pa. St. 23.

Tennessee.—Crockett v. Thomason, 5 Sneed (Tenn.) 342.

But see Herrick v. Baldwin, 17 Minn. 209, 10 Am. Rep. 161.

A Promissory Note Expressed No Time of Payment, and while it was in the possession of the payee, the words "on demand" were added without the assent of the maker. In an action by the payee against the maker, it was held that the alteration expressed only the effect of the note as it originally stood, and was therefore immaterial. Aldous v. Cornwell, L. R. 3 Q. B. 573.

3. See *supra*, this title and division, subd. *Change in Date*.

4. Alteration in Place of Payment—General Rule.—England.—Tidmarsh v. Grover, 1 M. & S. 735; Macintosh v. Haydon, R. & M. 362, 21 E. C. L. 456; Calvert v. Baker, 4 M. & W. 417; Crotty v. Hodges, 4 M. & G. 561, 43 E. C. L. 292; Cowie v. Halsall, 4 B. & Ald. 197, 6 E. C. L. 449; Taylor v. Mosely, 6 C. & P. 273, 25 E. C. L. 393; Desbrow v. Weatherbey, 6 C. & P. 758, 25 E. C. L. 636; Burchfield v. Moore, 25 Eng. L. & Eq. 123.

Canada.—McQueen v. McIntyre, 30 U. C. C. P. 427.

Alabama.—Winter v. Pool, 100 Ala. 503; Toomer v. Rutland, 57 Ala. 379, 29 Am. Rep. 722.

Delaware.—Newark Bank v. Crawford, 2 Houst. (Del.) 282; Sudler v. Collins, 2 Houst. (Del.) 538.

Georgia.—Pritchard v. Smith, 77 Ga. 463; Gwin v. Anderson, 91 Ga. 827.

Illinois.—Pahlman v. Taylor, 75 Ill. 629.

Indiana.—Shanks v. Albert, 47 Ind. 461; McCoy v. Lockwood, 71 Ind. 319; Ballard v. Franklin L. Ins. Co., 81 Ind. 239.

Iowa.—Knoxville Nat. Bank v. Clark, 51 Iowa 264, 33 Am. Rep. 129; Adair v. Egland, 58 Iowa 314; Charlton v. Reed, 61 Iowa 166, 47 Am. Rep. 808; Black v. DeCamp, 75 Iowa 105.

Kentucky.—Whitesides v. Northern Bank, 10 Bush (Ky.) 501, 19 Am. Rep. 74.

Nebraska.—Townsend v. Star Wagon Co., 10 Neb. 615, 35 Am. Rep. 493.

New York.—Woodworth v. Bank of America, 19 Johns. (N. Y.) 391; Nazro v. Fuller, 24 Wend. (N. Y.) 374.

Ohio.—Sturges v. Williams, 9 Ohio St. 443, 75 Am. Dec. 473.

Pennsylvania.—Southwark Bank v. Gross, 35 Pa. St. 80; Hill v. Cooley, 46 Pa. St. 259.

West Virginia.—Morehead v. Parkersburg Nat. Bank, 5 W. Va. 74, 13 Am. Rep. 636; Ohio Valley Bank v. Lockwood, 13 W. Va. 392.

Illustration.—A promissory note was made and indorsed, for the accommodation of the maker, at Albany where the parties resided. After indorsing the note in blank, the indorser returned it to the maker, who, without the knowledge or consent of the indorser, wrote in the margin, "Payable at the Bank of America," and presented it at the Bank of America in the city of New York for discount. When the note became due, payment was demanded at the Bank of America, and notice of nonpayment was regularly given to the indorser at Albany. It was held, in an action brought by the bank against the indorser, that the memorandum in the margin of the note by the maker was a material alteration of the contract which discharged the indorser from his liability. The court, by Skinner, Senator, said: "It was contended on the argument of this cause, and has been so decided by the Supreme Court, that the place of payment is no part of the contract, and, therefore, that the memorandum did not alter the contract as between the immediate parties to the note. I cannot assent to this proposition; on the contrary, it appears to me that the place of payment, next to the sum payable, is the most essential part of the contract, for on its proximity or remoteness must depend in point of time the indorser's knowledge of nonpayment, which, in most cases, must to him be a matter of great importance. And I apprehend that a merchant of this city, when about to indorse negotiable paper, would deem the contract into which he was entering as materially different, whether the note was made payable at Albany or at New Orleans. He would undoubtedly take into consideration, in estimating the responsibility he was to incur, that in the one case he would receive notice of his liability, in case of dishonor, the same day, but in the other not until twenty or thirty days after he became charged with the amount." Woodworth v. Bank of America, 19 Johns. (N. Y.) 391, 10 Am. Dec. 239.

Insertion of Words Making Designation of Place More Accurate.—Where the defendant

Insertion of Place of Payment by Acceptor of Bill.—If, however, a bill is addressed to a drawee at a particular town or city, without designating any particular place of payment therein, it seems that he may in his acceptance name some particular place in the city at which such bill shall be payable, and such acceptance will not be a material alteration of the instrument;¹ but if he were to accept the bill so as to make it payable in another city, such an acceptance would be a material departure from the tenor of the bill, and should be treated as a dishonor of it.²

Erasure of Place of Payment.—It is a material alteration to erase the place of payment from a note, even though the effect of such alteration is to enlarge the rights of the maker.³

11. Change in Statement of Consideration.—It is a material alteration of a bill or note to insert or erase words expressive of a stated consideration.⁴

12. Change in Description of Property.—It may be laid down as a general rule that any alteration in the descriptive clause of a contract or conveyance, whereby the identity of the subject-matter of the same is changed,⁵ or

signed an accommodation note for one B., dated at Oakland, Cal., payable to the First National Bank, and B., after the delivery of the note to him, and without the knowledge and consent of the defendant, inserted after the name of the payee the words "of Oak'd," it was held that the words added nothing to the note that it did not mean before, and that the alteration was therefore immaterial. *Oakland First Nat. Bank v. Wolff*, 79 Cal. 69. See also *Horton v. Horton*, 71 Iowa 448.

Memorandum as to Place of Payment.—As to the effect of indorsing a memorandum on a bill or note stating where it is payable, see *supra*, this title and division, subd. *Removal or Addition of Memoranda*.

1. Insertion of Place of Payment by Acceptor of Bill.—*Rowe v. Young*, 2 Brod. & B. 165, 6 E. C. L. 83; *Troy City Bank v. Lauman*, 19 N. Y. 477; *Niagara Dist. Bank v. Fairman*, etc., *Mach. Tool Mfg. Co.*, 31 Barb. (N. Y.) 403; *Shuler v. Gillette*, 12 Hun (N. Y.) 280; *Etz v. Place*, 81 Hun (N. Y.) 203; *Myers v. Standart*, 11 Ohio St. 29. And see *Jacobs v. Hart*, 2 Stark. 45, 3 E. C. L. 310.

2. Rowe v. Young, 2 Brod. & B. 165, 6 E. C. L. 83; *Walker v. State Bank*, 13 Barb. (N. Y.) 636; *Niagara Dist. Bank v. Fairman*, etc., *Mach. Tool Mfg. Co.*, 31 Barb. (N. Y.) 403.

3. Erasure of Place of Payment.—*Todd v. Lederach*, 4 Pa. Dist. Rep. 173, in which the authorities are collected and compared; *White v. Hass*, 32 Ala. 430, 70 Am. Dec. 548; 2 *Daniel on Neg. Inst.*, § 1378; 1 *Edwards on Bills and Notes*, § 253.

But in *Major v. Hansen*, 2 Biss. (U. S.) 195, the court held that the erasure of the place of payment from a promissory note was not a material alteration; that the rights of the maker were thereby enlarged and in no respect limited, and he could not complain unless he could show that he tendered the money at the place stated and had been damaged.

4. Change in Statement of Consideration.—*Knill v. Williams*, 10 East 431; *Low v. Argrove*, 30 Ga. 129; *Benjamin v. McConnell*, 9 Ill. 536, 46 Am. Dec. 474.

But see *Gardiner v. Harback*, 21 Ill. 129; *Magers v. Dunlap*, 39 Ill. App. 618.

Alteration of Consideration in Deed.—A deed of land was executed, leaving the consideration blank, except the word "dollars." Subsequently the amount of the consideration was inserted. This was held not to be a material alteration. The court said: "Every deed which is effectual to convey land must be upon consideration. * * * A deed or other grant made without any consideration is, as it were, of no effect, for it is construed to inure, or to be effectual, only to the use of the grantor himself. But the deed of April 5th was upon a consideration sufficient to rebut a resulting trust. The word 'dollars,' without any numbers prefixed, is enough for that purpose. An alteration to a deed to render it void must be a material one; that is, one that causes the deed to speak a language different in legal effect from that which it spoke originally. The necessity of a consideration in a deed is to prevent a trust resulting in favor of the grantor, and one valuable consideration does this as well as another. Changing the amount of the consideration does not cause the deed to speak a language differing in its legal effect. Such an alteration is not a material one." *Murray v. Klinzing*, 64 Conn. 78.

See also *Westmoreland v. Westmoreland*, 92 Ga. 233; *Cheek v. Nall*, 112 N. Car. 370.

5. Alteration in Description of Mortgaged Property.—A married woman executed a mortgage to secure a debt of her husband upon property which was described in the mortgage as "lot No. 26." After delivery, the plaintiff discovered that the property was described by the wrong number, and applied to the defendant's attorney to have it rectified. Without the knowledge of the defendant, but by his attorney, and in the presence of the plaintiff's attorney, the alteration was made. In an action brought to reform the mortgage, and for foreclosure thereof, it was held that the alteration was material, and had the effect to vitiate and destroy it, so as to render it incapable of being enforced by the plaintiff. *Marcy v. Dunlap*, 5 Lans. (N. Y.) 365.

In another case, a mortgage as executed described the property conveyed as "lots 1 and 2." After it had been acknowledged before a notary, the mortgagee discovered that the lots

its quantity increased or diminished, is material.¹

An alteration, however, which does not change the identity of the property, but which only serves to make the description more definite,² or in accord with the obvious intention of the parties, as imperfectly expressed therein,³

were improperly described, and applied to the notary, who changed the numbers to thirteen and fourteen, without the knowledge or consent of the mortgagor. In an action upon the mortgage, it was held that the alteration was material, and avoided it. *Pereau v. Frederick*, 17 Neb. 117.

Alteration of Section Number in Description of Property.—A deed offered in evidence described the land as "being the southeast quarter of section twenty-five (25)," etc. Upon examination, the figures 25 appeared to have been written above an erasure of figures denoting 24, and the word "five" made so by changing another word resembling "four" into "five." The court held that the alteration was material, and rejected the deed as evidence. *Montag v. Linn*, 23 Ill. 551.

1. Alteration in Deed of Quantity of Land Conveyed.—A deed purporting to convey fifteen acres of land was offered in evidence. It was proven by the subscribing witnesses that the deed, when signed and delivered, was a grant of five acres only, and that before registry the word "five" was altered to "fifteen," the boundaries being such as would apply equally well to either quantity of land. It was held that the alteration was material, and was a forgery, and the deed could not be admitted in evidence. *Chesley v. Frost*, 1 N. H. 145.

But in *Sharp v. Orme*, 61 Ala. 263, where the land was accurately described by metes and bounds, so that no mistake could be made, it was held that an alteration in the number of acres purported to be conveyed was immaterial.

Addition of Words "More or Less" after Statement of Quantity.—An oral contract for the sale, by the defendant to the plaintiff, of forty acres of land at three hundred dollars per acre, was by agreement reduced to writing by the plaintiff, who handed it and his check for the earnest money to the defendant's agent, with the understanding that when the defendant had signed the contract the check was to be delivered to him and the contract returned to the plaintiff. Without the plaintiff's knowledge, the agent inserted the words "more or less" after the words "forty acres," and the defendant signed the contract in that form, and was given the check. The contract was then returned to the plaintiff, who, as soon as he discovered the alteration, offered it back to the defendant, and demanded his check, but the defendant insisted upon the fulfilment of the contract as signed, and tendered a deed accordingly, which the plaintiff refused to accept. It was held that the alteration was material, and that the plaintiff had the right to repudiate the contract and recover the amount paid. *Sherwood v. Merritt*, 83 Wis. 233.

Inserting Description of Additional Property in Bill of Sale.—In an action against a sheriff

for the value of property seized under execution, the plaintiff, to establish his right to the property seized, tendered in evidence a bill of sale for the property. Upon examination, the instrument was found to have been altered by interlining other articles of property after its execution. The court held that the alteration was material, and refused to admit the instrument in evidence. *Babb v. Clemson*, 10 S. & R. (Pa.) 419, 13 Am. Dec. 684.

2. Identity Not Changed.—*Gordon v. Sizer*, 39 Miss. 805.

Insertion in Deed of Quantity of Land Conveyed.—A deed, as originally drawn and executed, and acknowledged by the wife, described by metes and bounds the land conveyed, without naming any quantity, but before it was acknowledged by the husband, he, upon objection being made to the omission, inserted or caused to be inserted the words "containing by survey two hundred acres," as part of the description; and also inserted or caused to be inserted in the covenant of warranty, which purported to be joint, the words, "and that the same shall contain two hundred acres." In an action by the wife to obtain dower in this land, it was held that the insertion did not alter the legal effect of the deed, and was immaterial. *Shelton v. Deering*, 10 B. Mon. (Ky.) 407.

Additions to Descriptive Clause in Delivery Bond.—An interlineation in a delivery bond, giving a more minute description of the attached property, made in good faith by the officer to whom the bond is presented for acceptance, at the request of the principal in the bond, is not a material alteration, and will not release his surety from liability thereon. *Rowley v. Jewett*, 56 Iowa 492.

Additions to Descriptive Clause of Building Contract.—The defendants entered into a contract with another, by which he was to erect a dwelling "on their lot on Romana street." After the acknowledgment of the contract, there were inserted in the descriptive clause, the words "to wit: lot 33 in block 1, Slocum Park." The parties treated the lot so described, and upon which the improvements were placed, as the one to which the contract referred. It was held that the alteration was not material. *Churchill v. Bielstein* (Tex. Civ. App. 1895), 29 S. W. Rep. 392.

3. Alteration in Direction of Courses.—In *Burnham v. Ayer*, 35 N. H. 351, it was held that changing "southeasterly" to "southwesterly" in the descriptive portion of a deed was not a material alteration. The court said: "In the case before us, the alteration of the word 'southeasterly' to 'southwesterly' was immaterial. * * * The case finds that the line must necessarily proceed southwesterly from the preceding angle in order to go 'by Moses Currier's land,' and in order to run around the tract of land clearly intended to be described in the deed. The law then would have

or which adds nothing to the legal effect of the description,¹ is immaterial.

13. Change in Negotiability—Altering Nonnegotiable to Negotiable Instrument.—Any alteration of a nonnegotiable instrument, whereby it is made negotiable, is material. Thus inserting the words “or order”² or “or bearer”³ in a bill or note payable to a designated person, or adding a place of payment when none is expressed,⁴ or erasing any clause or condition which restricts its negotiability,⁵ is a material alteration. It has been held, however, that if the note, from

supplied the word introduced by the alteration, on the familiar principle of construction that in the description of land in a deed or will, fixed monuments govern rather than courses and distances.”

Alteration of Description by Correcting Name of Abutting Owner.—In *Hatch v. Hatch*, 9 Mass. 307, a deed of land was left as an escrow to be delivered on the death of the grantor. At the request of the grantee, the depository, after the death of the grantor, altered the description of the property conveyed, by changing the given name of the owner of abutting property, therein stated as Joseph, to Joshua. It was held that the alteration was immaterial.

1. Adding to Description of Property the Words “with Pump and Well Water.”—The interlineation, in a deed of a parcel of land on which were a well and pump, of the words “with pump and well water,” after the description of the land by metes and bounds, is an immaterial alteration. *Brown v. Pinkham*, 18 Pick. (Mass.) 172.

Inserting Additional Words of Description in Contract.—A sold to B, by deed, a lot of gravel according to specifications and profiles which had been made by a surveyor. The exact quantity not having been computed at the time of the execution of the contract, the parties agreed orally that the surveyor should ascertain the quantity and fill up the blanks in the deed. It was held that his doing so, although after the delivery of the deed, was immaterial, as it in no way changed the terms of the contract, or enlarged the defendant's liability under it. *Vose v. Dolan*, 108 Mass. 155, 11 Am. Rep. 331.

2. Change in Negotiability—Insertion of Words “or Order.”—*Delaware*.—*Hollis v. Vandergrift*, 5 Houst. (Del.) 521.

Kentucky.—*Johnson v. U. S. Bank*, 2 B. Mon. (Ky.) 310.

New Hampshire.—*Haines v. Dennett*, 11 N. H. 180.

New York.—*Bruce v. Westcott*, 3 Barb. (N. Y.) 374.

South Carolina.—*Pepoon v. Stagg*, 1 Nott & M. (S. Car.) 102.

Texas.—*Taylor v. Moore* (Tex. 1892), 20 S. W. Rep. 53.

3. Insertion of Words “or Bearer.”—*Scott v. Walker, Dudley* (Ga.) 243; *Walton Plow Co. v. Campbell*, 35 Neb. 173.

But see *McLaughlin v. Venine*, 2 Wyoming 1.

4. Inserting Place of Payment.—Under the statutes of *Alabama*, *Indiana*, and *West Virginia*, it is necessary to the negotiability of a bill or note that it be payable at a bank, or at some other designated place; consequently,

inserting the name of a place of payment in a bill or note, otherwise not negotiable, renders such bill or note a negotiable instrument, and is a material alteration of it. *Toomer v. Rutland*, 57 Ala. 379, 29 Am. Rep. 722; *Winter v. Pool*, 100 Ala. 503; *McCoy v. Lockwood*, 71 Ind. 319; *Gillaspie v. Kelley*, 41 Ind. 158, 13 Am. Rep. 318; *Morehead v. Parkersburg Nat. Bank*, 5 W. Va. 74, 13 Am. Rep. 636.

5. Erasure of Clauses Restricting Negotiability.—The erasure or removal of any restrictive clauses in a note or bill, whereby a nonnegotiable instrument is made negotiable, is a material alteration. *Cochran v. Nebeker*, 48 Ind. 459; *State v. Stratton*, 27 Iowa 420, 1 Am. Rep. 282; *Davis v. Henry*, 13 Neb. 497.

Illustrations.—The erasure from a note of a clause “agreeing to pay all expenses incurred by suit or otherwise, in attempting the collection of this note, including a reasonable attorney's fee,” is material. *Decorah First Nat. Bank v. Laughlin*, 4 N. Dak. 391.

After the execution of a negotiable note by agreement between the maker and payee, an indorsement was placed on the back of it to the effect “that said note should be subject to any defense in the hands of any purchaser, that existed against it in the hands of the payee.” Subsequently, this indorsement was erased by the payee without the knowledge or consent of the maker, and the note indorsed to a third party. It was held that such erasure avoided the note. *Meade v. Sandidge*, (Tex. Civ. App. 1895), 30 S. W. Rep. 245.

The defendant made two promissory notes payable to the payee or bearer, but having indorsed on them contemporaneously with their making, and in the case of one of them on the edge of the paper, the words “the within note not to be sold,” which indorsement the evidence showed formed part of the contract between the parties. The notes were transferred to the plaintiff with the word “not” in the above indorsement, in the case of one of them, erased, and with the whole of the said indorsement in the case of the other, in which it was written on the edge, torn off, but without destroying any part of the face of the note. It was held that the purpose of the indorsements was to destroy the negotiability of the notes, so as to preserve to the maker all defenses and equities; consequently, the effect of the erasure was to render such notes negotiable, and it was a material alteration of them. *Swaissland v. Davidson*, 3 Ont. Rep. 320.

Obliteration of Restrictive Indorsement.—The obliteration of a restrictive indorsement, so as to render a bill negotiable, is a material alteration. *Mechanics' Bank v. Valley Packing Co.*, 70 Mo. 643.

its form or substance, be nonnegotiable, the insertion of the words "or bearer" cannot alter its effect, and such alteration is consequently immaterial.¹

Altering Negotiable to Nonnegotiable Instrument.—Any alteration which has the effect of destroying the negotiability of an instrument, as, for instance, affixing a seal to a promissory note,² or changing a general into a special consideration,³ is likewise material.

Change in Manner of Negotiability.—The same principle applies to changes in the manner of negotiability. Thus substituting the words "or bearer" for the words "or order,"⁴ or inserting "or bearer" in a note payable to the order of a certain person,⁵ renders such note or check transferrable by mere delivery, and is a material alteration of it.

14. Change in Attestation.—Inserting Signature of Attesting Witness.—It is a material alteration of an unattested instrument to insert, subsequent to its execution, the signature of an attesting witness.⁶ Such attestation furnishes a distinct and different medium of proof of the execution of the instrument,⁷ and, in some states, excepts it from the operation of the statute of limitation.⁸

1. *Goodenow v. Curtis*, 33 Mich. 505.

2. **Affixing Seal.**—*Rawson v. Davidson*, 49 Mich. 607. See *infra*, this title and division, subd. *Affixing or Removing Seal*.

3. **Changing General into Special Consideration.**—*Knill v. Williams*, 10 East 431.

4. **Substitution of Words "or Bearer" for "or Order."**—*Needles v. Shaffer*, 60 Iowa 65; *Belknap v. National Bank of North America*, 100 Mass. 376, 97 Am. Dec. 105; *Booth v. Powers*, 56 N. Y. 22, *reversing* *Flint v. Craig*, 59 Barb. (N. Y.) 319; *Re Commercial Bank, 10 Manitoba Rep.* 171. And see *Union Nat. Bank v. Roberts*, 45 Wis. 373.

5. **Note Payable to Order of Certain Person.—Addition of Words "or Bearer."**—*McCauley v. Gordon*, 64 Ga. 221, 37 Am. Rep. 68; *Croswell v. Labree*, 81 Me. 44, 10 Am. St. Rep. 238.

Inserting "or Bearer" in a Note after Its Indorsement in Blank Immaterial.—Where a note is made payable to the order of a certain person, and is indorsed in blank by that person, a subsequent insertion of the words "or bearer" does not affect the manner of negotiability of the instrument, since by the indorsement in blank it is payable to the bearer, and consequently such alteration is immaterial. *Weaver v. Bromley*, 65 Mich. 212.

6. **Adding Signature of Witness—Maine.**—*Brockett v. Mountfort*, 11 Me. 115.

Massachusetts.—*Homer v. Wallis*, 11 Mass. 309, 6 Am. Dec. 169.

Pennsylvania.—*Beary v. Haines*, 4 Whart. (Pa.) 17; *Foust v. Renno*, 8 Pa. St. 378; *Henning v. Werkheiser*, 8 Pa. St. 518; *Marshall v. Gougler*, 10 S. & R. (Pa.) 164; *Fisher v. King*, 153 Pa. St. 3. And see *Fritz v. Montgomery County*, 17 Pa. St. 130, for decision on special facts.

Contra, *Fuller v. Green*, 64 Wis. 159, 54 Am. Rep. 600; *Blackwell v. Lane*, 4 Dev. & B. (N. Car.) 113, *citing* *McCraw v. Gentry*, 3 Campb. 232, and *Talbot v. Hodson*, 7 Taunt. 251, 2 E. C. L. 251, *approved* in *State v. Gherkin*, 7 Ired. (N. Car.) 206.

Attestation by Mistake.—A bond, in the body of which the names of the obligors were written, was executed by one of them without a subscribing witness; afterwards, the other

executed it in the presence of two witnesses, who subscribed their names to a general attestation, as if they had witnessed the execution of the bond by both. It was held that if the attestation was purposely made general to import an attestation of execution by both the obligors, it avoided the bond; but if the witnesses subscribed their names to the attestation as it was prepared, without being practiced upon by the obligee, and only intending to attest the signature of the last maker, it did not vitiate the bond. *Foust v. Renno*, 8 Pa. St. 378.

Some time after the execution of a single bill, two persons, not present at the execution, and without any new delivery, put their names to it as witnesses, at the request of the obligee, who was about to assign it. It was held that if it was done by mistake, and with the intention of witnessing the assignment and not the bill, it did not avoid the instrument; but if done to authenticate the bill, this was rendered void by such alteration. *Marshall v. Gougler*, 10 S. & R. (Pa.) 164.

A person intending to indorse a note as surety wrote his name in the corner where witnesses ordinarily sign. It was held that if such signature was thus innocently made, it was immaterial, and did not avoid the note. *Fisher v. King*, 153 Pa. St. 3.

7. *Beary v. Haines*, 4 Whart. (Pa.) 17.

8. **Effect of Attestation upon Operation of Statute of Limitation.**—Under the statutes of *Massachusetts* and *Maine*, a distinction is made between notes with and those without a subscribing witness. Without an attestation, a note is barred by the statute in six years; with it, no bar whatever attaches by statute any more than to a specialty, and it is subject only to a presumption of payment after twenty years from the time when it becomes payable. *Homer v. Wallis*, 11 Mass. 309, 6 Am. Dec. 169; *Brackett v. Mountfort*, 11 Me. 115.

Exception to General Rule Governing Effect of Material Alterations.—In a few jurisdictions an exception to the general rule that a material alteration will vitiate an instrument, has been allowed in the case of alteration by subsequent attestation, and it has been held that the intent

Removing Signature of Attesting Witness.—The same principle obtains where the alteration is made by removing the signature of an attesting witness.¹

15. Affixing or Removing Seal—Affixing Seal.—The affixing of a seal to a promissory note or other simple contract, whereby its character, as such, is destroyed, and the instrument is made to appear to be the bond or deed of the maker, is a material alteration of it.² However, if the character of the

with which such alteration is made determines its effect upon the instrument.

Massachusetts.—In *Adams v. Frye*, 3 Met. (Mass.) 103, the court stated the rule of law applicable to alteration of instruments by the addition of the name of a subscribing witness, as follows: "1. That if the obligee of an unattested bond, after the execution and delivery thereof, shall, without the knowledge and assent of the obligor, fraudulently and with a view to gain some improper advantage thereby, procure a person who was not present at the execution of the bond, to sign his name thereto as an attesting witness, such act will avoid the bond, and discharge the obligor from all liability on the same. 2. That the act of the obligee in procuring the signature of one as a witness who was not present at its execution, and not duly authorized to attest it, will, if unexplained, be *prima facie* sufficient to authorize the jury to infer the fraudulent intent; but that it is competent for such obligee to rebut such inference; and if the act be shown to have been done without any fraudulent purpose, the bond will not be avoided by such alteration." *Citing* *Smith v. Dunham*, 8 Pick. (Mass.) 246; *Ford v. Ford*, 17 Pick. (Mass.) 418. *Followed and approved* in *Willard v. Clarke*, 7 Met. (Mass.) 435; *Church v. Fowle*, 142 Mass. 12.

Maine.—In *Milbery v. Storer*, 75 Me. 69, 46 Am. Rep. 361, the trial judge instructed the jury that if the defendant signed the note without its being witnessed, and, after he had parted with it, without his knowledge or consent it was witnessed so as to be, or appear to be, a witnessed note, this was a material alteration, and would relieve him from liability upon it. Upon appeal from this instruction, the appellate court said: "This enunciation correctly states the general rule, but the rule admits of an exception. The rule does not apply to a case where a person sees the maker sign, and afterwards adds his own name as a witness, behind the back of the maker, without his knowledge and consent, the act having been done, or procured to be done, through honest motives and without any wrongful intent. The law shrinks from applying the severest rule in such a case, but pardons the act upon the grounds of expediency and for the public good. It is a somewhat common belief among the masses of the people that, if a person sees another sign an instrument, or if he knows his handwriting, such person may attest his knowledge of the fact by signing the instrument as a witness without the maker's knowledge or consent. This is often the case with contracts, bonds, and deeds, as well as with promissory notes. It is better that a maker or promisor should occasionally and accidentally have such a

slight risk or chance of injury imposed upon him than that many important deeds and notes should become, through innocent mistake, invalidated and lost." To the same effect, see *Eddy v. Bond*, 19 Me. 461, 36 Am. Dec. 767; *Rollins v. Bartlett*, 20 Me. 319; *Thornton v. Appleton*, 29 Me. 298; *Hilton v. Houghton*, 35 Me. 143.

United States Courts.—In *Hall v. Weaver*, 34 Fed. Rep. 104, the court, following the rule laid down in *Adams v. Frye*, 3 Met. (Mass.) 103, held that the procurement by the holder of a writing or an obligee in a bond, of the signature of a person as a subscribing witness thereto, who is not authorized to attest the same, is *prima facie* a fraudulent alteration thereof, and, unless shown to be otherwise, will avoid the instrument as to him.

1. Cutting Off Signature of Attesting Witness.—Where the payee of a promissory note mutilated it by cutting off the name of the attesting witness, it was held that he was not entitled to recover either at law or in equity. *Sharpe v. Bagwell*, 1 Dev. Eq. (N. Car.) 115.

2. Affixing Seal to Simple Contract in Writing.—*Morrison v. Welty*, 18 Md. 169; *Warring v. Williams*, 8 Pick. (Mass.) 326; *Rawson v. Davidson*, 49 Mich. 607; *Fred Heim Brewing Co. v. Hazen*, 55 Mo. App. 277; *Vaughan v. Fowler*, 14 S. Car. 355, 37 Am. Rep. 731.

And see *U. S. v. Linn*, 1 How. (U. S.) 104; *Fullerton v. Sturges*, 4 Ohio St. 530.

Affixing Seal to Guaranty.—In an action of assumpsit on a written guaranty not under seal, the defendant pleaded that after the guaranty had been given to the plaintiff, and while it was in his hands, it had been altered in a material particular by some person to the defendant unknown, and without his consent, by affixing a seal so as to make it appear to be the deed of the defendant. Issue being taken on this plea, the jury found that the instrument had been so altered, whereupon the court gave judgment that the alteration was material, and avoided the instrument. *Davidson v. Cooper*, 11 M. & W. 784, *affirmed* in 13 M. & W. 353.

Affixing Seal to the Signature of One of Three Joint Makers Releases Others.—Where an instrument, in the form of a joint and several promissory note for the payment of a certain sum of money, is signed by three persons, and a seal is affixed to the signature of one of them afterwards, and in the absence of the other two, the instrument is rendered void as to the latter. *Biery v. Haines*, 5 Whart. (Pa.) 563.

Affixing Seal to Principal's Signature after Execution by Sureties Material.—In an action to set aside certain judgments against the plaintiffs as sureties on the official bond of a tax collector, it appeared that the tax

instrument be such that the affixing of the seal does not alter its legal effect, it has been held that the seal should be treated as mere surplusage.¹

Removing Seal.—A seal being the distinguishing characteristic of a specialty, its removal or defacement is a material alteration, and avoids the instrument.²

16. Insertion of Provision for Exchange.—Inserting a fixed rate of exchange in a foreign bill,³ or inserting words making a note payable with exchange on another city, is a material alteration.⁴ It would seem, however, that if a note

collector, without the knowledge of the sureties, affixed a seal to his signature after the bond had been signed and sealed by them. It was held that the bond was void. *State v. Smith*, 9 Houst. (Del.) 143.

1. Affixing Seal where Legal Effect of Instrument Unaltered.—A, being indebted to B, and being suddenly called away from his business, gave to C, his general agent, a sheet of paper with his signature at the foot of it, for the purpose of being filled up with a letter of attorney to confess a judgment. C took it to the attorney who held the claim for collection, who wrote a letter of attorney over the signature and then suggested to C that he add a scroll to the name of his principal, that being the most usual mode of executing such papers. The agent complied with the suggestion, and then delivered the paper to the attorney. It was held that the letter of attorney was sufficient, and that, although it was usual to affix a seal or scroll to such instruments, it was not necessary, and that the affixing of the seal did not alter its legal effect, and was consequently immaterial. *Truett v. Wainwright*, 9 Ill. 411.

Change in Position of Seal Immaterial.—Where a scrawl made below the signature of the obligor to a bond was erased, and another scrawl made in juxtaposition to the name, it was held that such alteration did not change the legal effect of the instrument, and was immaterial. *Keen v. Monroe*, 75 Va. 424.

2. Removal of Seal from Specialty.—*Evans v. Williamson*, 79 N. Car. 86; *Organ v. Allison*, 9 Baxt. (Tenn.) 459; *Piercy v. Piercy*, 5 W. Va. 199.

Cutting Out Seal on Bond Material.—Where a sealed note was found among the papers of the payee after his death, with the seal carefully cut out, leaving a mere filament by which it was allowed to remain attached, to show what had been the character of the instrument, it was held that the destruction of the seal must be attributed to the payee, and that such destruction vitiated the instrument. *Porter v. Doby*, 2 Rich. Eq. (S. Car.) 49.

Cases of Joint, or Joint and Several Specialty, and One Merely Several, Distinguished.—The effect of removing a seal from a joint or a joint and several specialty, and from one that is merely several, was distinguished in some early *English* cases, which held that if the bond were joint, or joint and several, the effect of removing any one of the seals would go to the whole instrument and avoid it, but if the specialty were several merely, the effect would go to him only whose seal had been removed, and that the instrument as a whole would not be avoided.

Illustrations.—A charter party was indented

between the masters and owners of a ship of the one part, and seven merchants of the other part, by which the masters and owners covenanted to ship certain merchandise at such a port, to be transported to the city of London, for which service each of the merchants covenanted to pay a distinct sum. In an action of debt against one of the merchants upon this indenture, it was pleaded that a seal of one of the merchants affixed to the said indenture was broken from the deed, and vitiated it, but the court held "that although the covenants on the part of the masters and owners were joint, yet the covenants on the part of the merchants stood several; and for this cause, if the seal of one of the merchants be broken from the deed it doth not avoid the deed, but only against him; but if any of the seals of the masters or owners had been broken from the deed, all their covenants had been defeated; and if the deed had been rased in the date after the delivery, the same had gone to the whole and all. But when the covenants are several, they are as several deeds written in one piece of parchment." *Mathewson's Case*, 5 Coke 23.

In an action on a bond, whereby N. C., G. S. W., and J. W. acknowledged themselves held and bound to the plaintiffs in "one thousand pounds each, for which they bound themselves, and each of them for himself, for the whole and entire sum of one thousand pounds each," subject to a condition that G. B. M. should render a true account of all moneys received by him as treasurer for the county of Middlesex, it was held that this was a several bond only, and that the obligees, by removing the seal of one obligor, did not render it void as to the others. *Collins v. Prosser*, 1 B. & C. 682, 8 E. C. L. 287.

3. Inserting Rate of Exchange in Foreign Bill.—A bill for two hundred and fifty pounds was drawn in England payable to the drawer's order, directed to and accepted by the drawee in France, payable in France, and was indorsed by the drawer to the defendant in England with the following indorsement: "Pay to the order of Mr. E. T. Smith, at the rate of twenty-five francs seventy-five centimes for one pound, value received, the sum of six thousand four hundred and thirty-seven francs fifty centimes, *ut retro*;" and upon the face of the bill was placed a superscription of the same words, purporting to make them part of the acceptor's contract. In an action upon the bill, it was held that the insertion of the rate of exchange was a material alteration, and vitiated it. *Hirschfeld v. Smith*, L. R. 1 C. P. 340.

4. Inserting Provision for Exchange on Another City.—In a promissory note, payable at

were payable in a city other than the residence of the maker, the insertion of the words "with current exchange or express charges" would be immaterial, as they add nothing to the note which it did not before import, since in any event the maker would have to remit the money at his expense to the place of payment.¹

17. Change in Serial Number of Instrument.—The serial number of a negotiable bond or bank note being a matter extrinsic to the contract, a fraudulent alteration thereof is not material.²

18. Changes in Insurance Policy.—The materiality of an alteration in an insurance policy, just as in another contract, depends upon its legal effect.

Material Alterations.—Any alteration which changes the terms or conditions of the contract, as, for instance, in a marine policy varying the course³ or destination⁴ of the voyage, or the time of sailing,⁵ is material, and vitiates the policy.

Immaterial Alterations.—The insertion of words in a policy which do not vary its legal effect is immaterial, and will not affect the validity of the instrument.⁶

Zanesville, Ohio, the payee, without authority from the maker, inserted the words "with difference of exchange on Baltimore," apprising the maker at the same time that he had done so. The note was not paid at maturity, and in an action upon it, the court held that the alteration was material and vitiated it. *Merrick v. Boury*, 4 Ohio St. 60.

1. *Bullock v. Taylor*, 39 Mich. 139, 33 Am. Rep. 356.

2. **Alteration of Serial Number of Bond.**—Five bonds of the denomination of one thousand dollars each, issued by the commonwealth, and payable to the bearer, were stolen from the holder in May, 1863. On the 7th of November, 1863, they were received by the Emigrant Industrial Savings Bank in the usual course of business, for a valuable consideration, and without notice, express or implied, of any defect in the title which the bank then acquired, and without any reasonable cause to question their genuineness. In the interval of time between these dates, the numbers of the bonds had been fraudulently altered; by whom, it did not appear, but presumably by the thief. In an action to try the validity of these bonds in the hands of the bank, the court, by Hoar, J., said: "The alteration of the numbers upon the bonds did not in any particular change the liability of the obligor, either in time, place, or amount. Neither the rights or interests, duties, or obligations of either party to the contract were affected by it. Indeed, it was not an alteration of the written contract at all. * * * It is argued that the number of the bond constitutes a part of the identity of the instrument. But this is merely an ambiguous use of the word 'instrument.' It is a part of the identity of the paper, but not of the contract any more than any device, picture, or impression upon it would be. The presence or absence of the number does not change the written contract in substance or in form, nor affect the proof of it. The purpose of putting it on the bond is a collateral object, convenient to the maker, and convenient and important to the holder as a means of distinguishing his property, but not affecting his rights against the maker under the written agreement. We think the change of the numbers was not a material alteration of the

bonds." *Com. v. Emigrant Industrial Sav. Bank*, 98 Mass. 12, 93 Am. Dec. 126. To the same effect see *Suffell v. Bank of England*, 7 Q. B. Div. 270; *Wylie v. Missouri Pac. R. Co.*, 41 Fed. Rep. 623; *Elizabeth v. Force*, 29 N. J. Eq. 587, reversing 28 N. J. Eq. 403; *Note Holders v. Funding Board*, 16 Lea (Tenn.) 46; *Birdsall v. Russell*, 29 N. Y. 220; *State v. Cobb*, 64 Ala. 127; *Brown v. U. S.*, 20 Ct. of Cl. 416.

3. **Marine Insurance—Variation of Voyage.**—A policy of insurance on a ship and cargo from Cuba to Liverpool was altered by the assured by interlining the words "with leave to call off Jamaica." All of the underwriters except one, who, being out of the way, was not applied to, assented to the interpolation without increase of premium. The ship touched at Jamaica, and was lost on the voyage to Liverpool. In an action on the policy, it was held void as to the nonconsenting underwriter. *Forshaw v. Chabert*, 3 Brod. & B. 158, 7 E. C. L. 389.

4. **Alteration in Respect to Destination.**—A policy of insurance from Colmar to Portsmouth was altered by inserting the words "or Weymouth" after Portsmouth. Some of the underwriters gave their consent to the alteration, but in an action against one of the nonconsenting underwriters it was held that the policy was void as to him. *Campbell v. Christie*, 2 Stark. 64, 3 E. C. L. 318.

5. **Alteration in Respect to Time of Sailing.**—If the assured, after subscription by the underwriter, strikes out with a pen the time of warranty of sailing, which stood in the body of the policy, and inserts in a memorandum in the margin a different time for sailing, which the underwriter does not sign, the assured thereby destroys the policy, and the underwriter is discharged from the original contract. *Fairlie v. Christie*, 7 Taunt. 416, 2 E. C. L. 416.

6. **Alterations Which do Not Vary Legal Effect Immaterial.**—A policy of insurance was issued on a ship and cargo "at and from Liverpool, to her port or ports, place or places of discharge and loading in Africa and African islands, and during her stay there, and at and from thence back to Liverpool, or her final port or place of discharge in the United

V. FILLING BLANKS—1. By Express Parol Agreement—*a. SIMPLE CONTRACTS IN WRITING.*—Blanks left in writings not under seal, of whatever description, may, except in those cases prohibited by the statute of frauds,¹ unquestionably be filled up in pursuance of mere parol authority.²

b. SEALED INSTRUMENTS—(1) In General.—But on the question whether blanks left in sealed instruments may be filled in after delivery and out of the presence of the maker,³ by the insertion of material words,⁴ in pursuance of an express parol authority, there is an irreconcilable conflict of authority.⁵

(2) Filling Blanks, and Writing Contract over Signature and Seal, Distinguished.—A distinction seems to have been taken, in at least one well considered case, between the filling in of an instrument which is so radically defective that the insertion of the omitted matter will practically amount to the creation of the instrument, and the completion of a merely imperfect instrument by the filling in of matter suggested and called for by the written or printed portion, and apparently intended by the parties to be inserted.⁶

Kingdom," with liberty on that voyage "to proceed and sail to, touch and stay at, any ports or places whatsoever and wheresoever as above, to sell, barter, and exchange goods, and load, unload, and reload at any and all of the ports and places she may call at and proceed to." The vessel was lost, and, in an action against the underwriters on the policy, the defendants pleaded that the policy was void by reason of a material alteration which had been made therein, to wit: an insertion of the words "and trade" after the words "during her stay." The court, by Burrough, J., said: "If the insertion of these words had altered the effect of the policy, I should think the defendant was not liable to the present demand. But they do not alter it, for the insured were to have liberty to sell, barter, exchange, load, and reload; and more than this is not comprehended in the words 'and trade.' There can be no color for saying that this alteration was material." There was a judgment for the plaintiff. *Sanderson v. Symonds*, 1 B. and B. 426.

1. *Nelson v. Dutton*, 51 Mich. 416. See the title **FRAUDS, STATUTE OF**.

2. See the title **AGENCY**, vol. 1, p. 955.

3. **Filling Blanks in Presence of Grantor or Obligor.**—The cases seem to recognize the validity of the filling of blanks in sealed instruments by a third person having only parol authority to do so, if done in the presence of the grantor or obligor. *Hudson v. Revett*, 5 Bing. 368, 15 E. C. L. 467; *Warring v. Williams*, 8 Pick. (Mass.) 322. See the title **AGENCY**, vol. 1, p. 953.

4. **Filling Blank with Immaterial Matter.**—Where the matter inserted in a blank left in a sealed instrument does not change its legal effect, this is not a case for the application of the rule that blanks in a deed, which constitute a material part of the instrument, cannot, in the absence of the maker, be filled up by parol authority, because authority to make a deed must be given by deed, but it is rather a case for the application of the principle that immaterial alterations do not avoid a writing. *Vose v. Dolan*, 108 Mass. 155, 11 Am. Rep. 331; *Keen v. Monroe*, 75 Va. 424. See also 1 *Jones Mortg.*, § 95. See *supra*, this title, division *Effect of Alterations*, subd. *Immaterial Alterations*.

A deed having been signed, sealed, and delivered, with a blank left for the date, the grantee afterwards inserted the date; the deed was adjudged to be good, the date not being a material part thereof, and no evil design in filling up the blank appearing. *Whiting v. Daniel*, 1 Hen. & M. (Va.) 391.

5. See the title **AGENCY**, vol. 1, p. 954.

6. *South Berwick v. Huntress*, 53 Me. 89. In *Burns v. Lynde*, 6 Allen (Mass.) 305, it was held that the filling up a blank form of a deed, by parol authority of one who has signed and sealed it, will not make it a valid conveyance of land, unless the instrument is redelivered after being completed in form.

Referring to this case, in *South Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec. 535, the court, by Kent, J., points out that *Burns v. Lynde*, 6 Allen (Mass.) 305, "was a case where, when the seal and signature were affixed to the paper, it was a printed form of a deed, in which none of the blanks had been filled up. As the court say, 'When the paper was delivered, it had no validity or meaning. The filling of the blanks created the substantial parts of the instrument itself, as much so as the signing or sealing.' The defendant filled the blanks after it was given to him by the signer, in her absence, by entering the names of the parties, the description of the land, and the agreement of release of dower on her part, and the date and other words necessary to complete it. The defendant offered to prove that when she signed it she authorized him to fill it up as he did, and that, after it was filled up and the husband had executed it, the defendant informed her of the facts, and she thereupon verbally assented to what had been done, and agreed that it should be taken to be her deed, duly executed. This evidence was excluded; and the court held that the prior authority did not give a right to make this entire deed, and that the subsequent assent did not amount to a new delivery. That case differs from the one before us in several particulars; especially in the point that the paper or deed, when signed, contained nothing expressive of the intentions of the parties, or a description of the property to be conveyed. Nothing could be gathered from it."

(3) *Writing Contract over Signature and Seal*.—And it has been held, in cases where a paper wholly blank, or one which was so incomplete that there was nothing expressive of the intention of the parties, and the filling in of the blanks would create the substantial parts of the instrument, had been signed, sealed and delivered, that the writing in of the terms of the contract, in pursuance of either an express or implied authority, did not make such writing a valid instrument.¹

(4) *Perfecting Merely Incomplete Instrument*.—(a) **English Rule—Parol Authority Insufficient**.—In an early English case, which occupies a very conspicuous figure in the discussions on this subject, it was decided that blanks in a sealed instrument might be filled by parol authority.² But this case has been overruled.³ Applying the principle that an authority to make a deed or execute a sealed instrument must be of as high a character as the instrument itself, *i. e.*, must be under seal, the English courts have declared that blanks in a sealed instrument cannot be filled up, except by authority of the grantor or obligor under seal.⁴ This doctrine, though it seems to have been somewhat trenched upon in other English cases,⁵ is now generally accepted

1. **Deeds**.—Thus it is held that a valid deed cannot be made by writing it over a signature and seal made upon a blank or an empty sheet of paper. *Simms v. Hervey*, 19 Iowa 273; *Ayres v. Harness*, 1 Ohio 368, 13 Am. Dec. 629; *Duncan v. Hodges*, 4 McCord (S. Car.) 239, 17 Am. Dec. 734.

In *Lindsley v. Lamb*, 34 Mich. 509, it was held that a blank deed executed in another state, which did not contain the name of the grantee, the description of the property, or a statement of the consideration, but was filled out in these particulars in Michigan by some one not shown to have authority from the grantor, conveyed no title to any one who had notice of the facts. See the title **DEEDS**.

Bonds.—So where a signature and seal are attached to a blank piece of paper for the purpose of having a bond thereafter written upon it, it has been held that the completed instrument will not constitute a valid bond. *Byers v. McClanahan*, 6 Gill & J. (Md.) 250.

In the case of *Gilbert v. Anthony*, 1 Yerg. (Tenn.) 69, 24 Am. Dec. 439, it was held that a paper signed in blank with verbal authority given at the time to fill it up as a prison-bonds bond, which was afterwards done, was void unless redelivered. And see the title **BONDS**.

Mortgages.—A like rule has been applied to the filling up of a mere blank for a mortgage. *Ayres v. Probasco*, 14 Kan. 175. See the title **MORTGAGES**.

2. **Case of Texira v. Evans—Sufficiency of Parol Authority**.—The case of *Texira v. Evans* is not reported, but is referred to by Wilson, J., 1 Anst. 228 (33 Geo. III.), and thus stated by him: "I remember the case of *Texira v. Evans*, before Lord Mansfield, which was this: Evans wanted to borrow four hundred pounds, or so much of it as his credit should be able to raise; for this purpose he executed a bond, with blanks for the name and sum, and sent an agent to raise money on the bond. *Texira* lent two hundred pounds on it, and the agent accordingly filled up the blanks with that sum and *Texira's* name, and delivered the bond to him. On *non est factum*

pleaded, Lord Mansfield held it a good deed;" in other words, held that blanks in a sealed instrument of this character might be filled by parol authority.

3. **Case of Texira v. Evans Overruled**.—In *Hibblewhite v. M'Morine*, 6 M. & W. 200, Parke, B., says of the case of *Texira v. Evans*, 1 Anst. 228, that it is "justly questioned by Mr. Preston in his edition of *Shep. Touch.* 68, 'as it assumes that there could be an attorney without deed;' and we think it cannot be considered to be law. On the other hand, there are several authorities that an instrument which has a blank in it, which prevents it from having any operation when it is sealed and delivered, cannot become a valid deed by being afterwards filled up."

4. **English Authorities Denying Sufficiency of Parol Consent**.—Co. Litt. 171; *Shep. Touch.* 54; 4 Vin. Abr., *Blank*; Com. Dig., *Fail*, a. p. 1; *Hibblewhite v. M'Morine*, 6 M. & W. 215, 2 Eng. R. & Canal Cas. 51; *Enthoven v. Hoyle*, 9 Eng. L. & Eq. 434.

Example.—In the above cited case of *Hibblewhite v. M'Morine*, 6 M. & W. 215, 2 Eng. R. & Canal Cas. 51, it was held that if a conveyance of shares in a railway, which is called a "deed of conveyance," and a "deed of sale or transfer" by a clause in the Brighton Railway Act (1 Vict., cxix., § 155), has the name of the vendee left out, the filling in of his name by an agent appointed by parol, and then delivering the instrument in the absence of the principal as a deed, would be in violation of the principle that an attorney, to execute and deliver a deed for another, must himself be appointed by deed.

5. **Apparent Departure from Rule**.—In the case of *Eagleton v. Gutteridge*, 11 M. & W. 466, where a blank had been left in a power of attorney, under seal, for the purpose of being filled in with the Christian name of the person meant to be empowered, the insertion of such Christian name was held not to vitiate the instrument, on the ground that consent might be inferred.

And in *Markham v. Gonaston*, Moore 547, the bond was drawn to indemnify against a

as the established law in England.¹

(b) **Rule in the United States—Strict Rule Followed in Some Jurisdictions.**—And the strict rule of the English courts has been applied by the courts of a number of the states of the Union.²

Blanks Filled by Agent with Parol Authority.—Thus it has been held that where an instrument containing a blank is signed and sealed and handed to an agent, only verbally authorized to fill up the blank and deliver the writing, it is not the deed of the principal, unless it is afterwards delivered or adopted by him.³

Parol Authority Sufficient in Some Jurisdictions.—But the courts of other states of the Union have taken the view that the principle that an authority to make a deed or execute a sealed instrument for another must be under seal should be limited to the execution of a sealed instrument by one person for another; and it is considered that the mere completion of an imperfect sealed instrument by the filling of blanks left therein does not come within the inhibition of the rule.⁴ In line with this view, cases are found which have sustained the

certain person, but, his Christian name not being recollected, the bond was executed with a blank for his Christian name to be filled in afterwards. The obligee afterwards filled it in himself, and for this alteration the obligee pleaded that it was not his deed. But the court held the bond to be valid.

This case was cited by Sir Matthew Hale in 2 Lev. 35, and the doctrine of it was established by the whole court, that an alteration in even a material part of a bond, if made by consent of both parties, does not invalidate the instrument.

And in *Zouch v. Clay*, 1 Vent. 185, the court say it is the common practice for sheriffs to take bail bonds of defendants, with blanks for the names of sureties, which are afterwards filled up with the names of those securities when they come to sign the bonds.

1. See *Bish. Contr.*, § 1168; *Preston v. Hull*, 23 Gratt. (Va.) 600, 14 Am. Rep. 153.

Canada.—In *Canada* the courts have shown a disposition to favor the view that where a blank left in a specialty has been filled in under express authority, given by the grantor or obligor, the instrument is a valid deed. *Leonard v. Merritt*, Drap. (U.C.) 281; *Stuart v. Prentiss*, 20 U. C. Q. B. 513.

2. **English Decisions Followed—United States.**—*U. S. v. Nelson*, 2 Brock. (U. S.) 74.

Arkansas.—*Cross v. State Bank*, 5 Ark. 525. **Georgia.**—*Ingram v. Little*, 14 Ga. 173, 58 Am. Dec. 549.

Illinois.—*People v. Organ*, 27 Ill. 27, 79 Am. Dec. 301; *Chase v. Palmer*, 29 Ill. 306.

Iowa.—*Simms v. Hervey*, 19 Iowa 273, criticised in *Swartz v. Ballou*, 47 Iowa 188, 29 Am. Rep. 470.

Massachusetts.—*Burns v. Lynde*, 6 Allen (Mass.) 305.

Mississippi.—*Williams v. Crutcher*, 5 How. (Miss.) 71, 35 Am. Dec. 422.

North Carolina.—*Bland v. O'Hagan*, 64 N. Car. 471; *Barden v. Southerland*, 70 N. Car. 528.

Washington.—*Walla Walla County v. Ping*, 1 Wash. Ter. 339.

See *Tucker v. Allen*, 16 Kan. 312.

Filling Blanks in Bond with Amount.—Where a blank was left in a bond for money, to be filled up when the sum was ascertained, and,

after the delivery, the blank was fairly filled up by a stranger, it was held that the instrument was void. *M'Kee v. Hicks*, 2 Dev. (N. Car.) 379.

Blanks in Bond Filled by Principal after Signature by Sureties.—A blank paper was signed and sealed by a principal, and three others as sureties, and left with the principal to be filled up and signed by him. He did fill it up, and delivered it to the obligee named therein. It was held not to bind the sureties, but that it was the bond of the principal who filled up the blanks and delivered it. *Penn v. Hamlett*, 27 Gratt. (Va.) 337.

Tender of Deed with Blank for Consideration.—It has been held that a purchaser of land is not bound to accept a deed of bargain and sale in which there is a blank left for the consideration money, notwithstanding the grantors, after acknowledgment of the deed by them, have authorized their agent to fill the blank. *Moore v. Bickham*, 4 Binn. (Pa.) 1.

Mortgage of Crop—Insertion of Date.—Where a mortgage on a crop to secure supplies was executed with a blank date before the crop was planted, and with an agreement to date and acknowledge it after the crop should be planted and the supplies furnished by the mortgagee, the insertion of the subsequent date by the mortgagee was not unauthorized, and the mortgage was held valid in equity as of its actual date, notwithstanding the subsequent refusal of the mortgagor to date and acknowledge it as agreed. *Lemay v. Johnson*, 35 Ark. 225.

3. **Blanks Filled by Agent with Parol Authority.**—*Basford v. Pearson*, 9 Allen (Mass.) 387, 85 Am. Dec. 764; *Davenport v. Sleight*, 2 Dev. & B. (N. Car.) 381, 31 Am. Dec. 420; *Graham v. Holt*, 3 Ired. (N. Car.) 300, 40 Am. Dec. 408; *Blacknall v. Parish*, 6 Jones Eq. (N. Car.) 70, 78 Am. Dec. 239; *Shirley v. Burch*, 16 Oregon 83, 8 Am. St. Rep. 273; *Mosby v. Arkansas*, 4 Sneed (Tenn.) 324; *Preston v. Hull*, 23 Gratt. (Va.) 600, 14 Am. Rep. 153. See *Upton v. Archer*, 41 Cal. 85, 10 Am. Rep. 266.

4. **Execution of and Filling Blanks in Instrument Distinguished.**—*South Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec. 535. In the opinion delivered in this case by Kent, J., it

sufficiency of parol authority to fill blanks in sealed instruments,¹ such as deeds,² bonds,³ mortgages,⁴ and powers of attorney under seal.⁵

is said: "When the instrument is a sealed instrument, when signed by the party, the filling in of the blanks afterwards by another is not, strictly speaking, the execution of a sealed instrument. That has already been done by the party himself. The third party does not make it a specialty by his act. It was one before. The filling up merely perfects an imperfect sealed deed or bond."

1. Filling Blanks in Sealed Instruments—Parol Authority Held Sufficient.—*Drury v. Foster*, 2 Wall. (U. S.) 24; *Bridgeport Bank v. New York, etc., R. Co.*, 30 Conn. 274; *Swartz v. Ballou*, 47 Iowa 188, 29 Am. Rep. 470; *criticising Simms v. Hervey*, 19 Iowa 273; *State v. Young*, 23 Minn. 551; *Forster v. Moore*, 79 Hun (N. Y.) 472; *Woolley v. Constant*, 4 Johns. (N. Y.) 54, 4 Am. Dec. 246; *Cribben v. Deal*, 21 Oregon 211.

In *South Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec. 535, in discussing the force of the rule that an authority to make a deed or execute a sealed instrument for another must be under seal, which is by some authorities invoked in support of the proposition that blanks left in sealed instruments cannot be filled after execution, the court, by Kent, J., says that it "is purely technical." Of the proposition itself it is said: "Practically, there is no real distinction in this matter between bonds and simple contracts. There is no more danger of fraud or injury or wrong in allowing insertions in a bond than there is in allowing them in a promissory note or bill of exchange. Both are agreements or contracts, and in neither can unauthorized alterations be made with impunity. Considering that the assumed difference rests on a mere technical rule of the common law, we do not think that the rule should be extended beyond its necessary limits, viz.: that a sealed instrument cannot be executed by another, so far as its distinguishing characteristic as a *sealed* instrument is in question, unless by an authority under seal."

Authority must be Strictly Followed.—But this authority must be strictly followed. *Trundy v. Erkenbrack*, 8 Alb. L. J. (N. Y.) 10, cited by *Barnard, P. J.*, in *Chauncey v. Arnold*, 24 N. Y. 330, note. So while an agent to whom a grantor delivered a deed, blank as to the name, may, upon the grantor's authority, fill in the name of the grantee with whom the grantor had contracted, he may not, even upon the request of the grantee, insert another name. *Schintz v. McManamy*, 33 Wis. 299. *Compare Clark v. Allen*, 34 Iowa 190.

2. Filling Blanks in Deeds.—*Doe v. McArthur*, 2 Hawks. (N. Car.) 33, 11 Am. Dec. 738. See *Drury v. Foster*, 2 Wall. (U. S.) 24; *Murray v. Klinkzing*, 64 Conn. 78. See also the title DEEDS.

Filling in Name of Grantee.—It has been held that when a deed is regularly executed in other respects, with a blank left therein for the name of the grantee, parol authority is sufficient to authorize the insertion of the name

of such grantee. *Devin v. Himer*, 29 Iowa 297; *Swartz v. Ballou*, 47 Iowa 188, 29 Am. Rep. 470; *Burnside v. Wayman*, 49 Mo. 357; *Field v. Stagg*, 52 Mo. 534, 14 Am. Rep. 435; *Threadgill v. Butler*, 60 Tex. 599.

3. Filling Blanks in Bonds—Alabama.—*Gibbs v. Frost*, 4 Ala. 720.

Illinois.—*Donnell Mfg. Co. v. Jones*, 49 Ill. App. 327.

Indiana.—*Richmond Mfg. Co. v. Davis*, 7 Blackf. (Ind.) 412.

Missouri.—*Greene County v. Wilhite*, 29 Mo. App. 459.

New York.—*Hemmenway v. Mulock*, 56 How. Pr. (N. Y. Supreme Ct.) 38; *Ex p. Kerwin*, 8 Cow. (N. Y.) 118.

Pennsylvania.—*Stahl v. Berger*, 10 S. & R. (Pa.) 170, 13 Am. Dec. 666; *Costen's Appeal*, 13 Pa. St. 292; *Wiley v. Moor*, 17 S. & R. (Pa.) 438, 17 Am. Dec. 696; *Bugger v. Cresswell* (Pa. 1888), 12 Atl. Rep. 829.

See also *White v. Vermont, etc., R. Co.*, 21 How. (U. S.) 575; *Bell v. Quick*, 13 N. J. L. 312; *Hale v. Russ*, 1 Me. 334; *Smith v. Crooker*, 5 Mass. 538.

Inserting Penal Sum.—It has accordingly been held that the insertion of the penal sum of a bond in a blank left therein for that purpose will not vitiate the instrument. *Brown v. Colquitt*, 73 Ga. 59, 54 Am. Rep. 869; *South Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec. 535; *State v. Young*, 23 Minn. 551.

Inserting Name of Oblige.—Where A gave B a bond with a blank for the name of the payee, and agreed that the payee's name might afterwards be inserted, it was held that B might insert his name accordingly. *Boardman v. Gore*, 1 Stew. (Ala.) 517, 18 Am. Dec. 73.

Where a bond was signed in blank, with the obligee's name and the penalty not inserted, and the obligor directed an officer, who was authorized to take such bond, to insert the name of the obligee and the penalty in such bond in his absence, and this was done, such obligee's name and the amount of the penalty in the bond being known to the obligor to whom the instructions were given, it was held that the instrument was not avoided, but was binding on the obligor. *Brown v. Colquitt*, 73 Ga. 59, 54 Am. Rep. 869.

4. Filling Blanks in Mortgages.—*Hemmenway v. Mulock*, 56 How. Pr. (N. Y. Supreme Ct.) 38; *Forster v. Moore*, 79 Hun (N. Y.) 472.

In *Van Etta v. Evenson*, 28 Wis. 33, 9 Am. Rep. 486, it was held that where a note and mortgage, otherwise fully executed, but with a blank in each for the name of the payee and mortgagee, were delivered to an agent who was to procure from whomsoever he could a loan of money thereon for the maker, this showed an intention that the agent should fill the blanks, and, when so filled, the instruments were valid without a new execution and delivery.

5. Filling Blanks in Powers of Attorney under Seal.—*Eagleton v. Gutteridge*, 11 M. & W.

Blanks Filled by Agent with Parol Authority.—Where this rule prevails, it is held that where a sealed instrument containing blanks is given to an agent with parol authority to fill the blanks and deliver it, the writing, when so filled out and delivered, is a valid instrument.¹

Under Statutes Dispensing with Seals.—On this question of the sufficiency of parol authority to fill a blank in a deed after delivery, the decisions of some of the states attach importance to the fact that the statutes have dispensed with the necessity of seals.²

2. Implied Authority—*a.* GENERAL RULE.—It may be stated as a general rule, which is unquestionably applicable to all simple contracts in writing, and, according to some authorities, also to specialties,³ that where a person intending to enter into a contract delivers a writing containing blanks, evidently meant to be filled, this creates in the receiver, and, at least in the case of negotiable paper, in his transferees,⁴ an implied authority to complete the instrument by filling the blanks in the way apparently contemplated by the maker with matter in general conformity to the character of the writing.⁵

***b.* BASIS OF RULE.**—This right to fill blanks left in a writing, without any

466; *Markham v. Gonaston*, Moore 547; *Bridgeport Bank v. New York, etc., R. Co.*, 30 Conn. 231; *Commercial Bank v. Kortright*, 22 Wend. (N. Y.) 348, 34 Am. Dec. 317.

1. Blanks Filled by Agent Having Parol Authority.—*Field v. Stagg*, 52 Mo. 534, 14 Am. Rep. 435; *Hemmenway v. Mulock*, 56 How. Pr. (N. Y. Supreme Ct.) 38; *Cribben v. Deal*, 21 Oregon 211; *Duncan v. Hodges*, 4 McCord (S. Car.) 239, 17 Am. Dec. 734; *Schintz v. McManamy*, 33 Wis. 299.

But in *Allen v. Withrow*, 110 U. S. 119, while the court admits that although "it may be, and probably is, the law in *Iowa*, as it is in several states, that the grantor in a deed conveying real property, signed and acknowledged, with a blank for the name of the grantee, may authorize another party, by parol, to fill up the blank," it says: "But there are two conditions essential to make a deed thus executed in blank operate as a conveyance of the property described in it; the blank must be filled by the party authorized to fill it, and this must be done before or at the time of the delivery of the deed to the grantee named."

Alteration of Bond by Agent after Filling Blanks.—It has been held that an appeal bond executed in blank, and delivered to an agent to fill up and make perfect, cannot be altered by him after he has filled the blanks and delivered the bond to the justice. *Ex p. Decker*, 6 Cow. (N. Y.) 59.

2. Swartz v. Ballou, 47 Iowa 188, 29 Am. Rep. 470; *McClain v. McClain*, 52 Iowa 274. See *Lockwood v. Bassett*, 49 Mich. 546.

And in the case of *Threadgill v. Butler*, 60 Tex. 599, it is said: "Formerly, when seals were essential, it was generally held that blanks in deeds, bonds, and other specialties could not be supplied and the instrument perfected by any one acting under parol authority. But more recently, since seals have been generally abolished, and but little importance attached to their use, undoubtedly the weight of authority sustains the proposition that any one acting under parol authority can fill blanks, and perfect such instru-

ments in accordance with the intention of the parties."

3. See *infra*, this title and division, subd. *Application of Rule.*

4. Blanks in Negotiable Paper Filled by Transferee.—The right to fill up blanks left in negotiable instruments is not restricted to the first holder thereof, but may be exercised by his transferee. *Page v. Morrell*, 33 How. Pr. (N. Y. Ct. App.) 244.

5. General Rule as to Implied Authority—*England.*—*In re Tahiti Cotton Co.*, L. R. 17 Eq. 273.

Alabama.—*Boardman v. Gore*, 1 Stew. (Ala.) 517, 18 Am. Dec. 73.

Illinois.—*Yocum v. Smith*, 63 Ill. 321, 14 Am. Rep. 120; *Jewell v. Rock River Paper Co.*, 101 Ill. 57.

Indiana.—*Spitler v. James*, 32 Ind. 202, 2 Am. Rep. 334; *Gillaspie v. Kelley*, 41 Ind. 158, 13 Am. Rep. 318.

Iowa.—*Rainbolt v. Eddy*, 34 Iowa 440, 11 Am. Rep. 152.

Kentucky.—*Commonwealth Bank v. Curry*, 2 Dana (Ky.) 142; *Commonwealth Bank v. McChord*, 4 Dana (Ky.) 191, 29 Am. Dec. 398; *Hall v. Commonwealth Bank*, 5 Dana (Ky.) 258.

Maine.—*South Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec. 535.

Massachusetts.—*Smith v. Crooker*, 5 Mass. 538.

Missouri.—*New England L. & T. Co. v. Brown*, 59 Mo. App. 461.

New York.—*Page v. Morrell*, 3 Abb. App. Dec. (N. Y.) 433; *Van Duzer v. Howe*, 21 N. Y. 531; *Redlich v. Doll*, 54 N. Y. 234, 13 Am. Rep. 573, and note; *McGrath v. Clark*, 56 N. Y. 34, 15 Am. Rep. 372.

Pennsylvania.—*Hepler v. Mount Carmel Sav. Bank*, 97 Pa. St. 420, 39 Am. Rep. 813; *Wiley v. Moor*, 17 S. & R. (Pa.) 438, 17 Am. Dec. 696; *Garrard v. Haddan*, 67 Pa. St. 82, 5 Am. Rep. 412.

South Carolina.—*Duncan v. Hodges*, 4 McCord (S. Car.) 239, 17 Am. Dec. 734.

Virginia.—*Jordan v. Neilson*, 2 Wash. (Va.) 164.

But see *Holmes v. Trumper*, 22 Mich. 427, 7 Am. Rep. 661.

express authority, rests upon an assumption of consent; it is considered that the fact that blanks are left in an instrument implies an authority to fill them.¹

Express Authority Governs.—It is, therefore, apparent that the right cannot exist where it has been negated by an express agreement.² And it seems even to have been held that where express authority is given to fill the blanks left in an instrument in one respect only, that authority must be pursued, and no other can be exercised.³

c. APPLICATION OF RULE—(1) *In General.*—In the application of this principle, a distinction necessarily exists in some jurisdictions between simple contracts in writing and contracts under seal.⁴

(2) *Simple Contracts in Writing.*—While the most common application of this rule arises with reference to the filling of blanks in commercial paper,⁵ it is not confined to such instruments, but is unquestionably applicable to all simple contracts in writing.⁶

(3) *Sealed Instruments*—(a) *Where Parol Authority is Deemed Insufficient.*—Since the right to fill blanks left in an instrument is based wholly upon the assumption of a consent thereto on the part of the maker, his consent being in the absence of express authority implied from the delivery of the instrument containing blank spaces, it is clear that no authority to fill blanks left in a specialty can be implied, if it is true, as is held in some jurisdictions, that blanks left in a sealed instrument cannot be filled up after delivery in pursuance of any authority of a lesser dignity than the instrument itself.

(b) *Where Sufficiency of Parol Authority is Sustained.*—But in those jurisdictions where the courts have sustained the validity of sealed instruments in which blanks were filled in pursuance of parol authority expressly given, it would seem proper for them also to hold that blanks in writings of this character may be filled by virtue of the authority so to do which is implied from the delivery of an instrument containing blanks.⁷ And they have so held,⁸ of course with the proviso that that there is nothing in the circumstances of the case which negatives the implication of consent, the rule being that this authority will be implied whenever it is fairly and legally inferable from all the circumstances of the particular case under consideration.⁹

1. Greenl. Ev., § 568a; South Berwick v. Huntress, 53 Me. 89, 87 Am. Dec. 535; Smith v. Crooker, 5 Mass. 538; New England L. & T. Co. v. Brown, 59 Mo. App. 461.

2. **Agreement that Blanks shall Remain Unfilled.**—If a blank left in a note is filled up, notwithstanding an express agreement that it shall be left unfilled, the note will be avoided as between the original parties or in the hands of a transferee who has knowledge of the agreement. Charlton v. Reed, 61 Iowa 166, 47 Am. Rep. 808.

3. **Implied Authority Negatived by Express Authority.**—Thus where a note was delivered with the blanks for the time and place of payment, and express authority was given the payees to fill in the date of maturity, it was held that their authority was exhausted, and they could not insert a place of payment. Toomer v. Rutland, 57 Ala. 379, 29 Am. Rep. 722.

4. See the case of South Berwick v. Huntress, 53 Me. 89, 87 Am. Dec. 535, where the propriety of this distinction is elaborately discussed.

5. Douglass v. Scott, 8 Leigh (Va.) 43.

6. Angle v. North Western Mut. L. Ins. Co., 92 U. S. 330; Humphreys v. Guillo, 13 N. H. 385, 38 Am. Dec. 499.

Power of Attorney Not under Seal.—Thus it has been held that the rule authorizes the filling of blanks in a power of attorney to confess judgment which is attached to a promissory note. White v. Alward, 35 Ill. App. 195.

7. **Implied Authority to Fill Blanks in Specialties Favored.**—It is on the consent of the grantor or obligor that the right to fill blanks is based. Consent may be implied as well as expressed. And when fairly and legally inferred, it is actual and effective consent; as much so as when direct authority by parol is given. See opinion by Kent, J., in South Berwick v. Huntress, 53 Me. 89, 87 Am. Dec. 535.

8. **Leaving Blank in Specialty Implies Right to Fill.**—In South Berwick v. Huntress, 53 Me. 89, 87 Am. Dec. 535, it was held that the principle that where a person executes a writing and delivers it to another, knowing that there are blanks in it necessary to be filled in order to make it a perfect instrument, he must be considered as agreeing that the blanks may be filled in the manner suggested or called for by the incomplete instrument, is applicable to instruments under seal. And see State v. Young, 23 Minn. 551.

9. **Right Implied from All the Circumstances.**—Swartz v. Ballou, 47 Iowa 188, 29 Am. Rep.

d. EXTENT OF IMPLIED AUTHORITY—(1) Insertion of Matter Necessary to Complete Instrument.—While there is an implied authority to fill blanks left in a written instrument with such matter as is apparently called for by the written or printed words, and is necessary to make it complete, there can be no implied authority to fill the blanks with anything not necessary to the completion of the instrument in accordance with the form when delivered.¹

Filling in Date.—While it is not essential to the validity of a note that the date be expressed, yet it is highly important to the free and uninterrupted negotiability of the instrument that it should be dated. And this consideration has led courts to hold that a person to whom a note containing a blank space for the date is delivered has an implied authority to fill in the blank with the proper date.² And it has even been held that where a blank is left in a note for the day of the month, the holder of the instrument may fill in the blank at his discretion with any day in that month.³ But, on the other hand, it has been held that there is no implied authority to insert any other than the true date.⁴

Filling in Amount.—This authority to perfect an instrument by filling in blanks, which is impliedly conferred upon a person to whom an instrument containing blank spaces is intrusted, gives the holder of a note which contains a blank for the amount the right to fill in the blank with the true amount of the principal.⁵ But the insertion of an amount different from the true one has been held a vitiating alteration of a mortgage.⁶

Marginal Figures Stating Amount.—Where the amount of the principal is left blank in the body of a bill or note, but there is a marginal memorandum expressing the amount, it is held that the holder may fill in the blank with any amount, not exceeding the limitation in the margin, which the transaction between him and the person from whom he received the instrument will warrant.⁷

Filling in Interest.—It has been held that where a note contains an interest clause complete in all respects, except that a blank space is left for the rate, the insertion in the blank of a figure expressive of the rate changes the note from a non-interest-bearing instrument to one bearing interest, and bars

470; *State v. Young*, 23 Minn. 551. Compare *Arguello v. Bours*, 67 Cal. 447.

Express Authority Required.—But it has been held that a deed or mortgage executed in blank, that is, without inserting the name of any grantee or mortgagee, may not be filled in without express authority of the grantor, evidenced otherwise than by mere delivery; that such authority cannot be inferred with respect to deeds or instruments under seal; and that an instrument in the form of a mortgage, but containing the name of no mortgagee, does not become effectual by delivery to one who advances money upon the faith of an agreement that he shall hold the instrument as security for such advance. *Chauncey v. Arnold*, 24 N. Y. 330.

1. Extent of Implied Authority—General Rule.—*Davidson v. Lanier*, 4 Wall. (U. S.) 447; *Toomer v. Rutland*, 57 Ala. 379, 29 Am. Rep. 722; *Farmers' Nat. Bank v. Thomas*, 79 Hun (N. Y.) 595; *Smith v. Eals*, 81 Iowa 235; *South Berwick v. Huntress*, 53 Me. 89, 87 Am. Dec. 535.

Insertion of Words "or His Order."—In *Bruce v. Westcott*, 3 Barb. (N. Y.) 374, it was held that the insertion of the words, "or his order," in a promissory note, after the name of the payee, although there was sufficient space left to do so without creating sus-

picion in the mind of an innocent holder, rendered the note invalid in the hands of such innocent holder, on the ground that the note was already perfect without the words of negotiability.

2. Filling in Date.—*Overton v. Matthews*, 35 Ark. 146, 37 Am. Rep. 9; *Gill v. Hopkins*, 19 Ill. App. 74; *Weyerhauser v. Dun*, 100 N. Y. 150; *Hepler v. Mount Carmel Sav. Bank*, 97 Pa. St. 420, 39 Am. Rep. 813; *Bechtel's Estate*, 133 Pa. St. 367. See *Wilson v. Henderson*, 9 Smed. & M. (Miss.) 375, 48 Am. Dec. 718. *Contra*, *Stout v. Cloud*, 5 Litt. (Ky.) 205. Compare *English v. Breneman*, 9 Ark. 122, 47 Am. Dec. 735.

3. Mitchell v. Culver, 7 Cow. (N. Y.) 336; *Page v. Morrell*, 33 How. Pr. (N. Y. Ct. App.) 244, 3 Abb. App. Dec. (N. Y.) 433.

4. English v. Breneman, 5 Ark. 377, 41 Am. Dec. 96, 9 Ark. 122, 47 Am. Dec. 735.

5. Filling in Amount.—*Eichelberger v. Old Nat. Bank*, 103 Ind. 401; *Boyd v. Brotherson*, 10 Wend. (N. Y.) 93. See *Blackwell v. Ketcham*, 53 Ind. 184.

6. Filling in Amount Other than True One.—*Green v. Sneed*, 101 Ala. 205.

7. Filling in Amount in Accordance with Marginal Figures.—*Norwich Bank v. Hyde*, 13 Conn. 279; *Williamson v. Smith*, 1 Coldw. (Tenn.) 1, 78 Am. Dec. 478.

recovery thereon.¹ Certainly such blank cannot, in the absence of an express agreement, be filled with a rate which is greater than the legal one.²

Filling in Time of Payment.—It has been held that a transferee of a note which contains a blank for the time of payment may, in the absence of any agreement on the subject, fill up the blank.³

Filling in Place of Payment.—Where a blank left in a promissory note is clearly intended for the purpose of being filled in with an interest clause, the delivery of an instrument with such blank unfilled cannot give any implied authority for the insertion therein of words expressing a particular place of payment.⁴ But it has been held that where a blank space is left after the word "at" in a promissory note, the holder has an implied authority to fill the blank with words designating the place of payment.⁵

Filling in Name of Party.—If a promissory note or bill of exchange is drawn and negotiated with a blank left for the name of the payee, the blank may be filled in by any holder, who comes regularly by the instrument, with his own name.⁶ And it has been held that it is competent for the holder of a negotiable instrument indorsed in blank to insert the name of an indorsee.⁷

(2) *Insertion of Repugnant Stipulations.*—Nothing can be inserted in, or added to, an instrument, which would vary or alter its material terms, or be

1. **Filling in Rate of Interest.**—Gwin v. Anderson, 91 Ga. 827; Yost v. Minneapolis Harvester Works, 41 Ill. App. 556; Grand Haven First Nat. Bank v. Hall, 83 Iowa 645.

Where a note contained the following clause, "With interest at the rate of — per cent. per annum from maturity," and the word "ten" was inserted in the blank, it was said that as it read before the insertion it was a perfect note, and bore six per cent. interest after maturity, and the insertion of the word "ten" was not only unnecessary to make it a complete and perfect note, but materially increased the defendant's liability, and it was held that the alteration therefore vitiated the instrument. Paris Nat. Bank v. Nickell, 34 Mo. App. 295; Washington Sav. Bank v. Ecky, 51 Mo. 272. *Contra*, Visher v. Webster, 8 Cal. 109.

In Fisher v. Dennis, 6 Cal. 577, 65 Am. Dec. 534, it was held that where the payee of a note filled in a blank left therein for the rate of interest, this was not such an alteration of the note as would vitiate it, but he could recover only legal interest unless he proved an agreement or consent by the maker to the rate inserted.

2. **Filling in Legal Rate.**—Hoopes v. Collingwood, 10 Colo. 107.

Apparently on the ground that a note which contains an interest clause which is complete in every respect, except that the rate of interest is left blank, will draw interest at the legal rate (see the title **BILLS AND NOTES**; Salazar v. Taylor, 18 Colo. 538), it has been held that the insertion in such blank space of a figure expressing the legal rate will not render the note void. Oakland First Nat. Bank v. Wolff, 79 Cal. 69. See *supra*, this title, div. *Materiality of Alterations*, subd. *Change in Interest*.

3. **Filling in Time of Payment.**—Johns v. Harrison, 20 Ind. 324; Wilson v. Henderson, 9 Smed. & M. (Miss.) 375, 48 Am. Dec. 716.

4. **Filling in Blank for Interest with Place of Pay-**

ment.—Where a note at the time of its execution and delivery to the payee contained a blank space after the words "with interest," and it was evident that in preparing the note the parties used the ordinary printed blank form of a common note, not payable at a bank, and that the blank space thus left in the printed form of such note was so left for the purpose of inserting therein the contract or agreement, if any, in relation to interest on the note, and for no other purpose, it was held that the insertion of the words, "Payable at the First National Bank of Kendallville," in such blank, vitiated the instrument. McCoy v. Lockwood, 71 Ind. 319.

5. **Filling in Place of Payment.**—Kitchen v. Place, 41 Barb. (N. Y.) 465; Redlich v. Doll, 54 N. Y. 234, 13 Am. Rep. 573; Waggoner v. Millington, 8 Hun (N. Y.) 142. See Canon v. Grigsby, 116 Ill. 151, 56 Am. Rep. 769; Cason v. Grant County Deposit Bank (Ky. 1895), 31 S. W. Rep. 40. *Compare* Toomer v. Rutland, 57 Ala. 379, 29 Am. Rep. 722; Adair v. Egland, 58 Iowa 314.

Where a blank space was left in a note, immediately following the printed words "payable at," and in answer to an inquiry made by the payee of the maker as to where the note should be left for payment, the latter mentioned a certain bank, it was held that the payee had implied authority, from such statement and from the condition of the note, to fill up the blank by inserting the name of the bank mentioned. Marshall v. Drescher, 68 Ind. 359.

6. **Blank Left for Name of Payee.**—Cruchley v. Clarence, 2 M. & S. 90, 14 Rev. Rep. 596; Atwood v. Griffin, R. & M. 425, 2 C. & P. 368, 12 E. C. L. 176; Mutual Safety Ins. Co. v. Porter, 7 New Bruns. 230; Boyd v. McCann, 10 Md. 118; Dunham v. Clogg, 30 Md. 284; Hardy v. Norton, 66 Barb. (N. Y.) 527; Thompson v. Rathbun, 18 Oregon 202.

7. Kennon v. M'Rea, 7 Port. (Ala.) 175; Croskey v. Skinner, 44 Ill. 321. See Clawson v. Gustin, 5 N. J. L. 947.

repugnant to what was expressed in the instrument when delivered.¹

(3) *Addition of Stipulations Not Provided for by Blanks.*—This implied authority to perfect an instrument must be limited to the filling of blanks; it does not include authority to make additions, as to insert additional terms or stipulations.²

(4) *Erasure or Alteration of Written or Printed Words.*—Of course, the implied authority to fill blanks left in an instrument does not embrace the right to make a new instrument by erasing or altering what is written or printed.³

3. Effect of Unauthorized Filling of Blanks—*a. AS BETWEEN ORIGINAL PARTIES.*—As between the original parties to the instrument, the insertion in blanks left therein of material matter in excess of the express or implied authority has precisely the same invalidating effect as any other material alteration.⁴

1. Angle v. North Western Mut. L. Ins. Co., 92 U. S. 330; *McCoy v. Lockwood,* 71 Ind. 319; *Ives v. Farmers' Bank,* 2 Allen (Mass.) 236.

Payment a Specified Time after Date Intended—*Insertion of Words "on Demand."*—Where a note read "— after date — promise to pay," etc., thus indicating that a specified time was to be inserted for the payment, the filling out of the note so as to make it payable on demand was held a vitiating alteration. *Farmers' Nat. Bank v. Thomas,* 79 Hun (N. Y.) 595.

Converting Instrument Apparently Intended as Bill of Exchange into Promissory Note.—Where a person signed a form for a bill of exchange as drawer, leaving blanks for the names of the drawee and the payee, the date, the amount, and the place where payable; and the holder, without the knowledge and consent of the signer, filled up the blanks in such a manner as to make a promissory note, it was held that the signer was released from liability as the maker or surety upon the note in the hands of the person chargeable with such alterations. *Mahaiwe Bank v. Douglass,* 31 Conn. 181; *Luellen v. Hare,* 32 Ind. 211.

2. Insertion of Additional Stipulations.—*Holland v. Hatch,* 11 Ind. 497, 71 Am. Dec. 363; *Schnewind v. Hackett,* 54 Ind. 248; *Weyerhauser v. Dun,* 100 N. Y. 150.

Insertion of Interest Clause.—Where a negotiable instrument is complete and perfect in form and meaning, without the insertion of an interest clause, the insertion of such provision avoids the instrument. *Smith v. Eals,* 81 Iowa 235.

Thus the insertion of the words "with interest" in a note which contained blanks for the date, time of payment, the name of the payee, and the amount, but which contained no blank for the insertion of an interest clause, was held a material alteration which vitiated the note. *Farmers' Nat. Bank v. Thomas,* 79 Hun (N. Y.) 595; *McGrath v. Clark,* 56 N. Y. 34, 15 Am. Rep. 372; *Reeves v. Pierson,* 23 Hun (N. Y.) 185; *Meise v. Doscher,* 83 Hun (N. Y.) 580.

Insertion of Word "Cashier" after Name of Payee.—A signed a blank note as surety for the accommodation of B, and after its signature by C, as a second surety, it was next presented to D, who also signed it as surety, but at the same time filled in the date, amount,

and name of the payee. As he filled out the note, it was payable to "David Coulter," and a line was drawn through the blank space after "Coulter," leaving then no blank space in that part of the note left for the payee's name. B then presented the note for discount at the bank of which David Coulter was cashier, and, on objection being raised that the note should have been made payable to the bank instead of to Coulter, B told the latter to add the word "cashier" to his name, which was done. The addition of this word was held to vitiate the instrument as to the sureties. *Hodge v. Farmers' Bank,* 7 Ind. App. 94.

Affixing Seal.—It has been held that where a person signs a paper in blank, with the understanding that an agreement of a certain description is to be written thereon, this does not authorize anything beyond a simple contract, and he will not be bound by the contract if a seal is affixed after his name. *Warring v. Williams,* 8 Pick. (Mass.) 326.

3. Erasing or Altering Written or Printed Words.—*Angle v. North Western Mut. L. Ins. Co.,* 92 U. S. 330; *Mahaiwe Bank v. Douglass,* 31 Conn. 181; *Adair v. Egland,* 58 Iowa 314; *Commonwealth Bank v. McChord,* 4 Dana (Ky.) 191, 29 Am. Dec. 398; *Clute v. Small,* 17 Wend. (N. Y.) 238. *Compare Douglass v. Scott,* 8 Leigh (Va.) 43.

Alteration of Date.—Where a paper is signed and delivered for the most part blank, if at the time of such delivery the date was not blank, there is no implied authority to make the note of any other date than that which was then affixed; and if in such case the date is afterwards changed without the consent of those who had signed the paper, then the note, with such substituted date, is not that which they had signed, and no action can be maintained against them upon it. *Mitchell v. Ringgold,* 3 Har. & J. (Md.) 159, 5 Am. Dec. 433; *Commonwealth Bank v. McChord,* 4 Dana (Ky.) 191, 29 Am. Dec. 398.

4. Unauthorized Filling of Blanks—Effect upon Original Parties—United States.—*Davidson v. Lanier,* 4 Wall. (U. S.) 447.

Alabama.—*Green v. Sneed,* 101 Ala. 205, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 518; *Toomer v. Rutland,* 57 Ala. 379, 29 Am. Rep. 722.

Colorado.—*Hoopes v. Collingwood,* 10 Colc. 107.

b. AS TO THIRD PERSONS—(1) *With Knowledge*.—And a negotiable instrument will be vitiated by an alteration of this kind in the hands of a transferee with knowledge of the circumstances of the alteration; the signer of a negotiable instrument containing blanks which have been filled out in an unauthorized manner and then transferred for value will be bound by the instrument only in the hands of a transferee who had no notice of the alteration.¹

(2) *Bona Fide Purchasers of Negotiable Instruments*.—It is a generally accepted doctrine, that even though the authority to fill blanks left in a negotiable instrument has been exceeded, the instrument will nevertheless be enforceable in the hands of a transferee for value, who came regularly by it, without notice of the alteration.²

(3) *Filling Blanks in Specialties—Estoppel*.—On the question of the effect of filling blanks in sealed instruments, it has been held by courts which deny the sufficiency of parol authority to fill blanks in specialties, as well as by courts which sustain the sufficiency of such authority, that when a grantor or obligor signs and seals a deed, leaving unfilled blanks, and gives it to an agent with authority to fill the blanks and deliver it, if the agent fills the blanks as authorized and delivers it to an innocent grantee or obligee without knowledge, the

Indiana.—Luellen *v. Hare*, 32 Ind. 211.

Massachusetts.—Putnam *v. Sullivan*, 4 Mass. 45, 3 Am. Dec. 206.

New York.—Van Duzer *v. Howe*, 21 N. Y. 531.

Wisconsin.—Schintz *v. McManamy*, 33 Wis. 299.

1. **Unauthorized Filling of Blanks—As to Third Parties with Knowledge—United States**.—Davidson *v. Lanier*, 4 Wall. (U. S.) 447.

Georgia.—Clower *v. Wynn*, 59 Ga. 246.

Indiana.—Conklin *v. Wilson*, 5 Ind. 209; Emmons *v. Meeker*, 55 Ind. 321.

Iowa.—Smith *v. Eals*, 81 Iowa 235.

Mississippi.—Johnson *v. Blasdale*, 1 Smed. & M. (Miss.) 17, 40 Am. Dec. 85; Hemphill *v. Alabama Bank*, 6 Smed. & M. (Miss.) 44.

Missouri.—Wagner *v. Diedrich*, 50 Mo. 484; Green *v. Kennedy*, 6 Mo. App. 577; State Bank *v. Phillips*, 17 Mo. 29.

New Hampshire.—Hill *v. Sweetser*, 5 N. H. 168.

New York.—Farmers' Nat. Bank *v. Thomas*, 79 Hun (N. Y.) 595.

Ohio.—Schryver *v. Hawkes*, 22 Ohio St. 308; Holland *v. Hatch*, 15 Ohio St. 464.

Wisconsin.—Snyder *v. Van Doren*, 46 Wis. 602, 32 Am. Rep. 739.

Insertion of Excessive Amount—Recovery of True Sum.—It has, however, been held in *Mississippi* that where a holder for value has notice of the fact that blanks left in the instrument have been filled in by the agent in excess of his authority, by the insertion of an amount larger than that authorized, the instrument will not be void as to him *in toto*, but only to the extent of the excess. Johnson *v. Blasdale*, 1 Smed. & M. (Miss.) 17, 40 Am. Dec. 85; Goss *v. Whitehead*, 33 Miss. 213.

2. **Unauthorized Filling of Blanks—Bona Fide Purchasers—England**.—Collis *v. Emett*, 1 H. Bl. 313; Montague *v. Perkins*, 22 Eng. L. & Eq. 516.

United States.—Angle *v. North Western Mut. L. Ins. Co.*, 92 U. S. 330; Pittsburgh Bank *v. Neal*, 22 How. (U. S.) 96; Davidson *v. Lanier*, 4 Wall. (U. S.) 447; Goodman *v. Simonds*,

20 How. (U. S.) 343; Violett *v. Patton*, 5 Cranch (U. S.) 142; Michigan Ins. Bank *v. Eldred*, 9 Wall. (U. S.) 544.

Alabama.—Huntington *v. Mobile Branch Bank*, 3 Ala. 186; Roberts *v. Adams*, 8 Port. (Ala.) 297, 33 Am. Dec. 291; Robertson *v. Smith*, 18 Ala. 220; Toomer *v. Rutland*, 57 Ala. 379, 29 Am. Rep. 722; Winter *v. Pool*, 104 Ala. 580.

Arkansas.—Overton *v. Matthews*, 35 Ark. 146, 37 Am. Rep. 9.

Connecticut.—Norwich Bank *v. Hyde*, 13 Conn. 279.

Georgia.—Moody *v. Threlkeld*, 13 Ga. 55.

Indiana.—Geddes *v. Blackmore*, 132 Ind. 551; Spittler *v. James*, 32 Ind. 202, 2 Am. Rep. 334.

Iowa.—Rainbolt *v. Eddy*, 34 Iowa 440, 11 Am. Rep. 152; Shepard *v. Whetstone*, 51 Iowa 457, 33 Am. Rep. 143.

Kansas.—Lowden *v. Schoharie County Nat. Bank*, 38 Kan. 533.

Kentucky.—Commonwealth Bank *v. McChord*, 4 Dana (Ky.) 191, 29 Am. Dec. 398; Commonwealth Bank *v. Curry*, 2 Dana (Ky.) 142; Hall *v. Commonwealth Bank*, 5 Dana (Ky.) 258; Jones *v. Shelbyville F., etc., Ins. Co.*, 1 Metc. (Ky.) 60.

Massachusetts.—Androscoggin Bank *v. Kimball*, 10 Cush. (Mass.) 373; Putnam *v. Sullivan*, 4 Mass. 45, 3 Am. Dec. 206.

Mississippi.—Torrey *v. Fisk*, 10 Smed. & M. (Miss.) 590.

New York.—Mechanics', etc., Bank *v. Schuyler*, 7 Cow. (N. Y.) 338, note; Mitchell *v. Culver*, 7 Cow. (N. Y.) 336; Weyerhauser *v. Dun*, 100 N. Y. 150.

Ohio.—Fullerton *v. Sturges*, 4 Ohio St. 529; Schryver *v. Hawkes*, 22 Ohio St. 308.

Pennsylvania.—Worrall *v. Gheen*, 39 Pa. St. 388.

Vermont.—Michigan Ins. Co. *v. Leavenworth*, 30 Vt. 11.

Virginia.—Douglass *v. Scott*, 8 Leigh (Va.) 43; Orrick *v. Colston*, 7 Gratt. (Va.) 189.

For a complete treatment of this matter, see the title **BILLS AND NOTES**.

maker is estopped to deny that the instrument as delivered is his deed.¹

VI. RATIFICATION OF ALTERATIONS—1. General Rule.—As appears from what is said elsewhere in this article, an instrument may be altered, even in a material respect, in pursuance of a sufficient authority thereto given by the parties bound by the writing, and it will be binding upon the consenting parties in its altered form.² And on the principle that an act which might have been authorized before it was done may be subsequently ratified,³ a material alteration in a written instrument may be ratified after it has been made, and the instrument as altered will bind the parties,⁴ and this although the ratification is not founded upon any new consideration.⁵

2. What Constitutes Ratification—*a*. SEALED INSTRUMENTS—Sufficiency of Parol Consent Denied.—In those jurisdictions where the courts, applying the technical rule that authority to execute a sealed instrument must be by deed, hold that authority to insert anything in a sealed instrument can neither be expressly given by parol nor implied,⁶ the possibility of parol ratification of alterations in a sealed instrument is necessarily excluded, and nothing but a redelivery will suffice to make the instrument valid and effectual.⁷

Parol Consent Held Sufficient.—But in those jurisdictions where the courts

1. Filling Blanks in Specialties—California.—*Dolbeer v. Livingston*, 100 Cal. 617.

Illinois.—*McNab v. Young*, 81 Ill. 11; *Donnell Mfg. Co. v. Jones*, 49 Ill. App. 327. *Iowa.*—*Quinn v. Brown*, 71 Iowa 376; *McCleery v. Wakefield*, 76 Iowa 529.

Massachusetts.—*Phelps v. Sullivan*, 140 Mass. 36, 54 Am. Rep. 442.

Minnesota.—*Pence v. Arbuckle*, 22 Minn. 417.

Nebraska.—*Garland v. Wells*, 15 Neb. 298; *Reed v. Morton*, 24 Neb. 760, 8 Am. St. Rep. 247.

Texas.—*Ragsdale v. Robinson*, 48 Tex. 379. *Virginia.*—*Gordon v. Jeffery*, 2 Leigh (Va.) 410.

Compare Schintz v. McManamy, 33 Wis. 301. See the title **ESTOPPEL**.

2. See *supra*, this title, *Effect of Alterations—By Consent of Grantor or Promisor*.

3. *Montgomery v. Crossthwait*, 90 Ala. 553, 24 Am. St. Rep. 832; *Emerson v. Opp*, 9 Ind. App. 581. See the title **AGENCY, vol. 1, p. 1184.**

4. Material Alteration may be Ratified—England.—*Tarleton v. Shingler*, 7 C. B. 812, 62 E. C. L. 812.

United States.—*Smith v. U. S.*, 2 Wall. (U. S.) 219.

Alabama.—*Montgomery v. Crossthwait*, 90 Ala. 553, 24 Am. St. Rep. 832.

Illinois.—*Goodspeed v. Cutler*, 75 Ill. 534. See also *Linnington v. Strong*, 107 Ill. 295.

Indiana.—*Emerson v. Opp*, 9 Ind. App. 581.

Iowa.—*Grimsted v. Briggs*, 4 Iowa 559; *Pelton v. Prescott*, 13 Iowa 567; *Andrews v. Burdick*, 62 Iowa 714.

Massachusetts.—*Prouty v. Wilson*, 123 Mass. 297.

Michigan.—*Stewart v. Port Huron First Nat. Bank*, 40 Mich. 348.

Missouri.—*King v. Hunt*, 13 Mo. 97.

New Hampshire.—*Humphreys v. Guillo*, 13 N. H. 385, 38 Am. Dec. 499.

New York.—*National State Bank v. Rising*, 4 Hun (N. Y.) 793.

Pennsylvania.—*Wilson v. Jamieson*, 7 Pa.

St. 126; *Stahl v. Berger*, 10 S. & R. (Pa.) 170, 13 Am. Dec. 666.

5. New Consideration Not Necessary.—*Montgomery v. Crossthwait*, 90 Ala. 553, 24 Am. St. Rep. 832; *Pelton v. Prescott*, 13 Iowa 567.

Minnesota.—In Minnesota it has been held that where the holder of a promissory note makes a fraudulent alteration, amounting in law to a forgery, destroying the instrument and extinguishing the debt, a subsequent assent by the maker to such alteration without any new consideration will not create any liability on the note as altered in favor of the holder who made the fraudulent alteration. *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754.

Kentucky.—In Kentucky it has been held that when a surety has been discharged from legal liability upon a written obligation, by its alteration without his consent, a subsequent promise by him to pay is not binding, unless made upon some new consideration. *Warren v. Fant*, 79 Ky. 1.

6. See *supra*, this title, *Filling Blanks*.

7. Parol Consent to Alteration in Specialty Held Invalid.—*Kilkelly v. Martin*, 34 Wis. 525. See *Henderson v. Vermilyea*, 27 U. C. Q. B. 544; *Humphreys v. Guillo*, 13 N. H. 385, 38 Am. Dec. 499; *Nesbitt v. Turner*, 155 Pa. St. 429.

Ratification of Alteration in Bond.—Where the defendant had executed a bond entirely in blank, and it was filled up and afterwards shown to him, and he admitted his signature and did not deny that he would be bound by it, it was held that the bond was valid. *Byers v. McClanahan*, 6 Gill & J. (Md.) 250. So it is said in *Hill v. Scales*, 7 Yerg. (Tenn.) 410, that if the name of an obligor is signed without his authority, yet if he afterwards acknowledges the bond to be his, he will be bound.

But it has been held that when an alteration has been made in a bond, it cannot be rendered valid by the subsequent bare acknowledgment by the obligor that he is willing to be bound by it. *Sans v. People*, 8 Ill. 327.

sustain the sufficiency of parol authority to alter an instrument under seal,¹ it would seem that an alteration made in a specialty after its execution may be subsequently ratified in precisely the same manner as an alteration in any other written instrument.²

b. NEGOTIABLE INSTRUMENTS.—The assent of a party to negotiable paper to an alteration already made therein ratifies such alteration.³

Ratification need Not Be Express or in Writing.—It is not necessary that the consent to, or ratification of, the alteration be in writing,⁴ nor even that it be in express terms.⁵

Intent to Ratify and Knowledge of Alteration Essential.—In order that any act of a

1. See *supra*, this title, *Filling Blanks*.

2. **Consent by Parol to Alteration of Specialty Held Sufficient.**—*Penny v. Corwithe*, 18 Johns. (N. Y.) 499. See *Mohlis v. Trauffer*, 91 Iowa 751.

Failing to Object for Several Years to Proceedings under Altered Bond.—It has been held that where the sureties of an administrator's bond were informed of an alteration in it shortly after it was made, and permitted the administration to proceed thereunder for a number of years without objection, the jury were authorized to infer a ratification of the alteration. *Jackson v. Johnson*, 67 Ga. 167.

Promise to Pay Bond.—So an offer to make a part payment on a bond, and a request for further time in which to pay the balance, made with the knowledge of an alteration after execution, have been held to constitute a ratification of, or assent to, the alteration. *Dickson v. Bamberger* (Ala. 1895), 18 So. Rep. 290.

And where an obligor in bonds, knowing the fact of their alteration by the obligee, promised the transferee of the bonds that he would pay them, it was held that the fact of such alteration would not support a plea of *non est factum* in a suit by the transferee on such promise. *Cleaton v. Chambliss*, 6 Rand. (Va.) 86.

Sureties on Altered Bond Endeavoring to Hold Property of Defaulting Principal.—The fact that sureties upon an official bond, immediately upon the discovery of a defalcation by their principal, unite with a cosurety who had been substituted without their knowledge in place of another surety, in an endeavor to hold the money of the principal upon deposit in a bank, does not amount to a ratification of the altered bond. *Fairhaven v. Cowgill*, 8 Wash. 687.

3. **Parol Consent of Party.**—*Pulliam v. Withers*, 8 Dana (Ky.) 98, 33 Am. Dec. 479; *Stewart v. Port Huron First Nat. Bank*, 40 Mich. 348; *Evans v. Foreman*, 60 Mo. 449; *Kilkelly v. Martin*, 34 Wis. 525; *Fitch v. Kelly*, 44 U. C. Q. B. 578.

Illustrations.—Where the acceptor of a bill of exchange, upon being informed of an alteration of the date, said, "That is right," it was held that the alteration did not vitiate the bill. *Jacob v. Hart*, 6 M. & S. 142.

But the fact that an acceptor of an order which has been altered, upon its presentation to him takes it and looks at it and says that it is all right, does not of itself amount to a ratification, his attention not having been called to the alteration, and there being no

evidence that he noticed it. *Lammers v. White Sewing Mach. Co.*, 23 Mo. App. 471.

Insurance Policy.—The fact that an underwriter had said that he would take no advantage of an alteration which had been made in an insurance policy, was held to be immaterial, the policy being nevertheless void. *Campbell v. Christie*, 2 Stark. 64, 3 E. C. L. 318.

4. **Written Consent Not Necessary.**—*Stewart v. Port Huron First Nat. Bank*, 40 Mich. 348; *Kilkelly v. Martin*, 34 Wis. 525.

5. **Recognition of Liability.**—Thus it has been held that if the person to be affected by the alteration, after he has been informed of it, recognizes his unqualified liability upon the instrument, that circumstance will in itself amount to a ratification of it. *Prouty v. Wilson*, 123 Mass. 297; *Stewart v. Port Huron First Nat. Bank*, 40 Mich. 348.

Failing to Object to Alteration.—The fact that the maker of a note which had been altered saw it after the alteration, and made no objection, will not necessarily raise the presumption that he assented to the change. *German Bank v. Dunn*, 62 Mo. 79. But in this case there was testimony that the maker's attention was directed to the signature only. For a case where the attention of the party was directed to the alteration, and he was held to have ratified the altered instrument by failing to object, see *Landwerlen v. Wheeler*, 106 Ind. 523.

Retaining Consideration of Altered Instrument.—Two parties, desirous of purchasing certain personal property, filled up two notes for the price, bearing six per cent. interest, and prepared a bill of sale of the property, with a warranty showing the giving of the notes at six per cent. interest. One of the makers took these instruments to the seller, who refused to take notes bearing that rate of interest, and it was then agreed by such maker to change the rate of interest to seven per cent. in both the notes and the bill of sale, which was done, and the purchase concluded. The other maker of the notes afterwards saw and read the bill of sale, which showed the notes bore interest at seven per cent., and he failed to rescind the contract and return the property. It was held that if the maker last mentioned knew of the alteration of the notes, and did not in a reasonable time rescind the contract for that reason, by offering to return the property, he must be treated as having ratified the alteration, and was bound by it. *Canon v. Grigsby*, 116 Ill. 151. Compare *Emerson v. Opp*, 9 Ind. App. 581.

party to an instrument which has been altered may constitute a ratification, he must have full knowledge of the alteration,¹ and there must be a manifest intention on his part to ratify the instrument as altered.²

Illustrations.—Thus a party to an altered instrument, who has a full knowledge of the alteration, may be considered as ratifying the change by an unconditional promise to pay the indebtedness,³ by obtaining an extension of time,⁴ or by making a partial payment.⁵

VII. ALTERATION MADE BY ACCIDENT OR MISTAKE.—The alteration of an instrument, even in a material part, if made by accident⁶ or mis-

1. Knowledge of Alteration Necessary.—Cutler v. Rose, 35 Iowa 456; Lammers v. White Sewing Mach. Co. 23 Mo. App. 471; State v. Findley, 101 Mo. 368; Boalt v. Brown, 13 Ohio St. 364; Nesbitt v. Turner, 155 Pa. St. 429; McDaniel v. Whitsett (Tenn. 1896), 33 S. W. Rep. 567; Westloh v. Brown, 43 U. C. Q. B. 402. See Henderson v. Vermilyea, 27 U. C. Q. B. 544; State v. Churchill, 48 Ark. 426.

Making Payment on Note without Knowledge of Alteration.—Thus it has been held that where a surety makes a payment on a note, which has been so altered as to increase his liability, such payment does not amount to a ratification if, at the time of making it, he knew nothing of the alteration. Benedict v. Miner, 58 Ill. 19.

Renewal Bill Given without Knowledge of Alteration.—And if a bill is altered so that a man otherwise liable on it is discharged, he is not liable on a bill given in renewal of the altered bill, unless he was actually apprised of the alteration at the time he gave the substituted bill. Bell v. Gardiner, 11 L. J. C. P. 195, 4 M. & G. 11, 43 E. C. L. 16.

Evidence of Knowledge.—It has been held that the possession of a warehouseman's receipt, corresponding with the entry in his books as altered, is not evidence that the party was cognizant of the alteration. Wilson v. O'Day, 5 Daly (N. Y.) 354.

2. Intent to Ratify Necessary.—State v. Churchill, 48 Ark. 426; Boalt v. Brown, 13 Ohio St. 364.

Ratification of Alteration in Mortgage Note Not a Ratification of Altered Mortgage.—The ratification of an alteration in a mortgage note by the maker has been held not to constitute a ratification of an alteration in the mortgage securing the note; since the maker did not have any knowledge of the alteration in the latter instrument, no intention to ratify was shown. Cutler v. Rose, 35 Iowa 456.

3. Promise to Pay Note.—Where a promisor in a note, with full knowledge of an alteration therein, promises to pay it, this is a ratification of the alteration, and he becomes bound by the note as it then appears. Scott v. Bibb, 48 Ill. App. 657; Goodspeed v. Cutler, 75 Ill. 534; Emerson v. Opp, 9 Ind. App. 581; Humphreys v. Guillow, 13 N. H. 385, 38 Am. Dec. 499; National State Bank v. Rising, 4 Hun (N. Y.) 793.

Waiver of Notice, and Promise to Pay.—Where an indorser of a promissory note, with full knowledge of an alteration therein, waived protest and notice by an indorsement upon the note over his signature, and promised to pay

the same, it was held that he thereby ratified the alteration. Montgomery v. Crossthwait, 90 Ala. 553, 24 Am. St. Rep. 832. But see Warren v. Fant, 79 Ky. 1.

Conditional Promise to Pay Note.—Where the maker of a note, which had been materially altered, upon its presentation to him for payment saw the alterations, and said that he thought they made the note void, but proposed that if the plaintiff would grant him further indulgence and renew the note, and charge only six per cent. interest for the delay, he would pay it in a certain time, and this proposition was declined by the payee, it was held that this offer did not constitute a ratification of the alteration. The court said: "It is true he proposed to renew the note and pay it after the alteration, but it was on conditions which the plaintiff refused to accept, and the waiver did not, therefore, become operative and valid." McDaniel v. Whitsett (Tenn. 1896), 33 S. W. Rep. 567, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 522, note.

4. Obtaining Extension of Time.—It has been held that where a surety on a promissory note, after he obtained knowledge of an alteration therein, requested and obtained an extension of time for the payment of the note, this constituted such a ratification of the alteration as would bind the surety requesting the extension. Bell v. Mahin, 69 Iowa 409.

5. Partial Payment on Note.—The presumptive effect of an alteration in a note was held to be removed by payments by the maker who was not deceived as to the alteration. Johnson v. Johnson, 66 Mich. 525. See Evans v. Foreman, 60 Mo. 449; Wright v. Buck, 62 N. H. 656.

Payment of Interest.—Evidence of the payment of interest by a surety was held sufficient to show a ratification by him of the altered note. Prouty v. Wilson, 123 Mass. 297.

Where the defendant had paid two years' interest on a note alleged to have been materially altered, it was held that this was sufficient evidence from which to infer that the alteration had taken place with the defendant's consent. Cariss v. Tattersall, 2 M. & G. 890, 40 E. C. L. 677.

6. Mutilation by Accident.—If a deed or patent, once perfect, has its seal or signature torn off, or is otherwise mutilated, by accident or the effects of time, such mutilation will not render it invalid. Argoll v. Cheney, Palm. 402; Bolton v. Carlisle, 2 H. Bl. 263; Doe v. McGill, 8 U. C. Q. B. 224; Todd v. Cain, 16 U. C. Q. B. 516; Frazer v. Boss, 66 Ind. 1; Van Riswick v. Goodhue, 50 Md. 57.

A bond with three sureties, while in the

take,¹ does not vitiate it or affect the liability of the parties under it.

VIII. EFFECT OF RESTORATION—Restoration will Not Revive Validity.—It is the general rule that after an instrument has been altered in a material respect,

hands of one of them, was accidentally mutilated by a child, by tearing off the name and seal of one of the sureties, and the seal of another. The payee afterwards attempted to restore the instrument by having the surety whose name had been torn off sign it, which he did; but neither of the seals was restored. Payment on this bond was refused, and in an action upon it it was held that the mutilation, being accidental, did not avoid the bond, and the attempted restoration could not have this effect. *Rhoads v. Frederick*, 8 Watts (Pa.) 448.

Accidental Mutilation of Bank Bills.—The mutilation to a greater or less degree of bank bills, by time or accident, will not affect a holder's right to recovery if the particular bills are shown to be genuine and to have been actually issued by the bank, and if enough remains of the bills to identify them. *Note Holders v. Funding Board*, 16 Lea (Tenn.) 46, 57 Am. Rep. 211.

Mutilation of Chattel Mortgage.—Where the holder of a chattel mortgage, through ignorance, and in good faith, without intent to defraud, tore the same in two parts, thus separating the granting from the defeasance clause, and upon the trial presented the two parts as an entire instrument, it was held that it was receivable in evidence. *Russell v. Longmoor*, 29 Neb. 209.

1. Cancellation of Acceptances by Mistake.—The defendant, in discharge of a debt to the plaintiff, indorsed bills to him. On their being presented for payment, the banker's clerk inadvertently canceled the acceptances, such being the custom where bills were intended to be paid. Immediately afterwards, discovering that the acceptor had no effects in his hands, he wrote opposite the cancellation, "Canceled by mistake." The holders then presented them at a house to which they were addressed in case of need, but that house refused payment in consequence of the cancellation; they would otherwise have honored them. The bills not being paid, in an action brought thereon it was held that the cancellation being by mistake could not vitiate the instruments, and that the plaintiff should recover. *Novelli v. Rossi*, 2 B. & Ad. 757, 22 E. C. L. 176.

For decisions upon nearly similar facts, see *Warwick v. Rogers*, 5 M. & G. 340, 44 E. C. L. 184; *Raper v. Birkbeck*, 15 East 17.

Cancellation of Indorsements by Mistake.—Certain bills of exchange, purporting to have amongst others the indorsement of H. & Co. of Manchester, were presented for payment in London at a house where the acceptance appointed them to be paid. Payment being refused, the notary who presented them took them to the plaintiff, the London correspondent of H. & Co., and asked him to take up the bills for their honor. He did so, and struck out the indorsements subsequent to that of H. & Co., and the money was paid over to the defendants, the holders of the bills. The same morn-

ing it was discovered that the bills were not genuine, and that the names of drawer, acceptor, and H. & Co. were forgeries. The plaintiff immediately sent notice to the defendant, and demanded to have the money repaid. This notice was given in time for the post, so that notice of the dishonor could be sent the same day to the indorsers. It was held that the plaintiff, having paid the money through a mistake, was entitled to recover it back, the mistake having been discovered before the defendant had lost his remedy against prior indorsers, and that the rights of the parties were not altered by the erasure of the indorsements, that having been done by mistake, and being capable of explanation by evidence. *Wilkinson v. Johnson*, 3 B. & C. 428, 10 E. C. L. 140.

The payee of a note, having authority to cancel an indorsement thereon, by mistake erased the indorsement from another note also. In an action on the latter, it was held that under the circumstances the latter note was not avoided by the alteration. *Brett v. Marston*, 45 Me. 401.

Qualifying Indorsement by Mistake.—Two promissory notes, payable to the order of the maker, were indorsed by him and delivered to another for his accommodation. The latter indorsed them, and upon the back stamped the words, "Demand, protest, and notice of protest waived, and payment guaranteed within five days from date of maturity." By mistake, this stamp on one of the notes was placed above the indorsement of the maker. In an action on these notes, it was held that the stamped words having been placed above the maker's indorsement by mistake, and having no effect upon the maker's rights, the notes were not vitiated. *Gordon v. Chattanooga Third Nat. Bank*, 144 U. S. 97.

Witnessing Note by Mistake.—An ignorant person, intending to sign a note as surety for another, signed his name in the place where witnesses ordinarily subscribe. It was held that the alteration, being made by mistake, did not vitiate the instrument. *Fisher v. King*, 153 Pa. St. 3.

Some time after the execution of a single bill, two persons put their names to it as witnesses, at the request of the obligee, who was about to assign it to another. It was held that if the signatures were placed to the instrument with the intention of witnessing the assignment, and not the bill, such signing should be considered as an alteration by mistake, and would not vitiate the instrument. *Marshall v. Gougler*, 10 S. & R. (Pa.) 164.

Alteration through Ignorance of Form of Negotiation.—The payee of two promissory notes, wishing to negotiate them, and being ignorant of the proper method, signed his name below that of the maker, and, on being informed that this was not the proper form, he erased his name and indorsed it upon the back of the notes, in which form they were negotiated.

a restoration of it to its original form will not revive its validity. The instrument having been destroyed, as a binding obligation upon nonconsenting parties, they cannot again be bound without their consent.¹

Fraudulent Intent.—Certainly this is the rule where the alteration was made with a fraudulent intent.²

Innocent Alterations.—It has been held, however, by many respectable authorities, that the validity of an instrument, innocently altered, through ignorance or mistake, may be resuscitated by the restoration of it to its original form, where the rights of third parties have not intervened so as to be injuriously affected thereby.³

It was held that the alteration being made in ignorance, the validity of the notes was not destroyed. *Lynch v. Hicks*, 80 Ga. 200. And see *Cason v. Wallace*, 4 Bush (Ky.) 388.

A payee of a note, wishing to transfer it to the firm of which he was a member, inserted after his name the words "& Bro.," believing that to be the proper way to do it. In an action on the note in its altered form, the suit was dismissed. Afterwards the inserted words were erased, and the note sued upon in its original form. In this action it was held that the alteration, having been ignorantly made, did not vitiate the note. *Skelton v. Tillman* (Tex. 1892), 20 S. W. Rep. 71.

In the case of *Horst v. Wagner*, 43 Iowa 373, 22 Am. Rep. 255, the payee of a note desiring to transfer it, and being ignorant of the appropriate method, erased his own name and inserted that of the transferee, but afterwards, and before delivery, restored the instrument to its original form, and transferred it by indorsement. It was held that the maker was not discharged, and the indorsee was permitted to recover.

Canceling Note by Mistake.—If the word "paid" by mistake is written across the face of a promissory note, the validity thereof is not destroyed. *Lowremore v. Berry*, 19 Ala. 130, 54 Am. Dec. 188.

And so in an action where the cashier of a bank, through mistake, canceled the note executed to the bank, it was held not to affect the right of the bank to recover the debt. *Boulevard v. State Bank*, 12 Mo. 542.

Alteration Made under Mistake of Fact.—On the first trial of a case, the attorney for the plaintiff added over the signature of the indorser these words, "And for value received I guarantee the payment of the within note." This addition was made in open court after the introduction of proof supposed to be sufficient to show an intention to guarantee the note, and was supposed by counsel, and also by the court, to be authorized. Subsequently the conclusion was reached that such a view of the matter was erroneous, and the added words were stricken out of the indorsement, leaving it precisely as it was at first. On a second trial of the cause, it was contended that the alteration and restoration vitiated the note, but the court held that the alteration having been made under mistake of fact, it did not vitiate the note, and that it might be sued on in its original form. *Newton v. Bramlett*, 55 Ill. App. 661.

1. **Restoration of Altered Instruments.**—*Warpole v. Ellison*, 4 Houst. (Del.) 322; *Schne-*

wind v. Hacket, 54 Ind. 248; *Shepard v. Whetstone*, 51 Iowa 457, 33 Am. Rep. 143; *Locknane v. Emerson*, 11 Bush (Ky.) 69; *Citizens' Nat. Bank v. Richmond*, 121 Mass. 110; *Fulmer v. Seitz*, 68 Pa. St. 237, 8 Am. Rep. 172; *Plyler v. Elliott*, 19 S. Car. 263; *McDaniel v. Whitsett* (Tenn. 1896), 33 S. W. Rep. 568, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 504 (note), 520. And see *Horst v. Wagner*, 43 Iowa 373, 22 Am. Rep. 255.

In *Locknane v. Emerson*, 11 Bush (Ky.) 69, the court said: "The question is, can the note be restored to vitality and made obligatory on the surety by the act of others without his consent after it had been rendered invalid? We think not. When the alteration was made, it discharged E. from the legal obligation he was under, because he never undertook to pay or discharge the note in its altered form, and after his discharge he could have been no more bound by the acts of others without his authority and consent than he would have been bound to pay the note if he had never executed it." See also *Cotton v. Edwards*, 2 Dana (Ky.) 106.

2. **Fraudulent Alterations.**—A party guilty of a fraudulent alteration cannot, by removing it, recover the right of action which he has lost by his fraud. *Robinson v. Reed*, 46 Iowa 219; *Kountz v. Kennedy*, 63 Pa. St. 187, 3 Am. Rep. 541; *McDaniel v. Whitsett* (Tenn. 1896), 33 S. W. Rep. 567.

3. **Innocent Alterations.**—It has been held that an alteration which has been innocently and ignorantly made may be corrected, and recovery had on the instrument in its original form. *Rogers v. Shaw*, 59 Cal. 260. And see *Nevins v. DeGrand*, 15 Mass. 436; *Kimball v. Lamson*, 2 Vt. 138. See *supra*, this title, division *Alteration Made by Accident or Mistake*.

Restoration where Alteration Made under Misapprehension.—In *Kountz v. Kennedy*, 63 Pa. St. 187, 3 Am. Rep. 541, where a material alteration was made in a note, and subsequently erased, the court held that as there was no intention to defraud in making the alteration, and as the note sued upon was in precisely the form in which it was issued, it was a valid instrument, and recovery was had thereon. But in *Fulmer v. Seitz*, 68 Pa. St. 242, 8 Am. Rep. 172, the court, by Agnew, J., in referring to the decision in *Kountz v. Kennedy*, 63 Pa. St. 187, 3 Am. Rep. 541, said: "That case is a very close one, and was decided doubtfully on its peculiar circumstances. One of our number expressly dissented, and I gave my own assent with hesitation. * * *

IX. ALTERATIONS IN WILLS—1. Generally.—The term “alteration,” as used in this section, has special reference to an alteration in a will by the act of erasing or interlining words and clauses for the purpose of amending one or more of its provisions, and not to alterations by codicil, nor to mutilations or obliterations which are intended to effect a total revocation of the instrument.¹

2. Alterations by the Testator—*a.* RIGHT OF TESTATOR TO ALTER.—A will having no element of mutuality, and being ambulatory in its nature until the death or disability of the testator, it rests in his discretion to alter or amend it at any time or in any manner, provided he observes the formalities of execution imposed by statute for the protection of the instrument. The question to be considered, therefore, is not, as in other instruments, the maker's right to alter, but whether, in the exercise of that right, he has observed the requirements of the statute. If the will is properly re-executed after alteration, it is valid;² what is now to be considered is the effect of such alteration without re-execution.

The evidence showed that the alteration was evidently the result of a misapprehension. * * * It was therefore held that the indorser was not affected by anything which had been done, the alteration being innocent, and the correction being made immediately, as soon as it was discovered that he had not assented to the change.”

In *Seymour v. Mickey*, 15 Ohio St. 515, it was held that where a note was indorsed in blank, a mistake made by writing over the signature a contract not authorized by the circumstances would not discharge the indorser, no fraud being intended, but that the mistake might be at any time corrected by canceling the indorsed writing and substituting therefor such terms as would truly express the contract of the signer, or the unauthorized writing might be disregarded and the actual contract enforced.

Erasure of Credits Wrongfully Made.—The agent of the payee presented a note to the maker, who paid a certain sum thereon and indorsed the credit on the back. He also made another indorsement, crediting thereon a certain sum for services rendered. The agent protested against the latter indorsement, but was assured by the maker that it was all right, but if not, he would make it right with the payee. The payee, upon receiving the note back, objected to the indorsement, and obliterated it with his pen. It was held that the credit, having been wrongfully made, was properly obliterated by the payee. *Burch v. Dent*, 13 Ind. 543.

Alteration and Restoration before Delivery.—A note and mortgage assigned by husband and wife were altered in a material part by the husband before delivery to the mortgagee. The latter, upon discovering the alteration, objected to it, whereupon the husband restored the instruments to their original form, in which shape they were delivered to the mortgagee. It was held that the alteration and restoration did not vitiate the instruments. *Osborne v. Andrees*, 37 Kan. 301.

Restoration of Note Altered by Stranger.—The draughtsman of a note, after it had been executed and while it was yet in his possession, made a material alteration therein, without

the knowledge or consent of either party, to make the note conform to what he understood to be their intention, and, upon objection being made to the alteration, he restored the note to its original form. In an action on this note, it was held that the alteration being the act of a stranger, its validity was not destroyed, and it might be sued upon in its original form. *Collins v. Makepeace*, 13 Ind. 448.

Intervention of Rights of Third Parties after Restoration.—In *Shepard v. Whetstone*, 51 Iowa 457, 33 Am. Rep. 143, a payee made a material alteration in a note, and subsequently restored the same to its original form, and transferred it to a third party for value without notice. A very close inspection would possibly have discovered that an alteration had been made, but it was held that the purchaser was not put upon inquiry, and that the note was a valid instrument in his hands. The court said: “Where the note is restored, as in this case, to its original form, it expresses the precise contract which the parties entered into, and the objection, if any, to enforcing such contract, must rest upon grounds of public policy, and not upon the necessity of protecting the maker in the individual case. * * * In our opinion, the plaintiff may be regarded as purchasing without notice of the alteration, and we see nothing in the demands of public policy which would require that a loss shall be imposed upon him, and the defendant be allowed to escape a just liability.” But see *supra*, this title, *Effect of Alterations—As to Innocent Third Persons*.

1. For alteration by codicil and revocation, see the title **WILLS**.

2. See the title **WILLS**.

Re-execution before Witnesses.—A will having been duly signed by a testator and attested by the subscribing witnesses, the testator afterwards inserted therein an additional bequest. The insertion was made by the scrivener who wrote the will, in the testator's presence and by his direction. The original subscribing witnesses were also present, recognized the paper to which their names were signed, were called upon by the testator to witness the additional provision, and saw it inserted. It was held that the new provision became part

b. EFFECT OF ALTERATION AFTER EXECUTION—Not a Revocation of the Will.—The doctrine is well settled, that, after a will has been made and executed according to the forms of law, no alteration made upon its face, for the purpose of amending its provisions, will revoke the will as a whole, whatever effect such alteration may have upon the particular clause or section so altered.¹

Cancellation of Clauses.—Under the statute of frauds, a cancellation or obliteration of any clause in a will was a revocation *pro tanto*,² provided such

of the will, and that the will as amended was duly executed and attested. *Wright v. Wright*, 5 Ind. 389.

Partial Execution Valid as to Personal Property—Invalid as to Realty.—A testator made his last will and testament, disposing of his real and personal estate, which was signed, sealed, published, and attested by two witnesses. Subsequently one of the witnesses, by order of the testator and in his presence, made some alterations in its provisions as to both the real and personal estate, but there was no attesting witness to the alterations. The testator merely put his finger to the signature, and said it was as he wanted it, and the witness making the alterations made an indorsement on the back of the will to refresh his memory. It was held by the court that the alteration was no revocation of the whole will, and that the will as it stood before the alteration was a good will to pass real estate and that as altered it was a good will to pass the personal estate according to the alterations. *Greer v. M'Crackin, Peck* (Tenn.) 301, 14 Am. Dec. 755.

To the same effect, see *Pringle v. M'Pherson*, 2 Desaus. (S. Car.) 524; *Wells v. Wells*, 4 T. B. Mon. (Ky.) 152, 16 Am. Dec. 150.

1. Will Not Revoked by Alteration—England.—*In re Goods of Woodward*, L. R. 2 P. & D. 206.

Illinois.—*Wolf v. Bollinger*, 62 Ill. 368.

Indiana.—*Wright v. Wright*, 5 Ind. 389.

Kentucky.—*Wells v. Wells*, 4 T. B. Mon. (Ky.) 152, 16 Am. Dec. 150; *Tudor v. Tudor*, 17 B. Mon. (Ky.) 383.

Massachusetts.—*Wheeler v. Bent*, 7 Pick. (Mass.) 61.

Minnesota.—*In re Penniman*, 20 Minn. 245, 18 Am. Rep. 368.

New York.—*Dyer v. Erving*, 2 Dem. (N. Y.) 160; *Matter of Prescott*, 4 Redf. (N. Y.) 178; *O'Donohue v. O'Connor*, N. Y. Daily Reg., 10 March, 1886; *Clark v. Smith*, 34 Barb. (N. Y.) 140; *Matter of Twombly*, 4 Month. L. Bull. (N. Y.) 24.

Pennsylvania.—*Dixon's Appeal*, 55 Pa. St. 424.

South Carolina.—*Pringle v. M'Pherson*, 2 Desaus. (S. Car.) 524.

Tennessee.—*Greer v. M'Crackin, Peck* (Tenn.) 301, 14 Am. Dec. 755; *Stover v. Kendall*, 1 Coldw. (Tenn.) 557.

Virginia.—*Cogbill v. Cogbill*, 2 Hen. & M. (Va.) 467.

2. Cancellation of Clauses a Revocation Pro Tanto—England.—*Larkins v. Larkins*, 3 B. & P. 16; *Short v. Smith*, 4 East 419; *Francis v. Grover*, 5 Hare 39; *Martins v. Gardiner*, 8 Sim. 73; *Mence v. Mence*, 18 Ves. Jr. 350.

Kentucky.—*Brown's Will*, 1 B. Mon. (Ky.) 56, 35 Am. Dec. 174; *Wells v. Wells*, 4 T. B. Mon. (Ky.) 154, 16 Am. Dec. 150; *Overall v. Overall*, Litt. Sel. Cas. (Ky.) 502; *Tudor v. Tudor*, 17 B. Mon. (Ky.) 383.

New Jersey.—*In re Kirkpatrick*, 22 N. J. Eq. 463.

Illustrations.—The statute concerning wills provides that no devise, or any clause thereof, shall be revocable but by the testator or testatrix destroying, canceling, or obliterating the same, or causing it to be done in his or her presence. Under this provision, any clause in a will may be revoked by obliteration, and the balance of the will remain valid and unaffected, if the obliteration was made by the testator himself, or by his direction and in his presence, with the intention to revoke that clause only of the will, and not to revoke the whole will. And after such a partial revocation has been made, no republication is necessary to the validity of the balance of the will. *Tudor v. Tudor*, 17 B. Mon. (Ky.) 383.

An erasure by a testator of certain clauses in his will, with the intention of revoking them only, is a valid revocation of such clauses, but not of the whole will; and the property thereby covered, in the absence of a contrary intention, passes under a general residuary clause in the will, and does not go to the heirs at law or distributees. *Bigelow v. Gillott*, 123 Mass. 102, 25 Am. Rep. 32.

A testator who died before 1838, by a will duly executed and attested devised realty to his mother, "Elizabeth Eley, her heirs and assigns forever." After execution he drew his pen through the words, "Eley, her heirs and assigns forever," and wrote the word "Eley" above the words erased. On the question whether the obliteration cut down the devise from an estate in fee to an estate for life, as being a revocation of a devise, or of a clause within section 6 of the statute of frauds, it was held that this was a revocation of the clause within the statute and not an alteration, and that the mother took an estate for life only. *Swinton v. Bailey*, 1 Exch. Div. 110.

Partial Cancellation of Clause Insufficient.—A testator, having an only son, devised certain real estate to his "son J. W. S." Subsequently he expressed an intention to leave nothing to his son, and erased with a pen from the clauses of the will containing the devise the name J. W. S., leaving the word "son" uncanceled. It was held that neither the will nor the devise to J. W. S. were revoked by the erasures; that the intention of a testator to cancel or revoke a clause in his will, however strongly declared, is of no consequence,

cancellation did not create a new or enlarge an existing legacy;¹ but under the Wills Act (1 Vict., c. 26) in *England*, and by special statutes in a few of the states of the *Union*, a formal re-execution of the will is now required to give effect to such cancellation.²

Alteration in Clauses.—No alteration in a clause of a will, or in a devise or legacy therein, effected by erasure or obliteration and the insertion or interlineation of new matter, can avail to alter its disposition, except where evidence cannot restore its original provisions. If the provisions of the will at its execution are discoverable from the paper, or can be supplied by extrinsic evidence, the will must be admitted to probate as originally drawn.³ If the

unless it is carried out by some act amounting in judgment of law to an actual cancellation or revocation. *Clark v. Smith*, 34 Barb. (N. Y.) 140.

1. Cancellation of a Legacy Enlarging Others.—A testator, after the execution of his will, erased or obliterated the names of two legatees by drawing a line through the names with his pen. The obliterations were intended to revoke these devises, but they also operated to raise others from estates for life to estates in fee. It was held that the attempted obliterations were inoperative, and that the will should be read as it was originally written and executed. *Eschbach v. Collins*, 61 Md. 478.

In *Pringle v. McPherson*, 2 Brev. (S. Car.) 279, 3 Am. Dec. 713, the testator had excepted certain lands from a general devise of his estate, and at a subsequent period, when his fortune had much increased, he erased the exception. It was held that it must be presumed, from all the facts of the case, that the erasure was made with a view of enlarging the devise and bringing the whole of the estate in question within its operation; and as this intention could not be satisfied without a republication, the devise should be read as it originally stood, and as if the exception had not been canceled.

2. English Wills Act (1 Vict., c. 26).—The Wills Act (1 Vict., c. 26) enacts that no obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as therein, before is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses are made in the margin or in some part of the will opposite or near to such alteration, or at the foot or end of, or opposite to, a memorandum referring to such alteration, and written at the end or some other part of the will. *Greville v. Tyler*, 7 Moo. P. C. 320.

An alteration opposite which the testator and two witnesses have set their initials in the margin, is sufficiently executed under this section. *In re Goods of Blewitt*, 5 Prob. Div. 116. See *In re Goods of Treeby*, L. R. 3 P. & D. 242; *In re Shearn*, 50 L. J. P. D. 15.

A sentence commenced on the second page, and carried over to the third, was admitted to

probate, though the testator and witnesses had initialed only the second page. *In re Goods of Wilkinson*, 6 Prob. Div. 100.

New York.—Under the New York Revised Statutes, a codicil or other writing duly executed is required. *Matter of Prescott*, 4 Redf. (N. Y.) 178; *Lovell v. Quitman*, 88 N. Y. 377, 42 Am. Rep. 254, *overruling* *McPherson v. Clark*, 3 Bradf. (N. Y.) 92.

3. Alteration in Legacies—England.—*Winsor v. Pratt*, 2 Brod. & B. 650, 6 E. C. L. 314; *Larkins v. Larkins*, 3 B. & P. 16; *In re Goods of Adamson*, L. R. 3 Adm. 253; *Short v. Smith*, 4 East 419; *Locke v. James*, 11 M. & W. 901; *In re Goods of Parr*, 29 L. J. P. 70; *In re Goods of Harris*, 29 L. J. P. 79; *In re Goods of Hardy*, 30 L. J. P. 142.

Illinois.—*Wolf v. Bollinger*, 62 Ill. 368.

Maine.—*Doane v. Hadlock*, 42 Me. 75.

Massachusetts.—*Laughton v. Atkins*, 1 Pick. (Mass.) 535.

Minnesota.—*In re Penniman*, 20 Minn. 245, 18 Am. Rep. 368.

New York.—*Quinn v. Quinn*, 1 Thomp. & C. (N. Y.) 437; *McPherson v. Clark*, 3 Bradf. (N. Y.) 92; *Wetmore v. Carryl*, 5 Redf. (N. Y.) 544; *Jackson v. Holloway*, 7 Johns. (N. Y.) 394; *Matter of Lang's Will*, 9 Misc. Rep. (N. Y. Surrogate Ct.) 521.

North Carolina.—*Bethell v. Moore*, 2 Dev. & B. (N. Car.) 316; *Wood v. Wood*, Phil. (N. Car.) 538.

Pennsylvania.—*Dixon's Appeal*, 55 Pa. St. 424.

South Carolina.—*Means v. Moore*, Harp. (S. Car.) 314.

Tennessee.—*Stover v. Kendall*, 1 Coldw. (Tenn.) 557.

Alteration Inoperative, Original Provision Revived.—In *Locke v. James*, 11 M. & W. 901, a testator, by his will duly executed, devised certain real estate to R. N. in fee, subject to and charged with an annuity of six hundred pounds a year, which he gave his daughter E. J. for her life, with powers of distress and entry on the devised estates in case the annuity was in arrears. He subsequently erased with his pen the word "six" and inserted over it the word "two," leaving, however, the word "six" legible in each place where it occurred, and on the same day he added a memorandum or codicil to his will in the presence of one witness only, recognizing the above alterations. It was held that the substitution of two hundred for six hundred under these circumstances was inoperative, and that E. J. retained a legal interest in the annuity of six

parts altered cannot be restored, such portions are to be read blank.¹

Additional Provisions or Legacies.—Additions made to a will by the testator after the execution of the instrument are void, and the will should be probated as originally drawn.²

3. Alterations by a Legatee.—The effect of an alteration made by a legatee in a bequest is, on principles of public policy, to annul his interest therein; but such alteration cannot affect other bequests in the will, either to himself or to others.³

hundred pounds. "The substitution in the will," says Parke, B., "was inoperative, having been made after the subscription of the witnesses, not in their presence and without republication, and the substitution, for the purpose of giving effect to which the erasure was made, thus failing, the law is clear that the erasure fails also. It is treated as an act done by mere mistake, *sine animo cancellandi*. What the testator in such a case is considered to have intended is a complex act, to undo a previous gift for the purpose of making another gift in its place. If the latter branch of his intention cannot be effected, the doctrine is that there is no sufficient reason to be satisfied that he meant to vary the former gift at all." *Cited and followed in Doane v. Hadlock*, 42 Me. 75.

Where the amount of a pecuniary legacy as originally written was five thousand dollars, but the amount was changed by the testator after execution to read two thousand dollars, it was held that the will as originally written should be received for probate, and a petition to rectify a record of the will was granted. *Wetmore v. Carryl*, 5 Redf. (N. Y.) 544. *Cited and approved in Matter of Lang's Will*, 9 Misc. Rep. (N. Y. Surrogate Ct.) 521.

A testator, after the publication of his will, sent for the executor and custodian of the same, and informed him that he wished to alter his will so that A should have a tract of land devised therein to B, and the executor, at the instance of the testator, canceled the name of B by drawing a line through it with a pen, leaving the name still legible, and interlining over it the name of A, so that the devise read as to A; but the will as altered was never republished or attested by two witnesses in the presence of the testator. It was held that in favor of A, for want of attestation, the will as altered was wholly inoperative, and that the will should be admitted to probate as originally drawn. The court said: "It is believed to be the doctrine, * * * and well settled by the authorities, that where the testator makes an alteration in his will by erasure and interlineation, or in any other mode, without authenticating such alteration by a new attestation in the presence of witnesses, or other form required by the statute, it is presumed that the erasure was intended to be dependent upon the alteration going into effect as a substitute; and such alteration not being so made as to take effect, the will, therefore, stands in legal force the same as it did before, so far as it is legible after the attempted alteration." *Wolf v. Bollinger*, 62 Ill. 368.

A testator, by his will, devised all the lands then in his possession to his four sons. Subsequently acquiring other lands, he altered the will by erasure and interlineation to include all the lands of which he should die seised, and called attention to these alterations in an indorsement which he signed and had attested by two witnesses. As the law required an attestation of three witnesses, it was held that the alterations could not operate, but that the will should be effective as originally executed, and that the after-acquired lands descended to his heirs at law. *Jackson v. Holloway*, 7 Johns. (N. Y.) 395.

1. Altered Clause to be Read Blank, if Original Not Decipherable.—*In re Ibbetson*, 2 Curt. 337; *Townley v. Watson*, 3 Curt. 761; *Doherty v. Doherty*, 25 L. R. Ir. Prob. 297.

A testatrix, after the execution of her will, erased certain parts, substituting in their places other words. The original words not being discernible on the face of the paper, and there being no evidence to show what they were, probate was granted of the will with these parts blank. *In re Goods of James*, 1 S. & T. 238.

2. Additions after Execution Void.—A testator wrote his will upon the first and third pages of several sheets of note paper. At the bottom of one of these pages were the words and mark: "I leave the whole of my property to the following religious societies, viz., * * * to be divided in equal shares among them." On the top of the opposite page was a similar mark to that following "viz.," and the names of four religious societies. There being no evidence that the names of the societies were written before the execution of the will, the court considered them to be interlineations, and excluded them from probate. *In re Goods of White*, 30 L. J. P. 55.

After a testatrix had duly and completely executed and published her will, she informed the draughtsman that she wished to make some additions thereto, and the draughtsman wrote her directions on a slip of paper, stating that he would paste the latter in the will on reaching home. When produced for probate, the will presented a cross-section into which the post-testamentary slip had been inserted by the draughtsman. "There was no re-execution or republication of the will after the insertion. It was held that the instrument should be admitted as executed, excluding the interpolated clause. *Stevens v. Stevens*, 6 Dem. (N. Y.) 262.

3. Alterations by Legatee.—*Smith v. Fenner*, 1 Gall. (U. S.) 170. In this case, the court, by Story, J., said: "If the interlineation, etc., be made by a stranger, and the original legacy

4. Alterations by a Stranger.—Alterations in a will, made by a stranger, have no effect if the original words or intent can be shown.¹

X. RECOVERY OF MONEY PAID ON ALTERED INSTRUMENT.—Upon the principle that money paid under a mistake of fact may be recovered, it has been held that one who, in ignorance of the alteration, makes a payment on an instrument which has been so materially altered as to discharge him, may recover the money so paid.²

XI. RECOVERY OF POSSESSION OF ALTERED INSTRUMENT.—It is held that where a negotiable paper has been vitiated by a material alteration, possession of the instrument may be recovered by the promisor.³

XII. QUESTIONS OF LAW AND FACT—**Fact of Alteration.**—Whether or not an alteration has been made in an instrument, is a question of fact for the jury.⁴

be known, it will have no legal effect, and the legacy will be still recoverable, and ought to be proved as it originally stood. If made by the legatee himself, at most in *odium spoliatoris* it will only avoid the legacy so altered, but it cannot destroy other bequests in the will, either to the legatee himself or to others. This is not like the case of a contract where the alteration of a security by the obligee himself avoids it. The legatees all take by the bounty of the testator; the object is to carry his will into effect, and not merely to attend to the merits or demerits of those who claim under it. If any alteration in a will would avoid it, the executor before probate might, by such alteration, destroy the rights of all third persons, which would be in the highest degree unreasonable." *Cited and followed* in *Doane v. Hadlock*, 42 Me. 72. See also *Jackson v. Malin*, 15 Johns. (N. Y.) 293; *In re Wilson*, 8 Wis. 171; *McIntire v. McIntire*, 19 D. C. 482.

1. Alterations by a Stranger.—*Smith v. Fennner*, 1 Gall. (U. S.) 170; *Camp v. Shaw*, 52 Ill. App. 241; *Doane v. Hadlock*, 42 Me. 72; *Malin v. Malin*, 1 Wend. (N. Y.) 625; *Jackson v. Malin*, 15 Johns. (N. Y.) 293; *Holman v. Riddle*, 8 Ohio St. 384; *Grubbs v. McDonald*, 91 Pa. St. 236.

2. Fraker v. Little, 24 Kan. 598, 36 Am. Rep. 262; *Sheridan v. Carpenter*, 61 Me. 88; *National Bank of Commerce v. National Mechanics' Banking Assoc.*, 55 N. Y. 211; *Houston City Bank v. Houston First Nat. Bank*, 45 Tex. 203.

Compare Blakey v. Johnson, 13 Bush (Ky.) 197, 26 Am. Rep. 254; *Davis v. Bauer*, 41 Ohio St. 259; *Sherwood v. Merritt*, 83 Wis. 233.

But in *Decorah First Nat. Bank v. Laughlin*, 4 N. Dak. 391, it was held that one who has paid a note materially altered after delivery, without knowledge of such alteration, cannot recover the amount so paid, unless the note was given without consideration. See the title **MISTAKE**.

Right of Surety Paying Altered Note to Contribution.—It has been held that a surety who pays an altered note, which he could have defeated because of a material alteration therein, may compel contribution from co-sureties who signed the note subsequently to the alteration. *Houck v. Graham*, 106 Ind. 195.

3. Replevin for Altered Bill.—In *Smith v. Eals*, 81 Iowa 235, it was held that where a draft had been rendered void by an alteration

therein after acceptance, the acceptor might recover possession of the instrument from the holder in an action of replevin. *Smith v. Eals*, 81 Iowa 235.

Injunction to Restrain Transfer or Collection of Altered Note.—But it has been held that a court of equity has no jurisdiction to enjoin the transfer or collection of a promissory note which has been materially altered without the consent of the maker, since the maker has an adequate remedy at law. *Erickson v. Oakland First Nat. Bank*, 44 Neb. 622.

Right to Recover Paper Pledged as Collateral Not Affected by Alteration.—It has been held that the right of a payee of a note, who had transferred it to another as collateral, to recover possession thereof on payment of the amount secured, was not affected by the fact that the note had been materially altered by such payee. *Flint v. Craig*, 59 Barb. (N. Y.) 319.

Conversion for Altered Note.—It seems that an action by the payee for the conversion of an altered note will not lie where it appears that the instrument had been vitiated by a material alteration made therein by such payee. *Booth v. Powers*, 56 N. Y. 22.

4. United States.—*Steele v. Spencer*, 1 Pet. (U. S.) 552; *Wood v. Steele*, 6 Wall. (U. S.) 80.

Colorado.—*Schmidt v. Steckler*, 3 Colo. 273; *Huston v. Plato*, 3 Colo. 402.

Georgia.—*Pritchard v. Smith*, 77 Ga. 463.

Illinois.—*Schwarz v. Herrenkind*, 26 Ill. 208.

Kentucky.—*Elbert v. McClelland*, 8 Bush (Ky.) 577.

Massachusetts.—*Norwood v. Fairservice*, Quincy (Mass.) 189.

Missouri.—*Paramore v. Lindsey*, 63 Mo. 63; *Western Bldg., etc., Assoc. v. Fitzmaurice*, 7 Mo. App. 283.

Nebraska.—*Cass County Bank v. Morrison*, 17 Neb. 341, 52 Am. Rep. 417.

New Jersey.—*Cumberland Bank v. Hall*, 6 N. J. L. 215; *Den v. Wright*, 7 N. J. L. 175, 11 Am. Dec. 546; *Richman v. Richman*, 10 N. J. L. 114; *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232.

New York.—*Conable v. Smith*, 61 Hun (N. Y.) 185; *Rogers v. Vosburgh*, 87 N. Y. 228.

Pennsylvania.—*Stevens v. Martin*, 18 Pa. St. 101; *Clark v. Eckstein*, 22 Pa. St. 507, 62 Am. Dec. 307; *Foster v. McGraw*, 64 Pa. St. 464; *Robinson v. Myers*, 67 Pa. St. 9; *Farmers' Mut. F. Ins. Co. v. Bair*, 82 Pa. St. 33.

Where Alteration is Presumed from Appearance of Instrument.—In this connection it is to be observed that in some jurisdictions the courts have adopted the rule that where an instrument shows on its face that an erasure, interlineation, or other change has been made in the original draught, it must, in the absence of all evidence, either from the nature of the change or otherwise, to show when it was made, be presumed to be an alteration made after the execution of the instrument.¹ And where this presumption arises, and there is no evidence to rebut it, there cannot be anything for the jury to decide; it is for the court to determine from the inspection of the instrument whether the alteration is such that it must be explained.² But whenever there is evidence rebutting the presumption of alteration, it is for the jury to determine whether the change was made before or after the execution of the instrument; *i. e.*, whether or not an alteration has been made in the instrument.³

Materiality of Alterations.—Whether or not an alteration is material, is a question of law for the court.⁴

Consent.—The question of whether an alteration in an instrument was made with the consent of the parties, is one of fact for the jury.⁵

West Virginia.—Conner *v.* Fleshman, 4 W. Va. 693.

Canada.—Domville *v.* Davies, 13 Nova Scotia 159.

Hawaii.—Pahukula *v.* Parke, 6 Hawaiian Rep. 210.

By Whom Made.—Upon an issue to determine the validity of a judgment note, it was held that where both parties acknowledged that the note of the attorney's commission was inserted after the delivery of the note, the question of who made the alteration was for the jury. Martin *v.* Kline, 157 Pa. St. 473.

1. See *infra*, this title, the division *Evidence*.

2. Holton *v.* Kemp, 81 Mo. 661; Cass County Bank *v.* Morrison, 17 Neb. 341, 52 Am. Rep. 417; Hills *v.* Barnes, 11 N. H. 395; Clark *v.* Eckstein, 22 Pa. St. 507, 62 Am. Dec. 307. Compare Cole *v.* Hills, 44 N. H. 227.

3. *Massachusetts.*—Newman *v.* Wallace, 121 Mass. 323.

Michigan.—Wilson *v.* Hotchkiss, 81 Mich. 172.

Mississippi.—Commercial, etc., Bank *v.* Lum, 7 How. (Miss.) 414; Wilson *v.* Henderson, 9 Smed. & M. (Miss.) 375, 48 Am. Dec. 716.

Missouri.—Holton *v.* Kemp, 81 Mo. 661.

Nebraska.—Cass County Bank *v.* Morrison, 17 Neb. 341, 52 Am. Rep. 417.

New York.—Tuthill *v.* Hussey (Supreme Ct.), 27 N. Y. St. Rep. 362, 7 N. Y. Supp. 547.

Ohio.—Haynes *v.* Haynes, 33 Ohio St. 598, 31 Am. Rep. 579.

Pennsylvania.—Clark *v.* Eckstein, 22 Pa. St. 507, 62 Am. Dec. 307; Heffner *v.* Wenrich, 32 Pa. St. 423.

South Carolina.—Commissioners of Poor *v.* Hanion, 1 Nott & M. (S. Car.) 554.

4. *England.*—Tidmarsh *v.* Grover, 1 M. & S. 735; Vance *v.* Lowther, 1 Exch. Div. 176.

United States.—Steele *v.* Spencer, 1 Pet. (U. S.) 552.

Georgia.—Pritchard *v.* Smith, 77 Ga. 463.

Illinois.—Milliken *v.* Marlin, 66 Ill. 13.

Indiana.—Cochran *v.* Nebeker, 48 Ind. 459.

Iowa.—Jones *v.* Ireland, 4 Iowa 63; Robinson *v.* Phoenix Ins. Co., 25 Iowa 430.

Kansas.—Johnson *v.* Moore, 33 Kan. 90.

Maine.—Belfast Nat. Bank *v.* Harriman, 68 Me. 522.

Massachusetts.—Drum *v.* Drum, 133 Mass. 566.

Mississippi.—Hill *v.* Calvin, 4 How. (Miss.) 231.

Missouri.—Western Bldg., etc., Assoc. *v.* Fitzmaurice, 7 Mo. App. 283; State *v.* Dean, 40 Mo. 464.

Nebraska.—Palmer *v.* Largent, 5 Neb. 223, 25 Am. Rep. 479; Oliver *v.* Hawley, 5 Neb. 439.

New Hampshire.—Martendale *v.* Follet, 1 N. H. 95; Bowers *v.* Jewell, 2 N. H. 543; Burnham *v.* Ayer, 35 N. H. 351.

New Jersey.—Putnam *v.* Clark, 33 N. J. Eq. 343.

New York.—Tillou *v.* Clinton, etc., Mut. Ins. Co., 7 Barb. (N. Y.) 564; Woodworth *v.* Bank of America, 19 Johns. (N. Y.) 396, 10 Am. Dec. 239.

Pennsylvania.—Stephens *v.* Graham, 7 S. & R. (Pa.) 508, 10 Am. Dec. 485; Robinson *v.* Myers, 67 Pa. St. 9.

South Carolina.—Jacobs *v.* Gilreath, 41 S. Car. 143.

Virginia.—Keen *v.* Monroe, 75 Va. 424.

Hawaii.—Pahukula *v.* Parke, 6 Hawaiian Rep. 210.

Compare Moyer *v.* Herndon, 30 Miss. 110; Boyd *v.* Brotherson, 10 Wend. (N. Y.) 93.

5. *Alabama.*—White *v.* Hass, 32 Ala. 430, 70 Am. Dec. 548.

Illinois.—Benedict *v.* Miner, 58 Ill. 19.

Indiana.—Richmond Mfg. Co. *v.* Davis, 7 Blackf. (Ind.) 412; Cochran *v.* Nebeker, 48 Ind. 459.

Kentucky.—Stout *v.* Cloud, 5 Litt. (Ky.) 205.

Maine.—Belfast Nat. Bank *v.* Harriman, 68 Me. 522.

Mississippi.—Wilson *v.* Henderson, 9 Smed. & M. (Miss.) 375, 48 Am. Dec. 716.

Pennsylvania.—Stahl *v.* Berger, 10 S. & R. (Pa.) 170, 13 Am. Dec. 666.

South Carolina.—Jacobs *v.* Gilreath, 41 S. Car. 143.

Intent.—When the question of the intent with which an alteration was made becomes of importance, whether in connection with the right to resort to the original consideration or otherwise,¹ it is for the jury to determine whether or not the alteration was made with a fraudulent motive.²

XIII. EVIDENCE—1. Competency and Sufficiency of Evidence—*a. COMPETENCY OF EVIDENCE—In General.*—Where the defense of a vitiating alteration is interposed in an action of a written instrument, it is, generally speaking, competent to introduce evidence bearing in any way on the nature of the transaction.³

See *Jackson v. Osborn*, 2 Wend. (N. Y.) 555, 20 Am. Dec. 649.

Where Blanks are Left in Instrument.—It has been held that where a blank is left in a bill for the date, the jury may decide whether it was intended that the holder should fill it, and whether a particular date was to be inserted. *Stout v. Cloud*, 5 Litt. (Ky.) 205. See *Abbott v. Rose*, 62 Me. 194, 16 Am. Rep. 427.

Where there was evidence that there was an understanding between the parties to a single bond that a blank left therein for the amount might be filled in with a sum not to exceed a specified figure, it was held that the question of whether the blank had been filled up with the obligor's consent was for the jury. *Richmond Mfg. Co. v. Davis*, 7 Blackf. (Ind.) 412. See *supra*, this title, the division *Filling Blanks*.

Ratification.—It has been held that it is for the court to pass upon the sufficiency of facts to constitute a ratification. *Dickson v. Bamberger* (Ala. 1895), 18 So. Rep. 290. See *Conable v. Smith*, 61 Hun (N. Y.) 185.

1. See *supra*, this title, division *Effect of Alterations*, subdivisions *On Right to Recover on Original Consideration* and *Immaterial Alterations*.

2. *Wallace v. Wallace*, 8 Ill. App. 69; *Bel-fast Nat. Bank v. Harriman*, 68 Me. 522; *Bowers v. Jewell*, 2 N. H. 543; *Booth v. Powers*, 56 N. Y. 22; *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775.

In *Pritchard v. Smith*, 77 Ga. 463, it was held that there being no controversy as to the alteration of the note in question, and none as to the facts from which a fraudulent intent in making it was sought to be deduced, the materiality of the alteration and the intent with which it was made became questions of law to be decided by the court.

Whether Intention Was to Correct Mistake.—It seems that whether the intention was to vary the contract or merely correct a mistake, is a question for the jury. *Byles on Bills* 327; *Atwood v. Griffin*, R. & M. 425, 2 C. & P. 368, 12 E. C. L. 176; *Boyd v. Brotherson*, 10 Wend. (N. Y.) 93; *Brutt v. Picard*, R. & M. 37, 21 E. C. L. 376.

3. *Winters v. Mowrer*, 163 Pa. St. 239.

Illustrations.—Thus where a fraudulent alteration of the amount was alleged as a defense to an action on a note, it was held that evidence was properly admissible that plaintiff at the time had a larger amount borrowed from a third party, and that he had declared to the defendant's family that nothing was due him, and that he did not mention the debt

when inquiry was made at an inquest of lunacy held over the debtor. *Winters v. Mowrer*, 163 Pa. St. 239.

In *Jourden v. Boyce*, 33 Mich. 302, it was held that evidence that the only note of the kind the defendant had ever signed was payable in two years, while the note sued upon and produced in court was payable in four months, was evidence fairly tending, if believed, to prove an alteration of the identical instrument originally signed.

Admission of Correctness of Instrument.—Where a note past due was presented to its maker for payment, and he admitted it to be correct, it was held that this was evidence that an alteration apparent on the face of the instrument was made previous to its execution, or, if afterwards, with the maker's consent. *King v. Bush*, 36 Ill. 142.

Alteration in Date of Renewal Note—Competency of Prior Note to Prove.—Where an action was brought against the indorser of a note dated May 16, which had been given in renewal of a prior note, and the defendant claimed that the date of the note in suit had been altered from 11 to 16, it was held that the former note, which bore date February 16 and was payable in three months, was competent evidence to establish the date of the note in suit. *Plattsburgh First Nat. Bank v. Heaton*, 6 Thomp. & C. (N. Y.) 37.

Terms of Contract upon Which Note was Given Competent to Show Alteration.—Where the issue is whether certain notes have been altered since their execution, the contract for the purchase of goods for which the notes were given is competent and relevant evidence, as tending to prove that the notes signed by the defendants were given in conformity to the terms of the sale. *Stein v. Brunswick-Balke-Collender Co.*, 69 Miss. 277.

Duplicate Copy of Instrument as Evidence.—An action was brought to recover for work performed under a written contract, and the contract was made an exhibit to the complaint; the defendant admitted making the contract, but denied that the work had all been done as charged for. At the trial, the contract was offered in evidence, and showed on its face certain interlineations and erasures. The defendant offered in evidence a duplicate of the contract, for the purpose of showing that the contract offered by the plaintiff had been changed, and it was held that the duplicate contract should have been received, and a new trial was ordered unless the plaintiff remitted so much of the verdict which he had obtained as was affected by the alteration. *Young v. Cohen*, 42 S. Car. 328. See also

Corroborating Circumstances.—And it has been held that where there are strong circumstances pointing to the suspicion that an instrument has been altered, general corroborating circumstances may be introduced in evidence to strengthen the suspicion.¹

Expert Testimony.—On the question of whether or not an alteration has been made in a writing, the opinion of an expert is competent evidence.²

North v. Henneberry, 44 Wis. 306; *Prevost v. Gratz*, 1 Pet. (C. C.) 369.

Evidence of Similar Handwriting.—On the trial of the question whether an alteration in a will was made by the original draughtsman or by a stranger, evidence of other writings proved by witnesses, and also of witnesses, is admissible, to show that the peculiarities in the alteration are such as the party frequently used in his ordinary handwriting. *Smith v. Fenner*, 1 Gall. (U. S.) 170.

Instrument Alleged to have been Altered as Evidence.—In *Horton v. Horton*, 71 Iowa 448, while it was not denied that a note alleged to have been altered might be submitted to the jury as an item of evidence upon the question of alteration, it was held that, since the body of the instrument was in the writing of the plaintiff, and she testified that she never at any time made an alteration in the note, and there was evidence tending to show that the note was blotted after it passed out of the hands of the plaintiff, it was error to instruct a jury to determine from a mere inspection of the instrument whether it had been materially altered or not, but that they should have been instructed to determine the question from a consideration of all the evidence.

In an action on a note, an expert witness testified that the body of the note and the signature were in the handwriting of the maker; that the indorsement was the signature of the indorser; that the note had the appearance of having been all written at one time, and by the same pen, ink, and hand, and that, in his opinion, it was so written. It was held that the note was properly received in evidence, to be scrutinized by the jury, as the basis for a verdict if found to be genuine. *Pearson v. Hardin*, 95 Mich. 360.

Instrument Bearing Impossible Date.—The fact that an instrument which is claimed to have been materially altered bears an impossible date, may be evidence to show that the writing was antedated, but not that it was altered after delivery. *Davis v. Loftin*, 6 Tex. 489.

Terms of Other Notes Given in Same Transaction.—Where an action was brought on a promissory note in which the words "after maturity," printed in the interest clause, were erased, it was held that it would not be competent for the defendant to introduce other notes made by himself in the same transaction containing the same phrase, in order to show that these words were in the note in suit at the time of its execution. *Paramore v. Lindsey*, 63 Mo. 63.

Evidence of General Reputation.—Evidence that the general reputation of a plaintiff among his neighbors was that he was a tricky man, and would take liberties with papers in his hands, thereby altering their character, is

not sufficient proof that he has perpetrated the alteration complained of, nor is it, when followed by testimony showing that the note given in evidence had been altered, sufficient or admissible to prove forgery or alteration of the note by the plaintiff. *Martin v. Good*, 14 Md. 398, 74 Am. Dec. 545. See the title CHARACTER IN EVIDENCE.

Evidence Touching Conversation as to Alteration.—Where, upon the trial of a case, it appeared that a written contract, which was set up in defense, had been altered, but the alteration was conceded by both parties, and the case was tried relying upon the contract as originally executed, it was held that evidence touching conversations as to who had made the alteration was irrelevant. *Jones v. Julian*, 12 Ind. 274.

Witnesses.—The fact of a rasure having been made in an instrument after delivery may be proved either by a subscribing witness or by any other person who saw the rasure made. *Penny v. Corwith*, 18 Johns. (N. Y.) 499. See *M'Connell v. Brown*, Litt. Sel. Cas. (Ky.) 459.

1. Alteration of Other Instruments between Same Parties.—It has accordingly been declared competent to show that other notes drawn and indorsed by the same parties, to take up one of which the note in question had been given, had also been altered. *Rankin v. Blackwell*, 2 Johns. Cas. (N. Y.) 198, *approved* in *Haynes v. Christian*, 30 Mo. App. 198.

Evidence of Similar Alterations Held Incompetent.—In an action on a bill of exchange, where the defense is that the bill has been altered, it has, in *England*, been held that the defendant cannot go into evidence to show that other bills have likewise been altered. *Thompson v. Mosely*, 5 C. & P. 501, 24 E. C. L. 428; *Balcetti v. Serani*, Peake N. P. 142; *Viney v. Barss*, 1 Esp. 293.

2. Opinion of Expert Competent Evidence.—*Pearson v. Hardin*, 95 Mich. 360; *Dubois v. Baker*, 30 N. Y. 355. See *National State Bank v. Rising*, 4 Hun (N. Y.) 793. And see the titles, EXPERT AND OPINION EVIDENCE; HANDWRITING.

Thus it has been held that the opinion of an expert may be given in evidence on the question of whether the date of a note has been altered by the substitution of one figure for another. *Nelson v. Johnson*, 18 Ind. 329.

A question was put to a witness to give his best judgment whether certain words in a note were written in the same ink as the other parts of the note. The question was objected to because the witness testified that he "was not an expert, and not an expert in ink." He testified that for twenty-two years he had been in the timber business, which necessitated the handling of a great many letters, notes, checks,

b. SUFFICIENCY OF EVIDENCE.—The party to a civil action who has the burden of showing an alteration in an instrument is required to establish it only by a preponderance of the evidence,¹ even although the alteration constitutes a criminal act.²

2. Burden of Proof—*a.* NONAPPARENT ALTERATIONS.—The authorities are agreed that where an instrument does not bear upon its face any evidence of having been altered at any time, the party who seeks to recover upon the instrument need not, after proving its execution, offer any proof, in the first instance, upon the subject of an alleged alteration; if the alteration is not apparent upon the face of the writing, the party claiming that the instrument has been altered must introduce evidence of the alteration,³ or, as the rule is most frequently, but perhaps not so accurately,⁴ expressed, the burden of proof is upon him to show the alteration.⁵

b. APPARENT ALTERATIONS—PRESUMPTIONS.—(1) *Generally—Conflict of Authorities.*—There is much conflict in the adjudications as to whether or not, on the production of a written instrument which shows an erasure, or words recast, or an interlineation, there is, in the absence of all evidence, a presumption for or against the validity of the instrument, and whether or not, in consequence, it is incumbent upon the party offering it in evidence to offer an explanation of such erasure or interlineation.⁶

drafts, accounts, etc., and showed qualifications rendering him competent to answer the question propounded. It was held that there was no error in allowing him to answer it. *Glover v. Gentry*, 104 Ala. 222.

1. *Farmers' L. & T. Co. v. Olson* (Iowa 1894), 61 N. W. Rep. 199.

Impeaching Certified Copy of Mortgage.—Where the original of a mortgage is lost, a certified copy cannot be impeached on the ground of an alteration of the original before recording, except upon clear and convincing evidence, and in the absence of such proof it will be presumed that the certified copy is a precise transcript of the original as it was executed and recorded. *Blasey v. Delius*, 86 Ill. 558.

2. *Coit v. Churchill*, 61 Iowa 296; *Lewis v. Garretson*, 56 Iowa 278. Compare *Hughes's Estate* (Surrogate Ct.), 18 N. Y. St. Rep. 395.

3. *Lowman v. Aubrey*, 72 Ill. 619; *Simpson v. Davis*, 119 Mass. 269; *Farmers' L. & T. Co. v. Siefke*, 144 N. Y. 354; *Boston Block Co. v. Buffington*, 39 Minn. 385; *Wells v. Moore*, 15 Tex. 521.

4. **Correct Statement of Rule.**—In *Farmers' L. & T. Co. v. Siefke*, 144 N. Y. 354, it was held that the burden of proof remains upon the plaintiff throughout the case, although the defendant alleges that the instrument sued upon has been materially altered. The court, by *Andrews, C. J.*, said: "It is very common to say in such cases that the burden is upon the defendant to establish the fact relied upon. All that this can properly mean is that when the plaintiff has established a *prima facie* case the defendant is bound to controvert it by evidence, otherwise he will be cast in judgment. When such evidence is given, and the case upon the whole evidence, that for and that against the fact asserted by the plaintiff, is submitted to court or jury, then the question of the burden of proof as to any fact, in its proper sense, arises, and rests upon the party upon whom it was at the outset,

and is not shifted by the course of the trial, and the jury may be properly instructed that all material issues tendered by the plaintiff must be established by him by a preponderance of evidence."

5. **Nonapparent Alterations—Burden of Proof**—*United States.*—*U. S. v. Linn*, 1 How. (U. S.) 104.

Alabama.—*Montgomery v. Crossthwait*, 90 Ala. 563, 24 Am. St. Rep. 832; *Barclift v. Treece*, 77 Ala. 528.

Indiana.—*North America Ins. Co. v. Brim*, 111 Ind. 281; *Meikel v. State Sav. Inst.*, 36 Ind. 355.

Iowa.—*Odell v. Gallup*, 62 Iowa 253; *Farmers' L. & T. Co. v. Olson* (Iowa 1894), 61 N. W. Rep. 199; *Potter v. Kennelly*, 81 Iowa 96.

Kansas.—*J. I. Case Threshing Mach. Co. v. Peterson*, 51 Kan. 713.

Kentucky.—*Thacker v. Booth* (Ky. 1888), 6 S. W. Rep. 460.

Massachusetts.—*Davis v. Jenney*, 1 Met. (Mass.) 221.

Wisconsin.—*Gorden v. Robertson*, 48 Wis. 493.

See *Harris v. Jacksonville Bank*, 22 Fla. 501, 1 Am. St. Rep. 201. See also *Sturm v. Boker*, 150 U. S. 340.

6. In *Neil v. Case*, 25 Kan. 510, 37 Am. Rep. 259, *Horton, C. J.*, in speaking on this subject, said: "This is a vexed question, and the books are full of diverse decisions. Four different rules are generally stated: First, that an alteration apparent on the face of the writing raises no presumption either way, but the question is for the jury; second, that it raises a presumption against the writing, and requires therefore some explanation to render it admissible; third, that it raises such a presumption when it is suspicious, otherwise not; fourth, that it is presumed, in the absence of explanation, to have been made before delivery, and therefore requires no explanation in the first instance."

The various authorities upon this vexed question are collected in the following paragraphs, and it is believed that an examination will show that in almost all cases the conflict is theoretical and apparent rather than practical and real.¹

(2) *Preliminary Inquiry by Court.*—The preliminary inquiry whether a writing offered shall be admitted in evidence is for the court. And so it is for the court to determine in the first instance whether alterations are so far accounted for as to permit the instrument to be read in evidence.²

Question should Generally be Submitted to Jury.—Unless, however, there are circumstances of suspicion, and no explanation is offered, the court should permit the instrument to go in evidence, and submit to the jury, under proper

The same classification of the authorities will be found adopted in many decisions. See, for instance, *Hagan v. Merchant's, etc., Ins. Co.*, 81 Iowa 321, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), title ALTERATION OF INSTRUMENTS.

It is believed that the analysis of the authorities given by Mitchell, J., in *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754, is more correct. The learned judge said: "The rule adopted by some authorities is that the presumption, in the absence of evidence to the contrary, is that the alteration was made before execution, and therefore that no explanation is required in the first instance; while others hold * * * that the presumption of law is that the alteration was made after delivery, and therefore the burden is upon the holder to explain it, and show that it was made under circumstances that would not invalidate the instrument. In addition to these two leading and opposing views, different courts have adopted certain intermediate or compromise rules, none of which need be here referred to, except one, seemingly adopted by some very eminent courts, to wit, that the alteration raises a presumption against the instrument when it is suspicious; otherwise not. But this furnishes no definite rule by which to determine when the burden is upon the holder to explain the alteration and when it is not. * * * It seems to us that the rule just referred to amounts to nothing more than saying that in some cases this intrinsic evidence [furnished by the inspection of the instrument itself] may tend to prove that the alteration was made after delivery, and therefore throw the preponderance on that side, unless the holder of the instrument produces extrinsic rebutting evidence. Thus construed, we would find no special fault with the rule. But it is incorrect to call this a presumption of law; it is simply an inference of fact drawn from evidence in the case."

1. In *Cox v. Palmer*, 1 McCrary (U. S.) 431, McCrary, Circuit Judge, said: "Upon this question there is an apparent conflict of authority. I think, however, it is apparent only, and not real. * * * I think that one rule governs in all these cases, and it is this: If the interlineation is in itself suspicious, as if it appears to be contrary to the probable meaning of the instrument as it stood before the insertion of the interlined words, or if it

is in a handwriting different from the body of the instrument, or appears to have been written with different ink, in all such cases, if the court considers the interlineation suspicious on its face, the presumption will be that it was an unauthorized alteration after execution. On the other hand, if the interlineation appears in the same handwriting with the original instrument, and bears no evidence on its face of having been made subsequent to the execution of the instrument, and especially if it only makes clear what was the evident intention of the parties, the law will presume that it was made in good faith and before execution."

2. In *Parsons First Nat. Bank v. Franklin*, 20 Kan. 264, wherein it was held that in general there was a presumption that the alteration was contemporaneous with the execution of the instrument, it was stated by Brewer, J., that when there were circumstances of suspicion, and no explanation given, it might be the duty of the court to refuse to let the instrument go before the jury. See also *Russell v. Peyton*, 4 Ill. App. 473; *Neil v. Case*, 25 Kan. 510, 37 Am. Rep. 259; *Stillwell v. Patton*, 108 Mo. 352; *Paramore v. Lindsey*, 63 Mo. 63; *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775.

In *McMicken v. Beauchamp*, 2 La. 290, it was held that where the acceptance of a bill of exchange contained an interlineation in a different colored ink, the court should not admit it in evidence until the alteration was explained. See *Johnson v. First Nat. Bank*, 28 Neb. 792.

In *Tillou v. Clinton, etc., Mut. Ins. Co.*, 7 Barb. (N. Y.) 564, it was held that where an instrument appeared to have been mutilated, and the party who signed the instrument and who proved its execution testified that the paper originally contained a postscript modifying the body of the writing, the court did not err in refusing to submit it to the jury. See *York v. Janes*, 43 N. J. L. 332.

In *Pennsylvania*, where a negotiable instrument contains a visible and material alteration, it is not receivable in evidence unless explanation is offered. *Hartley v. Corboy*, 150 Pa. St. 23.

Where the plaintiff in such a case testifies positively that the note was altered before it came to his hands, it should be admitted, leaving to the jury the truth of the matter. *Miller v. Stark*, 148 Pa. St. 164.

instructions, the questions as to the time when and the persons by whom the alterations were made.¹

(3) *View that Apparent Alteration Raises No Presumption.*—The view best supported by reason, and the one to which the authorities seem tending, is that the mere fact of an interlineation or erasure appearing in an instrument does not *per se* raise any presumption either for or against the validity of the writing; but that the question when, by whom, and with what intent an alteration was made, is one of fact to be submitted to the jury upon the whole evidence.²

Duty of Explanation Devolves on Him Who Produces Instrument.—According to this view, as the party who has the affirmative of an issue must prove it, it is the duty of him who produces an instrument, and who claims under it, to prove its genuineness, and that the alterations apparent upon it were honestly and properly made, but the extent to which he shall go depends upon the circumstances of each case.³

Proof of Signature Generally Makes Prima Facie Case.—In general, however, the party makes out a *prima facie* case by the proof or admission of the signature of

1. *Parsons First Nat. Bank v. Franklin*, 20 Kan. 264. See *Corcoran v. Doll*, 32 Cal. 83; *Hoey v. Jarman*, 39 N. J. L. 523; *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232; *Smith v. McGowan*, 3 Barb. (N. Y.) 404.

2. *A Question of Fact for the Jury—Arkansas.*—*Gist v. Gans*, 30 Ark. 285.

Connecticut.—*Bailey v. Taylor*, 11 Conn. 531, 29 Am. Dec. 321; *Hayden v. Goodnow*, 39 Conn. 164.

Illinois.—*Reed v. Kemp*, 16 Ill. 445; *Milliken v. Marlin*, 66 Ill. 13.

Iowa.—*Hagan v. Merchant's, etc., Ins. Co.*, 81 Iowa 321.

Kansas.—*Neil v. Case*, 25 Kan. 510, 37 Am. Rep. 259; *J. I. Case Threshing Mach. Co. v. Peterson*, 51 Kan. 713.

Maine.—*Gooch v. Bryant*, 13 Me. 386; *Crabtree v. Clark*, 20 Me. 337.

Massachusetts.—*Davis v. Jenney*, 1 Met. (Mass.) 221; *Ely v. Ely*, 6 Gray (Mass.) 439.

Minnesota.—*Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754.

Nebraska.—*Cass County Bank v. Morrison*, 17 Neb. 341, 52 Am. Rep. 417; *Goodin v. Plugge* (Neb. 1896), 66 N. W. Rep. 407.

New Jersey.—*Cumberland Bank v. Hall*, 6 N. J. L. 215; *Den v. Wright*, 7 N. J. L. 175, 11 Am. Dec. 546; *Hunt v. Gray*, 35 N. J. L. 227, 10 Am. Rep. 232; *White v. Williams*, 3 N. J. Eq. 385; *Sayre v. Reynolds*, 5 N. J. L. 848.

New York.—*Van Buren v. Cockburn*, 14 Barb. (N. Y.) 118.

See *Davis v. Carlisle*, 6 Ala. 707; *Jourden v. Boyce*, 33 Mich. 302; *Von Eherenkrook v. Webber*, 100 Mich. 314; *Maybee v. Sniffen*, 2 E. D. Smith (N. Y.) 7; *Pullen v. Shaw*, 3 Dev. (N. Car.) 238.

Such is in effect the ruling in many cases where the courts hold or intimate that there is a presumption that the alteration is contemporary with the instrument. Thus in an unusually satisfactory and well-considered opinion, in the case of *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775, Hall, J., after stating that the presumption should be that an apparent alteration was made before execu-

tion, said: "On the usual proof of the execution of the instrument, it should, without reference to the character of any alteration upon it, be admitted in evidence, leaving all testimony in relation to such alteration to be given to the jury. It will doubtless be the duty of the court to give the jury proper instructions upon any given state of facts. * * * But, generally, the whole inquiry, whether there has been an alteration, and if so, whether in fraud of the defending party or otherwise, to be determined by the appearance of the instrument itself, or from that and other evidence in the case, is for the jury. The whole is matter of fact, and they must determine it from all the testimony before them." See also *Welch v. Coulborn*, 3 Houst. (Del.) 647; *Stoner v. Ellis*, 6 Ind. 159; *Neil v. Case*, 25 Kan. 510, 37 Am. Rep. 259; *Parsons First Nat. Bank v. Franklin*, 20 Kan. 264; *Franklin v. Baker*, 48 Ohio St. 296; *Huntington v. Finch*, 3 Ohio St. 449; *Wicker v. Pope*, 12 Rich. (S. Car.) 387, 75 Am. Dec. 732; *Wolferman v. Bell*, 6 Wash. 84. Compare *Warren v. Layton*, 3 Harr. (Del.) 404.

3. *Plaintiff must Make Out His Case.*—*Dodge v. Haskell*, 69 Me. 429; *Ely v. Ely*, 6 Gray (Mass.) 439. See *Reed v. Kemp*, 16 Ill. 445; *Comstock v. Smith*, 26 Mich. 306; *Huntington v. Finch*, 3 Ohio St. 449; *Priest v. Whitacre*, 78 Va. 151.

Material Alteration in Deed.—It has been said that a material alteration apparent in a deed calls for explanation, but the question at last is one of fact for the jury, and there is no presumption. *Acker v. Ledyard*, 8 Barb. (N. Y.) 514; *Van Buren v. Cockburn*, 14 Barb. (N. Y.) 118. See *Dow v. Jewell*, 18 N. H. 356; *Burnham v. Ayer*, 35 N. H. 352.

Adverse Party Demanding Production of Altered Instrument.—In *Priest v. Whitacre*, 78 Va. 151, it was held that where a witness refers to a written instrument, and thereupon the opposite party demands its production, it will not be incumbent on the party who does not offer or claim under it, to explain any apparent alteration on the face of the instrument.

the instrument, since that is *prima facie* evidence that the whole instrument is the act of the party signing.¹

Rebuttal of Prima Facie Case.—But the other party is entitled to introduce evidence to rebut this *prima facie* case, and thus throw upon the party introducing the writing the burden of accounting for the alteration.²

Evidence in Rebuttal—The Writing as Evidence.—Evidence rebutting such a *prima facie* case may be either evidence extrinsic to the instrument, or intrinsic evidence from the appearance of the writing itself, that is, from the character of the alteration determined by inspection of the writing, considered in connection with the relations of the parties to the instrument.³

Where the Alteration Is in Itself Suspicious.—If the intrinsic evidence derived from an inspection of the writing shows the alteration to be of a suspicious character, warranting the inference that it was not honestly and properly made, the party offering the instrument so altered must explain it, but whether such explanation is satisfactory is for the jury.⁴

Absence of Explanation Considered as Evidence.—And the circumstance that the party offers no explanation is, it seems, in itself to be taken into consideration by the jury in connection with the fact that a suspicious alteration exists.⁵

Alteration against Interest.—If, on the other hand, the alteration is against the interest of the party introducing the paper, this fact strengthens his *prima facie* case and must be given its due weight by the jury.⁶

(4) *View that Alteration Presumed Made before Execution.*—The presumption that an apparent alteration in an instrument will be presumed to have been made before execution, was early stated to be applicable in the case of a deed,⁷ and has been frequently stated as a rule applicable generally to all contracts.⁸

1. **Proof of Execution Enough in the First Instance.**—*Stayner v. Joyce*, 120 Ind. 99; *Willett v. Shepard*, 34 Mich. 106; *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754. See *Cox v. Palmer*, 1 McCrary (U. S.) 431; *Hagan v. Merchant's, etc., Ins. Co.*, 81 Iowa 321; *Wickes v. Caulk*, 5 Har. & J. (Md.) 36; *Simpson v. Davis*, 119 Mass. 269, 20 Am. Rep. 324.

2. *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754; *Courcamp v. Weber*, 39 Neb. 533. See also *supra*, this division, *Nonapparent Alterations*.

3. **The Instrument Itself as Evidence.**—*Bailey v. Taylor*, 11 Conn. 531, 29 Am. Dec. 321; *Miliken v. Marlin*, 66 Ill. 13; *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754.

The appearance of the instrument itself, or, in other words, the internal evidence offered by the instrument, may show that the alteration preceded the execution. *Wicker v. Pope*, 12 Rich. (S. Car.) 387, 75 Am. Dec. 732; *Hills v. Barnes*, 11 N. H. 395. But see *Ran-kin v. Blackwell*, 2 Johns. Cas. (N. Y.) 198, where it was held that the mere fact that alterations appeared on the face of a note, unsupported by other proof, would not be competent evidence to go to the jury on the question whether the note had been altered or not.

4. *Cox v. Palmer*, 1 McCrary (U. S.) 431; *Hill v. Nelms*, 86 Ala. 446, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 512; *State v. Roberts*, 37 Kan. 437; *Wilde v. Armsby*, 6 Cush. (Mass.) 314; *Smith v. McGowan*, 3 Barb. (N. Y.) 404. And see *infra*, this division, *Suspicious Circumstances Calling for Explanations*.

5. *Davis v. Carlisle*, 6 Ala. 707; *Reed v.*

Kemp, 16 Ill. 445; *Crabtree v. Clark*, 20 Me. 337; *Herrick v. Malin*, 22 Wend. (N. Y.) 389.

6. **Alterations against Interest.**—See *Den v. Farlee*, 21 N. J. L. 279; *Maybee v. Sniffen*, 2 E. D. Smith (N. Y.) 7.

So where the effect of the alteration is to postpone the date of the maturity of the instrument for one year. *Wilson v. Henderson*, 9 Smed. & M. (Miss.) 379, 48 Am. Dec. 716.

Or to cut off one year's interest from the amount recoverable upon a bond. *Pullen v. Shaw*, 3 Dev. (N. Car.) 238.

Or where the alteration greatly reduces the amount of the instrument. *Bailey v. Taylor*, 11 Conn. 531, 29 Am. Dec. 321.

7. *Trowel v. Castle*, 1 Keb. 21, decided in 1661. See *Bailey v. Taylor*, 11 Conn. 531, 29 Am. Dec. 321; *Doe v. Catomore*, 16 Q. B. 745.

In Co. Litt. 225b it is said that "of ancient time, if the deed appeared to be rased or interlined in places material, the judges adjudged upon their view the deed to be void, but of latter time, the judges have left that to the jurors to try whether the rasing or interlining were before the delivery."

A statement to the same effect is made in *Leyfield's Case*, 10 Coke 92b, where the Year Books, 7 Edw. III. 57, 25 Edw. III. 41, 41 Edw. III. 10, are cited for the ancient practice.

When Execution of Deed Denied.—In some instances it has been held that the presumption that the alteration in a deed was made before the deed was executed will cease to exist when the execution of the deed is denied on oath. *Banks v. Lee*, 73 Ga. 25. See also *Thrasher v. Anderson*, 45 Ga. 538.

8. *Indiana*.—*Stoner v. Ellis*, 6 Ind. 159.

Subsidiary Principle as to Suspicious Alteration.—Such a presumption, however, has been denied;¹ and where it is admitted, it is necessary to introduce the subsidiary principle that where circumstances of suspicion exist the burden of proof is shifted, and it becomes necessary for the party introducing an instrument to account for the alteration.²

(5) *View that Alteration Presumed Made after Execution.*—In some cases the general rule is announced that where a written instrument shows an interlineation or erasure upon its face, the presumption, in the absence of

Missouri.—*Paramore v. Lindsey*, 63 Mo. 63; *Stillwell v. Patton*, 108 Mo. 352.

Ohio.—*Franklin v. Baker*, 48 Ohio St. 296.

Tennessee.—*Farnsworth v. Sharp*, 4 Sneed (Tenn.) 55.

Texas.—*Collins v. Ball*, 82 Tex. 259.

Vermont.—*Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775.

Washington.—*Wolferman v. Bell*, 6 Wash. 84; *Yakima Nat. Bank v. Knipe*, 6 Wash. 348; *Kleeb v. Bard*, 12 Wash. 140.

Interlineation by Attesting Officer to Deed.—Where interlineations in a deed were in the handwriting of the officer who officially attested the same, it was held that the presumption would be that they were made before the execution of the instrument. *Bedgood v. McLain*, 89 Ga. 793.

Alteration in Same Ink.—If an interlineation appeared to be written with the same pen and ink as the body of the instrument, the natural inference would be that it was made before the sealing and delivery of the deed. But if it did not appear to be made with the same pen and ink, no such presumption would arise, and other evidence would be required to explain it. *Robinson v. Myers*, 67 Pa. St. 9.

Alteration in Handwriting of Grantor.—Where interlineations in a deed appear to be in the handwriting of the grantor, and merely cure a defective description, and accord with the purpose and objects of the deed, the fair presumption is that the interlineations were made before the acknowledgment of execution, and the burden of repelling the presumption rests on the party asserting the contrary. *Sharpe v. Orme*, 61 Ala. 263.

Erasure in Printed Blanks.—In *Corcoran v. Doll*, 32 Cal. 83, it was held that where a printed form is used for a contract, and an erasure is made only as to the printed matter, the presumption is that it was made prior to the execution of the contract, for the purpose of suiting the printed form to the terms agreed upon by the parties. See *Willett v. Shepard*, 34 Mich. 106; *Cass County Bank v. Morrison*, 17 Neb. 341, 52 Am. Rep. 417.

But in *Page v. Danaher*, 43 Wis. 221, it was held that where printed words were stricken out in a note, apparently in different ink from that used in the rest of the instrument, explanation was necessary.

Where an Interlineation Appears on the Face of an Officer's Return, and there is no evidence to show when it was done, it will be presumed that it was done before the return was made. *Sloan v. Stanly*, 11 Ired. (N. Car.) 627.

Alteration in Indictment.—Where there were alterations in an indictment, and there was nothing appearing upon the face of the written instrument, or shown extrinsically, to prove that such interlineations were made after the execution of the instrument, it was held that it would be presumed that they were made before or at its execution. *French v. State*, 12 Ind. 670, 74 Am. Dec. 229.

Alteration in Transcript of Judgment.—Where, on a transcript of a foreign judgment, alterations appeared on the face of the record, which were verified by the initials of the clerk making the record, it was held that they would be presumed to have been made at the time that the transcript was certified or authenticated. *Lazier v. Westcott*, 26 N. Y. 146, 82 Am. Dec. 404.

Alteration in Administrator's Bond.—Where an action was brought on an administrator's bond, which from the time of its execution had been in official custody, it was held that the burden of proving that it had been altered as to its amount was upon the defendants. *Peveler v. Peveler*, 54 Tex. 53.

1. See *Ely v. Ely*, 6 Gray (Mass.) 439.

In *Doe v. Catomore*, 16 Q. B. 745, 71 E. C. L. 745, Lord Campbell, C. J., said: "This doctrine seems to me to rest upon principle. A deed cannot be altered after it is executed without fraud or wrong, and the presumption is against fraud or wrong." It is to be observed, however, that in this and other cases where the presumption is commended, the only alternative in the mind of the judge was the presumption that the alteration was subsequent to execution.

2. **Where the Alteration Is Suspicious.**—In *Stoner v. Ellis*, 6 Ind. 159, the court held that the fact that certain names in a list of counties in which the instrument, the assignment of a patent right, was to be effective, were struck out by having pencil marks drawn through them, had no effect upon the presumption that the alteration was contemporaneous with the execution of the instrument. But it was stated that had the alteration been of such a character as to defeat entirely the operation of the instrument, as, for instance, the erasure of the signature and seal, it would have called for explanation. See also *Cox v. Palmer*, 1 McCrary (U. S.) 431; *Stillwell v. Patton*, 108 Mo. 352; *Paramore v. Lindsey*, 63 Mo. 67; *Huntington v. Finch*, 3 Ohio St. 449; *Farnsworth v. Sharp*, 4 Sneed (Tenn.) 55; *Collins v. Ball*, 82 Tex. 259; *Deweese v. Bluntzer*, 70 Tex. 406; *Davis v. State*, 5 Tex. App. 48. And see *infra*, this title, *Suspicious Circumstances Calling for Explanations*.

evidence, is that it was made after execution, and the burden is upon the party claiming under the instrument to account for the alteration.¹

Origin of the Rule.—This ruling seems to have had its origin in cases concerned with bills of exchange and promissory notes, and seems unquestionably to have been based originally on the provisions of the English Stamp Act with reference to instruments of that character.²

Presumption Denied, Limited, or Explained.—The existence of such a presumption has been frequently denied;³ and the cases which apply it will be found to limit its application to commercial paper,⁴ or generally to be capable of explanation upon the ground that the intrinsic evidence derived from the

1. *McMicken v. Beauchamp*, 2 La. 290; *Commercial, etc., Bank v. Lum*, 7 How. (Miss.) 414; *Cole v. Hills*, 44 N. H. 227; *Hills v. Barnes*, 11 N. H. 395.

Document in Official Custody.—The rule which excludes papers on account of an unexplained alteration, applies to papers in possession of the party to be injured or benefited thereby and not to official documents not in the custody of or under the control of the party. *Devoey v. New York*, 35 Barb. (N. Y.) 264, 22 How. Pr. (N. Y.) 226. See also *supra*, this title, *View that Alteration Presumed Made before Execution*.

2. **Origin of the Rule.**—The earliest English case is that of *Johnson v. Marlborough*, 2 Stark. 313, 3 E. C. L. 424, decided *ad nisi prius* in 1818. In this case, *Abbott, J.*, refused to indulge any presumption as to the time of the alteration, but held that unless the plaintiff, who brought the action against the defendant as acceptor of a bill, proved that an apparent alteration in the date of the instrument was made before execution, the bill was void under the Stamp Act for want of a new stamp. To the same effect are *Bishop v. Chambre*, 3 C. & P. 55, 14 E. C. L. 207; *Leykariff v. Ashford*, 12 Moore 281, 22 E. C. L. 450; *Taylor v. Mosely*, 6 C. & P. 273, 25 E. C. L. 393; *Sibley v. Fisher*, 7 Ad. & El. 444, 34 E. C. L. 139; *Knight v. Clements*, 8 Ad. & El. 215, 35 E. C. L. 377; *Clifford v. Parker*, 2 M. & G. 909, 40 E. C. L. 687. In *Henman v. Dickinson*, 5 Bing. 183, 15 E. C. L. 409, the same ruling was made, although the Stamp Act was not referred to.

These English cases will be found discussed or reviewed in *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775; *Bailey v. Taylor*, 11 Conn. 531, 29 Am. Dec. 321; and in *Simpson v. Stackhouse*, 9 Pa. St. 186, 49 Am. Dec. 554, by *Gibson, C. J.*, who regarded them as "founded in reason and not in considerations growing out of the Stamp Acts."

A few cases will be found, independent of the series of authorities here referred to, which hold that this presumption exists with regard to deeds or other instruments, as well as with regard to commercial paper. The earliest of these decisions seems to have been *Morris v. Vanderen*, 1 Dall. (Pa.) 64, where *McKean*, Chief Justice of the Supreme Court of *Pennsylvania*, instructed the jury in a *ad nisi prius* case that in the case of an interlineation in a deed the presumption was that it was made after execution. The authority of this case has not been followed in the *Pennsylvania*

courts. See the *Pennsylvania* decisions cited in the following notes.

3. **Presumption against Validity of Instrument Denied.**—In *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754, *Mitchell, J.*, said: "The doctrine that the presumption of law is that the alteration was made after delivery, and that the burden is on the holder in the first instance to explain it, seems to us to be unsound as well as harsh. Presumptions of law, if indulged in, should be in favor of innocence rather than guilt. * * * Hence such presumptions ought to be conformable to the experience of mankind, and the inferences which, in the light of that experience, men would naturally draw from a given state of facts." After observing that instruments are frequently drawn at the present day by laymen, without much regard to form and with frequent erasures and interlineations, and that the printed blanks which are now in common use have to be adapted to the purposes of the parties by erasures and interlineations, the learned judge proceeded: "Whatever might have been the fact formerly, when but few men could write, and when contracts were usually drawn by skilled conveyancers or scriveners, with great care and wholly in their own proper handwriting, the rule under consideration is wholly unsuited to the business habits or usages of this country at the present day." See also *Gooch v. Bryant*, 13 Me. 386; *Wickes v. Caulk*, 5 Har. & J. (Md.) 36; *Beaman v. Russell*, 20 Vt. 205, 49 Am. Dec. 775; and generally the cases cited in the notes to the preceding paragraphs.

4. **Rule Confined to Commercial Paper—Pennsylvania.**—*Simpson v. Stackhouse*, 9 Pa. St. 186, 49 Am. Dec. 554; *Paine v. Edsell*, 19 Pa. St. 178; *Hill v. Cooley*, 46 Pa. St. 259; *Neff v. Horner*, 63 Pa. St. 327, 3 Am. Rep. 555; *Hartley v. Corboy*, 150 Pa. St. 23; *Gettysburg Nat. Bank v. Chisolm*, 169 Pa. St. 564; *Citizens' Nat. Bank v. Williams* (Pa. 1896), 34 Atl. Rep. 303.

See also *Piercy v. Piercy*, 5 W. Va. 199.

It has been said that this rule is most essential, since the defendant, the maker or acceptor, might not have the means of proving that the instrument went unaltered from his hands. *Wood's Byles on Bills* 329. But as is said by *Mitchell, J.*, in *Wilson v. Hayes*, 40 Minn. 531, 12 Am. St. Rep. 754, whatever force such a rule might once have had, it can have little now when parties are competent to testify in their own behalf. See also *Franklin v. Baker*, 48 Ohio St. 296.

instrument itself was such as to overcome the *prima facie* case made out by the mere proof of the execution of the paper.¹

Where the Alteration Is against Interest, or Not Suspicious.—This rule is squared with common sense by the holding that the presumption against the instrument is overcome, and the burden of proof is shifted, by the character of the instrument itself, where the alteration is against the interest of the party introducing it; or that the onus is met by very slight evidence in other cases, and the whole question thrown open as a question of fact to the jury.²

(6) *Suspicious Circumstances Calling for Explanations.*—The decisions of the courts have not been uniform as to what amounts to suspicious circumstances within the rule that the alteration in the instrument may be of such a suspicious character as in itself to overcome, according to one view, the *prima facie* case made out by the mere proof of execution, or, according to another view, to rebut the presumption that the alteration was contemporaneous with the execution of the instrument.

Instances of Suspicious Alterations.—A typical instance is where an instrument, coming from the custody of one claiming under it, shows an interlineation or erasure enlarging the rights of the propounder.³ But other circumstances,

1. **Where Presumption Applied, Facts of the Case Usually Warrant Adverse Inference.**—Cox v. Palmer, 1 McCrary (U. S.) 431.

Thus in Prevost v. Gratz, 1 Pet. (C. C.) 369, Washington, J., stated in general terms the presumption against the validity of an apparently altered deed or settled account. But the facts in that case were that one copy of an account showed material alterations in the handwriting of him in whose possession it was, and that these alterations made the paper different from a duplicate copy in the possession of another party.

In Simpson v. Stackhouse, 9 Pa. St. 186, 49 Am. Dec. 554, the fact that the place of payment at the end of a promissory note was in a different handwriting from the body of the instrument, and broken into two half lines, necessarily crowded into the left-hand corner of the paper so as not to run into the signature, was held to throw on the holder the onus of showing that the name of the place was there at the time of indorsement.

In some cases, however, alterations which were apparently without any circumstances of suspicion have been held to fall within the rule, and to throw the burden of explanation upon the party offering the instrument. Thus where "May 4, 1837," in the date of a note, was changed to "April 4, 1837." Hills v. Barnes, 11 N. H. 395. See Warren v. Layton, 3 Harr. (Del.) 404.

An interlineation in a note, in a different handwriting from the rest of the instrument, has been held to throw the burden of explanation upon the person claiming under it. Commercial, etc., Bank v. Lum, 7 How. (Miss.) 414.

2. Wilson v. Henderson, 9 Smed. & M. (Miss.) 375, 48 Am. Dec. 716; Heffelfinger v. Shutz, 16 S. & R. (Pa.) 46.

Question Is for the Jury in Last Instance.—In Cole v. Hills, 44 N. H. 227, it was held that the presumption that a material alteration in an instrument was made after its execution arises where there is an entire absence of evidence and of circumstances, both in the

instrument itself and *aliunde*, from which any inference can be legitimately drawn as to the time when the alteration was actually made; and when any such evidence or circumstances exist in a case, the presumption arises only when the jury, upon a consideration of all such evidence and circumstances, are unable to find when the alteration was made, the presumption being one of fact for the jury, and not of law for the court. See also Wilson v. Henderson, 9 Smed. & M. (Miss.) 375, 48 Am. Dec. 716; Heffelfinger v. Shutz, 16 S. & R. (Pa.) 46.

3. **Alterations in Favor of Propounder.**—In Pullen v. Shaw, 3 Dev. (N. Car.) 238, the court, by Henderson, C. J., said: "Formerly the court judged of an erasure by inspection; latterly the jury do. In judging by inspection, the court governed itself as juries do now, by probabilities in the absence of positive proof. If the alteration on the erased part was in the handwriting of the obligee or a stranger, and beneficial to the obligee, the court adjudged it an erasure, that is, an alteration made after the execution, and avoided the deed. If prejudicial to the obligee, the court adjudged it no erasure, that is, made before execution, and did not avoid the deed. If in the handwriting of the obligor either way, they adjudged it no erasure, that the alteration was made before execution, and did not avoid the deed. Juries are now governed by the same rules."

See Hill v. Nelms, 86 Ala. 446, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 512; Comstock v. Smith, 26 Mich. 306.

Alteration while in Custody of Holder or Grantee.—An alteration of an instrument after its delivery, and while in the custody of a party asserting a right thereunder, throws upon him the burden of producing explanatory evidence as to the alteration. Everman v. Robb, 52 Miss. 653, 24 Am. Rep. 682; Chesley v. Frost, 1 N. H. 145.

Alteration to Prevent Bar of Statute of Limitations.—In an action brought on a bond, where it is apparent that the bond has been

such as the fact that the alteration is in a different ink or a different handwriting from the rest of the instrument, have been sometimes held to throw the burden of proof upon the party producing the instrument.¹

Bill in Equity to Cancel Altered Instrument.—When a person comes into a court of equity to have an instrument canceled, upon the ground that it has been materially altered, the burden is upon him to prove the alteration, and he cannot throw upon the defendant the burden of proving that the alteration was contemporaneous by showing such suspicious circumstances as at law, in a suit upon the instrument, would shift the burden of proof to the propounder.²

c. PROOF OF FACTS AVOIDING EFFECT OF ALTERATION—General Rule.—

Upon proof that an instrument has been materially altered, if the party who seeks to enforce the contract relies upon facts to establish the validity of the instrument notwithstanding the alteration, such as that the alteration was

so altered as to prevent the operation of the statute of limitations, the burden of explaining the alteration is on the plaintiff. *Hodnett v. Pace*, 84 Va. 873.

The Insertion of "or Bearer" after the words "to the order of A B," in a promissory note, throws the burden upon the holder to show that the alteration was innocent. *Croswell v. Labree*, 81 Me. 44, 10 Am. St. Rep. 238.

The Removal of a Seal from an obligation offered in evidence throws the burden on him in whose possession the instrument has been to account for the alteration. *Porter v. Doby*, 2 Rich. Eq. (S. Car.) 49.

Change in Amount.—The addition of words largely increasing the amount recoverable upon the instrument throws on the person seeking to enforce the instrument the burden of accounting for the alteration. *Glover v. Gentry*, 104 Ala. 222. See *Wheat v. Arnold*, 36 Ga. 482; *Drum v. Drum*, 133 Mass. 566.

Changing and increasing in a receipt the amount of which payment is acknowledged requires an explanation. *Elgin v. Hall*, 82 Va. 680.

Ancient Documents.—It is said to be the unquestioned rule that when documents more than thirty years old are offered in evidence without proof as ancient documents, some explanation must be offered of apparent alterations. *Ridgeley v. Johnson*, 11 Barb. (N. Y.) 540; *Herrick v. Malin*, 22 Wend. (N. Y.) 388. See also the title ANCIENT DOCUMENTS.

1. *Cox v. Palmer*, 1 McCrary (U. S.) 431; *Stillwell v. Patton*, 108 Mo. 352; *Paramore v. Lindsey*, 63 Mo. 63.

Alterations in Different Ink or Handwriting.—Where parts of a deed were on paper of different color and size from the sheet executed, and written with different ink, and the numbering of the sheets had been changed, and there were erasures and alterations on the last sheet which were not noted, it was held that the party producing the instrument was bound to explain the suspicious circumstances, but the whole question was for the jury in the light of all the testimony. *Van Buren v. Cockburn*, 14 Barb. (N. Y.) 118.

The fact that in an instrument the name of a corporation had been altered by interlining "& Co." in a different handwriting and different ink, threw the burden on the

plaintiff to show that the interlineation was made before execution. *Wilde v. Armsby*, 6 Cush. (Mass.) 314.

Where the name of the grantee in a deed is written in a different handwriting over an erasure, and apparently some time after the remainder of the deed, this is a suspicious circumstance which requires some explanation from the propounder of the instrument. But whether the explanation is satisfactory is for the jury to determine. *Jackson v. Osborn*, 2 Wend. (N. Y.) 555, 20 Am. Dec. 649. See *Jackson v. Jacoby*, 9 Cow. (N. Y.) 125.

In *Crabtree v. Clark*, 20 Me. 337, where the note sued on had the words "Attest, A B," and "with interest," added in different ink and handwriting, it was said that this circumstance might justify the jury in finding, in the absence of all explanation, that the instrument had been altered; but the court refused to interfere with a verdict for the plaintiff.

Changing Date.—A mere change in date has been held not to throw the burden upon the person offering the instrument. *Gooch v. Bryant*, 13 Me. 386.

Neither is explanation required where the date of a bond has been changed so as to make it one year later than it was originally, since such an alteration is prejudicial to the holder as cutting off a year's interest. *Pullen v. Shaw*, 3 Dev. (N. Car.) 238. But see *Hodnett v. Pace*, 84 Va. 873.

On the other hand, it has been held that dating back a note four years throws on the plaintiff the burden of accounting for the alteration. *Warren v. Layton*, 3 Harr. (Del.) 404. See *Johnson v. First Nat. Bank*, 28 Neb. 792; *Wheat v. Arnold*, 36 Ga. 482.

A Change in the Rate of Interest from seven to ten per cent., or from ten to seven per cent., was held not to affect the burden of proof. *Neil v. Case*, 25 Kan. 510, 37 Am. Rep. 259.

Otherwise where an alteration is peculiar in appearance, in a different ink, and favorable to the plaintiff by adding three per cent. to the interest. *Sheldon v. Hawes*, 15 Mich. 522. See *Courcamp v. Weber*, 39 Neb. 533.

2. *Putnam v. Clark*, 33 N. J. Eq. 338; *Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 122. But see *Harris v. Jacksonville Bank*, 22 Fla. 501, 1 Am. St. Rep. 201.

made with the consent of or by the party bound by the writing,¹ or was subsequently ratified by him,² or that it was made by a stranger to the contract,³ the general rule is that he must introduce evidence of such facts.⁴

Proof of Consent.—Thus where the alteration has been proved and it appears to be a material one, it is not necessary for the party who relies upon the alteration to defeat a recovery against him, also to show that it was made without his consent; it is for the party who seeks to enforce the contract notwithstanding the alteration, to give evidence of such consent.⁵

Proof as to Person Making Alteration.—And the fact of a material alteration in an instrument having been established, it may be presumed that it was made by the person claiming under the writing, or by one under whom he claims, unless the party who seeks to recover thereon shows that the alteration was not made by him, or by those under whom he claims, nor with his or their privity or consent.⁶

3. Wills—Presumptions as to Alterations—*a. GENERALLY.*—The generally recognized rule is that where unattested alterations or interlineations appear upon the face of a testamentary disposition of property, complete without them, they are presumed, in the absence of evidence to the contrary, to have been made after execution.⁷

1. See *supra*, this title, division *Effect of Alterations*, subdivisions *By Consent of Grantor or Promisor* and *By the Grantor or Promisor*.

2. See *supra*, this title, division *Ratification of Alterations*.

3. See *supra*, this title, division *Effect of Alterations*, subd. *By a Stranger to the Contract*.

4. *Winter v. Pool*, 100 Ala. 503; *Robinson v. Reed*, 46 Iowa 219; *Conger v. Crabtree*, 88 Iowa 536; *Elbert v. McClelland*, 8 Bush (Ky.) 577; *Croswell v. Labree*, 81 Me. 44, 10 Am. St. Rep. 238; *Warder, etc., Co. v. Willyard*, 46 Minn. 531, 24 Am. St. Rep. 250; *Capital Bank v. Armstrong*, 62 Mo. 59; *National Ulster County Bank v. Madden*, 114 N. Y. 280, 11 Am. St. Rep. 633. See *Van Horn v. Bell*, 11 Iowa 465, 79 Am. Dec. 506.

5. *White v. Hass*, 32 Ala. 430, 70 Am. Dec. 548; *Emerson v. Opp*, 9 Ind. App. 581; *Schroeder v. Webster*, 88 Iowa 627; *Havens v. Osborn*, 36 N. J. Eq. 426; *Gleason v. Hamilton*, 138 N. Y. 353, *affirming* 64 Hun (N. Y.) 96. See *Mundy v. Stevens*, 61 Fed. Rep. 77; *Capital Bank v. Armstrong*, 62 Mo. 59.

Instrument Declared on as Altered.—But it has been held that a bond altered in a material part, and declared upon as altered, is admissible in evidence without explaining the alteration, unless there is a sworn plea of *non est factum*, or some plea denying on oath that the alteration was made with the consent or by authority of the makers of the instrument. *Thompson v. Gowen*, 79 Ga. 70.

6. *Davis v. Carlisle*, 6 Ala. 707; *White v. Hass*, 32 Ala. 430, 70 Am. Dec. 548; *Green v. Beckner*, 3 Ind. App. 39; *Cochran v. Nebeker*, 48 Ind. 459; *Eckert v. Louis*, 84 Ind. 99; *Bowman v. Mitchell*, 79 Ind. 84; *Bremen Bank v. Umrath*, 42 Mo. App. 525; *Solon v. Williamsburgh Sav. Bank*, 114 N. Y. 122; *Waring v. Smyth*, 2 Barb. Ch. (N. Y.) 119, 47 Am. Dec. 299. See *Ferguson v. White* (Miss. 1895), 18 So. Rep. 124. But *compare Coulson v. Walton*, 9 Pet. (U. S.) 62.

In *Drum v. Drum*, 133 Mass. 566, it was held that if the plaintiff in an action upon a promissory note proved that the note had never rightfully, or to his knowledge, been in the possession of any one but himself and his agent, and that the alterations were not made by him or his agent, or with the knowledge or consent, directly or indirectly, of either of them, he was entitled to recover on the note as originally written, though he might not be able to prove the circumstances of its alteration.

7. Apparent Alterations in Wills Presumed to have been Made after Execution—*England.*—*Cooper v. Bockett*, 4 Moo. P. C. 419, 4 N. of C. 685, 10 Jur. 931, 4 Marit & E. C. C. L. Cas. 685; *Doe v. Palmer*, 15 Jur. 836, 16 Q. B. 747; *Williams v. Ashton, Johns. & H.* 115; *Greville v. Tylee*, 7 Moo. P. C. 320; *Christmas v. Whinyates*, 3 S. & T. 81; *Simmons v. Rudall*, 1 Sim. N. S. 115; *In the Goods of Sykes*, L. R. 3 P. & D. 26; *Burgoyne v. Showler*, 1 Rob. 5, 8 Jur. 814, 3 Not. Cas. 20.

Kentucky.—*Toebe v. Williams*, 80 Ky. 661.

New York.—*Matter of Carver's Estate*, 3 Misc. Rep. (N. Y. Surrogate Ct.) 567; *Wetmore v. Carryl*, 5 Redf. (N. Y.) 544; *Dyer v. Erving*, 2 Dem. (N. Y.) 160; *Matter of Lang's Will*, 9 Misc. Rep. (N. Y. Surrogate Ct.) 521; *Van Buren v. Cockburn*, 14 Barb. (N. Y.) 118; *Crossman v. Crossman*, 95 N. Y. 145, 5 Civ. Pro. Rep. (N. Y.) 204, *affirming* 30 Hun (N. Y.) 385, which *affirmed* 2 Dem. (N. Y.) 69; *Matter of Wilcox's Will* (Surrogate Ct.), 20 N. Y. Supp. 131.

Compare Wikoff's Appeal, 15 Pa. St. 281, 53 Am. Dec. 597.

Modified Statement of Rule.—In the case of *In the Goods of James*, 1 S. & T. 238, which was before the court of probate in 1858, the question arose as to the effect of erasures so complete as to baffle all efforts for ascertaining the obliterated words. In the judgment of the court the presumption was that the erasures had been made subsequent to execution, and it was decreed that, so far as related to

Burden of Proof.—And the burden of proof is on those seeking to establish a

the parts erased, probate should be had in blank. Two years later, the same will was before the vice chancellor, in the case of *Williams v. Ashton, Johns. & H. 115*. It appeared that over the erasures certain provisions had been written in the handwriting of the testatrix. By the evidence of the attesting witnesses, it also appeared that the testatrix told them, at the time of the execution, that she had made some alterations in her will. The will was so folded, however, that they did not see what the alterations were. The vice chancellor mildly criticises that form of stating the rule of law which the courts had sanctioned. He thinks it inaccurate to say that alterations in a will must be presumed to have been made at one time or another. It is more correct, in his view, to state that the onus is cast upon the party who seeks to derive an advantage from an alteration in a will, to adduce some evidence from which a jury might infer that the alteration was made before the will was executed. He adds that the rule of law as to deeds has no application to wills. "There is no crime," he says, "in a testator choosing to make alterations in his own will, but he cannot reserve to himself a power of making future testamentary gifts by unattested instruments. * * * I apprehend the rule is that those who propound a doubtful instrument must make the doubt clear."

The Rule Limited—Interlineation Fair on Its Face.—In *Crossman v. Crossman*, 95 N. Y. 145, 5 Civ. Pro. Rep. (N. Y.) 204, *affirming* 30 Hun (N. Y.) 385, which *affirmed* 2 Dem. (N. Y.) 69, the court, by Earl, J., said: "Where an interlineation or erasure in a will is fair upon its face, and it is entirely unexplained, there being no circumstance whatever to cast suspicion upon it, it would not be proper for any court to hold that the alteration was made after execution; but if there are any suspicious or doubtful circumstances growing out of the mode of the alteration, the ink in which it was made, the fact that it was in favor of the party holding the instrument, and that it is not noted at the bottom, then these and all the other circumstances must be submitted as questions of fact to be determined by the court in deciding whether the alterations were made before execution or not." See also *Matter of Homes' Will* (Surrogate Ct.), 11 N. Y. Supp. 898; *Matter of Wood* (Surrogate Ct.), 32 N. Y. St. Rep. 286.

But the application of the principle as there enunciated was limited to wills where the interlineation was fair upon its face. *Matter of Carver's Estate*, 3 Misc. Rep. (N. Y. Surrogate Ct.) 567.

Interlineation in Duplicate Will.—Where, in a duplicate will not presented for probate, the name of one of the executors, which was regularly written in the other, was interlined, it apparently having been omitted in copying, and the interlineation was noted at the bottom before the attestation clause, with the statement that it was made before signing, it was held that there was no presumption that the interlineation was fraudulently made after

execution, but, on the contrary, the presumption was the other way, and the burden of proof was upon the contestants of showing that the interlineation was fraudulent or unauthorized. *Crossman v. Crossman*, 95 N. Y. 145, 5 Civ. Pro. Rep. (N. Y.) 204, *affirming* 30 Hun (N. Y.) 385, which *affirmed* 2 Dem. (N. Y.) 69.

Words in Darker Shade of Ink.—Where the words "to be accepted in lieu of dower" were incorporated in a will, the words being somewhat heavier than the letters in most of the other portions of said instrument, it being probable that the apparent darker hue was occasioned by a freer flow in the pen, it was held that the words would not be presumed to have been made after execution, as the proponent of the will was the only person to be injured by the words. *Matter of Carver's Estate*, 3 Misc. Rep. (N. Y. Surrogate Ct.) 567.

Will in Private Repository of Testator.—Where a will is found in a desk, fireproof, or other receptacle for private and valuable papers, the presumption is that any alterations and erasures thereon were made by the testator. *In re Fuguet's Will*, 32 Pa. Leg. Int. 179, 11 Phila. (Pa.) 75; *Baptist Church v. Robbarts*, 2 Pa. St. 110.

Thus where a will was found in the private chamber of the deceased, in his dwelling, and locked in his private desk, the name being obliterated and the will canceled, it was held that the legal presumption arising on the evidence was that it was the act of the testator. *Baptist Church v. Robbarts*, 2 Pa. St. 110.

In *Matter of Homes' Will* (Surrogate Ct.), 11 N. Y. Supp. 898, where a will which was found among the private papers of the deceased, and which did not appear to have been disturbed by any one until found by his executors a day or two after the testator's death, had been mutilated by cutting off the bottom of the first page, still leaving a perfect sentence on that page, and the next page beginning with a sentence, it was held that there was no proof which would warrant a presumption that the will was mutilated after it was executed. It seems that the will was folded in such a manner that neither of the subscribing witnesses could swear that the paper presented for probate had been mutilated or changed in any way since its execution.

In a will offered for probate, there were several interlineations and erasures, but an inspection showed plainly that all the interlineations were in the handwriting of the testatrix, and it was held that they, as well as the erasures, would be presumed to have been made by her in the preparation of the will, and prior to its execution. The fact that the testatrix was her own scrivener, and the custodian of the document, was also held to weigh in favor of this presumption. There was no evidence to show that the obliterations were made with intent to nullify the will, and a decree was accordingly made admitting it to probate. *Matter of Potter's Will* (Surrogate Ct.), 12 N. Y. Supp. 105.

will containing such apparent defects, to overcome such presumption by proof direct or inferential.¹

Will Incomplete without Alterations.—Interlineations and alterations apparent in a will, which would be incomplete without them, will, as a general rule, be presumed to have been made before execution.²

Repository of Will Accessible to Strangers.—Where a will was found among a deceased person's papers, immediately after his death, in a mutilated condition, it was held that the presumption of law was that the act of mutilation was done by him in his lifetime, and for the purpose of revocation, and that the same presumption would arise where the repository of the will was equally accessible to a stranger and to the deceased in the lifetime of the latter. But it seems that no such presumption arises, but rather the contrary will be inferred, where a will is not found mutilated until two days after the death of the testator, when, in the meantime, it has been under the control or in the custody of one interested to defeat it, and who refused, when it was first demanded, to produce it, and did not then allege that the will was mutilated. *Benneet v. Sherrod*, 3 Ired. (N. Car.) 303.

Alterations in Holographic Will.—A holographic will contained material alterations, regarding which no information could be obtained. The testator, at the time he signed the will, was a soldier in actual military service, and it was held that the alterations would be presumed to have been made during the continuance of such military service, and would be included in the probate. In the Goods of Tweedale, L. R. 3 P. & D. 204.

Alterations in Different-colored Ink.—Where some blanks were filled in with black ink, and others with red, it was held that it would be presumed that additions in black ink were made before, and those in red ink after, execution. It seems that the envelope in which the will was found appeared to have been sealed, opened, and resealed. *Birch v. Birch*, 6 Not. Cas. 581.

1. Burden of Proof—England.—*Cooper v. Bockett*, 4 Moo. P. C. 419, 4 Not. Cas. 685, 10 Jur. 931, 4 Marit & E. C. C. L. Cas. 685; *Williams v. Ashton*, Johns. & H. 115; *Duffy v. Duffy*, 11 Ir. Law T. 127; *Doherty v. Doherty*, 25 L. R. Ir. Prob. 297; *Doe v. Palmer*, 15 Jur. 836.

Canada.—*In re Lawson*, 25 Nova Scotia 454. **New York.**—*Matter of Carver's Estate*, 3 Misc. Rep. (N. Y. Surrogate Ct.) 567.

The person offering such an instrument for probate should be prepared to show that the alteration was properly made, and clear up every suspicious circumstance about the instrument. *In re Wilson*, 8 Wis. 171.

In the leading case of *Cooper v. Bockett*, 4 Moo. P. C. 419, 4 Not. Cas. 685, 10 Jur. 931, 4 Marit & E. C. C. L. Cas. 685, the question before the court was whether the will should be admitted to probate with or without certain alterations apparent on its face. Lord Brougham, delivering the opinion, stated that there were two questions: "First, at what time were the alterations made * * *, were they made before or after the

attestation? Secondly, if that point cannot be ascertained, is the instrument to be read as it originally stood, or are the alterations to be admitted as parcel of it? * * * Can anything be more clear than that we ought to know whether the testator executed, and the witnesses subscribed, this will as it now stands, or a former will; for that is precisely the question before us. * * * Whoever propounds an instrument which, on the very face of it, exhibits grounds of great doubt, must remove those grounds and clear up the doubts." To the same effect, see *Lushington v. Onslow*, 6 Not. Cas. 183.

Where a will bore upon its face strong evidence that it had been altered after its execution—the alterations being of the most material parts of the instrument—the substituted parts being on paper of different color and size from the remainder of the will, and written with different ink, the numbering of the sheets having been changed, although the former numbers could be discovered, and there being erasures and alterations on the last sheet which were not noted, it was held that the party producing the instrument was bound to explain the suspicious circumstance, and that it was proper to charge the jury that it was a question of fact, to be decided by them upon the evidence, whether the paper produced was the same instrument as that executed by the testator. *Van Buren v. Cockburn*, 14 Barb. (N. Y.) 118.

2. Will Incomplete without Alterations.—In the Goods of Cadge, L. R. 1 P. & D. 543; In the Goods of Birt, L. R. 2 P. & D. 214; *Birch v. Birch*, 1 Rob. 675, 6 Not. Cas. 581; In the Goods of Adams, L. R. 2 P. & D. 367; *Greville v. Tylee*, 7 Moo. P. C. 320; *In re Swinden*, 2 Rob. 192; In the Goods of King, 23 W. R. 552.

In *Matter of Voorhees*, 6 Dem. (N. Y.) 162, the court, quoting 1 Jar. on Wills 144, said: "Where a will has been drawn with blanks left for the names of legatees and the amounts of the legacies, which blanks are afterwards filled up, but there is no evidence to show when, the presumption is that the blanks were filled in before execution, and although there may have been no blanks but the names of the legatees are found interlined, yet if the interlineation only supplies a blank in the sense, and appears to have been written with the same ink and at the same time as the rest of the will, the court will conclude that it was written before execution."

In the Goods of Cadge, L. R. 1 P. & D. 543, a will contained several interlineations, most of them of single words, each of which was required to complete the sentence to which it belonged. They were apparently written with the same ink and at the same time as the rest of the will, but at the time of the execution of the will the witnesses were unable to see whether the interlineations were there

b. **EXTRINSIC EVIDENCE AS TO DATE OF ALTERATION.**—When the question arises as to whether alterations on the face of a will were made before or after execution, extrinsic evidence is admissible for the purpose of showing when they were made.¹

Declarations of Testator.—The statements of a testator made before the execution of a will,² or of a codicil which republishes the will,³ may be given in evidence as showing an intention to benefit an individual which cannot be carried out unless the alterations are admitted as part of the will.

c. **DISTINCTION BETWEEN INK AND PENCIL ALTERATIONS.**—Alterations in ink made in a will are presumed to be final, while those in pencil, the will being written in ink, are *prima facie* deliberative.⁴

or not; and the court held that it was not bound to presume that these interlineations were made after execution, and included them in the probate.

Where the date of a will admitted to probate appears to have been changed from 1875 to 1873, and the record elsewhere shows that the testator died prior to 1875, the change or correction will be presumed to have been made at the time the instrument was executed. *Martin v. King*, 72 Ala. 354.

1. Extrinsic Evidence as to Date of Alteration.—In the Goods of Duffy, 5 Ir. R. Eq. 506; *Moore v. Moore*, 6 Ir. R. Eq. 166; In the Goods of Hindmarch, L. R. 1 P. & D. 307; *Van Buren v. Cockburn*, 14 Barb. (N. Y.) 118.

The testimony of a witness who has means of knowledge whether a written instrument has been altered or not, outweighs the evidence of a dozen witnesses who speak only from an inspection of the paper. *Malin v. Malin*, 1 Wend. (N. Y.) 625.

Presumptive Effect of a Date to Alteration.—In the Goods of Adamson, L. R. 3 P. & D. 253, Hannen, J., said: "I have been unable to find any case in which it has been held that a date to an alteration was in itself sufficient to establish that it was made at that time. It is no doubt a general presumption that documents were made on the day they bear date; but it may well be that the presumption does not exist with reference to alterations in a will, though made by the testator himself, because the legislature, in prescribing the conditions necessary for the due execution of testamentary papers, intended to guard against certain innocent acts of testators as well as the fraudulent acts of others."

If the actual time of the execution of a will should become material, that fact may be established by parol proof. *Wright v. Wright*, 5 Ind. 389.

2. Declarations of Testator Made before Execution of Will.—*Doe v. Palmer*, 16 Q. B. 747, 15 Jur. 836, 20 L. J. Q. B. 367; *Dench v. Dench*, 2 Prob. Div. 60; In the Goods of Sykes, L. R. 3 P. & D. 26.

Declarations by Testator after Execution of Will.—The declarations of a testator made after the execution of a will, that an alteration was made before, are not admissible in evidence. *Doe v. Palmer*, 16 Q. B. 747, 15 Jur. 836, 20 L. J. Q. B. 367; In the Goods of Adamson, L. R. 3 P. & D. 253.

But in *Ravenscroft v. Hunter*, 2 Hagg. 69, declarations of an intent to benefit certain

legatees, made after the will was executed, seem to have been admitted.

3. Declarations of Testator Made before Execution of Codicil.—In the Goods of Sykes, L. R. 3 P. & D. 26, Hannen, J., said: "As the declarations of a testator, made before the execution of a will, are admissible to show that alterations were made before such execution, so declarations made before the execution of a codicil, which republishes the will, may be admitted to show that the alterations in the will were made before the execution of the codicil." It was accordingly held in this case that where the deceased executed a will and codicil, the latter referring to the former by its date, and the name of an executor appointed by the will being written on an erasure, it was held that it was proper to admit the declaration of the testator as to the person he had appointed executor, such declaration being made before the execution of the codicil.

4. Distinction between Ink and Pencil Alterations.—*Hawkes v. Hawkes*, 1 Hagg. 322; *Edwards v. Astley*, 1 Hagg. 490; *Ravenscroft v. Hunter*, 2 Hagg. 68; *Parkin v. Bainbridge*, 3 Phill. 321; *Lavender v. Adams*, 1 Addams 406; *Bateman v. Pennington*, 3 Moo. P. C. 223; *Francis v. Grover*, 5 Hare 39; *Gann v. Gregory*, 3 De G. M. & G. 780; In the Goods of Hall, L. R. 2 P. & D. 256; In the Goods of Adams, L. R. 2 P. & D. 367. See, further, *Mence v. Mence*, 18 Ves. Jr. 348; In the Goods of Bellamy, 14 W. R. 501.

Where a will was written in ink, and formally executed, and the testator afterwards drew a line in pencil through a clause in the will, it was held that the erasure in pencil raised no presumption of revocation, and that, without other explanation, it was properly regarded not as a revocation of the clause, but as merely deliberative, or indicative of some future and incomplete purpose. *Francis v. Grover*, 5 Hare 39. *Wigram, V. C.*, said: "The alleged omission was in not directing the jury that, *prima facie*, the pencil erasure was a revocation, and that they were therefore bound to find the bequest revoked; unless evidence was given to countervail that act. The judge certainly did not tell the jury that the pencil erasure was a revocation, but only that the act was equivocal, and that they were to decide, from the collateral facts and the nature of the alteration, which was in pencil instead of the more durable material, ink, what effect was to be given to it; and the judge observed very properly that the testator

Alterations in Both Ink and Pencil.—Where there are alterations in both ink and pencil, the presumption as to each will be stronger than if either stood alone.¹

ALTERATION OF RECORDS. (See also ALTERATION; ALTERATION OF INSTRUMENTS; AMOTION; CLERKS OF COURTS; FORGERY; PUBLIC OFFICERS; RECORDS; RECORDING ACTS.)—It is provided by statute in most of the United States that any public officer, or other person, who shall maliciously, mischievously, or fraudulently alter, deface, mutilate, falsify, or otherwise change any record of a will, conveyance, or other instrument required to be recorded, any record of court proceedings, or any other public record whatever, shall be guilty of a criminal offense, and be liable to punishment by fine or imprisonment or both.²

had taken pains to have the will formally drawn up, and had afterward made pencil alterations. Omitting the case of *Mence v. Mence*, 18 Ves. Jr. 348, it appears to me that, in the cases of *Parkin v. Bainbridge*, 3 Phill. 321; *Ravenscroft v. Hunter*, 2 Hagg. 68; *Lavender v. Adams*, 1 Addams 406; *Edwards v. Astley*, 1 Hagg. 490; and *Hawkes v. Hawkes*, 1 Hagg. 322, the learned judges have all considered that a pencil alteration may be final or that it may be deliberative; and that from the nature of the act they consider it, *prima facie*, as deliberative and not final. That view has always been taken in the ecclesiastical courts, admitting that any circumstance appearing upon the face of the will, or facts appearing by extrinsic evidence, must be taken into account in deciding the question. It is impossible not to feel the force of what the learned judges have said. Every man who makes an alteration in ink supposes that alteration to remain, for the material cannot, without much labor, be got rid of; but with respect to alterations in pencil, the probability is that they have been made as notes for the purpose of altering the instrument, to be changed as the testator thinks fit."

Where a testator executed a will and codicil, and some time after the execution of the will, but prior to that of the codicil, he struck out with a pencil several paragraphs of the will, making his initials on the margin, and also placing a query opposite other paragraphs, in so far as it did not alter the will the codicil confirmed it; and it was held that the alterations were only deliberative, and not final, and as they were not included in the confirmation of the codicil, the will should be admitted to probate without them. In the *Goods of Hall*, L. R. 2 P. & D. 256, 23 L. T. 709.

In *Pennsylvania* a contrary view is entertained, and it is held that alterations made by a testator with a lead pencil have the same effect as if they were in ink; and from the fact that the alterations are in pencil upon a will written in ink, no presumption arises that they are deliberative only and do not express the final intent of the testator. *Tomlinson's Estate*, 133 Pa. St. 245, 19 Am. St. Rep. 637. See also *Knox's Estate*, 131 Pa. St. 220, 17 Am. St. Rep. 798.

Interlineations Made before Execution of Codicil.—Where interlineations and alterations were inserted in a will at the time of the ex-

ecution of the codicil, and were therefore confirmed by it, the will and codicil, with the interlineations, were admitted to probate, including certain pencil writing at the foot of the will. *Tyler v. Merchant Taylors' Co.*, 15 Prob. Div. 216.

1. Alterations in Both Ink and Pencil.—*Hawkes v. Hawkes*, 1 Hagg. 322. In this case Sir J. Nichol said: "There are various erasures, and crossings, and interlineations—some in pencil, some in ink; the general presumption and probability are that, where alterations in pencil only are made, they are deliberative; where in ink, they are final and absolute; but when they are of both sorts, the presumption as to each is stronger; if the writer had made up his mind, and intended the variation to be final, he would, instead of pencil, have used the other material, ink; if he were deliberating only, and undecided, he would not use ink, but pencil."

2. See the statutes of the several states.

For a definition of alteration, see the titles ALTERATION; ALTERATION OF INSTRUMENTS. See also the titles FORGERY and RECORD.

California.—Under section 114 of the California Penal Code, declaring that every officer having the custody of any record, map, etc., filed or deposited in any public office, or placed in his hands for any purpose, who is guilty of mutilating, altering, or falsifying any part of such record, map, etc., or who permits any other person so to do, is punishable by imprisonment in the state prison not less than one nor more than fourteen years; it is immaterial whether the records are in the custody of the officer or not, the words "having the custody of any record" being used to designate the officer who is punishable for the acts prohibited. *People v. O'Brien*, 96 Cal. 171.

Illinois.—If any judge, justice of the peace, sheriff, coroner, recorder, or other public officer, or any person whatsoever, shall steal, embezzle, alter, corrupt, withdraw, falsify, or avoid any record, process, charter, gift, grant, conveyance, bond, or contract, or shall knowingly or willfully take off, discharge, or conceal any issue, forfeited recognition, or other forfeiture, or shall forge, deface or falsify any document or instrument recorded, or any registry, acknowledgment or certificate, or shall alter, deface, or falsify any minute, document, book or any proceeding

ALTHOUGH.—The word “although” implies a doubt, a concession, or something not positively determined.¹

ALWAYS.—See note 2

whatever of, or belonging to, any public office, within this state, the person so offending shall be imprisoned in the penitentiary not less than one nor more than seven years. Rev. Stat. Ill. 1893, c. 38, § 176. *Loehr v. People*, 132 Ill. 504.

Pennsylvania.—The *Pennsylvania* Act of 1770 (Brightly Purd. Dig. (12th ed.) 507, § 210), providing that “if any prothonotary, clerk, register, public officer, or other person shall fraudulently make a false entry in, or erase, alter, secrete, carry away, or destroy, any public record or any part thereof, of any court or public office of this commonwealth, such person shall be guilty of a misdemeanor, and on conviction shall be sentenced to pay a fine not exceeding one thousand dollars, and to undergo an imprisonment by a separate and solitary confinement at labor not exceeding two years,” embraces every registry or enrollment directed by law to be preserved for the use of the public. *Ream v. Com.*, 3 S. & R. (Pa.) 207.

Alteration by Clerk—Georgia.—It is grossly improper for the clerk, in concert with an attorney, to privately and secretly add to or otherwise alter any document on file in the clerk’s office, the same being forbidden by section 4471 of the Georgia Code (1882) as a criminal offense. *Matthews v. Reid*, 94 Ga. 461.

Alteration of Record of Judgment—Presumption.—Where the record of a judgment was altered by the cancellation of a part, under circumstances that rendered it improbable that it would have escaped the notice of the clerk and the attorney for the plaintiff in the action, it was held that from the facts presented the inference that the cancellation was not made at the time the record was entered or approved, was not justified, the presumption being that the alteration was made before approval, at the suggestion of the judge. *Lutz v. Kelly*, 47 Iowa 307.

Mutilation of Pleadings.—A counsel has no right to go into the office of the keeper of the records of the chancery court, and take from the files there kept an official document belonging to the cause then pending, and mutilate it by erasing therefrom the indorsement of the chancellor. *Ex p. Mercantile Trust, etc., Co.* (Ala. 1895), 18 So. Rep. 235.

Copy of Legislative Bill.—An engrossed copy of a legislative bill of any session prior to the *California* Act of 1861 requiring such documents to be preserved by the secretary of state, was not a public record within the meaning of an act providing for the punishment of persons convicted of altering or falsifying public records. *In re Corryell*, 22 Cal. 178.

Alteration must Be with Intent to Benefit or Injure—Mississippi.—Under § 959 Annot. Code of Mississippi, 1892, providing that “if any clerk of any court, or public officer, or any other person, shall wittingly make any false entry or erase any word or letter, or change

any record belonging to any court or public office, whether in his keeping or not, he shall, on conviction thereof, be imprisoned in the penitentiary for a term not exceeding ten years, and be liable to the action of the party aggrieved,” it was held that while not expressly so stated, it was manifest that it was only intended to render penal such changes or mutilations in the record as were intended or calculated to damnify some one, or to benefit the party making them, or some person for whose advantage he was acting. *Harrington v. State*, 54 Miss. 490.

Intent—Ignorance of Law—California.—It was held in California that it is not necessary to prove any fraudulent intent in order to make out the offense of altering a public record, and that ignorance of the law, and innocence of any intent to violate it, is no defense against the consequences of its violation. *People v. O’Brien*, 96 Cal. 171.

1. *Hogan v. State*, 36 Wis. 244. As, for example, in the definition of murder in the second degree, “although without any premeditated design to effect the death of any particular individual.”

“Even If.”—In *Burnstein v. Cass Ave., etc.*, R. Co., 56 Mo. App. 54, the following instruction was given in an action against a street railway for running over plaintiff. If the jury find that before the accident the driver discovered, or might have discovered by the exercise of reasonable care, the danger of the plaintiff, and could have averted the injuries complained of, then the negligence of the plaintiff, “even if the jury find he was negligent,” would not defeat a recovery. This was held no error, the appellate court saying: “We see no ground for the contention of the appellant that a controverted fact was therein assumed. We are also satisfied that the terms ‘even if’ as used in this instruction signify *although*, and were not intended to be used in a different sense.”

2. **Railroads—Always upon the Lookout.**—A statute provided that every railroad company should keep some person upon the locomotive “always upon the lookout ahead.” It was held that this was not to be construed as requiring, for the exoneration of the company, that somebody on the locomotive must, throughout the whole trip, have been literally *always* upon the lookout. It is sufficient if the precaution was being observed when the accident happened. *Louisville, etc., R. Co. v. Stone*, 7 Heisk. (Tenn.) 468.

“In All Cases.”—*Always* has been held to be synonymous with “in all cases.” *Gyger’s Estate*, 65 Pa. St. 313.

Instruction as to Insanity.—The trial court instructed that the presumption of law is *always* in favor of sanity. To this, counsel objected. The appellate court said that *always*, as used in the instruction, does not mean that after proof is shown that the testator was insane, the presumption is not rebutted, but it simply means that *always*, in every case, the

AMALGAMATE—AMALGAMATION. (See also the title CONSOLIDATION OF CORPORATIONS.)—This word is used in *England*, as “consolidation” in the *United States*, of the merger of one incorporated company or society into another. In *England* it is generally effected under the Companies Act 1864, the property and business of one company being transferred to the other, and the stockholders of the old company becoming stockholders in the new.¹

AMBASSADOR.—See the titles CONSULS; MINISTERS AND AMBASSADORS.

presumption is in favor of sanity, and, unless it is rebutted, it must be held that the testator was sane. *Nicholas v. Kershner*, 20 W. Va. 261.

Always and Forever.—A statute declared that a judgment should be a lien on real estate of the debtor, and that this lien might *always* be enforced in a court of equity. It was held, that it was not intended that the lien should exist independent of the judgment, nor that the word *always* should be taken as equivalent to “forever.” *Werdenbaugh v. Reid*, 20 W. Va. 596.

1. Dissident Shareholders.—In such a case, however, it was held that a clause in the articles of association of a company registered under the Companies Act 1862, authorizing the directors to *amalgamate*, etc., did not empower them to compel a dissident shareholder to become a member in a new company; *Wood, V. C.*, saying: “I think it is impossible to give to the word *amalgamate* the force which is contended for. It is difficult to say what the word *amalgamate* means. I confess at this moment I have not the least conception of what the full legal effect of the word is. We do not find it in any law dictionary, or expounded by any competent authority. But I am quite sure of this, that the word *amalgamate* cannot mean that the execution of a deed shall make a man a partner in a firm in which he was not a partner before, under conditions of which he is in no way cognizant, and which are not the same as those contained in the former deed. It is true that in this instance partners, engaged in a concern for insurance of a particular character, have authorized their directors to *amalgamate* with another company. It is possible that this authority may go thus far; it may empower the directors, without being called to account for so doing in this court, or by any other jurisdiction, to sacrifice, or to give up (which implies something more), the whole of their business, and to

transfer their assets, if they think fit, to some other company, allowing that other company to carry on the business on the best terms they can make with them. In carrying out this, the directors may possibly be authorized by the clause to say, ‘You who do not like this arrangement must simply lose; we have *amalgamated* one company with the other’ (which seems to be a process of annihilation or extinction rather than anything else), ‘and we have placed all your assets in the hands of another concern.’ But that does not imply that the dissident shareholders, besides losing all their assets, are personally bound to take their part and lot in the new concern. It is one thing to say (not ‘probably,’ but), ‘Possibly you may find all the assets gone, and your shares of no value;’ but it is a prodigious step further to say that a dissident shareholder, having been concerned in an insurance company, shall be obliged to become subject to all the liabilities of another company which is not only an insurance company but a guarantee company, and a company for the purchase of houses and various other things as well. I am here assuming that the words of this clause are large enough to embrace all the assets of one company, and mix them up with those of another. * * * But I think this much may be said, that persons who execute these deeds ought to know that the word *amalgamate* is not a word by which, having subscribed to company A, they may be compelled to become subscribers to company B. It is just possible that directors may, under this clause, be justified in transferring all the assets of a dissident shareholder to another company, but it does not appear to me that these words go to anything like the extent of saying that the applicants in this case shall be put on the list of a totally different concern, to being members of which concern they entirely object.” *In re Empire Assurance Corp.*, L. R. 4 Eq. 347. See also the title *ULTRA VIRES*.

AMBIGUITY.

BY A. S. H. BRISTOW.

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CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the titles: BONDS; BOUNDARIES; CONTRACTS; DEEDS; PAROL EVIDENCE; STATUTES; WILLS.

I. DEFINITION.—An ambiguity is the effect of words where they have either no definite sense or a double sense.¹

1. *Ellmaker v. Ellmaker*, 4 Watts (Pa.) 90.

Use of Term in Broad Sense.—An ambiguity has been stated in a broad sense to be equivalent to doubtfulness, uncertainty, and double meaning. *Fish v. Hubbard*, 21 Wend. (N. Y.) 658.

Thus, it has been defined as follows: "Duplicity, indistinctness, or uncertainty of meaning of an expression used in a written instrument." *Bouvier L. Dict.* See also *Nindle v. State Bank*, 13 Neb. 246; *Kraner v. Halsey*, 82 Cal. 212.

As Distinguished from Uncertainty, etc.—In 2 Pars. Contr. 557, note e, it is said that the term "ambiguity," which properly means the having two meanings, is misapplied when used to comprehend all doubts and uncertainties in respect to the meaning of written instruments.

In *Abbott's Law Dict.*, vol. 1, the following language is used: "Several of the definitions given treat ambiguity, duplicity, indistinctness, obscurity, and uncertainty as equivalent words; and the case of a blank left for a name in a written instrument has been mentioned as an instance of an ambiguity. But we think a distinction should be observed; that ambiguity or duplicity is predicable only of language as to which it is needful to make a choice of meanings, while indistinctness, obscurity, and uncertainty include these, and also cases of language devoid

of sense or which does not present any meaning with clearness or precision. The case of a blank left for a name should be deemed an uncertainty but not an ambiguity."

But in *Vandevoort v. Dewey*, 42 Hun (N. Y.) 68, where a lease contained a stipulation that it might be determined on payment of an amount not named, the place where the amount should have been written being left blank, it was held that this was a patent ambiguity not explainable by parol evidence. See also *Stokeley v. Gordon*, 8 Md. 505; *Wolpert v. Pittsburg, etc., R. Co.*, 44 Mo. App. 330; *Goodrich v. McClary*, 3 Neb. 130.

As Distinguished from Inaccuracy.—In *Bouvier's Law Dict.* it is said that ambiguity does not include inaccuracy or such uncertainty as arises from the use of peculiar words or of common words in a peculiar sense.

Also, an eminent law-writer uses the following language: A distinction must be taken between inaccuracy and ambiguity of language. Language may be inaccurate without being ambiguous, and it may be ambiguous although perfectly accurate. If, for instance, a testator having one leasehold house in a given place, and no other house, were to devise his freehold house there to A B, the description, though inaccurate, would occasion no ambiguity. If, however, a testator were to devise an estate to John Baker, of Dale, the son of Thomas, and there

II. KINDS OF AMBIGUITY—1. Patent Ambiguity.—A patent ambiguity is one which arises upon the words of the will, deed, or other instrument as looked at in themselves, and before any attempt is made to apply them to the object which they describe.¹

2. Latent Ambiguity.—A latent ambiguity is one which arises not upon the

were two persons to whom the entire description accurately applied, this description, though accurate, would be ambiguous. It is obvious, therefore, that the whole of that class of cases in which an inaccurate description is found to be sufficient, merely by the rejection of words of surplusage, are cases in which no ambiguity really exists. The meaning is certain, notwithstanding the inaccuracy of the testator's language. A judge in such cases may hesitate long before he comes to a conclusion; but, if he is able to come to a conclusion at last, with no other assistance than the light derived from a knowledge of those circumstances to which the words of the will expressly or tacitly refer, he does, in effect, declare that the words have a legal uncertainty—a declaration which of course excludes the existence of any ambiguity. The language may be inaccurate; but if the court can determine the meaning of this inaccurate language, without any other guide than a knowledge of the simple facts upon which, from the very nature of language in general, its meaning depends, the language, though inaccurate, cannot be ambiguous. The circumstance that the inaccuracy is apparent upon the face of the instrument cannot, in principle, alter the case. Wigram on Extrin. Ev. (O'Hara's ed.), §§ 202–205.

But in this country many cases of misdescription have been classed under the head of latent ambiguities. See *infra*, this title, *Wills; Conveyances; Contracts*.

Must Be of Uncertain Meaning to Competent Persons.—A written instrument is not ambiguous because an ignorant and uninformed person is unable to interpret it. It is ambiguous only if found to be of uncertain meaning when persons of competent skill and information are unable to do so. Words cannot be ambiguous because they are unintelligible to a man who cannot read; nor can they be ambiguous merely because the court which is called upon to explain them may be ignorant of a particular fact, art, or science which was familiar to the person who used the words, and a knowledge of which is therefore necessary to a right understanding of the words he has used. If this be not a just conclusion, it must follow that the question whether a will is ambiguous might be dependent, not upon the propriety of the language the testator has used, but upon the degree of knowledge, general or even local, which a particular judge might happen to possess; nay, the technical precision and accuracy of the scientific man might occasion his intestacy—a proposition too absurd for an argument. Wigram on Extrin. Ev. (O'Hara's ed.), §§ 200, 201.

Explanation by Expert.—Where entries in themselves might be ambiguous to a person not skilled in bookkeeping, it is held proper to have them explained by an expert in book-

keeping. *Rogers v. State*, 26 Tex. App. 430.

Ambiguity upon the Factum.—In *Eatherly v. Eatherly*, 1 Coldw. (Tenn.) 461, 78 Am. Dec. 499, McKinney, J., said: "By ambiguity upon the *factum* is meant, not an ambiguity upon the construction, as, whether a particular clause shall have a particular effect, but an ambiguity as to the foundation itself of the instrument, or a particular part of it, as, whether the testator meant a particular clause to be part of the instrument, or whether it was introduced with his knowledge; whether a codicil was meant to republish a former or subsequent will; or whether the residuary clause or any other passage was accidentally omitted. These are all matters of ambiguity upon the *factum* of the instrument."

1. Patent Ambiguity Defined.—*Chambers v. Ringstaff*, 69 Ala. 140; *Mesick v. Sunderland*, 6 Cal. 313; *Walker v. Wells*, 25 Ga. 142, 71 Am. Dec. 164; *Craven v. Butterfield*, 80 Ind. 510; *Grimes v. Harmon*, 35 Ind. 208, 9 Am. Rep. 690; *Palmer v. Albee*, 50 Iowa 429; *Breckenridge v. Duncan*, 2 A. K. Marsh. (Ky.) 50, 12 Am. Dec. 359; *Stokeley v. Gordon*, 8 Md. 505; *Carter v. Holman*, 60 Mo. 504.

Ambiguity of Which the Court Takes Judicial Notice.—The authorities do not agree as to whether an ambiguity of which the court takes judicial notice properly belongs under the head of patent or latent ambiguities. In *Ives v. Kimball*, 1 Mich. 308, where a deed described a piece of land as "all that tract or parcel of land situate in the town of Logan, county of Lenawee, and territory of Michigan, being known and distinguished as the east half of the northwest quarter of section 21, in township number 26 south, and range number 3," and it appeared from the act organizing the town that there were two sections numbered 21 in the town corresponding with the description in the deed, one in surveyed township number 6, and one in surveyed township number 7, both in range 3 east; the ambiguity thus shown was held not to be a patent ambiguity, although the court was bound judicially to take notice of the act organizing the town. But see *Chambers v. Ringstaff*, 69 Ala. 140, where the opposite doctrine is laid down.

A Matter for the Court.—It has been held that patent ambiguities are to be dealt with by the court alone. *Smith v. Thompson*, 8 C. B. 44, 65 E. C. L. 44; *Bruff v. Conybeare*, 13 C. B. N. S. 263, 106 E. C. L. 263; *Hills v. London Gas Light Co.*, 27 L. J. Exch. 60; *Brown v. Guice*, 46 Miss. 299. Compare *Cosper v. Nesbit*, 45 Kan. 457; *Campbell v. Jimenes*, 3 Misc. Rep. (N. Y. C. Pl.) 516; *Ely v. Adams*, 19 Johns. (N. Y.) 313.

In *Georgia* patent ambiguities are for the

words of the will, deed, or other instrument, as looked at in themselves, but upon those words when applied to the object or subject which they describe.¹

A Question of Fact.—When an ambiguity of this kind arises upon an instrument, it is a question of fact, and, as such, should be submitted to the determination of the jury.²

3. Ambiguity of Intermediate Class.—There is also an ambiguity recognized in cases involving principles which are scarcely referable to either latent or patent ambiguities. It arises when, on mere inspection, there does not appear to be any uncertainty or ambiguity, and frequently grows out of the careless use of language, and it sometimes results from the many shades of meaning that usage and provincial habit accord to the same word or expression. Out of this has grown a seeming modification of the old rule as to patent ambiguities, which has been characterized as an intermediate class of cases, partaking of the nature of both latent and patent ambiguities.³

III. PAROL EVIDENCE TO EXPLAIN—1. **Patent Ambiguity**—General Rule.—It has been laid down in many cases as a general rule that extrinsic evidence is not admissible to remove a patent ambiguity, and that the instrument is inoperative and void.⁴

Reason of the Rule.—The reason stated for the rule is that if a meaning should be assigned by the aid of extrinsic evidence to that which is apparently desti-

jury to determine. *Holland v. Long*, 57 Ga. 36.

1. Latent Ambiguity Defined.—See cases *infra*, this title, *Parol Evidence to Explain*.

In *Herring v. Boston Iron Co.*, 1 Gray (Mass.) 134, Thomas, J., said: "An ambiguity is latent if it results from viewing the instrument in the light of the collateral facts or what may be called the necessary intrinsic evidence."

2. Latent Ambiguity—Question of Fact.—*Smith v. Thompson*, 8 C. B. 44, 65 E. C. L. 44; *Bruff v. Conybeare*, 13 C. B. N. S. 263, 106 E. C. L. 263; *Hills v. London Gas Light Co.*, 27 L. J. Exch. 60; *Bartlett v. Nottingham*, 8 N. H. 300; *Curtis v. Aaronson*, 49 N. J. L. 68, 60 Am. Rep. 584; *Opdyke v. Stephens*, 28 N. J. L. 83; *McCullough v. Wainright*, 14 Pa. St. 171.

3. Ambiguity of Intermediate Class.—*Peisch v. Dickson*, 1 Mason (U. S.) 10; *Chambers v. Ringstaff*, 69 Ala. 140; *Jenny Lind Co. v. Bower*, 11 Cal. 198; *Peachar v. Strauss*, 47 Miss. 353; *Fish v. Hubbard*, 21 Wend. (N. Y.) 651; *Dupree v. M'Donald*, 4 Desaus. Eq. (S. Car.) 211; *Beason v. Kurz*, 66 Wis. 448; *Merriam v. Field*, 29 Wis. 592; *Ganson v. Madigan*, 15 Wis. 144, 82 Am. Dec. 659. See also *Stokeley v. Gordon*, 8 Md. 505; *Bell v. Martin*, 18 N. J. L. 169.

Thus, under this rule, it has been held that a description of lands in a conveyance by section, township, and range, without mention of the state, county, land district, or government survey in which the lands lie, may be aided by oral testimony, showing that when the conveyance was made the grantor owned and resided on lands in a given county in the state which were known by the same numbers as those employed in the conveyance. Aided by such proof, and in the absence of proof that the grantor owned or claimed other lands falling within the same description, it becomes the duty of the court to pronounce

the conveyance valid. *Chambers v. Ringstaff*, 69 Ala. 140.

Agreement as to Boundary.—In an action concerning a disputed boundary between two mining claims, depending on agreement between the parties, in which the word "north" was used and parol evidence was admitted to prove that it was the custom of the locality to run boundary lines by the magnetic meridian, and that this was the understanding of the parties, it was held that such evidence was admissible, not to contradict or vary the term but to ascertain the sense in which it was used. *Jenny Lind Co. v. Bower*, 11 Cal. 195.

Comments upon This Class.—In 2 Phil. Ev. (Cowen, Hill's & Edwards' Notes, 5th Am. ed.) p. 628, the following comment is made upon this class of cases: "Now, this and various other instances of a kindred character, which will be found in our subsequent notes, fall exactly within the general definition of a patent ambiguity. The terms used are in themselves of doubtful meaning, and consistently admit of more than one interpretation according to the subject-matter in contemplation of the parties. The ambiguity is not latent in any proper sense; it arises from the known infirmity of language. It is inherent in the instrument, appearing on its face and evincing a difficulty at the very moment of perusal."

4. Effect of Patent Ambiguity—England.—*Cheyney's Cas.*, 5 Coke Rep. 68; *Doe v. Lyford*, 4 M. & S. 550; *Strode v. Russel*, 2 Vern. 624; *Hollier v. Eyre*, 9 Cl. & F. 1; *Saunderson v. Piper*, 5 Bing. N. Cas. 425, 35 E. C. L. 162. Compare *Doe v. Needs*, 2 M. & W. 129; *Birch v. Depeyster*, 1 Starkie N. P. 210, 2 E. C. L. 86.

Ontario.—*Clark v. Bonnycastle*, 3 U. C. Q. B. (O. S.) 528.

Quebec.—*Connolly v. Provincial Ins. Co.*, 3 Q. L. R. 6.

Alabama.—*Johnson v. Johnson*, 32 Ala. 637

tute of meaning, or if the same instrument could be made to operate in different ways, according to the weight of oral evidence, the effect would

California.—Brandon *v.* Leddy, 67 Cal. 43; Cadwalader *v.* Nash, 73 Cal. 43; Mesick *v.* Sunderland, 6 Cal. 297.

Illinois.—Panton *v.* Tefft, 22 Ill. 367; Doyle *v.* Teas, 5 Ill. 202; Griffith *v.* Furry, 30 Ill. 251, 83 Am. Dec. 186; Bisbee *v.* Woodbury, 8 Ill. App. 336.

Indiana.—Richmond Trading, etc., Co. *v.* Farquar, 8 Blackf. (Ind.) 89; Grimes *v.* Harmon, 35 Ind. 208, 9 Am. Rep. 690; Craven *v.* Butterfield, 80 Ind. 510.

Louisiana.—Mithoff *v.* Byrne, 20 La. Ann. 363.

Maryland.—Fenwick *v.* Floyd, 1 Har. & G. (Md.) 172; Dashiell *v.* Atty.-Gen., 6 Har. & J. (Md.) 1; Hunt *v.* Gist, 2 Har. & J. (Md.) 498; Stokeley *v.* Gordon, 8 Md. 505; Clarke *v.* Lancaster, 36 Md. 196, 11 Am. Rep. 486.

Massachusetts.—Comstock *v.* Van Deusen, 5 Pick. (Mass.) 163; Storer *v.* Freeman, 6 Mass. 440, 4 Am. Dec. 155; King *v.* King, 7 Mass. 496.

Michigan.—Rood *v.* School Dist. No. 7, 1 Dougl. (Mich.) 502.

Mississippi.—Brown *v.* Guice, 46 Miss. 299.

New Hampshire.—Webster *v.* Atkinson, 4 N. H. 21. See also Greenleaf *v.* Kilton, 11 N. H. 530; Brown *v.* Brown, 43 N. H. 17.

New York.—Blossburg, etc., R. Co. *v.* Tioga R. Co., 1 Keyes (N. Y.) 486; Vandevoot *v.* Dewey, 42 Hun (N. Y.) 68; Hyatt *v.* Pugsley, 23 Barb. (N. Y.) 285; Mann *v.* Mann, 1 Johns. Ch. (N. Y.) 231.

North Carolina.—Capps *v.* Holt, 5 Jones Eq. (N. Car.) 153; Taylor *v.* Maris, 90 N. Car. 619.

Oregon.—Brauns *v.* Stearns, 1 Oregon 368; Noyes *v.* Stauff, 5 Oregon 455.

Pennsylvania.—Stecher *v.* Com., 6 Whart. (Pa.) 60; Wright *v.* Weakley, 2 Watts (Pa.) 89. See also McDermott *v.* U. S. Ins. Co., 3 S. & R. (Pa.) 604.

Tennessee.—Nashville L. Ins. Co. *v.* Mathews, 8 Lea (Tenn.) 500.

Texas.—Curdy *v.* Stafford (Tex. Civ. App. 1894), 27 S. W. Rep. 823; Norris *v.* Hunt, 51 Tex. 609.

Vermont.—Pingry *v.* Watkins, 17 Vt. 379.

Virginia.—Gatewood *v.* Burrus, 3 Call (Va.) 194.

Wills.—A testator wrote his will in various pages of a book at different times, part of it being executed and attested in 1820, and the remainder in 1827. No devisees were mentioned by name, but the testator's real estate was devised "first to K., then to —, then to L., then to M.," etc. On a slip of paper pasted in the book, and forming part of the will at the time of the attestation in 1820, the testator stated that "the key and index to the letter, initials," etc., were in a writing case, in the drawer of his writing desk, on a card. The testator died on the 11th of December, 1828, and on that day a card, in his handwriting and signed by him, was found in the writing desk, dated January 30th, 1828, as follows: "K. signifies Eleanor Mary East; L. signi-

fies Gilbert East Clayton; M. signifies second son of William Robert Clayton; N. signifies eldest son of Richard Rice Clayton." Two years before his death a card with writing on it had been seen by a person lying before the testator, together with the book containing the will, which appeared to be similar to the card and writing thereon found after his death. It was held that the will disclosed, on its face, a patent ambiguity, and that the card, which was not in existence at the date of the will, was not admissible as a declaration of the intention of the testator, nor was it receivable as secondary evidence of another card, supposing any such card to have existed at the time of his will. Clayton *v.* Nugent, 13 M. & W. 200, 13 L. J. N. S. Exch. 363.

If a devise be to one of the sons of J. S. who hath several sons, the devise is void, and shall not be supplied by parol proof. Strode *v.* Russel, 2 Vern. 624.

Deeds.—Where a deed, for description of the property, refers to a map, the map is to be considered with the deed in construing it, and if, from the face of such deed and map, it appears that there are two lots to which the description in the deed equally applies, the ambiguity is patent, and resort cannot be had to parol to show which lot was intended to be conveyed. Brandon *v.* Leddy, 67 Cal. 43.

Where the description in a deed read "38 degrees" instead of "38 perches," it was held that the ambiguity was patent, and parol evidence to explain it was inadmissible. Clarke *v.* Lancaster, 36 Md. 196, 11 Am. Rep. 486.

In the following note: "\$456.75. One day after date, we promise to pay Daniel Furry, or order, \$456.75 for value received, ten per cent.," the words "ten per cent." were held to render the instrument ambiguous. Walker, J., in delivering the opinion of the court, said: "The addition of the words 'ten per cent.' at the end of the note are in their connection without any meaning. They are added after the note is complete in all of its parts; nor can it be determined whether they were added as a mark of designation, or that the note was given for a tenth part of an entire sum, or for ten per cent. which had accrued upon some other debt, or that ten per cent. interest had been added into this note for the period it had to run. Or it may be that the parties had designed this note to draw ten per cent. interest, and, after writing thus far, have changed their agreement and omitted to erase these words. We may as readily infer one as another of these suppositions, unless we could resort to extrinsic evidence, which is not admissible." Griffith *v.* Furry, 30 Ill. 251, 83 Am. Dec. 186.

Court Records.—Where a suit was brought upon two notes for equal amounts, and a *vol. pros.* was entered as to one, but as to which one was not apparent from the record, and a suit was subsequently brought upon one of the notes, it was held that the ambiguity upon the record was patent, and that evidence was not admissible to show to which of the notes

depend not upon the instrument, but upon the force of the oral evidence, and thus the latter would be virtually substituted for the former.¹

Qualification of the Rule.—This rule, however, should be stated with qualification. The true doctrine seems to be, that while direct evidence of intention is not admissible in explanation of ambiguous terms in a writing,² yet proof of collateral facts and surrounding circumstances existing when the instrument was made, may be properly admitted in order that the court may be

the *vol. pros.* had been intended to apply. *Bisbee v. Woodbury*, 8 Ill. App. 336.

Transcript of Justice's Judgment.—Under a proper entitling of a cause with the names of the parties, a justice of the peace entered on his docket an award of judgment in the following form: "It is therefore considered that the said P. do recover of the said D. the sum," etc. In debt on this judgment, it was held that parol evidence was inadmissible to prove that the letters P. and D. on the docket entry of the judgment meant plaintiff and defendant. *Rood v. School Dist. No. 7, 1 Dougl. (Mich.) 502.*

1. *Brown v. Guice*, 46 Miss. 302; *Senger v. Senger*, 81 Va. 694.

"**Ambiguitas Patens**," says Lord Bacon, "cannot be holden by averment, and the reason is because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averment, which is of the lower account in law, for that were to make all deeds hollow and subject to averment, and so in effect to make that pass without deed which the law appoints shall not pass but by deed." *Bac. Max. Reg. 23.*

2. **Evidence of Intention—England.**—*Charter v. Charter*, L. R. 7 H. L. 364.

Alabama.—*Driggers v. Cassidy*, 71 Ala. 529.

Arkansas.—*Swayne v. Vance*, 28 Ark. 282.

Connecticut.—*Brown v. Slater*, 16 Conn. 192, 41 Am. Dec. 136.

Iowa.—*McClelland v. James*, 33 Iowa 577; *Palmer v. Albee*, 50 Iowa 429.

Massachusetts.—*Aldrich v. Aldrich*, 135 Mass. 153.

Michigan.—*Waldron v. Waldron*, 45 Mich. 350.

Minnesota.—*McNair v. Toler*, 5 Minn. 435.

Missouri.—*Davis v. Davis*, 8 Mo. 56; *Bell v. Dawson*, 32 Mo. 79; *Carter v. Holman*, 60 Mo. 498; *Campbell v. Johnson*, 44 Mo. 247.

New Hampshire.—*Webster v. Atkinson*, 4 N. H. 21. See also *Greenleaf v. Kilton*, 11 N. H. 530; *Brown v. Brown*, 43 N. H. 17.

Ohio.—*Worman v. Teagarden*, 2 Ohio St. 380.

Pennsylvania.—*Wright v. Weakly*, 2 Watts (Pa.) 89.

Wisconsin.—*Johnson v. Ashland Lumber Co.*, 52 Wis. 458.

Thus, in *Charter v. Charter*, L. R. 7 H. L. 364, it was held that evidence of the declarations of a testator as to whom he intended to benefit, or supposed he had benefited, cannot be received to explain a patent ambiguity upon that point. See also *Waldron v. Waldron*, 45 Mich. 350.

Another Statement of Rule.—This rule, as laid down in the text, has been stated in dif-

ferent language, thus: When the mere perusal of the instrument shows plainly that something more must be added before the reader can determine which of several things is meant by it, then the rule is inflexible that no evidence to supply the deficiency can be admitted. *Cowen & Hill's Notes to Phill. Ev. (5th Am. ed.) 629.*

Under this rule, in *Palmer v. Albee*, 50 Iowa 429, it was held that where, by the terms of the contract of subscription, the party undertook to give, for the purpose of the subscription, "twenty acres of land," there was such an ambiguity as could not be rendered certain or explained by parol. Also in *McNair v. Toler*, 5 Minn. 435, the description of a "certain lot of ground situate in the city of St. Paul, and State of Minnesota, namely, the east half, northwest quarter of section 32, range 21," was held to present such a patent ambiguity as could not be cured by parol. See also *Davis v. Davis*, 8 Mo. 56.

Under Georgia Code, 1882, § 3801, parol evidence is admissible to explain all ambiguities, latent and patent. *Johnston v. Patterson*, 86 Ga. 725; *Ferrell v. Hurst*, 68 Ga. 132; *Jennings v. Athens Nat. Bank*, 74 Ga. 782; *Barrett v. Powell*, 63 Ga. 552; *Burge v. Hamilton*, 72 Ga. 568; *Wilson v. Coleman*, 81 Ga. 297; *Shore v. Miller*, 80 Ga. 93, 12 Am. St. Rep. 239; *Savannah, etc., R. Co. v. Collins*, 77 Ga. 376, 4 Am. St. Rep. 87; *Bell v. Boyd*, 53 Ga. 645; *American Exch. Nat. Bank v. Georgia Constr., etc., Co.*, 87 Ga. 651; *Brown v. Doane*, 86 Ga. 32; *Turner v. Berry*, 74 Ga. 481; *Atlanta v. Schmetzer*, 83 Ga. 609; *Wheelwright v. Aiken*, 92 Ga. 394; *Neal v. Reams*, 88 Ga. 298; *Towner v. Thompson*, 82 Ga. 740; *Central, etc., R. Co. v. Georgia Fruit, etc., Exchange*, 91 Ga. 389; *Riley v. Hicks*, 81 Ga. 265; *Shore v. Miller*, 80 Ga. 93. See also *Allan v. Comstock*, 17 Ga. 554; *Crawford v. Brady*, 35 Ga. 184.

Thus, in *Ferrell v. Hurst*, 68 Ga. 132, it was held that while a mistake in the name of a grantee of land from the state cannot be proved by parol when it is offered in evidence, yet, where the grant described the grantee as Ferrell, and the plat accompanying it described him as Terrell, and each located him in a certain district, there was a patent ambiguity, and parol testimony was admissible to show that Ferrell was the name of the man living in that district, and that no such man as Terrell lived there.

In *Mohr v. Dillon*, 80 Ga. 572, it was held that the rule as to the admission of parol evidence to explain a patent ambiguity in a deed to land applies with equal force to an auctioneer's memorandum of the sale of land. See *Wilson v. Coleman*, 81 Ga. 297.

placed as nearly as possible in the situation of the testator, or the contracting parties, as the case may be, with a view the better to adjudge in what sense the language of the instrument was intended to be used, and to apply it to the subject-matter.¹

Reputation or Usage.—Under this rule, the meaning of ambiguous terms in an

The expression "value received" in a note is a patent ambiguity, and, under the *Georgia* statute, it may be explained and failure of consideration shown by parol. *Pitts v. Allen*, 72 Ga. 69.

1. Proof of Collateral Facts and Surrounding Circumstances.—*England*.—*Charter v. Charter*, L. R. 7 H. L. 364; *Smith v. Doe*, 2 Brod. & B. 555, 6 E. C. L. 271; *Colpoys v. Colpoys*, Jac. 451.

Canada.—*Harris v. Moore*, 10 Ont. App. 10.
United States.—*Reed v. Merchants Mut. Ins. Co.*, 95 U. S. 23; *U. S. v. Peck*, 102 U. S. 64; *Moore's Case*, 17 Ct. of Cl. 17; *Bradley v. Washington*, etc., *Steam Packet Co.*, 13 Pet. (U. S.) 99; *Baldwin v. Newbury Bank*, 1 Wall. (U. S.) 234; *Salmon Falls Mfg. Co. v. Goddard*, 14 How. (U. S.) 446; *Blake v. Doherty*, 5 Wheat. (U. S.) 359; *Wilson v. Higbee*, 62 Fed. Rep. 723.

Alabama.—*Meyer v. Mitchell*, 75 Ala. 478; *Boykin v. Mobile Bank*, 72 Ala. 262, 47 Am. Rep. 408; *Chambers v. Falkner*, 65 Ala. 448; *Gunn v. Clendenin*, 68 Ala. 294.

Arkansas.—*Swayne v. Vance*, 28 Ark. 282.

California.—*Altschul v. San Francisco, Cent. Park Homestead Assoc.*, 43 Cal. 171.

Colorado.—*Kretschmer v. Hard*, 18 Colo. 223.

Connecticut.—*Brown v. Slater*, 16 Conn. 192, 41 Am. Dec. 136; *Hatch v. Douglas*, 48 Conn. 116, 40 Am. Rep. 154.

Georgia.—*Armistead v. McGuire*, 46 Ga. 232.

Illinois.—*Colcord v. Alexander*, 67 Ill. 581; *Adams Express Co. v. Boskowitz*, 107 Ill. 660; *Peabody v. Dewey*, 51 Ill. App. 260.

Indiana.—*Reissner v. Oxley*, 80 Ind. 580; *Scheible v. Slagle*, 89 Ind. 323; *Martindale v. Parsons*, 98 Ind. 174; *Swarts v. Cohen*, 11 Ind. App. 20.

Iowa.—*McClelland v. James*, 33 Iowa 577; *Hamill v. Woods* (Iowa 1895), 62 N. W. Rep. 735.

Kansas.—*Simpson v. Kimberlin*, 12 Kan. 579; *Bell v. Rankin* (Kan. 1895), 40 Pac. Rep. 1094.

Kentucky.—*Thompson v. Thompson*, 2 B. Mon. (Ky.) 166; *Henry v. Henry*, 81 Ky. 342.

Maine.—*Lancey v. Phoenix F. Ins. Co.*, 56 Me. 562; *Veazie v. Forsaith*, 76 Me. 172; *Snow v. Pressey*, 85 Me. 408.

Maryland.—*Stockham v. Stockham*, 32 Md. 207; *Haile v. Peirce*, 32 Md. 327, 3 Am. Rep. 139; *Warfield v. Booth*, 33 Md. 63; *Planter's Mut. Ins. Co. v. Deford*, 38 Md. 382; *Fryer v. Patrick*, 42 Md. 51; *McCreary v. McCreary*, 5 Gill & J. (Md.) 157.

Massachusetts.—*Stoops v. Smith*, 100 Mass. 63, 97 Am. Dec. 76; *Miller v. Stevens*, 100 Mass. 518, 97 Am. Dec. 123; *Swett v. Shumway*, 102 Mass. 365; *Keller v. Webb*, 125 Mass. 88, 28 Am. Rep. 209; *Matthews v. Westborough*, 134 Mass. 555; *Aldrich v. Al-*

drich, 135 Mass. 153; *Fitzgerald v. Libby*, 142 Mass. 235.

Michigan.—*North American F. Ins. Co. v. Throop*, 22 Mich. 146, 7 Am. Rep. 638; *Moran v. Lezotte*, 54 Mich. 83; *Waldron v. Waldron*, 45 Mich. 350. See also *Cook v. Brown*, 62 Mich. 473.

Minnesota.—*Austrian v. Davidson*, 21 Minn. 117.

Missouri.—*Emory v. Joice*, 70 Mo. 537; *Bollinger County v. McDowell*, 99 Mo. 635; *Ellis v. Harrison*, 104 Mo. 270; *Weil v. Schwartz*, 21 Mo. App. 372; *Washington Mut. F. Ins. Co. v. St. Mary's Seminary*, 52 Mo. 480.

New York.—*Clark v. Woodruff*, 83 N. Y. 518; *White's Bank v. Myles*, 73 N. Y. 335, 29 Am. Rep. 157; *Blossom v. Griffin*, 13 N. Y. 569, 67 Am. Dec. 75; *Greenwood v. Marvin*, 111 N. Y. 423; *Brill v. Tuttle*, 81 N. Y. 454, 37 Am. Rep. 515; *Union Trust Co. v. Whitton*, 97 N. Y. 177; *Collender v. Dinsmore*, 55 N. Y. 203, 14 Am. Rep. 224; *Harris v. Rathbun*, 2 Abb. App. Dec. (N. Y.) 326; *Ely v. Adams*, 19 Johns. (N. Y.) 313; *Fish v. Hubbard*, 21 Wend. (N. Y.) 651; *Goodrich v. Stevens*, 5 Lans. (N. Y.) 230; *DeWolf v. Crandall*, 1 Sweeney (N. Y.) 556; *People v. Love*, 63 Barb. (N. Y.) 535.

North Carolina.—*Dunkart v. Rineheart*, 89 N. Car. 354; *Graham v. Hamilton*, 5 Ired. (N. Car.) 428.

Ohio.—*Masters v. Freeman*, 17 Ohio St. 323; *Hildebrand v. Fogle*, 20 Ohio 147; *Baldwin Quarry Co. v. Clements*, 38 Ohio St. 587, 43 Am. Rep. 442.

Pennsylvania.—*Smith v. Farmers', etc., Mut. F. Ins. Co.*, 89 Pa. St. 287; *Berridge v. Glassey*, 112 Pa. St. 442, 56 Am. Rep. 322.

Rhode Island.—*Kinney v. Flynn*, 2 R. I. 319.
South Carolina.—*Craig v. Pervis*, 14 Rich. Eq. (S. Car.) 150.

Tennessee.—*Holmes v. Jarrett*, 7 Heisk. (Tenn.) 506.

Texas.—*Hueske v. Broussard*, 55 Tex. 201; *Davis v. State*, 75 Tex. 420; *Gardner v. Watson*, 76 Tex. 25; *Ullman v. Babcock*, 63 Tex. 68; *McHugh v. Gallagher*, 1 Tex. Civ. App. 196; *Missouri, etc., R. Co. v. Graves* (Tex. App. 1890), 16 S. W. Rep. 102.

Vermont.—*Gray v. Clark*, 11 Vt. 583; *Noyes v. Canfield*, 27 Vt. 79; *Rugg v. Hale*, 40 Vt. 138; *Young v. Young*, 59 Vt. 347; *Foster v. Dickerson*, 64 Vt. 233.

Virginia.—*Crawford v. Jarrett*, 2 Leigh (Va.) 630; *Knick v. Knick*, 75 Va. 12.

West Virginia.—*Crislip v. Cain*, 19 W. Va. 483; *Scraggs v. Hill*, 37 W. Va. 706; *Caperton v. Caperton*, 36 W. Va. 479; *Titchell v. Jackson*, 26 W. Va. 460.

Wisconsin.—*Rockwell v. Mutual L. Ins. Co.*, 21 Wis. 548; *Bancroft v. Grover*, 23 Wis. 463, 99 Am. Dec. 195; *Johnson v. Northwestern Nat. Ins. Co.*, 39 Wis. 88; *Nilson v. Morse*, 52 Wis. 240.

instrument may be fixed by showing that a particular significance has become attached to those terms by reputation or usage.¹

Acts under the Instrument.—Also evidence of acts under the instrument, such as occupation of lands under a deed, is admissible as showing the practical construction which the parties themselves placed upon the instrument.²

Wyoming.—*Frank v. Hicks* (Wyoming, 1894), 35 Pac. Rep. 475, 35 Pac. Rep. 1025. See also *Suffern v. Butler*, 21 N. J. Eq. 410.

A Promissory Note was given in the following terms: "Four months after date, we the president and directors of the Dulaney's Valley and Sweet Air Turnpike Company, of Baltimore county, promise to pay to William F. Peirce, or order, one thousand dollars, with interest, for value received." The note was signed by C. T. H., president, J. N. H. and J. G. D., directors, and E. R. S., secretary. On a suit by the payee to charge the drawers of the note, it was held that the note, upon its face, being ambiguous and uncertain as to the fact whether the parties signing the note did so in their individual or official capacity, it was competent for either party to show by relevant extraneous proof on what account the note was given. *Haile v. Peirce*, 32 Md. 327, 3 Am. Rep. 139. See also *Chambers v. Falkner*, 65 Ala. 448. Compare *McClellan v. Reynolds*, 49 Mo. 312, where similar circumstances were held to constitute a latent ambiguity.

Identification of Subject-matter.—Where descriptions in instruments are ambiguous or doubtful, and even void on their face for uncertainty, the courts often admit, in aid of the identification of the subject-matter, proof of the situation of the parties and the circumstances surrounding them. *Meyer v. Mitchell*, 75 Ala. 478; *Sikes v. Shows*, 74 Ala. 386; *Peabody v. Dewey*, 51 Ill. App. 260; *Keller v. Webb*, 125 Mass. 88, 28 Am. Rep. 209; *Stoops v. Smith*, 100 Mass. 66, 97 Am. Dec. 76; *Dunham v. Gannett*, 124 Mass. 151, 126 Mass. 151; *Lechmere Bank v. Boynton*, 11 Cush. (Mass.) 379; *State v. Sibley*, 25 Minn. 387; *Ellis v. Harrison*, 104 Mo. 270; *Steadman v. Taylor*, 77 N. Car. 134; *Fish v. Hubbard*, 21 Wend. (N. Y.) 651.

Where, by a written agreement, one party agreed to furnish another with water out of a milldam sufficient to carry the fulling mill and carding machine, and at all times to have such a share of the water as would be sufficient to carry one wheel when either of the wheels of the gristmill and sawmill were running; without any description of the location of the dam or mills, or allusion to the ownership of the same; it was held in an action brought by the party who, by the terms of the agreement, was to be furnished with water, on a motion for a new trial, he having been nonsuited, that parol evidence was admissible to show the location and ownership of the dam and respective mills in reference to which the agreement was made, to show that the party granting the privilege was, at the date of the agreement, the owner of a milldam, a gristmill and sawmill, and that the other party at the same time was the owner of a fulling mill and carding machine

in the vicinity of the other mills and dam, and that the respective parties owned no other mills or dam. *Fish v. Hubbard*, 21 Wend. (N. Y.) 651.

Different Statement of Rule.—In *Broom's Leg. Max.* 612, the doctrine is thus expressed: "The general rule, however, as to patent ambiguity must be received with this qualification, viz.: that extrinsic evidence is unquestionably admissible for the purpose of showing that the uncertainty which appears on the face of the instrument does not in point of fact exist, and that the intent of the party, though uncertainly and ambiguously expressed, may yet be ascertained by proof of facts to such a degree of certainty as to allow of the intent being carried into effect."

1. Usage and Custom.—*Robinson v. U. S.*, 13 Wall. (U. S.) 363; *South Bend Iron Works v. Cottrell*, 31 Fed. Rep. 254; *Loneragan v. Stewart*, 55 Ill. 50; *Lyon v. Lenon*, 106 Ind. 567; *Woods v. Sawin*, 4 Gray (Mass.) 322; *Collender v. Dinsmore*, 55 N. Y. 203, 14 Am. Rep. 224; *Livingston v. Ten Broeck*, 16 Johns. (N. Y.) 14, 8 Am. Dec. 287; *Harris v. Rathbun*, 2 Abb. App. Dec. (N. Y.) 326; *Goodrich v. Stevens*, 5 Lans. (N. Y.) 230. See also *Brown v. Brooks*, 25 Pa. St. 210.

Thus, when a receipt for personal property does not disclose whether the transaction is a sale or bailment, evidence of general usage in trade has been held admissible to give a particular sense to the words. *Lyon v. Lenon*, 106 Ind. 567; *Loneragan v. Stewart*, 55 Ill. 50.

2. Acts of the Parties.—*United States v. Topliff*, 122 U. S. 131; *Chicago v. Sheldon*, 9 Wall. (U. S.) 50.

Alabama.—*Sikes v. Shows*, 74 Ala. 382; *Meyer v. Mitchell*, 75 Ala. 475.

California.—*Truett v. Adams*, 66 Cal. 218.

Colorado.—*McPhee v. Young*, 13 Colo. 80. *Illinois.*—*Purinton v. Northern Illinois R. Co.*, 46 Ill. 297.

Massachusetts.—*Lovejoy v. Lovett*, 124 Mass. 270.

Missouri.—*St. Louis Gaslight Co. v. St. Louis*, 46 Mo. 121; *Ellis v. Harrison*, 104 Mo. 270.

New Jersey.—*Jackson v. Perrine*, 35 N. J. L. 137.

New York.—*Dodge v. Zimmer*, 110 N. Y. 43; *French v. Carhart*, 1 N. Y. 102.

Texas.—*Linney v. Wood*, 66 Tex. 22; *Heidenheimer v. Cleveland* (Tex. 1891), 17 S. W. Rep. 524.

Vermont.—*Gray v. Clark*, 11 Vt. 583.

West Virginia.—*Scraggs v. Hill*, 37 W. Va. 706.

Compare *Webster v. Atkinson*, 4 N. H. 21.

Thus, parol evidence of the acts of the parties to an instrument was held admissible to determine whether it was a mortgage or conditional sale. *Eckford v. Berry* (Tex.

Verbal Declarations to Explain Contracts.—There is some conflict of opinion as to the admissibility of verbal declarations of the parties to explain ambiguities on the face of a contract. According to some of the authorities, they are in no case receivable.¹ But the majority of the decisions support the rule that for the purpose of applying the terms of a contract to the subject-matter, and removing any ambiguity which arises from such application, it is admissible to show by the declarations of the parties before, or at the time of the contract, or afterwards, what was meant by its terms.²

Civ. App. 1894), 27 S. W. Rep. 841; Walker v. McDonald, 49 Tex. 458.

Where an ambiguity exists in the location of a lot, from inconsistent calls, the acts of the grantor in making the survey, and marking the boundary by stakes, which is consistent with one call for a boundary, and not with another, when coupled with evidence of an acceptance by the grantee of such location, by setting his fences by the stakes, are competent evidence of a practical location by mutual consent, which, when once made, will be conclusive upon both parties, especially when, by such location, the grantee obtains his full complement of land, and the courses and distances set out in the deed are fully answered, and the rights of a subsequent purchaser from the same grantor of an adjoining lot have intervened. *Jackson v. Perrine*, 35 N. J. L. 137.

Book Entries.—Where an ambiguity arose upon a contract, as to the meaning of the words "mercantile debts," it was held proper to admit evidence of the construction placed upon the words by the parties themselves, as shown by the opening entries in the books of the firm, which consisted of the two litigating parties. *Ellis v. Harrison*, 104 Mo. 270.

1. Verbal Declarations.—*Kretschmer v. Hard*, 18 Colo. 233; *McClelland v. James*, 33 Iowa 577; *Caperton v. Caperton*, 36 W. Va. 479; *Scraggs v. Hill*, 37 W. Va. 706; *Titchenell v. Jackson*, 26 W. Va. 460; *Crislip v. Cain*, 19 W. Va. 483; *Connolly v. Provincial Ins. Co.*, 3 Q. L. R. 6.

Thus, in an Action on a Policy of Marine Insurance, the plaintiff wished to prove the conversation between himself and the agent of the defendants when the policy in question was applied for, the object of proving that conversation being to show the meaning which the parties themselves attached to the words "the vessel to go out in tow;" it was held that although ambiguous terms in a written instrument may be explained by parol evidence of a usage, they cannot be explained by parol evidence of a conversation which took place when the contract was made. *Connolly v. Provincial Ins. Co.*, 3 Q. L. R. 6.

2. Indiana.—*Motsinger v. State*, 123 Ind. 498.

Kansas.—*Mason v. Ryus*, 26 Kan. 464; *Cosper v. Nesbit*, 45 Kan. 457; *Coates v. Sulau*, 46 Kan. 341.

Maine.—*Gallagher v. Black*, 44 Me. 99.

Massachusetts.—*Stoops v. Smith*, 100 Mass. 66, 97 Am. Dec. 76; *Swett v. Shumway*, 102 Mass. 368; *Keller v. Webb*, 125 Mass. 88, 28 Am. Rep. 209; *MacDonald v. Dana*, 154 Mass. 152.

Michigan.—*Kendrick v. Beard*, 81 Mich. 182.

Minnesota.—*Aultman v. Clifford*, 55 Minn. 159.

Missouri.—*Wolfert v. Pittsburg, etc.*, R. Co., 44 Mo. App. 330; *Ellis v. Harrison*, 104 Mo. 270.

New Jersey.—*Sandford v. Newark, etc.*, R. Co., 37 N. J. L. 1.

New York.—*Crosby v. Delaware, etc.*, Canal Co., 128 N. Y. 641; *McNulty v. Urban*, 1 Misc. Rep. (Brooklyn City Ct.) 422; *Campbell v. Jimenes*, 3 Misc. Rep. (N. Y. C. Pl.) 516; *Cassidy v. Fonham (C. Pl.)*, 14 N. Y. Supp. 151; *Sire v. Rumbold (City Ct.)*, 11 N. Y. Supp. 734; *Hurd v. Bovee (Supreme Ct.)*, 7 N. Y. Supp. 241; *Austin v. Southworth*, 13 Misc. Rep. (N. Y. C. Pl.) 45; *Ely v. Adams*, 19 Johns. (N. Y.) 313. *Compare Dent v. North American Steamship Co.*, 49 N. Y. 395.

North Carolina.—*Steadman v. Taylor*, 77 N. Car. 134.

Pennsylvania.—*Selden v. Williams*, 9 Watts (Pa.) 9.

Texas.—*Lemp v. Armengol*, 86 Tex. 690.

Vermont.—*Hart v. Hammett*, 18 Vt. 127; *Wait v. Fairbanks, Brayt. (Vt.)* 77.

Washington.—*Adamant Plaster Mfg. Co. v. National Bank of Commerce*, 5 Wash. 232.

Illustrations.—In an action on a written agreement to pay the plaintiff "fifty dollars for inserting a business card in two hundred copies of his advertising chart, to be paid when the chart is published," parol evidence is admissible for the interpretation of the contract and its application to the subject-matter, that at the time of the making of the agreement the plaintiff represented and promised that his advertising chart should be composed of a certain material and be published in a certain manner. *Stoops v. Smith*, 100 Mass. 63, 97 Am. Dec. 76. In this case, Wells, J., said: "The purpose of all such evidence is to ascertain in what sense the parties themselves used the ambiguous terms in the writing which sets forth their contract. If the previous negotiations make it manifest in what sense they understood and used those terms, they furnish the best definition to be applied in the interpretation of the contract itself. The effect must be limited to definition of the terms used and identification of the subject-matter. If so limited, it makes no difference that the language of the negotiations relates to the future, and consists in positive engagements on the part of the other party to the contract. Their effect depends not upon their promissory obligation, but upon the aid they afford in the interpretation

2. Latent Ambiguity—*a.* IN GENERAL.—It is a well-settled rule that in cases of latent ambiguity parol evidence is admissible in explanation thereof.¹

of the contract in suit. They are not the less effective for the purposes of explanation and definition because they purport to carry the force of obligation."

Also in an action on a written contract for the purchase of a certain number of "casks" of black lead at so much a pound, oral evidence of the size of the casks agreed upon was held to be admissible. *Keller v. Webb*, 125 Mass. 88, 28 Am. Rep. 209.

In an instrument in the form of a note promising to pay the balance due on horses, "said horses to be holden to [the seller] as security for the payment of this note," the words quoted are not so certain and unambiguous as to import a mortgage and not a conditional sale; and parol testimony that the title was not to pass until paid for in full does not vary or change the terms of the note, but only explains its doubtful language. *Kendrick v. Beard*, 81 Mich. 182.

Where the defendant in an action had agreed in writing to execute a deed to complainant, conveying to him three of sixteen tenements which the complainant had contracted to build, each tenement being rated at one thousand dollars in value, the agreement being defective in not stating which three of the sixteen tenements were to be included, parol evidence was held admissible to show that while the work was in progress defendant had verbally agreed with the complainant as to which three particular tenements were to be selected and conveyed, and that the selection was accordingly made. *Ellis v. Burden*, 1 Ala. 458. *Somerville, J.*, in commenting upon this case in *Meyer v. Mitchell*, 75 Ala. 479, said: "This case may, perhaps, have gone too far in extending the application of a sound principle. It can be justified only on the theory that the selection of the three tenements was an act of negotiation performed by the parties in the construction of their contract. It was an attendant fact rather than a mere verbal declaration."

Contract Varied by Parol.—It has been held that ambiguities appearing upon the face of the contract may be explained, varied, added to, or contradicted by parol, where it is shown that but for the oral stipulation the contract would not have been executed. *Caley v. Philadelphia, etc., R. Co.*, 80 Pa. St. 364.

1. Rule as to Latent Ambiguities—*England.*—*Raffles v. Wichelhaus*, 2 H. & C. 906; *Smith v. Thompson*, 8 C. B. 44, 65 E. C. L. 44. ***Canada.***—*Cutten v. Ker*, 16 U. C. C. P. 227; *Clark v. Bonnycastle*, 3 U. C. Q. B. (O. S.) 528.

United States.—*Deery v. Cray*, 10 Wall. (U. S.) 263; *Clay v. Field*, 138 U. S. 464; *The Wanderer*, 29 Fed. Rep. 260.

Alabama.—*Paysant v. Ware*, 1 Ala. 160.

Arkansas.—*Cato v. Stewart*, 28 Ark. 146; *Dorr v. School Dist. No. 26*, 40 Ark. 237.

California.—*Board of Education v. Keenan*, 55 Cal. 642; *Piper v. True*, 36 Cal. 606.

Colorado.—*Blair v. Bruns*, 8 Colo. 397.

Connecticut.—*Hotchkiss v. Barnes*, 34 Conn. 27, 91 Am. Dec. 713; *Brewster v. McCall*, 15 Conn. 274; *Brainerd v. Cowdrey*, 16 Conn. 1; *Coit v. Starkweather*, 8 Conn. 289.

Georgia.—*Walker v. Wells*, 25 Ga. 141, 71 Am. Dec. 164; *Bowen v. Slaughter*, 24 Ga. 338, 71 Am. Dec. 135; *Whelan v. Edwards*, 29 Ga. 315; *Elder v. Ogletree*, 36 Ga. 64; *Wiley v. Smith*, 3 Ga. 557.

Illinois.—*Marshall v. Gridley*, 46 Ill. 247; *Lyon v. Lyon*, 3 Ill. App. 434; *Lyman v. Gedney*, 114 Ill. 388, 55 Am. Rep. 871; *Richards v. Miller*, 62 Ill. 417.

Kansas.—*Wyandotte County v. Wyandotte First Presbyterian Church*, 30 Kan. 620.

Kentucky.—*Wilson v. Robertson*, 7 J. J. Marsh. (Ky.) 78; *Breeding v. Taylor*, 13 B. Mon. (Ky.) 487; *Long v. Duvall*, 6 B. Mon. (Ky.) 220; *Tudor v. Terrel*, 2 Dana (Ky.) 48.

Maine.—*Patrick v. Grant*, 14 Me. 233; *Emery v. Webster*, 42 Me. 204, 66 Am. Dec. 274; *Storer v. Elliot F. Ins. Co.*, 45 Me. 175; *Howard v. American Peace Soc.*, 49 Me. 288.

Maryland.—*Mitchell v. Mitchell*, 6 Md. 224; *Warfield v. Booth*, 33 Md. 63.

Massachusetts.—*Hurley v. Brown*, 98 Mass. 548, 96 Am. Dec. 671; *Mead v. Parker*, 115 Mass. 413, 15 Am. Rep. 110; *Putnam v. Bond*, 100 Mass. 58; *Stoops v. Smith*, 100 Mass. 63, 97 Am. Dec. 76; *Storer v. Freeman*, 6 Mass. 435, 4 Am. Dec. 155; *Warren v. Gregg*, 116 Mass. 304; *Cleverly v. Cleverly*, 124 Mass. 314; *Keller v. Webb*, 125 Mass. 88, 28 Am. Rep. 209; *Foster v. Woods*, 16 Mass. 116; *Stackpole v. Arnold*, 11 Mass. 27, 6 Am. Dec. 150; *Wilson v. Fosket*, 6 Met. (Mass.) 400, 39 Am. Dec. 736; *Peabody v. Brown*, 10 Gray (Mass.) 45; *Sutton v. Bowker*, 5 Gray (Mass.) 416; *Woods v. Sawin*, 4 Gray (Mass.) 322; *Sargent v. Adams*, 3 Gray (Mass.) 72; *Gerrish v. Towne*, 3 Gray (Mass.) 82; *Herring v. Boston Iron Co.*, 1 Gray (Mass.) 134; *Waterman v. Johnson*, 13 Pick. (Mass.) 261.

Missouri.—*Hardy v. Matthews*, 38 Mo. 122; *Shuetze v. Bailey*, 40 Mo. 69; *Franklin Avenue German Sav. Inst. v. Roscoe*, 75 Mo. 408; *Goff v. Roberts*, 72 Mo. 570; *Brom v. Walker*, 11 Mo. App. 226; *Hymers v. Druhe*, 5 Mo. App. 580.

New Hampshire.—*Brown v. Brown*, 43 N. H. 17; *French v. Hayes*, 43 N. H. 30, 80 Am. Dec. 127; *Hall v. Davis*, 36 N. H. 569; *Webster v. Atkinson*, 4 N. H. 21; *Tilton v. American Bible Soc.*, 60 N. H. 377, 49 Am. Rep. 321; *French v. Hayes*, 43 N. H. 30, 80 Am. Dec. 127; *Bell v. Woodward*, 45 N. H. 315.

New Jersey.—*Hand v. Hoffman*, 8 N. J. L. 71; *Hartwell v. Camman*, 10 N. J. Eq. 128, 64 Am. Dec. 448; *Opdyke v. Stephens*, 28 N. J. L. 83; *Griscom v. Evens*, 40 N. J. L. 402, 29 Am. Rep. 251.

New York.—*Smith v. Smith*, 1 Edw. Ch. (N. Y.) 189; *Trustees, etc., v. Colgrove*, 4 Hun (N. Y.) 362; *Peters v. Porter*, 60 How. Pr. (N. Y. Supreme Ct.) 422; *Gallup v. Wright*, 61 How. Pr. (N. Y. Supreme Ct.)

The Reason of the Rule is that a latent ambiguity being created by parol, evidence of the same character may be resorted to for its removal.¹

b. WILLS.—There are two instances in which a latent ambiguity may arise upon a will, first, when it names a person as the object of a gift, or a thing as the subject of it, and there are in existence two persons²

286; *Jackson v. Sill*, 11 Johns. (N. Y.) 201, 6 Am. Dec. 363.

North Carolina.—*Deaf and Dumb Inst. v. Norwood*, Busb. Eq. (N. Car.) 65; *Steadman v. Taylor*, 77 N. Car. 134; *Wharton v. Eborn*, 88 N. Car. 344; *McDaniel v. King*, 90 N. Car. 597.

Ohio.—*Edwards v. Richards*, Wright (Ohio) 597; *Caldwell v. Carthage*, 40 Ohio St. 453.

Oregon.—*Raymond v. Coffey*, 5 Oregon Rep. 132.

Pennsylvania.—*Vernor v. Henry*, 3 Watts (Pa.) 385; *Best v. Hammond*, 55 Pa. St. 409.

South Carolina.—*Elfe v. Gadsden*, 2 Rich. (S. Car.) 373; *Patterson v. Leith*, 2 Hill Eq. (S. Car.) 15; *Goddard v. Bulow*, 1 Nott. & M. (S. Car.) 45, 9 Am. Dec. 663.

Texas.—*Linney v. Wood*, 66 Tex. 22; *Busby v. Bush*, 79 Tex. 656; *Wofford v. McKinna*, 23 Tex. 44, 76 Am. Dec. 53.

Utah.—*Coulam v. Doull*, 4 Utah 267.

Vermont.—*Button v. American Tract Soc.*, 23 Vt. 336; *Pitts v. Brown*, 49 Vt. 86, 24 Am. Rep. 114.

Virginia.—*Hawkins v. Garland*, 76 Va. 149, 44 Am. Rep. 158; *Senger v. Senger*, 81 Va. 687.

Wisconsin.—*Schmitz v. Schmitz*, 19 Wis. 207, 88 Am. Dec. 681; *Jenkins v. Sharpf*, 27 Wis. 472.

See also *U. S. Bank v. Dunn*, 6 Pet. (U. S.) 51; *Wusthoff v. Dracourt*, 3 Watts (Pa.) 240; *Comfort v. Mather*, 2 W. & S. (Pa.) 450, 37 Am. Dec. 523; *Betts v. Demumbrune*, Cooke (Tenn.) 39; *Bowyer v. Martin*, 6 Rand. (Va.) 525.

A Written Memorandum signed by the plaintiff, stating that a sum therein specified "is good as an offset to plaintiff's claims against defendant," presents a case of latent ambiguity, if it appears that the plaintiff had more claims than one against the defendant; and, under such circumstances, parol evidence is admissible to show to which of several claims the parties intended that the set-off should be applied. *Wilson v. Horne*, 37 Miss. 477.

Application for Insurance.—Hay and grain insured were stated in an application for insurance as in the "hay house in the meadow." There were two buildings in the meadow, in which hay was kept, one usually called a "hay house" and the other a "barn." Evidence was admissible to show which was intended. *Lycoming Mut. Ins. Co. v. Sailer*, 67 Pa. St. 108.

Receipt.—The words "received on settlement to this date," where there was a partnership account running through years, may refer to the settlement for the year or a settlement for the whole period of the partnership, and this ambiguity, being a latent one, may be explained by evidence *aliunde*. *Clay v. Field*, 138 U. S. 464.

Where, upon a Partition between Cohairs, a way is assigned to one, and, upon the evidence, it is uncertain which of two routes was intended, evidence is admissible of any circumstances or acts of the parties indicating such intention. *French v. Hayes*, 43 N. H. 30, 80 Am. Dec. 127.

Where a Deed of Trust provides for a sale at the court-house door at the city of J., if it appears that at the time of the execution of the deed there were two houses in the city of J. called court houses, parol evidence is admissible to show which was intended. *Goff v. Roberts*, 72 Mo. 570.

Statute.—Where an act of assembly prohibited the sale of liquor "within three miles of * * * Mount Zion Church in Gaston County," and it appeared on the trial of an indictment for its violation that there were two churches of that name in the county, it was held that the act was ambiguous, and that parol evidence was inadmissible to explain the ambiguity. *Merrimon, J.*, in delivering the opinion of the court, said: "A statute is an act of the legislature as an organized body. It expresses the collective will of that body, and no single member of it, or all the members as individuals, can be heard to say what the meaning of the statute is. It must speak for and be construed by itself, by the means and signs indicated above. Otherwise each individual might attribute to it a different meaning, and thus the legislative will and meaning be lost sight of. Whatever may be the views and purposes of those who procure the enactment of a statute, the legislature contemplates that its intention shall be ascertained from its words as embodied in it, and courts are not at liberty to accept the understanding of any individual as to the legislative intent." *State v. Partlow*, 91 N. Car. 550. See also the title **STATUTES**.

Parties to Whom Rule Applies.—It has been held that the rule permitting parol evidence to explain a latent ambiguity has generally no application, except as to parties and privies to the instrument sought to be explained. *Brokel v. McKechnie*, 69 Tex. 32.

1. See cases cited in note immediately preceding.

The rule is thus stated by Lord Bacon: "*Ambiguitas verborum latens verificatione suppletur; nam quod ex facto oritur ambiguum, verificatione facti tollitur.*" Bac. Max. Reg. 23.

2. **Two Persons Answering the Description.**—*England.*—*In re Kilvert's Trusts*, L. R. 12 Eq. 183; *Grant v. Grant*, L. R. 5 C. P. 380; *Doe v. Beynon*, 12 Ad. & El. 431, 40 E. C. L. 83; *Fleming v. Fleming*, 1 H. & C. 242; *Webber v. Corbett*, L. R. 16 Eq. 515; *In re Gregory's Settlement and Will*, 34 Beav. 600; *Miller v. Travers*, 8 Bing. 244, 21 E. C. L. 288; *In re Wolverton Mortgaged Estates*, 7 Ch. Div. 197.

or things,¹ as the case may be that answer such name or description; or, secondly, when the will contains a misdescription of the object² or subject,³

United States.—Gilmer v. Stone, 120 U. S. 588.

Connecticut.—Dunham v. Averill, 45 Conn. 61, 29 Am. Rep. 642; Brewster v. McCall, 15 Conn. 274.

Illinois.—Bradley v. Rees, 113 Ill. 327, 55 Am. Rep. 422.

Kentucky.—Cromie v. Louisville Orphans' Home Soc., 3 Bush (Ky.) 366.

Maine.—Howard v. American Peace Soc., 49 Me. 288.

Massachusetts.—Bodman v. American Tract Soc., 9 Allen (Mass.) 447.

New Hampshire.—Tilton v. American Bible Soc., 60 N. H. 377, 49 Am. Rep. 321; Goodhue v. Clark, 37 N. H. 525.

New York.—Jackson v. Goes, 13 Johns. (N. Y.) 518, 7 Am. Dec. 399; St. Luke's Home, etc., v. Association for Relief, etc., 52 N. Y. 191, 11 Am. Rep. 697.

North Carolina.—Clarke v. Cotton, 2 Dev. Eq. (N. Car.) 51, 24 Am. Dec. 279.

Pennsylvania.—Vernor v. Henry, 3 Watts (Pa.) 385.

Tennessee.—Gass v. Ross, 3 Sneed (Tenn.) 211.

Vermont.—Button v. American Tract Soc., 23 Vt. 336.

Thus where a testator devised as follows: "I give and bequeath to my son Edward Fleming all that dwelling-house * * * (now in the occupation of my son John Fleming), during his natural life, and at his death to descend to my grandson Henry Fleming, and his heirs forever," and the testator had two grandsons named Henry Fleming, the plaintiff who was the son of the testator's son Edward, and the defendant who was the son of the testator's son John, it was held that the proof of that fact raised an ambiguity in the will as to which of his two grandsons the testator meant Fleming v. Fleming, 1 H. & C. 242.

Collateral Fact must Be Such as to Raise Ambiguity.—But in order to raise a latent ambiguity by proof of some fact not to be collected from the instrument itself, the fact must be such as when proved will raise an ambiguity in the instrument. Thus where a testator by his will devised to Matthew W., his brother, and Simon W., his brother's son, a certain estate, and it appeared that the testator had three brothers, each of whom had a son by the name of Simon living at the time of the testator's death, it was held that the proof of this fact did not raise any latent ambiguity in the will so as to let in parol evidence or declarations of the testator as to the person intended, it being clear that the person entitled was Simon, son of Matthew. Doe v. Westlake, 4 B. & Ald. 57.

1. Two Things Answering the Description—England.—Miller v. Travers, 8 Bing. 244, 21 E. C. L. 288; Doe v. Lyford, 4 M. & S. 550.

Connecticut.—Doolittle v. Blakesley, 4 Day (Conn.) 265, 4 Am. Dec. 218.

Massachusetts.—Sargent v. Towne, 10 Mass. 303.

Michigan.—Waldron v. Waldron, 45 Mich. 350.

New Jersey.—Den v. Cubberly, 12 N. J. L. 308.

North Carolina.—Lowe v. Carter, 2 Jones Eq. (N. Car.) 377. See also Clarke v. Cotton, 2 Dev. Eq. (N. Car.) 51, 24 Am. Dec. 279.

Ohio.—Black v. Hill, 32 Ohio St. 313.

Pennsylvania.—Brownfield v. Brownfield, 12 Pa. St. 136, 51 Am. Dec. 590.

Vermont.—Townsend v. Downer, 23 Vt. 225.

Wisconsin.—Webster v. Morris, 66 Wis. 366, 37 Am. Rep. 278.

See also Pickering v. Pickering, 50 N. H. 349; Pritchard v. Hicks, 1 Paige (N. Y.) 270.

The testator devised to the defendant a lot of land "beginning in Joseph Wall's line at the corner between him and R. Chambers, thence as the line runs till it comes to the middle of the road leading from Vanderveer's tavern to Esquire James's, thence down said road to Joseph Wall's land, all the land to the east of said road that I own in said tract to Joseph Wall's." It appearing by parol evidence that there were two corners in Joseph Wall's line between him and R. Chambers answering so exactly to the description in the will that no construction upon the instrument could show which of the two the testator intended, there was held to be a latent ambiguity. Den v. Cubberly, 12 N. J. L. 308.

Where Two or More Objects may be Included in the Term Employed.—A latent ambiguity does not arise when there are two or more objects of a like kind which may both be included in the general terms used to describe what is given. Thus where a testator devised to his wife "my land," and it was ascertained that he owned two tracts of land both of which might be included in the description, it was held that this fact did not raise a question of latent ambiguity. Mitchell v. Walker, 17 B. Mon. (Ky.) 61.

2. Misdescription of Object.—Beardsley v. American Home Missionary Soc., 45 Conn. 327; Hinckley v. Thatcher, 139 Mass. 477, 52 Am. Rep. 719; Taylor v. Tolen, 38 N. J. Eq. 91; Lefevre v. Lefevre, 59 N. Y. 434; Gardner v. Heyer, 2 Paige (N. Y.) 11; Connolly v. Pardon, 1 Paige (N. Y.) 291, 19 Am. Dec. 433; Smith v. Smith, 1 Edw. Ch. (N. Y.) 189; Washington, etc., University's Appeal, 111 Pa. St. 572; Newell's Appeal, 24 Pa. St. 197; Hawkins v. Garland, 76 Va. 149, 44 Am. Rep. 158.

But it has been stated that cases of this kind cannot properly be called latent ambiguities. *In re Engle's Trusts*, L. R. 11 Eq. 578. See also Wood v. White, 32 Me. 342, 52 Am. Dec. 654; Roman Catholic Orphan Asylum v. Emmons, 3 Bradf. (N. Y.) 144.

3. Misdescription of Subject.—Miller v. Travers, 8 Bing. 244, 21 E. C. L. 288; Patch v. White, 117 U. S. 210; Allen v. Lyons, 2 Wash. (U. S.) 475; Decker v. Decker, 121 Ill. 341; Breckenridge v. Duncan, 2 A. K. Marsh. (Ky.) 50, 12 Am. Dec. 359;

as where there is no such person or thing in existence, or, if in existence, the person is not the one intended, or the thing does not belong to the testator.

How the Ambiguity may be Removed.—The first kind of ambiguity, where there are two persons or things equally answering the description, may be removed by any evidence, either of circumstances or declarations of the testator.¹

Haydon v. Ewing, 1 B. Mon. (Ky.) 111; *Tudor v. Terrel*, 2 Dana (Ky.) 47; *Riggs v. Myers*, 20 Mo. 239; *Winkley v. Kaime*, 32 N. H. 268. See also *Cleverly v. Cleverly*, 124 Mass. 314; *Doe v. Roe*, 1 Wend. (N. Y.) 541; *Mann v. Mann*, 1 Johns. Ch. (N. Y.) 234; *Merrick v. Merrick*, 37 Ohio St. 126, 41 Am. Rep. 493. Compare *Kurtz v. Hibner*, 55 Ill. 514, 8 Am. Rep. 665; *Fitzpatrick v. Fitzpatrick*, 36 Iowa 674, 14 Am. Rep. 538.

1. Two Persons or Things within the Description.—How the Ambiguity Removed.—England.—*In re Kilvert's Trusts*, L. R. 12 Eq. 183; *Grant v. Grant*, L. R. 5 C. P. 380; *Doe v. Beynon*, 12 Ad. & El. 431, 40 E. C. L. 83; *Fleming v. Fleming*, 1 H. & C. 242; *Webber v. Corbett*, L. R. 16 Eq. 515; *In re Gregory's Settlement and Will*, 34 Beav. 600; *In the Goods of Brake*, 32 Moak Rep. 601; *Miller v. Travers*, 8 Bing. 244, 21 E. C. L. 288; *In re Wolverton Mortgaged Estates*, 7 Ch. Div. 197; *Doe v. Lyford*, 4 M. & S. 550.

Connecticut.—*Dunham v. Averill*, 45 Conn. 61, 29 Am. Rep. 642; *Brewster v. McCall*, 15 Conn. 274; *Doolittle v. Blakesley*, 4 Day (Conn.) 265, 4 Am. Dec. 218.

Illinois.—*Bradley v. Rees*, 113 Ill. 327, 55 Am. Rep. 422.

Kentucky.—*Cromie v. Louisville Orphans' Home Soc.*, 3 Bush (Ky.) 366.

Maine.—*Howard v. American, etc., Soc.*, 49 Me. 288.

Massachusetts.—*Sargent v. Towne*, 10 Mass. 303; *Bodman v. American Peace Soc.*, 9 Allen (Mass.) 447.

Michigan.—*Waldron v. Waldron*, 45 Mich. 350.

New Hampshire.—*Tilton v. American Bible Soc.*, 60 N. H. 377, 49 Am. Rep. 321; *Goodhue v. Clark*, 37 N. H. 525. See also *Pickering v. Pickering*, 50 N. H. 349.

New Jersey.—*Den v. Cubberly*, 12 N. J. L. 308.

New York.—*Jackson v. Goes*, 13 Johns. (N. Y.) 518, 7 Am. Dec. 399; *Board of Missions v. Scovell*, 3 Dem. (N. Y.) 516; *Trustees, etc., v. Colgrove*, 4 Hun (N. Y.) 362; *St. Luke's Home, etc., v. Association for Relief, etc.*, 52 N. Y. 191, 11 Am. Rep. 697; *Gallup v. Wright*, 61 How. Pr. (N. Y.) Supreme Ct. 286. See also *Pritchard v. Hicks*, 1 Paige (N. Y.) 270.

North Carolina.—*Lowe v. Carter*, 2 Jones Eq. (N. Car.) 377. See also *Clarke v. Cotton*, 2 Dev. Eq. (N. Car.) 51, 24 Am. Dec. 279.

Ohio.—*Black v. Hill*, 32 Ohio St. 313.

Pennsylvania.—*Brownfield v. Brownfield*, 12 Pa. St. 136, 51 Am. Dec. 590; *Vernor v. Henry*, 3 Watts (Pa.) 385.

Tennessee.—*Gass v. Ross*, 3 Sneed (Tenn.) 211.

Vermont.—*Townsend v. Downer*, 23 Vt. 225; *Button v. American Tract. Soc.*, 23 Vt. 336.

Virginia.—*Maund v. M'Phail*, 10 Leigh (Va.) 207.

Wisconsin.—*Morgan v. Burrows*, 45 Wis. 211, 30 Am. Rep. 717; *Webster v. Morris*, 66 Wis. 366, 57 Am. Rep. 278.

Surrounding Facts and Circumstances.—A bequest was made to the Omro and Algoma Union Cemetery Association and the Union Cemetery Association, both having grounds in Omro. The members and incorporators of the latter included inhabitants of the towns of Omro and Algoma. It was held that extrinsic evidence of the above facts was admissible, and that the last-named corporation was the one intended. *Webster v. Morris*, 66 Wis. 360, 57 Am. Rep. 278.

Where a devisee was named in a will as the "American Home Mission Tract Society for our Western Mission," and it appeared that there was no society known by that name, but that the description named in the will contained some terms applicable to each of two well-known charitable societies, the American Tract Society and the American Home Missionary Society, testimony showing that the testator was acquainted with the objects and operations of the American Tract Society; that those operations were mainly confined to the western states, and were there conducted through the agency of colporteurs or missionaries; that the testator took a lively interest in the society, contributed to its funds in his lifetime, and expressed his preference for it over other charitable institutions, was adjudged proper to be considered in connection with the language of the will in determining the intention of the testator. Testimony as to instructions given by the testator to a scrivener who drew the will, to so draw it as to give the property to the Tract Society, was held to be inadmissible. *Button v. American Tract Soc.*, 23 Vt. 336.

A testator by his will gave the residue of his estate "equally to the Authorized Agents of the Home and Foreign Missionary Societies to aid in propagating the Holy religion of Jesus Christ." It was held that extrinsic evidence of the facts known to the testator at the time he executed the will, the names by which he was accustomed to call the missionary societies or by which they were usually called and known in the religious society with which he worshipped, the interest shown by him in any particular missionary society, and the contributions which he made for missionary purposes, was admissible to aid in identifying the societies intended by the will. *Hinckley v. Thatcher*, 139 Mass. 477, 52 Am. Rep. 719.

A legacy being provided for "the Bible Society," it was held that parol evidence was

In the Case of a Misdescription, the ambiguity consists in the repugnancy between the manifest intent of the will and the misdescription of the donee or the subject of the gift.¹ In such a case, parol evidence is admissible to show the donee or subject of the gift really intended.²

competent to show what society was meant, and also evidence that an annual contribution was taken for one of several such societies in the testator's church was competent. *Tilton v. American Bible Soc.*, 60 N. H. 377, 49 Am. Rep. 321.

A testator appointed his "said nephew, Joseph Grant, executor" of his will. His wife's nephew of that name had resided with him for many years, and managed his business. There was also living a nephew (a brother's son) of the like name. Both claimed probate of the will. It was held that parol evidence was admissible to show the relation and circumstances in which the respective parties stood to the testator, and the sense in which he habitually used the word "nephew" when referring to his wife's nephew. And the evidence showing that the wife's nephew was the person meant, probate of the will was decreed to him accordingly. *Grant v. Grant*, L. R. 2 P. & D. 8, L. R. 5 C. P. 727.

On a devise to B., widow, for life, and her three daughters, Mary, Elizabeth, and Ann, in fee, an illegitimate daughter, named Elizabeth, claimed as being the only Elizabeth answering the description at the time the will was made, a legitimate daughter Elizabeth having been dead six years previously. It was held that parol evidence was admissible to show that the testator intended his legitimate daughter as devisee, and that he did not know of her death. *Doe v. Beynon*, 12 Ad. & El. 431, 40 E. C. L. 83.

Reputation or Usage.—A will contained a bequest to the "Home of the Friendless in New York." There was no institution of that name. The bequest was claimed by defendant, "The American Female Guardian Society," incorporated by special act of the legislature, whose object and purpose was declared by its charter to be to "establish and maintain houses of industry and homes for the relief of friendless or unprotected children." In other places therein, these were termed home or homes for the friendless. Over its principal building was placed the name "Home for the Friendless;" the corporation was so styled in its circulars, and so, or "Home of the Friendless," indifferently by its officers and friends and by the testator. It was held that said defendant was the beneficiary intended. *Lefevre v. Lefevre*, 59 N. Y. 434. See also *Deaf and Dumb Inst. v. Norwood, Busb. Eq. (N. Car.)* 65; *Newell's Appeal*, 24 Pa. St. 197.

Testator's Declarations.—Where a testator devised land to "the four boys," it was held to be admissible to introduce parol evidence that he had seven sons, three of whom were adults living in their own homes, and the other four were minors living with him, and that his declarations before, at, and after the execution of the will showed that the devise was intended for the minors. *Bradley v. Rees*, 113 Ill. 327, 55 Am. Rep. 422.

Ambiguity Arising from Discrepancy between Name and Description of Devisee.—Where the clause of a will was in these words: "I give and bequeath to my nephew James Vernor Henry, son of my deceased sister Elizabeth," etc., and it was shown by extrinsic evidence that there was a person corresponding to the James Vernor Henry named, but that he was not the testator's nephew or the son of his deceased sister Elizabeth, it was held that explanatory declarations made by the testator at the time of the execution of the will, indicative of his design to give his property in a particular way, were admissible in evidence to explain the ambiguity. *Vernor v. Henry*, 3 Watts (Pa.) 385. See also *In re Gregory's Settlement and Will*, 34 Beav. 600.

1. *Patch v. White*, 117 U. S. 210.

2. **Rule in Case of Misdescription—England.**—*Miller v. Travers*, 8 Bing. 244, 21 E. C. L. 288. See also *Wells v. Wells*, L. R. 18 Eq. 504; *Drake v. Drake*, 8 H. L. Cas. 178.

United States.—*Patch v. White*, 117 U. S. 210; *Gilmer v. Stone*, 120 U. S. 590; *Allen v. Lyons*, 2 Wash. (U. S.) 475.

Connecticut.—*Beardsley v. American Home Missionary Soc.*, 45 Conn. 327.

Illinois.—*Decker v. Decker*, 121 Ill. 341. *Compare Kurtz v. Hibner*, 55 Ill. 514, 8 Am. Rep. 665.

Kentucky.—*Breckenridge v. Duncan*, 2 A. K. Marsh. (Ky.) 50, 12 Am. Dec. 359; *Haydon v. Ewing*, 1 B. Mon. (Ky.) 111; *Tudor v. Terrel*, 2 Dana (Ky.) 47.

Massachusetts.—*Hinkley v. Thatcher*, 139 Mass. 477, 52 Am. Rep. 719. See also *Cleverly v. Cleverly*, 124 Mass. 314.

Missouri.—*Riggs v. Myers*, 20 Mo. 239.

New Hampshire.—*Winkley v. Kaime*, 32 N. H. 268.

New Jersey.—*Taylor v. Tolen*, 38 N. J. Eq. 91.

New York.—*Lefevre v. Lefevre*, 59 N. Y. 434; *Doe v. Roe*, 1 Wend. (N. Y.) 541; *Gardner v. Heyer*, 2 Paige (N. Y.) 11; *Peters v. Porter*, 60 How. Pr. (N. Y. Supreme Ct.) 422; *Connolly v. Pardon*, 1 Paige (N. Y.) 291, 19 Am. Dec. 433; *Smith v. Smith*, 1 Edw. Ch. (N. Y.) 189. See also *Mann v. Mann*, 1 Johns. Ch. (N. Y.) 234.

See also *Washington, etc., University's Appeal*, 111 Pa. St. 572; *Newell's Appeal*, 24 Pa. St. 197; *Hawkins v. Garland*, 76 Va. 149, 44 Am. Rep. 158; *Merrick v. Merrick*, 37 Ohio St. 126, 41 Am. Rep. 493.

Where No Such Person as Named Exists.—Where the testator said in his will, "I give to each of my namesakes, S. G., son of S. G. S., S. G., son of S. G. W., S. G., son of S. G., and S. G., son of Captain J. F. S., a bond of \$1,000 of S. S. railroad," extraneous evidence was held admissible to show that no person answering the description of "S. G., son of Captain J. F. S.," existed, or was

c. CONVEYANCES.—Parol evidence is received to remove like ambiguities arising in case of conveyances.

Where the Description may Apply to More than One Person or Thing.—Thus, parol evidence is admissible where the description of the thing conveyed, or of the parties, is clear upon the face of the deed, but it appears from extrinsic evidence that there is more than one estate or subject-matter of conveyance,¹

intended as the object of the testator's bounty, but that a person known to testator as "S. G., son of Captain J. F. H.," was intended as the object of his bounty. *Hawkins v. Garland*, 76 Va. 149, 44 Am. Rep. 158.

Mistake as Distinguished from Latent Ambiguity.—In *Tucker v. Seaman's Aid Soc.*, 7 Met. (Mass.) 188, a testator gave a legacy to "the Seaman's Aid Society in the city of Boston," which was the correct name of a society. The legacy was claimed by another society called the Seaman's Friend Society. Chief Justice Shaw, in stating the case, said: "It is also, we think, well proved by the circumstances which preceded and attended the execution of the will, as shown by extrinsic evidence, that it was the intention of the testator to make the bequest in question to the Seaman's Friend Society, and at the time of the execution of the will he believed he had done so;" that "the testator was led into this mistake by erroneous information honestly given to him by the person who drew his will;" that "the testator acted on this erroneous information—erroneous as to his real purpose, as it now appears by the evidence—and made the bequest to the Seaman's Aid Society by their precise name and designation." The court, therefore, held that there was simply a mistake, and no latent ambiguity, and that extrinsic evidence was inadmissible. See also *Doe v. Lyford*, 4 M. & S. 550; *Jackson v. Sill*, 11 Johns. (N. Y.) 201, 6 Am. Dec. 363.

Where Testator does Not Own Property Devised.—Where A. devised to his brother H. a lot described in the will as "lot number 6 in square 403, together with the improvements thereon erected," it was held that evidence might properly be received to show that the testator did not and never did own lot number 6 in square 403, which had no improvements thereon, but did own lot number 3 in square 406, which had a house thereon occupied by his tenants. *Patch v. White*, 117 U. S. 210. See *Winkley v. Kaime*, 32 N. H. 268; *Decker v. Decker*, 121 Ill. 341. *Compare* *Judy v. Gilbert*, 77 Ind. 96, 40 Am. Rep. 289.

Parol Evidence Limited to Surrounding Circumstances.—It has been asserted that in the case of a misdescription, parol evidence is admissible only to show the condition of the testator's family and estate and the circumstances by which he was surrounded at the time of making his will. *Patch v. White*, 117 U. S. 210; *Decker v. Decker*, 121 Ill. 341.

But in *Doe v. Roe*, 1 Wend. (N. Y.) 542, where from proof *aliunde* it appeared that the testator did not own property corresponding with that described in his will, it was held that the declarations of the testator or his instructions for the drawing of the will might

be resorted to by way of explanation of what was intended to be devised.

1. Description Applicable to More than One Person or Thing—United States.—*Deery v. Cray*, 10 Wall. (U. S.) 263.

Illinois.—*Billings v. Kankakee Coal Co.*, 67 Ill. 489; *Bybee v. Hageman*, 66 Ill. 519; *Dougherty v. Purdy*, 18 Ill. 206; *Clark v. Powers*, 45 Ill. 283; *Bradish v. Yocum*, 130 Ill. 386. See also *Fisher v. Quackenbush*, 83 Ill. 310.

Kentucky.—*Shelby v. Teris* (Ky. 1890), 14 S. W. Rep. 501.

Maine.—*Emery v. Webster*, 42 Me. 204, 66 Am. Dec. 274; *Tyler v. Fickett*, 73 Me. 410.

Massachusetts.—*Hurley v. Brown*, 98 Mass. 545, 96 Am. Dec. 671; *Chester Emery Co. v. Lucas*, 112 Mass. 424; *Putnam v. Bond*, 100 Mass. 58; *Mead v. Parker*, 115 Mass. 413, 15 Am. Rep. 110; *Hoar v. Goulding*, 116 Mass. 132; *Flagg v. Mason*, 141 Mass. 64; *Woods v. Sawin*, 4 Gray (Mass.) 322; *Davis v. Sherman*, 7 Gray (Mass.) 291.

Minnesota.—*Slosson v. Hall*, 17 Minn. 95. *Missouri.*—*Hardy v. Matthews*, 38 Mo. 122; *Schreiber v. Osten*, 50 Mo. 513; *Coe v. Ritter*, 86 Mo. 277. See also *Jennings v. Brizeadine*, 44 Mo. 334.

New Hampshire.—*Claremont v. Carlton*, 2 N. H. 369, 9 Am. Dec. 88; *Clough v. Bowman*, 15 N. H. 504; *Hall v. Davis*, 36 N. H. 569.

New Mexico.—*Gentile v. Crossan* (N. Mex. 1894), 38 Pac. Rep. 247.

Pennsylvania.—*Hetherington v. Clark*, 30 Pa. St. 393; *Koch v. Dunkel*, 90 Pa. St. 264.

Tennessee.—*Snodgrass v. Ward*, 3 Hayw. (Tenn.) 40.

Texas.—*Early v. Sterrett*, 18 Tex. 116; *Hamman v. Keigwin*, 39 Tex. 34; *Bassett v. Martin*, 83 Tex. 339.

Washington.—*Reed v. Tacoma Bldg., etc., Assoc.*, 2 Wash. 198.

Wisconsin.—*Meade v. Gilfoyle*, 64 Wis. 18.

Canada.—*Clark v. Bonnycastle*, 3 U. C. Q. B. (O. S.) 528.

See also *Holcomb v. Mooney*, 13 Oregon 503.

Illustrations.—Where a lot in a town is described in a deed conveying it, by reference to the plat of the town on file, and there are two plats, and that fact raises a doubt as to the property conveyed, extrinsic evidence is admissible to show the lot intended. *Slosson v. Hall*, 17 Minn. 95. See also *Schreiber v. Osten*, 50 Mo. 513.

Where, however, the land described in a sheriff's deed was incapable of identification without reference to some map, and there were two maps which answered the description equally well, testimony of the sheriff as to which map he referred to in the deed was

or more than one person,¹ whose description follows out and fills the words used in the deed.

Ambiguity as to Consideration.—Similarly, where such ambiguity arises as to the consideration to be paid for the subject-matter conveyed, parol evidence is receivable.²

Where Two Deeds may Apply to the Same Property.—Where there are two deeds, each of an undivided half of certain premises, parol evidence may be admitted to explain a latent ambiguity arising as to whether the two deeds convey

held to be inadmissible. *Cadwalader v. Nash*, 73 Cal. 43.

In an Action by the Holder of a Tax Deed to recover a lot conveyed by it, it appeared that in the city plat the lot was mentioned as "lot 5, block 144, C.'s addition to the city of D.," and that in the tax list and in plaintiff's deed it was described as "lot 5, block 144, East D., A. county, Colo.," it was held that parol evidence was admissible to show that the two descriptions applied to the same property, and that the property was as well known by one description as by the other. *Sullivan v. Collins*, 20 Colo. 528.

The Description of Real Estate in a Mortgage was "one acre and a half in the north-west corner of section five (5), together with the brewery, malthouse, all buildings thereon, and fixtures contained therein, situated in the county of McDonough, and state of Illinois," without giving any township and range. It was held, that as there were several sections in that county bearing the same number, the ambiguity was a latent one, and was susceptible of explanation by evidence *dehors* the deed, to show in what township and range the land was situated. *Bybee v. Hageman*, 66 Ill. 519.

Where there Are Two or More Monuments, either of which may be that designated in a deed, parol evidence is admissible to show which is the one intended. *Clough v. Bowman*, 15 N. H. 504. See *Shelby v. Teris* (Ky. 1890), 14 S. W. Rep. 501; *Koch v. Dunkel*, 90 Pa. St. 264; *Curtis v. Aaronson*, 49 N. J. L. 68, 60 Am. Rep. 584; *Opdyke v. Stephens*, 28 N. J. L. 83; *Waterman v. Johnson*, 13 Pick. (Mass.) 261; *Flagg v. Mason*, 141 Mass. 64.

Where a Deed Described a Boundary, as follows: "*Por del camino a las lomas*," meaning "and from the road to the hills," and there was strong evidence that "*las lomas*" signified in that vicinity a certain kind of hills, it was held that the use of the terms constituted a latent ambiguity which could be explained by parol evidence. *Gentile v. Crossan* (N. Mex. 1894), 38 Pac. Rep. 247.

Where a Deed Calls for a Certain Named Stream having two forks, each of which has, at different times, been designated by the name of the stream, it has been held that parol evidence is admissible to explain the ambiguity. *Bassett v. Martin*, 83 Tex. 339.

Where there Are Two Lanes, to either of which the description in a deed might apply, parol evidence is receivable to show which lane was intended as a monument. *Thornell v. Brockton*, 141 Mass. 151.

Where Boundary is Variable.—Where the deed described the land as bounded on a certain pond, and upon applying the deed to the local objects embraced within its descriptive terms, it appeared that the pond was a natural pond which was raised more or less at different times by means of a dam existing and in use at the time of the conveyance, so that there was a latent ambiguity, it was held competent for a party to prove by parol evidence, that a certain line was agreed on and understood at the time of the conveyance as the boundary of the pond. *Waterman v. Johnson*, 13 Pick. (Mass.) 261. See also *Horner v. Stillwell*, 35 N. J. L. 307.

1. *Peabody v. Brown*, 10 Gray (Mass.) 45; *Simpson v. Dix*, 131 Mass. 179; *Kingsford v. Hood*, 105 Mass. 495; *Begg v. Begg*, 56 Wis. 534.

If land is conveyed to J. S., and there are two persons of that name, a father and son, and there is no presumption that the father is intended, evidence is receivable to show who is the grantee. *Simpson v. Dix*, 131 Mass. 179; *Begg v. Begg*, 56 Wis. 534; *Begg v. Anderson*, 64 Wis. 207.

Thus, under these circumstances, it was held competent to show that the deed was delivered to one of the two, and that he entered on and occupied the land. *Kingsford v. Hood*, 105 Mass. 495. See *Coit v. Starkweather*, 8 Conn. 289.

Where there Is Ambiguity Taking the Name and Addition Together.—Where, taking the name and addition together, the deed fully applies to neither, it falls within the rule of a latent ambiguity, and may be explained by parol evidence. Thus a deed to "Hiram Gowing, cordwainer," may be shown by parol evidence of the previous negotiations between the parties to have been intended for Hiram G. Gowing, his son, who was but thirteen years old. *Peabody v. Brown*, 10 Gray (Mass.) 45.

2. **Ambiguity in Consideration.**—Where the consideration specified in a deed was eight thousand dollars for four hundred acres of land, and it was subsequently ascertained that there were four hundred and sixty-eight acres in the tract, which was described by metes and bounds, on the question as to whether the grantor should recover for the additional sixty-eight acres, it was held that the sale was *prima facie* a sale in gross, but that the price being an exact multiple of the number of acres, such an ambiguity is created as to admit of parol evidence of the actual intention of the parties. *Hansford v. Chesapeake Coal Co.*, 22 W. Va. 70.

A deed from a father to a son expressed the consideration to be a certain cash payment and

separate portions of the premises, or whether the second deed was intended merely as a substitute for the first.¹

Where there is a misdescription in a conveyance, either as to the name of a party,² or as to the location of the property intended to be granted or sold,³ parol evidence may be received to show the real party intended, or to show that

"one thousand dollars * * * bearing interest at * * * eight per cent. per annum from date * * * until paid (if claimed)." A purpose of the father to advance one thousand dollars to each of his children was shown. It appeared also that from the date of the deed the son began to care for his father's brother, F., in accordance with a stipulation with his father, that the interest should be paid in that manner. By will, the father afterwards provided that the interest might be discharged by supporting the said F. It was held that the recital, "if claimed," applied to the interest alone. *Stautzenberger v. Stautzenberger* (Tex. 1891), 17 S. W. Rep. 1046.

1. Two Deeds Applying to Same Property.—Where in a real action the demandant put in evidence two deeds each of an undivided half of the premises, extrinsic evidence was held to be admissible on the question whether the two deeds conveyed separate portions of the premises, or whether the second deed was intended merely as a substitute for the first on account of some real or supposed defect therein. *Fisk v. Fisk*, 12 Cush. (Mass.) 150. See also *McGregor v. Brown*, 5 Pick. (Mass.) 170. In giving the opinion of the court in *Fisk v. Fisk*, 12 Cush. (Mass.) 150, Shaw, C. J., said: "Each was in terms for a moiety. This was equivocal. It might be the same or different. It was a latent ambiguity. There was nothing ambiguous on the face of either. It was when both were produced, one whole and one mutilated, whether they related to the same or different moieties, and this let in evidence *aliunde*, according to the well-known rule."

Where there is an agreement to sell lands charged with the mortgage of a certain amount, and two deeds are made conveying the land mentioned in the agreement in different parcels, each of which charges the land therein described with the mortgage of the amount named in the agreement, but does not, in terms, refer to the other deed or mortgage, the fact that it is the only mortgage, and the location of the lands, may be given in evidence by way of explanation. *Thayer v. Torrey*, 37 N. J. L. 339.

2. Misdescription in Name of Party.—*Harris v. Doe*, 4 Blackf. (Ind.) 369; *Scanlan v. Wright*, 13 Pick. (Mass.) 530, 25 Am. Dec. 344; *Staak v. Sigelkow*, 12 Wis. 234.

A grant was issued to Alfred Brown. There was no such person. It was held that this made a case of latent ambiguity, and that evidence *aliunde* was admissible to show who was the person named. *Bowen v. Slaughter*, 24 Ga. 338, 71 Am. Dec. 135. See also *Walker v. Wells*, 25 Ga. 141, 71 Am. Dec. 164; *Doe v. McMath*, 38 Ga. 648.

3. Misdescription in Location of Property.—*Sharp v. Thompson*, 100 Ill. 448, 39 Am. Rep. 61; *Mason v. Merrill*, 129 Ill. 503; *Chicago Dock, etc., Co. v. Kinzie*, 93 Ill.

428; *McLennan v. Johnston*, 60 Ill. 306; *Sullivan v. Collins*, 20 Colo. 528; *Abbott v. Abbott*, 51 Me. 575; *Crafts v. Hibbard*, 4 Met. (Mass.) 438; *Morton v. Jackson*, 1 Smed. & M. (Miss.) 494, 40 Am. Dec. 107; *Edwards v. Tipton*, 77 N. Car. 222; *Webb v. Frazar* (Tex. Civ. App. 1895), 29 S. W. Rep. 665; *Thompson v. Jones*, 4 Wis. 106. See also *Terry v. Berry*, 13 Nev. 514.

Where the premises conveyed are described by the number of the lot and block in a certain town, according to the plat of the same, and it appears that there is no block of that number in the plat of the town, nor of any of the additions save one, and that at the date of the deed that addition was within the corporate limits of the town, the reference to the plat will be rejected, and the deed held to convey the designated lot in the designated block in that addition. *Slosson v. Hall*, 17 Minn. 95. See also *Sharp v. Thompson*, 100 Ill. 448, 39 Am. Rep. 61.

Where the owner of city lots also owns an adjoining strip of land which was once a street, but which has been vacated, and there is a deed from him of the lots and street, there being no other street to which he has title, it has been held that parol evidence is admissible to show that title to such strip of land was intended. *Mason v. Merrill*, 129 Ill. 503.

Tax Deed.—In *Curtis v. Brown County*, 22 Wis. 167, it was held that where there were two additions to a town, called respectively A's addition and A's second addition, and certificates of tax sales and tax deeds were made of lots of specified numbers "in A's addition," there being lots so numbered in A's second addition, but not in the other, parol evidence could not be received to show that A's second addition was meant, and the certificates and deeds were invalid. *Dixon, C. J.*, giving the opinion of the court, said: "The counsel for plaintiff are fully sustained by authority and correct in the position that a false or mistaken description of the land in proceedings to enforce the collection of taxes avoids the sale, certificate or deed. The reasons are obvious. The officers are engaged in the exercise of mere naked statutory powers which must be strictly pursued and the execution of which can only be shown by the acts of the officers themselves, evidenced in the manner prescribed by the statute. The certificate is the sole evidence of the land sold; and the deed, of that conveyed; and, hence, parol evidence cannot be received to aid or correct a description which is false or mistaken. For the same reason, also, no part of the description can be rejected as surplusage, or words omitted be supplied as in similar transactions between private individuals. The officers must be presumed to have no intention different from that expressed by their acts."

the grantor had no property situate in the place stated in the deed, but had just such as the deed described, in another place.

d. CONTRACTS.—In the same way, parol evidence is admissible to explain a latent ambiguity in contracts in general.¹

Where there Are Two Subject-matters to Which Contract may Apply.—Thus parol evidence may be admitted where it appears from extrinsic evidence that there are two persons, or objects, or modes of performance, corresponding to the terms of the contract.²

But by statute in *Wisconsin* the rule in regard to the admission of parol evidence to explain a latent ambiguity in the case of a tax deed is the same as in an ordinary conveyance. *Meade v. Gilfoyle*, 64 Wis. 18. See also *Jenkins v. Sharp*, 27 Wis. 472.

1. General Rule as to Contracts.—*Alabama.*—*Smith v. Aikin*, 75 Ala. 209.

Connecticut.—*Collins v. Driscoll*, 34 Conn. 43.

Illinois.—*School Trustees v. Rodgers*, 7 Ill. App. 33.

Louisiana.—*Thomson v. Brothers*, 5 La. 279.

Maine.—*Patrick v. Grant*, 14 Me. 233.

Maryland.—*McCann v. Preston*, 79 Md. 223.

Massachusetts.—*Gerrish v. Towne*, 3 Gray (Mass.) 82.

Michigan.—*Wickes v. Swift Electric Light Co.*, 70 Mich. 322.

Missouri.—*Hardy v. Matthews*, 38 Mo. 122; *McClellan v. Reynolds*, 49 Mo. 312; *Shuetze v. Bailey*, 40 Mo. 69.

New York.—*Howlett v. Howlett*, 56 Barb. (N. Y.) 468; *Cole v. Wendel*, 8 Johns. (N. Y.) 116; *Manchester Paper Co. v. Moore*, 104 N. Y. 680.

Ohio.—*Webster v. Paul*, 10 Ohio St. 531.

Pennsylvania.—*McCullough v. Wainright*, 14 Pa. St. 171. See also *Brown v. Brooks*, 25 Pa. St. 210.

Tennessee.—*Mumford v. Memphis, etc., R. Co.*, 2 Lea (Tenn.) 393, 31 Am. Rep. 616.

Texas.—*Busby v. Bush*, 79 Tex. 656.

2. See cases in note immediately preceding.

Where there Are Two Persons.—Where a bond was given describing the obligees as "board of trustees of township number 5, range number 9," but omitting the name of the county, there was held to be a latent ambiguity that might be aided by averment. *School Trustees v. Rodgers*, 7 Ill. App. 33. Wall, P. J., in giving the opinion of the court, said: "Looking at this instrument alone it cannot be said that it would convey the notion that there is more than one township to which the description given could refer. It is only when we consider in connection with it the map of the state, and note the fact that townships may be north or south of base lines, and east or west of principal meridians, and that the boundaries of Illinois would include several townships, 5, 9, that ambiguity is manifest."

Where there Are Two Objects.—An agreement in writing to convey "the wharf and flats occupied by T. and owned by H." may be applied to the subject-matter by parol evi-

dence; and, on parol proof that two lots of land, only one of which is bounded on the sea and each separated from the other by a street, were both at the time of the agreement owned by H. and occupied by T. for the purpose of landing and storing wood and lumber, and known as T.'s wharf, and had, before the laying out of the street, formed parts of one entire lot, and been used together and occasionally covered with tide water, binds the party to convey both lots. *Gerrish v. Towne*, 3 Gray (Mass.) 82. See also *Hardy v. Matthews*, 38 Mo. 122.

B was appointed ticket agent of a certain railroad at Memphis, and gave bond for the performance of his duties as such. There were two ticket offices kept by the company there, the one at the depot, and the other on Court street; but B's bond did not show to which he was appointed. It was held that these facts presented a case of latent ambiguity, which might be removed by introducing parol evidence to show to which B's appointment related. *Mumford v. Memphis, etc., R. Co.*, 2 Lea (Tenn.) 393, 31 Am. Rep. 616.

Goods carried by sea were, by the terms of the bill of lading, to be delivered "at the Essex Railroad Wharf." The Essex Railroad Company owned but one wharf, which was by the side of their road, above two drawbridges. It was held, that, for the purpose of showing that a wharf called Phillips's Wharf, below the bridges, was the wharf intended by the parties, evidence was admissible that that wharf was generally known as the Essex Railroad Wharf, and was used by the railroad company to receive merchandise at; that more freight was charged at the port of shipment for vessels which had to pass drawbridges than for those which had not; that this vessel had previously delivered goods to the same consignee at the lower wharf; and that the upper wharf was more difficult and dangerous of access, and could not be safely approached by vessels of this size. *Sutton v. Bowker*, 5 Gray (Mass.) 416.

Where there Are Two Modes of Performance.—There being two well-recognized forms of measuring lumber, a contract to saw at "two dollars per thousand feet" was held to contain a latent ambiguity explainable by parol evidence of the parties' intention. *Smith v. Aikin*, 75 Ala. 209.

Where land was conveyed "with the privilege of deepening the ditch leading from the premises, to drain the same over the grantor's land as deep as the grantee may desire," and the ditch then existing was six feet wide at the top and two feet at the bottom, and six

One or the Other of the Two Things must be Intended.—But a case of latent ambiguity which may be explained by parol evidence does not exist where, according to the language of the contract, the parties may have intended either of the two things in which the difference is claimed to exist. The thing must be different, and the parties must, on account of such difference, have intended one and not the other.¹

Likewise, where there is a Misdescription of a person or thing in a contract, as where no such person² or thing³ exists, parol evidence to show the person or thing intended is admissible.

3. Ambiguity of Intermediate Class.—In the case of ambiguities of the intermediate class, parol evidence may be admitted to show the circumstances under which the instrument was made, and the subject-matter to which it refers.⁴

4. Object of Evidence.—Extrinsic evidence is received, not for the purpose of importing into the writing an intention not expressed therein, but simply with the view of elucidating the meaning of the words employed; and, in its admission, the line which separates evidence which aids the interpretation of what is in the instrument from direct evidence of intention independent of the instrument must be kept steadily in view, the duty of the court being to declare the meaning of what is written in the instrument, not of what was intended to be written.⁵

feet deep, and, to deepen it, required either curbing or widening the ditch at the top, it was held that parol evidence was admissible to show that the latter method was the usual mode of ditching swamp lands. *Collins v. Driscoll*, 34 Conn. 43.

Where, by the terms of a contract, it was specified that the supplies for a paper mill were to be furnished at the "ruling market rates," and extrinsic evidence disclosed the fact that the market rates for chemicals bought of importers were a fraction below the market rates for the same goods as sold by jobbers among the other supplies necessary for the manufacture of paper, it was held that the fact thus disclosed raised a latent ambiguity which it was competent to explain by parol testimony. *Manchester Paper Co. v. Moore*, 104 N. Y. 680.

A, by a written contract, agreed to receive of B sixty shares of the Hudson Bank (on which ten dollars per share had been paid), and to deliver B his note for six hundred and sixty-seven dollars, and pay him the balance in cash, and also to pay five per cent. advance. The nominal amount of each share being fifty dollars, parol evidence was held admissible to explain the written contract, or whether the five per cent. advance was to be paid on the sum paid in on each share only, or on the nominal amount. *Cole v. Wendel*, 8 Johns. (N. Y.) 116.

1. *Smith v. Jeffries*, 15 M. & W. 561.

Thus, where a contract in writing provided that hogs were to be shipped to New York by one of the parties who had made an advance on them to the other party; and evidence was offered to show that there were two usual or ordinary routes of shipping hogs, and that, at the time of making the written contract, it was verbally agreed that one of the routes should be selected, it was held that the evidence was inadmissible. *Webster v. Paul*, 10 Ohio St. 532.

2. Where a Stock Certificate was issued by a bank in the name of George Burnham instead of Jonathan L. Burnham, it was held that this was a case of misdescription constituting a latent ambiguity, and that parol evidence was admissible to show that Jonathan L. Burnham was the real grantee. *Cleveland v. Burnham*, 64 Wis. 354.

3. Where in a contract lead was described as being of "Walker, Parker and Walker" brand, and it appeared from extrinsic evidence that no such brand existed, it was held competent to prove by parol evidence that there was no firm with this name in the trade other than the firm of "Walker, Parker, Walker and Co." *Pollen v. Leroy*, 30 N. Y. 559.

Where the Misdescription is Accidental.—In *Commercial Bank v. Clapier*, 3 Rawle (Pa.) 335, Gibson, C. J., in commenting upon an ambiguity in a note, said: "Necessity, however, not accident, is the foundation of parol evidence to explain a latent ambiguity; such evidence being indispensable to distinguish a person or thing called by the right name, from another person or thing bearing the same name, or to ascertain a person or thing purposely miscalled. * * * In the case at bar there certainly was no intention to describe the note otherwise than as it was supposed to exist, and that it was not truly described is attributable to misapprehension. The instrument, then, being free from intentional ambiguity, would at law be left to its technical meaning. On the proofs in the cause, however, it would undoubtedly be reformed in equity."

4. See cases cited *supra*, this title, *Ambiguity of Intermediate Class*.

5. *England*.—*Clementson v. Gandy*, 1 Keen 309.

United States.—*Hanner v. Moulton*, 23 Fed. Rep. 5.

AMBIGUOUS. (See the title AMBIGUITY.)—Doubtful or uncertain, particularly in respect to signification ; equivocal, as an ambiguous course, an ambiguous expression ; synonymous with indeterminate, indefinite, doubtful, uncertain, unsettled, indistinct, equivocal.¹

AMBROTYPEPIST.—See note 2.

AMBUSH.—The noun “ambush” means, first, the act of attacking an enemy unexpectedly from a concealed station ; second, a concealed station, where troops or enemies lie in wait to attack by surprise ; an ambuscade ; third, troops posted in a concealed place, for attacking by surprise. The verb “ambush” means to lie in wait ; to surprise ; to place in ambush.³

AMENABLE.—To be “amenable” is to be liable to answer, responsible, answerable, liable to be called to account.⁴

AMEND—AMENDMENTS.—As to amendments of pleadings, indictments, process, etc., see vol. 1, ENCYC. OF PLEADING AND PRACTICE, title AMENDMENTS, for an exhaustive treatment ; as to amendments of statutes, see the title STATUTES ; as to amendments of constitutions, see the title CONSTITUTIONAL LAW.

The word “amend” came into our language from the French *amender*, the root or parent word being *menda*, a fault, and means, in its most comprehensive sense, to better. It is so defined by all the leading lexicographers ; to make better ; to change from bad to better.⁵

Alabama.—Hughes *v.* Wilkinson, 35 Ala. 453 ; Guilmartin *v.* Wood, 76 Ala. 204.

Arkansas.—Dorr *v.* School Dist. No. 26, 40 Ark. 237.

Georgia.—Cooper *v.* Berry, 21 Ga. 526 ; Hill *v.* Felton, 47 Ga. 455, 15 Am. Rep. 643.

Illinois.—Decker *v.* Decker, 121 Ill. 341 ; Bradish *v.* Yocum, 130 Ill. 395, citing 1 Am. and Eng. Encyc. of Law (1st ed.), p. 532.

Maryland.—Clarke *v.* Lancaster, 36 Md. 196, 11 Am. Rep. 486 ; Planters' Mut. Ins. Co. *v.* Deford, 38 Md. 382.

Massachusetts.—Brown *v.* Saltonstall, 3 Met. (Mass.) 423.

Michigan.—Waldron *v.* Waldron, 45 Mich. 350.

New Jersey.—Den *v.* Cubberly, 12 N. J. L. 308 ; Evens *v.* Griscom, 42 N. J. L. 579, 36 Am. Rep. 542.

New York.—Jackson *v.* Sill, 11 Johns. (N. Y.) 201, 6 Am. Dec. 363 ; Bell *v.* Holford, 1 Duer (N. Y.) 58 ; Peters *v.* Porter, 60 How. Pr. (N. Y. Supreme Ct.) 422.

Texas.—Franklin *v.* Mooney, 2 Tex. 452 ; Epperson *v.* Young, 8 Tex. 135.

Virginia.—Crawford *v.* Jarrett, 2 Leigh (Va.) 630.

Wisconsin.—Staak *v.* Sigelkow, 12 Wis. 234.

1. Webster's Dict., followed in Kraner *v.* Halsey, 82 Cal. 209. That case arose upon an alleged ambiguity in a pleading. See generally ENCYC. OF PLEADING AND PRACTICE, title DEFINITENESS AND CERTAINTY IN PLEADING.

2. **Expert Testimony.**—An *ambrotypist* was held a competent expert to give an opinion on the question whether photographs were well executed. The court said : “The *ambrotypist* or *daguerreotypist*, whatever title he may give himself, is rather an artisan than an artist. His labor is more manual than mental. He works more by rule than under the inspiration of genius. The process by which he

accomplishes his undertaking is mainly mechanical ; and success in his vocation demands, not creative power, but dexterity, contrivance, and the skillful application of fixed rules.” Barnes *v.* Ingalls, 39 Ala. 201.

3. Dale County *v.* Gunter, 46 Ala. 142. See also the title HOMICIDE.

4. **Obedient—Amenable.**—Miller *v.* Com., 1 Duv. (Ky.) 18. In that case it was held that an undertaking in which the defendant rendered himself “obedient” to the orders and processes of a court, was equivalent to the statutory form, “shall render himself *amenable*,” etc.

5. Diamond *v.* Williamsburgh Ins. Co., 4 Daly (N. Y.) 500 ; State *v.* White, 16 R. I. 595.

Amendment is the espying out of some error in the proceedings and correcting of it before judgment, and after, if the error be not in the giving of judgment, the remedy in that case being by writ of error. Diamond *v.* Williamsburgh Ins. Co., 4 Daly (N. Y.) 500.

Pleading.—An *amendment* is the correction of some error or mistake in a pleading already before the court, and there must, therefore, be something to amend by ; whereas, the insertion of facts constituting a new cause of action or defense would be a substituted pleading and not an *amendment* of an existing pleading. Woodruff *v.* Dickie, 31 How. Pr. (N. Y. Supreme Ct.) 164 ; Givens *v.* Wheeler, 6 Colo. 151.

But in Diamond *v.* Williamsburgh Ins. Co., 4 Daly (N. Y.) 494, this definition is *criticised* as too narrow.

Same—Application for Discharge in Bankruptcy.—A statute provided that the application should be subject to *amendment* at the discretion of the court. The court said : “What are we to understand by the term ‘subject to *amendment*,’ used in this section ? Does it mean that other and different causes

AMERCEMENT. (See also the titles FINES AND PENALTIES; SHERIFF.)—A pecuniary penalty or fine imposed upon an offender at the discretion of the court.¹

AMICABLE. See note 2.

specified in section 5110 may be added, as they may be discovered from time to time, after the lapse of two years, and while the matter is still pending? An *amendment* is the correction of errors omitted in the progress of a cause. It may be in the statement of the cause of action, in its form, and it is allowed to make more definite and certain a defectively-pleaded cause of action. It is not allowed to make an entirely new case. A new case is not to be regarded as an *amendment*." *In re Sims*, 9 Fed. Rep. 441.

Abrogation.—A law cannot be said to be either revised or *amended* when it is abrogated altogether. *Falconer v. Robinson*, 46 Ala. 348.

1. Rapalje and Lawrence Law Dict., *sub voce*.

Distinguished from Fine.—Anciently there was an important distinction between an *amercement* and a fine. A fine was a certain punishment growing expressly out of some statute, and was always imposed and assessed by the court; an *amercement* was imposed by the court in general terms (*quod sit in misericordia*; that the party be in mercy), and was afterwards assessed or affeered (that is, moderated and reduced to a certain sum) by the peers or equals of the party, who were hence called "affeerors." *Brook v. Hustler*, 1 Salk. 56, 3 Salk. 33. See also *Beecher's Case*, 8 Coke 58; *Godfrey's Case*, 11 Coke 42, Co. Litt. 126b, Elph. Int. Deeds 560.

The term *amercement* was also applied more particularly to pecuniary punishments imposed upon the officers of courts, as sheriffs and coroners, and the word is still used in this sense. In other respects, however, no essential distinction remains between an *amercement* and a fine. *Amercements*, in their ancient technical sense, are entirely disused in modern practice. *Burrill's Law Dict.*, *sub voce*.

2. **Amicable Action.**—An *amicable* action or lawsuit is one instituted seriously, but in a friendly spirit, that some matter in controversy may be settled definitely, as cheaply and with as little delay as possible. *Thompson v. Moulton*, 20 La. Ann. 537.

A brought a suit against B, and then entered into an arrangement with him, by which it was agreed that the suit should be discontinued, and an *amicable* action against B be brought at the same term. C then covenanted with A, that if A should recover from B in the *amicable* action, C would be surety for the payment. B was declared bankrupt, and when A applied to the court for leave to discontinue the action and enter an *amicable* action, B objected. The court, nevertheless, granted permission, and B appeared and pleaded his certificate. It was held that C was answerable under his agreement. *Brackenridge, J.*, said: "I would have taken it that the terms of the agreement of the 15th April, 1800, would have been an-

swered by a proceeding under the action as it was originally entered; for the word *amicable* is not of substance, the meaning being an action to be entered. Whether *amicable* or adverse could not be material, and was used only as that was the form of action that was then contemplated; but *ex majori cautela* and to avoid exceptions, it was discontinued, and the term *amicable* entered in the form of the new action, to which entry of the action it is alleged that the defendant in that action named did not consent. But the court, on hearing, so ordered it, which, under the circumstances of the case, they conceived themselves to have the power to do. This, I take it, cannot now be controverted. But if it could, the appearance of the defendant to the new action is a *ratihabitio*, and amounts to an assent originally given." *Bond v. Gardiner*, 4 Binn. (Pa.) 269.

Same—Distinguished from Collusive or Fictitious Action.—See also ENCYC. OF PLEADING AND PRACTICE, titles APPEALS, vol. 1, p. 341, DISMISSAL; DISCONTINUANCE AND NONSUIT. In *Lord v. Veazie*, 8 How. (U. S.) 255, the court said: "The suit is spoken of, in the affidavits filed in support of it, as an *amicable* action, and the proceeding defended on that ground. But an *amicable* action, in the sense in which these words are used in courts of justice, presupposes that there is a real dispute between the parties concerning some matter of right. And in a case of that kind it sometimes happens that, for the purpose of obtaining a decision of the controversy, without incurring needless expense and trouble, they agree to conduct the suit in an *amicable* manner; that is to say, that they will not embarrass each other with unnecessary forms or technicalities, and will mutually admit facts which they know to be true, and without requiring proof, and will bring the point in dispute before the court for decision, without subjecting each other to unnecessary expense or delay. But there must be an actual controversy and adverse interests. The amity consists in the manner in which it is brought to issue before the court. And such *amicable* actions, so far from being objects of censure, are always approved and encouraged, because they facilitate greatly the administration of justice between the parties. The objection in the case before us is, not that the proceedings were *amicable*, but that there is no real conflict of interest between them; that the plaintiff and defendant have the same interest, and that interest adverse and in conflict with the interest of third persons, whose rights would be seriously affected if the question of law was decided in the manner that both of the parties to this suit desire it to be."

Amicable Compounders. (See also the title ARBITRATION AND AWARD.)—The Louisiana Civil Code, art. 3076, under the title of "Arbitration," recognizes two classes of arbitrators:

AMICUS CURIAE. (See ENCYC. OF PLEADING AND PRACTICE, titles ARGUMENTS OF COUNSEL, vol. 2, p. 758; FRIEND OF COURT.)—A friend of the court; one who suggests something for the information of the court.¹

AMITY.—See note 2.

AMNESTY. (For a full treatment of the subjects of Pardons and Amnesty, see the title PARDON.)—Amnesty is a general pardon granted to a class of persons by law or proclamation.³ An "amnesty" is an act of oblivion or forgetfulness.⁴

"the arbitrators, properly so called," and "the *amicable* compounders." The following article defines the difference between them, as to the principles by which they are to be guided in the discharge of their duty: "The arbitrators," says article 3077, "ought to determine, as judges, agreeably to the strictness of the law. '*Amicable* compounders' are authorized to abate something of the strictness of the law in favor of natural equity." *Bird v. Laycock*, 7 La. Ann. 171.

Same—Distinguished from Arbitration.—Of the terms "arbitration" and "*amicable* lawsuit" as understood in their common and usual signification, the former means a reference or submission of a matter in dispute to the decision of one or more persons as arbitrators, whilst the latter, "an *amicable* lawsuit," is one instituted in a court of justice seriously, but in a friendly spirit, in order that some matter in controversy may, by a judicial decree, be settled definitely, as cheaply, and with as little delay, as possible. *Thompson v. Moulton*, 20 La. Ann. 535.

Same—Amiables Compositeurs.—In *Rolland v. Cassidy*, 57 L. J. P. C. 100, L. R. 13 App. Cas. 770, it was said: "What is the force and meaning of that expression '*amiables compositeurs*,' by Canadian law? We find it in the 1346th article of the Code of Civil Procedure: 'Arbitrators must hear the parties, and their respective proofs, or establish default against them, and decide according to the rules of law, unless they are dispensed from so doing by the terms of the submission, or unless they have been appointed as *amiables compositeurs*.' That is to say, if they are *amiables compositeurs*, they are to be exempt at all events from the strictness of the obligations expressed in the previous words. * * * Their lordships would, no doubt, hesitate much before they held that to entitle arbitrators named as *amiables compositeurs* to disregard all law, and to be arbitrary in their dealings with the parties; but the distinction must have some reasonable effect given to it, and the least effect which can reasonably be given to the words is, that they dispense with the strict observance of those rules of law the non-observance of which, as applied to awards, results in no more than irregularity."

1. An *amicus curiae*, in practice, is one who, as a stander-by, when a judge is doubtful or mistaken in a matter of law, may inform the court. *Bouv. Law Dict.*, followed in *Birmingham Loan, etc., Co. v. Anniston First Nat. Bank*, 100 Ala. 249.

This term is usually applied to a counselor of a court, who, being present, makes some suggestion to the court in regard to the mat-

ter pending. It is more rarely applied to counsel arguing in a cause, *e. g.*: "The case was elaborately argued by Fisher for the petitioner, and Fry, who was counsel in a similar case, as *amicus curiae*." See *Ex p. Yeager*, 11 Gratt. (Va.) 656; *Ex p. Randolph*, 2 Brock. (U. S.) 461.

It is also applied to the parties to actions, suggesting or showing something for their own benefit. *The Prince's Case*, 8 Coke 29.

So of persons who have no right to appear in a suit, but are allowed to introduce evidence to protect their own interests. See *Bass v. Fontleroy*, 11 Tex. 698.

Finally, of any stranger who, being in court, calls the court's attention to some error in its proceedings. *Falmouth v. Strode*, 11 Mod. 137; *Williams v. Blunt*, 2 Mass. 215.

"Any one, as *amicus curiae*, may make application for, and in the behalf of, an infant, though no relation." *Beard v. Travers*, 1 Ves. 313.

2. **Treaty—Statute.**—A treaty of *amity* has been held to be the equivalent of a treaty of peace; and the use of the term "in *amity*" in a statute which made the killing of an Indian a crime punishable with death, was held to mean nothing more nor less than that such an act was a crime as long as peace continued. *Love v. U. S.*, 29 Ct. of Cl. 342.

3. *Davies v. McKeeby*, 5 Nev. 373.

4. *Ex p. Law*, 35 Ga. 296; *State v. Blalock*, Phil. (N. Car.) 247.

The word *amnesty* does not belong to the common law, and has no technical meaning in it, and can be used in it only in the meaning of its synonym in our language, and that is oblivion. For the derivative and literal meaning of *amnesty* is removed from memory; and, in the English law, oblivion is the synonym of pardon, and is so used in it. *Knote's Case*, 10 Ct. of Cl. 407.

Distinguished from Pardon. (See also the title PARDON.)—*Amnesty* and pardon are very different. A pardon is granted to one who is certainly guilty, sometimes before but usually after conviction, and the court takes no notice of it unless pleaded, or in some way claimed, by the person pardoned; and it is usually granted by the crown or by the executive. But *amnesty* is granted to those who may be guilty, and is usually granted by parliament or the legislature, and to whole classes, before trial. *Amnesty* is the abolition or oblivion of the offense; pardon is its forgiveness. *State v. Blalock*, Phil. (N. Car.) 247. See also *U. S. v. Wilson*, 7 Pet. (U. S.) 150.

President's Proclamation. (See also the title PARDON.)—The general *amnesty* granted by the President, Dec. 25, 1868, does not entitle

AMONG.—See note 1.

one receiving its benefits to the proceeds of his property previously condemned and sold under the Confiscation Act of 1862, after such proceeds have been paid into the U. S. treasury. *Knote v. U. S.*, 95 U. S. 149. See also, as regards the President's proclamation, *Carlisle v. U. S.*, 16 Wall. (U. S.) 147; *Gay v. U. S.*, 13 Wall. (U. S.) 358; *U. S. v. Klein*, 13 Wall. (U. S.) 128.

1. Wills—Power of Appointment. (See also the title **POWERS**.)—A direction by a testator to distribute his property *among* his children would not authorize the distribution of all the property to one child, nor that one be wholly excluded. *Hudsons v. Hudson*, 6 Munf. (Va.) 353. To the same effect, see *Den v. Crawford*, 8 N. J. L. 90; *Knight v. Yarbrough*, Gilmer (Va.) 27; *Thrasher v. Ballard*, 35 W. Va. 526.

But in *Ingraham v. Meade*, 3 Wall. Jr. (C. C.) 32, it was held that a power to appoint "*among* such of the children of R. and M., and in such proportions, as M. shall appoint," was an exclusive power; that is to say, M. might entirely exclude certain children if she pleased.

Wills—Between and Among. (See also **BETWEEN**.)—In *Senger v. Senger*, 81 Va. 698, the counsel for the appellant suggested a distinction between the prepositions "between" and *among*. The court, while recognizing that the prepositions might express different ideas, said: "But when they follow the verb 'divide' [as they did in that case], their general signification is very similar and in popular use they are considered synonymous; though *among* denotes a collection, and is never followed by two of any sort, whilst 'between' may be followed by any plural number, and seems to denote rather the individuals of the class than the class itself generically."

And so, in *Hicks's Estate*, 25 W. N. C. (Pa.) 500, a similar conclusion was reached. Here the testator directed that his property should be equally divided between his wife and two daughters. It was held that "between" was used in the sense of *among*, and that each legatee took one-third. On appeal, *Hicks's Estate*, 134 Pa. St. 508, in supporting this decision, the court said: "It is now contended by the widow that her late husband intended his estate to be divided into two equal shares, she being entitled to one share, and that remaining to be equally divided between his two daughters; and that such was his intention is shown by the use of the preposition 'between,' which can only be properly construed by giving it its correct and accurate signification; and, as it applies properly only to the case of two parties, two objects, two points, or two classes, we must conclude that testator's meaning was thus to divide his estate between his wife and daughters, the former taking one share and the latter another share. But we do not think such was his intention. If testator had used the common preposition *among* or *amongst*, it is conceded there would be no room for argument. And it needs no il-

lustration to show the frequent and familiar use of the word 'between,' even by well-educated and otherwise accurate linguists, when *among* is intended."

But in *Ihrle's Estate*, 162 Pa. St. 369, it was held that where a testator provides that the residue of her estate is to be divided "between" her husband's grandchildren and the children of another, the presumption is in favor of the word "between" referring to two, and not to more in the sense of *among*, and the residuary estate is correctly distributed in two parts *per stirpes*. The court said: "The word 'between' refers properly to two, and not more. It is true that it is not unfrequently used, especially by the uneducated, and colloquially, in the sense of *among*, as referring to more than two objects. But that admittedly is not its correct use. The presumption is in favor of the proper and correct use of words, whether technical or belonging to the language of ordinary life. If we rest on this presumption, the distribution of the residuary estate into two parts was right."

Wills—Equal among.—A testator devised his estate to his wife for life, and, after making a provision for his daughter and a provision for his daughter-in-law, directed "the remainder of my estate to be divided equal *among* my heirs at law." It appeared that the testator had but two children, a daughter still living, and a son who died before the testator, leaving children. It was held that his heirs took *per stirpes* and not *per capita*. The court said: "The only doubt as to its correctness arises out of the use of the words, 'equal *among*,' in the will. It is understood the words 'equal *among*,' or 'equally,' or 'share and share alike,' when used in a will, mean a division of the estate *per capita*; but this meaning of these words may be controlled by the context, and is often so done. That is the case here. The testator, by making a bequest of money to his own daughter and a devise of land to his daughter-in-law, evidently intended to make an equal division of his estate between his daughter and the family of his deceased son, and it is not unreasonable to believe that was all he meant by the use of the words 'equal *among*.' This most just intention ought not to be defeated by giving to the words employed in the will an arbitrary and technical meaning never understood or perhaps thought of by the testator when he used them." *Kelley v. Vigas*, 112 Ill. 245.

"Among" in the Sense of "Intermingled with." (See also **COMMERCE**, and the title **INTERSTATE COMMERCE**.)—In construing the word *among* as used in the provision that Congress shall have the power to regulate commerce *among* the several states, *Marshall, C. J.*, in *Gibbons v. Ogden*, 9 Wheat. (U. S.) 194, said: "The subject to which the power is next applied, is to commerce '*among* the several states.' The word *among* means intermingled with. A thing which is *among* others is intermingled with them. Commerce *among* the states cannot stop at the external boundary line of each state, but may be introduced into the

interior. It is not intended to say that these words comprehend that commerce which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient, and is certainly unnecessary. Comprehensive as the word *among* is, it may very properly be restricted to that commerce which concerns more states than one. The phrase is not one which would probably have been selected to indicate the completely interior traffic of a state, because it is not an apt phrase for that purpose." See also *Com. v. Gloucester Ferry Co.*, 98 Pa. St. 120; *State v. Foreman*, 8 Yerg. (Tenn.) 316.

Among the Files.—In *State v. Washoe County*, 7 Nev. 83, it was held, where a clerk certified that certain papers were true and correct copies of original papers "*among* the files" in his office, that the language was sufficient to warrant the conclusion that such papers, being *among* the files, were themselves filed.

Holographic Wills—Among Valuable Papers.—A statute providing for the validity of holographic wills, designated the place where such a will should be kept as "*among* the valuable papers, etc., of the deceased." The court held that this phrase, "*among* the valuable papers," did not necessarily mean *among* the most valuable papers. *Winstead v. Bowman*, 68 N. Car. 174. See also VALUABLES, and the title WILLS.

AMOTION.

BY CHARLES R. COVILLE.

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CROSS-REFERENCES.

For matters of PROCEDURE see the ENCYCLOPÆDIA OF PLEADING AND PRACTICE, *titles CERTIORARI*, vol. 4, p. 1; *MANDAMUS*; *QUO WARRANTO*.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: BY-LAWS; CORPORATIONS (PRIVATE); DISFRANCHISEMENT; MUNICIPAL CORPORATIONS; OFFICERS AND AGENTS (OF PRIVATE CORPORATIONS); PUBLIC OFFICERS; RELIGIOUS SOCIETIES; SOCIETIES AND CLUBS.

I. DEFINITION.—Amotion is the removal of an officer or official agent of a corporation from his elective or appointive office, before the end of the term for which he was elected or appointed; but without necessarily depriving him of his right of membership in such corporation.¹

II. AT COMMON LAW.—At common law, every corporation has an implied right, incident to its existence, to exercise the power of amotion for just and reasonable cause;² except, perhaps, in the case of private eleemosynary

1. The Term Defined.—2 Kent's Com. 298; *White v. Brownell*, 4 Abb. Pr. N. S. (N. Y. C. Pl.) 192; *Richards v. Clarksburg*, 30 W. Va. 491, 20 Am. & Eng. Corp. Cas. 111.

Amotion and Disfranchisement Distinguished.—The terms amotion and disfranchisement are often used indiscriminately. Amotion, properly, is the removal of an officer in a corporation from his office, still leaving him a member of the corporation; disfranchisement, on the other hand, is the deprivation of membership in the corporation. Amotion relates to officers alone, and disfranchisement to the members of a corporation. The

terms are not synonymous. *Corporation of Doncaster*, 2 Ld. Raym. 1564; *Rex v. Richardson*, 1 Burr. 517; *Richards v. Clarksburg*, 30 W. Va. 491, 20 Am. & Eng. Corp. Cas. 111; *Evans v. Philadelphia Club*, 50 Pa. St. 107; *White v. Brownell*, 4 Abb. Pr. N. S. (N. Y. C. Pl.) 192.

Disfranchisement implies a greater power than amotion. 2 Kent's Com. 298.

See the title DISFRANCHISEMENT.

2. Power of Amotion at Common Law.—2 Kent's Com. 278-297.

England.—*Rex v. Richardson*, 1 Burr. 517; *Rex v. Liverpool*, 2 Burr. 723; *Rex v. Don-*

corporations and others of like nature, where a visitatorial power is vested in the founder or in the trustees.¹

III. MUNICIPAL CORPORATIONS—1. Modern Municipal Corporations.²—In modern municipal corporations, the power of amotion is usually vested in a common council or governing board, who represent the corporation and exercise its powers.³

2. Grounds for Amotion.—General rules have been enunciated by the courts as prescribing causes for amotion,⁴ and within these, the following specific

caster, 2 Burr. 738; Jay's Case, 1 Vent. 302; Bruce's Case, 2 Stra. 819; Reg. v. Newbury, 1 Q. B. 751, 41 E. C. L. 760; Rex v. Heaven, 2 T. R. 772; Rex v. Taylor, 3 Salk. 231, 1 Rolle 409; Rex v. Tidderly, 1 Sid. 14; Rex v. Lyme Regis, Doug. 153; Rex v. Ponsonby, 1 Ves. Jr. 1.

Imperial Hydropathic Hotel Co. v. Hampson, 23 Ch. Div. 1, while denying its existence as to private corporations, concedes it as to municipal corporations.

Louisiana.—State v. Judges, 35 La. Ann. 1075.

Missouri.—State v. Walbridge, 119 Mo. 383. *Mississippi.*—Bayless v. Orne, 1 Freem. Ch. (Miss.) 176.

New Jersey.—State v. Jersey City, 25 N. J. L. 536.

New York.—Fawcett v. Charles, 13 Wend. (N. Y.) 473.

North Carolina.—Ellison v. Aldermen, 89 N. Car. 125.

Pennsylvania.—Com. v. St. Patrick's Ben. Soc., 2 Binn. (Pa.) 441, 4 Am. Dec. 453; Evans v. Philadelphia Club, 50 Pa. St. 107; Com. v. Sanderson, 1 Pa. Dist. Rep. 714.

West Virginia.—Richards v. Clarksburg, 30 W. Va. 491, 20 Am. & Eng. Corp. Cas. 111.

Baggs' Case Distinguished.—The celebrated Baggs' Case, 11 Coke 93, often cited on questions involving the right of amotion, is strictly a case of disfranchisement, and, therefore, affords no authority for the proposition that a corporation does not possess the power of amotion unless it has authority to do so by the express words of the charter or by prescription. Richards v. Clarksburg, 30 W. Va. 491, 20 Am. & Eng. Corp. Cas. 111; Rex v. Richardson, 1 Burr. 517.

1. Eleemosynary Corporations.—Dartmouth College v. Woodward, 4 Wheat. (U. S.) 675; Evans v. Philadelphia Club, 50 Pa. St. 107; Fuller v. Plainfield Academic School, 6 Conn. 532.

2. For Removals under Particular Statutory or Charter Provisions, see:

Alabama.—Mobile v. Squires, 49 Ala. 339. *Colorado.*—Board of Aldermen v. Darrow, 13 Colo. 450, 16 Am. St. Rep. 215; Carter v. Durango, 16 Colo. 534; Hudson v. Denver, 12 Colo. 157.

California.—People v. Squires, 14 Cal. 12. *Georgia.*—Vason v. Augusta, 38 Ga. 542; Shaw v. Macon, 19 Ga. 468; Macon v. Shaw, 16 Ga. 172.

Indiana.—Madison v. Kelso, 32 Ind. 79.

Louisiana.—State v. Shakspeare, 43 La. Ann. 92.

Maine.—Andrews v. King, 77 Me. 224.

Massachusetts.—Williams v. Gloucester,

148 Mass. 256; Chandler v. Lawrence, 128 Mass. 213; O'Dowd v. Boston, 149 Mass. 443.

Minnesota.—State v. Duluth, 53 Minn. 238; State v. Kiichli, 53 Minn. 147.

Missouri.—State v. Walbridge, 119 Mo. 383; Manker v. Faulhaber, 94 Mo. 430.

New Jersey.—State v. Jersey City, 25 N. J. L. 536; Devault v. Camden, 48 N. J. L. 433; Ayers v. Newark, 49 N. J. L. 170.

New York.—People v. Fire, etc., Com'rs, 103 N. Y. 370; People v. Campbell, 50 N. Y. Super. Ct. 82; People v. New York, 82 N. Y. 491; People v. Campbell, 82 N. Y. 247; People v. Fire Com'rs, 72 N. Y. 445; Matter of Emmet, 65 How. Pr. (N. Y. Super. Ct.) 266; People v. Public Park Com'rs, 60 How. Pr. (N. Y. Supreme Ct.) 130; Matter of Nichols, 6 Abb. N. Cas. (N. Y. Supreme Ct.) 474; Demarest v. New York, 42 Barb. (N. Y.) 186; People v. French, 12 Hun (N. Y.) 254; People v. New York, 16 Hun (N. Y.) 309; People v. Fire Com'rs, 28 Hun (N. Y.) 495; People v. Starks, 33 Hun (N. Y.) 384; People v. Fire Com'rs, 43 Hun (N. Y.) 554; Hadley v. Mayor, 33 N. Y. 603, 88 Am. Dec. 412; People v. Fire Com'rs, 77 N. Y. 153; People v. Purroy (Supreme Ct.), 10 N. Y. Supp. 181.

North Carolina.—Ellison v. Aldermen, 89 N. Car. 125, 5 Am. & Eng. Corp. Cas. 477.

Pennsylvania.—Evans v. Philadelphia Club, 50 Pa. St. 107; Houseman v. Com., 100 Pa. St. 222.

South Dakota.—State v. Williams (S. Dak. 1894), 60 N. W. Rep. 410.

3. Richards v. Clarksburg, 30 W. Va. 491, 20 Am. & Eng. Corp. Cas. 111; Com. v. Sanderson, 1 Pa. Dist. Rep. 714.

Power Impelled.—Unless expressly limited by statute or by charter, the power of amotion is incidental to a municipal corporation as necessary for the good order and government of the corporation. Richards v. Clarksburg, 30 W. Va. 491, 20 Am. & Eng. Corp. Cas. 111; Willard's Appeal, 4 R. I. 597.

This, however, is *questioned* in Speed v. Detroit, 98 Mich. 360, 44 Am. & Eng. Corp. Cas. 270, on the theory that a common council is not the corporation, although representing it. The council cannot avail itself of the common-law jurisdiction vesting the right of amotion in the corporation.

New York.—Where a majority of a common council have power to elect a president they have, in the absence of a statute to the contrary, the power to remove. Armatage v. Fisher, 74 Hun (N. Y.) 167.

4. Lord Mansfield, in a celebrated case, enumerated the following offenses as warranting the exercise of the power under

offenses are held sufficient: Alteration, with fraudulent intent, of the records of the corporation;¹ bribing a voter at a corporate election;² reception of a bribe by a common councilman under a charter conferring power to remove for disorderly conduct;³ habitual drunkenness incapacitating one from the performance of his official duty;⁴ wilfully and corruptly refusing to account for money, amounting to a breach of trust;⁵ wilful maladministration in office;⁶ desertion of the municipality without an intention to return;⁷ knowingly permitting official records to be materially altered;⁸ or falsely certifying to fictitious records.⁹

consideration: 1. "Such as have no immediate relation to his office, but are in themselves of so infamous a nature as to render the offender unfit to execute any public franchise." 2. "Such as are only against his oath and the duty of his office as a corporator, and amount to breaches of the tacit condition annexed to his franchise or office." 3. Such as "is of a mixed nature, as being an offense not only against the duty of his office, but also a matter indictable at common law." *Rex v. Richardson*, 1 Burr. 517. This statement has been approved in:

England.—*Rex v. Liverpool*, 2 Burr. 723.
New York.—*Fawcett v. Charles*, 13 Wend. (N. Y.) 473.

Pennsylvania.—*Evans v. Philadelphia Club*, 50 Pa. St. 107; *Com. v. St. Patrick's Ben. Soc.*, 2 Binn. (Pa.) 441, 4 Am. Dec. 453; *Com. v. Guardians of Poor*, 6 S. & R. (Pa.) 469.

Wisconsin.—*State v. Chamber of Commerce*, 20 Wis. 63.

1. **Fraudulent Alteration of Corporate Records.**—*Rex v. Wilton*, 5 Mod. 257.

2. **Bribery of Voter at Election.**—*Rex v. Tiverton*, 8 Mod. 186.

3. **Receiving Bribe.**—*State v. Jersey City*, 25 N. J. L. 536.

4. **Habitual Drunkenness.**—*Rex v. Taylor*, 3 Salk. 237, 1 Rolle 409.

Intoxication is not misfeasance in office under a constitutional provision that for misfeasance in office the officer shall forfeit his right thereto, and a statute providing for the removal of the officer therefor is unconstitutional. *Com. v. Williams*, 79 Ky. 42, 42 Am. Rep. 204.

The legislature may, however, declare that for such incapacity as will result from voluntary intoxication within office hours, or from the confirmed habit of intoxication, a county officer shall forfeit his office and be removed therefrom, when the constitution declares that officers may be removed, among other things, for incapacity or negligence. *McComas v. Krug*, 81 Ind. 327, 42 Am. Rep. 135.

5. **Refusing to Account for Corporate Funds.**—*Woods v. Varnum*, 85 Cal. 639; *Rex v. Chalke*, 1 Ld. Raym. 226; *Com. v. Guardians of Poor*, 6 S. & R. (Pa.) 469.

6. **Maladministration.**—*Minkler v. State*, 14 Neb. 181. In this case, a county surveyor repeatedly and wilfully removed government section corner stones, under a claim of right to do so. The board of county commissioners, with power to remove formal administration, removed him, and, on error to the supreme court, were sustained.

7. **Leaving Municipality with No Intention of Returning.**—*Rex v. Leicester*, 4 Burr. 2087.

8. **Allowing Official Records to be Altered.**—*Com. v. Barry*, Hard. (Ky.) 237.

9. **Falsely Certifying to Fictitious Records.**—*Com. v. Chambers*, 1 J. J. Marsh. (Ky.) 161.

"Other Cause."—The phrase "other cause" for removal is construed to mean "other like cause." *State v. McGarry*, 21 Wis. 496; *Madison v. Korbly*, 32 Ind. 74; *State v. Jersey City*, 25 N. J. L. 536.

"Sufficient Cause."—The term "sufficient cause" means "legal cause," and must relate specially to and affect the administration of the office or the performance of its duties. *State v. Duluth*, 53 Minn. 238.

"Reasonable Cause."—The term "reasonable cause" for amotion means "just cause." *Osgood v. Nelson*, L. R. 5 H. L. 636.

"Due Cause."—Due cause for the removal of an officer is a question for the court, and in the absence of statute as to what shall constitute such cause, it must be determined with reference to the nature of the office and the qualifications requisite to fill it. *State v. Watertown*, 9 Wis. 254.

Misconduct in Office.—Under a provision authorizing removal from office for "misfeasance and malfeasance," a city attorney who, during his first term of office, stipulated not to appeal a case against the city, and, on his reappointment to a second term, reported to the common council during such second term that he had done nothing to prevent an appeal, is guilty of such misconduct as will sustain his removal. *People v. Auburn*, 85 Hun (N. Y.) 601.

Mississippi—Sheriff—Escape.—Under the provision of the state constitution that upon the conviction of a county officer for misdemeanor or wilful negligence in office, judgment of removal shall be pronounced, the court has no alternative. The provision is peremptory and leaves the court no discretion. Thus, where a sheriff was convicted of an escape, it was held that he must be removed, even though the escape occurred through defects in a newly-constructed jail, of which the sheriff had no knowledge. *Shattuck v. State*, 51 Miss. 575.

Texas—County Officers.—Under art. 4, § 24, of the constitution of this state, county officers may be removed for official misconduct, such as wilful or corrupt failure, refusal, or neglect of an officer to perform any duty enjoined on him by law. The wilful neglect which, under this provision, will justify a removal, is a neglect with bad or corrupt intent. *State v. Alcorn*, 78 Tex. 387.

3. Original Disqualification.—A preëxisting impediment which would affect a person's capacity to hold office is, independently of statute, no reason for a subsequent amotion.¹

4. Manner of Exercising the Power—*a.* IN GENERAL.—Power must be Exercised by Regularly-assembled Body.—The power of amotion, whether vested in the corporation at large or in a particular body, must be exercised in a meeting of the moving body regularly assembled in its corporate character.²

By a Majority Vote.—In the absence of statutory, charter, or by-law provision, a majority of the moving body must concur to effect a legal amotion.³ The accused, if a member of the body, is entitled to vote on the question of removal.⁴

b. MUST BE STRICTLY PURSUED.—The common-law, statutory, or charter rules controlling the exercise of the power of amotion must be strictly pursued; otherwise, the proceedings are void.⁵

A conviction for wilfully demanding fees not allowed by law is a conviction of a crime involving such misconduct, within the meaning of the statute that the conviction of the county officer for "felony or a misdemeanor involving official misconduct" shall work an immediate removal from office of the officer so convicted. *Brackenridge v. State*, 27 Tex. App. 513, 24 Am. & Eng. Corp. Cas. 366.

Offenses Not Grounds for Amotion.—Disrespectful and contemptuous language towards associates, *Fuller v. Plainfield Academic School*, 6 Conn. 532; alteration of corporate records without fraudulent intent, *Rex v. Wilton*, 5 Mod. 254; misemployment of money not amounting to a breach of trust, *Com. v. Guardians of Poor*, 6 S. & R. (Pa.) 469; failure to file an official bond, *Com. v. Slifer*, 25 Pa. St. 23, 64 Am. Dec. 680; mistakes honestly made in the absence of a corrupt motive, *Matter of Thomas* (Supreme Ct.), 2 N. Y. Supp. 38.

Kansas.—Under Comp. Laws, 1885, p. 300, par. 1694, of this state, which provides that a county officer may be removed from office for corruptly or oppressively performing the duties of the same, where the board of county commissioners, upon the advice of able and competent attorneys at law, allowed certain claims which were not strictly legal charges against the county, such official action was held not sufficient to render them liable to the charge of corruption, or forfeiture of office, if the allowances were honestly made and the board acted upon a mistake of law as to the liability of the county. *State v. Scates*, 43 Kan. 330, 30 Am. & Eng. Corp. Cas. 488.

De Facto Corporations.—An officer of a *de facto* municipal corporation cannot be ousted from his office at the suit of a private relator, on the ground that such corporation has no legal existence, for the reason that such action would in effect be an attack on the municipality which would not be in court. *Steelman v. Vickers*, 51 N. J. L. 180, 14 Am. St. Rep. 675.

1. Pre-existing Impediment.—*Ellison v. Aldermen*, 89 N. Car. 125, 5 Am. & Eng. Corp. Cas. 477; *Richards v. Clarksburg*, 30 W. Va. 502, 20 Am. & Eng. Corp. Cas. 111; *Speed v. Detroit*, 98 Mich. 360, 44 Am. & Eng. Corp.

Cas. 270; *Thurston v. Clark*, 107 Cal. 285; *Maroney v. Pawtucket* (R. I. 1895), 31 Atl. Rep. 265; *State v. Watertown*, 9 Wis. 254.

In *State v. Jersey City*, 25 N. J. L. 537, the relator was a member of the common council of Jersey City, and under the power conferred by the charter of the city the common council removed him for disorderly conduct, *i. e.*, receiving bribes for his official influence and votes. He was subsequently reelected as a member of the common council. The court in refusing to sustain the common council in a second expulsion because of the offense causing his first removal, said: "The [first] judgment was a judgment of expulsion, and that was carried into effect. The judgment extended no further; it was not a judgment of disqualification operating *in futuro*. The law does not add that penalty to the offense of which he was convicted."

In *Woods v. Varnum*, 85 Cal. 639, it was held that a tax collector who, during the last month of his first term of office, collected taxes not due, and corruptly converted them to his own use, it not being his duty to pay over such taxes to the proper officer until the following month, when his next term of office began, to which he had been reelected, was guilty of misconduct during his second term, for which he could be removed during such term.

In *Louisiana*, under article 196 of the Constitution, where certain acts are made grounds for removal, acts committed during a prior term of office by any officer who succeeds himself, may form the foundation for his removal if, during the prior term, they would have then justified his removal. *State v. Bourgeois*, 45 La. Ann. 1350.

2. *Rex v. Taylor*, 3 Salk. 231; *State v. Jersey City*, 25 N. J. L. 536; *Hadley v. Mayor*, 33 N. Y. 603, 88 Am. Dec. 412; *Jacksonville v. Allen*, 25 Ill. App. 54.

3. *Hopkins v. Scott*, 38 Neb. 664.

4. *Reg. v. Sutton*, 10 Mod. 74.

5. England.—*Reg. v. Sutton*, 10 Mod. 76; *Reg. v. Phippen*, 7 Ad. & El. 966, 34 E. C. L. 263; *Rex v. Oxford*, 6 Ad. & El. 349, 33 E. C. L. 87.

Colorado.—*Board of Aldermen v. Darrow*, 13 Colo. 460, 16 Am. St. Rep. 215.

Georgia.—*Macon v. Shaw*, 16 Ga. 172.

c. OFFICER HOLDING AT WILL.—Where the officer holds during the pleasure of the appointing power, or where the power to remove is discretionary, the power to appoint carries with it the right of amotion by the appointing officer or board, which may be exercised without notice or hearing.¹

d. TERM AND TENURE CERTAIN—*Notice and Hearing.*—Where the term or tenure of the office is certain, and there is no discretionary power of removal, it is a fundamental principle in the absence of statute² or acts constituting a

Illinois.—*People v. Higgins*, 15 Ill. 110.

Indiana.—*State v. Vincennes University*,

5 Ind. 77; *Madison v. Korbly*, 32 Ind. 74.

Massachusetts.—*Murphy v. Webster*, 131 Mass. 482.

Missouri.—*State v. Lingo*, 26 Mo. 496.

New Jersey.—*State v. Jersey City*, 25 N. J. L. 536; *Charles v. Hoboken*, 27 N. J. L. 203.

New York.—*People v. Fire Com'rs*, 77 N. Y. 153; *Hadley v. Mayor*, 33 N. Y. 603, 88 Am. Dec. 412.

Ohio.—*State v. Bryce*, 7 Ohio, pt. 2, 82.

Pennsylvania.—*Com. v. Sutherland*, 3 S. & R. (Pa.) 145; *Com. v. Shaver*, 3 W. & S. (Pa.) 338.

Wisconsin.—*State v. Chamber of Commerce*, 20 Wis. 72.

Amoving Power Interested.—A proceeding before a township board to remove an officer of a school district is judicial in its nature, and when one of the board is interested in the result of the inquiry, and the presence of such a member is essential to a quorum, the proceedings are void. *Stockwell v. White Lake Tp.*, 22 Mich. 341.

But if the accused is one of the amoving body he may vote on the question of his removal. *Reg. v. Sutton*, 10 Mod. 74.

In *People v. Auburn*, 85 Hun (N. Y.) 601, where, before proceedings were instituted to remove a city attorney, certain members of the common council were appointed to investigate his official conduct, and, as such, preferred charges against him and formed an opinion of the case, it was held that this did not disqualify them from voting on the question of removal. And in *Hopkins v. Scott*, 38 Neb. 662, it is held that a judgment of the county commissioners or supervisors removing a county officer is not invalidated by the fact that some of the officers who tried the accused were also witnesses against him.

1. *England.*—*Warren's Case*, Cro. Jac. 540; *Rex v. Lyme Regis*, Doug. 149; *Rex v. Richardson*, 1 Burr. 518; *Bruce's Case*, 2 Stra. 819; *Rex v. Guardianos Ecclesiae*, 1 Stra. 115; *Middleton's Case*, Cro. Jac. 358.

United States.—*Ex p. Hennen*, 13 Pet. (U. S.) 230.

Arkansas.—*Patton v. Vaughan*, 39 Ark. 211.

California.—*People v. Hill*, 7 Cal. 97; *People v. Squires*, 14 Cal. 12; *People v. Mizner*, 7 Cal. 519; *Ford v. Harbor Com'rs*, 81 Cal. 19.

Colorado.—*Board of Aldermen v. Darrow*, 13 Colo. 460, 16 Am. St. Rep. 215; *Carter v. Durango*, 16 Colo. 534.

Illinois.—*People v. Higgins*, 15 Ill. 110.

Indiana.—*Madison v. Korbly*, 32 Ind. 74.

Kentucky.—*Page v. Hardin*, 8 B. Mon. (Ky.) 648.

Louisiana.—*State v. Doherty*, 25 La. Ann. 119, 13 Am. Rep. 131.

Massachusetts.—*Chandler v. Lawrence*, 128 Mass. 213.

Michigan.—*Stadler v. Detroit*, 13 Mich. 346; *Hallgren v. Campbell*, 82 Mich. 255, 30 Am. & Eng. Corp. Cas. 494.

Mississippi.—*Newsom v. Cocke*, 44 Miss. 352, 7 Am. Rep. 686.

Missouri.—*State v. St. Louis*, 90 Mo. 19; *State v. Alt*, 26 Mo. App. 673.

New Jersey.—*Sweeney v. Stevens*, 46 N. J. L. 344.

New York.—*People v. Fire Com'rs*, 73 N. Y. 437; *Eames v. Brooklyn*, 15 N. Y. Wkly. Dig. 419; *People v. New York*, 5 Barb. (N. Y.) 43; *Laimbeen v. New York*, 4 Sandf. (N. Y.) 109; *People v. Comptroller*, 20 Wend. (N. Y.) 595; *People v. Nichols*, 79 N. Y. 582.

Pennsylvania.—*Field v. Girard College*, 54 Pa. St. 233; *Com. v. Sutherland*, 3 S. & R. (Pa.) 145.

Texas.—*Collins v. Tracy*, 36 Tex. 546; *Keenan v. Perry*, 24 Tex. 253.

West Virginia.—*Richards v. Clarksburg*, 30 W. Va. 491, 20 Am. & Eng. Corp. Cas. 111.

2. *People v. Fire Com'rs*, 73 N. Y. 437; *People v. Nichols*, 79 N. Y. 582; *Sweeney v. Stevens*, 46 N. J. L. 344.

Power of Legislature.—The legislature may authorize the removal of an officer without notice or hearing. *People v. Whitlock*, 92 N. Y. 191; *Sweeney v. Stevens*, 46 N. J. L. 344.

An officer has no vested right to be proceeded against in the manner required by law at the time of his election or appointment, and the legislature may change the mode of procedure during his term. *People v. Whitlock*, 92 N. Y. 191.

But in *Dullam v. Willson*, 53 Mich. 392, 51 Am. Rep. 128, it was held that in the absence of express constitutional authority, the legislature cannot confer the power to remove county officers arbitrarily and without a hearing.

New York.—Section 28 of the charter of New York City, Laws 1873, c. 335, which provides that no regular clerk or head of a department shall be removed until he has been informed of the cause of his removal and allowed an opportunity to be heard, does not apply to subordinate ministerial officers. Such officers are not clerks within the meaning of the statute, and are removable at pleasure. *People v. Fire Com'rs*, 72 N. Y. 445.

waiver,¹ that no corporate officer can be removed without:

First: Notice.—Due notice of the proceeding for his removal.²

Second: Charges Preferred.—Specific charges preferred with reasonable certainty.³

Third: Opportunity to Answer and Defend.—Reasonable time to answer the charges and opportunity to be heard in defense of the same.⁴

And section 48 of the Consolidation Act of New York City, prohibiting the discharge of a "regular clerk" without giving him a hearing and an opportunity to make explanation, does not apply where the salary is payable out of a special fund, of which the clerk had notice at the time of his appointment, and such fund becomes exhausted, and the clerk, in consequence, is removed; as he is presumed to have accepted the appointment with full notice that his salary was payable only from that special fund, and that when this was exhausted his employment should terminate, where there was no new appropriation for the same purpose. *Lethbridge v. New York*, 133 N. Y. 232; *Phillips v. New York*, 88 N. Y. 245.

Massachusetts.—Under *Massachusetts* Laws of 1885, c. 266, § 5, providing that officers and boards of the city of Boston may remove their subordinates for such cause as they may deem sufficient, and shall assign in their order for removal, such a subordinate may be summarily removed by them, without a hearing, when a cause for such removal is given in the order of removal. *O'Dowd v. Boston*, 149 Mass. 443.

1. Appearance in the Proceeding Is a Waiver of Notice.—*Com. v. Pennsylvania Ben. Inst.*, 2 S. & R. (Pa.) 141; *Rex v. Carmarthen*, 1 M. & S. 697; *Rex v. Faversham*, 8 T. R. 356; *Rex v. Wilton*, 2 Salk. 428.

At Common Law, conviction of the officer, of an infamous charge, would excuse notice, *Rex v. Chalke*, 1 Ld. Raym. 226; or desertion of the municipality, making service of notice impracticable, *Rex v. Leicester*, 4 Burr. 2087; *Rex v. Grimes*, 5 Burr. 2601; *Reg. v. Truebody*, 11 Mod. 75; *Rex v. Shrewsbury*, 7 Mod. 202; *Rex v. Harris*, 1 B. & Ad. 936, 20 E. C. L. 509.

2. Entitled to Notice—England.—*Rex v. Richardson*, 1 Burr. 540; *Rex v. Doncaster*, 2 Burr. 738; *Rex v. Wilton*, 5 Mod. 259; *Exeter v. Glide*, 4 Mod. 37; *Rex v. Gaskin*, 8 T. R. 209; *Reg. v. Saddlers' Co.*, 10 H. L. Cas. 404; *Innes v. Wylie*, 1 C. & K. 257, 47 E. C. L. 257; *Ex p. Ramshay*, 18 Q. B. 190, 83 E. C. L. 190.

Colorado.—*Board of Aldermen v. Darrow*, 13 Colo. 460, 16 Am. St. Rep. 215; *Carter v. Durango*, 16 Colo. 534.

Indiana.—*Southern Plank Road Co. v. Hixon*, 5 Ind. 165.

Kansas.—*Jacques v. Little*, 51 Kan. 300.

Maine.—*Andrews v. King*, 77 Me. 224.

Massachusetts.—*Murdock v. Phillips Academy*, 12 Pick. (Mass.) 244.

Michigan.—*McGregor v. Gladwin County*, 37 Mich. 388.

Missouri.—*State v. Walbridge*, 119 Mo. 383.

New Jersey.—*State v. Cape May Point* (N. J. 1892), 25 Atl. Rep. 259; *Devault v. Cam-*

den, 48 N. J. L. 433; *Ayers v. Newark*, 49 N. J. L. 170.

New York.—*People v. Whitlock*, 92 N. Y. 191; *People v. St. Francis Ben. Soc.*, 24 How. Pr. (N. Y. Supreme Ct.) 216; *Matter of Nichols*, 57 How. Pr. (N. Y. Supreme Ct.) 395, 6 Abb. N. Cas. 474; *People v. Nichols*, 79 N. Y. 582; *People v. Fire, etc., Com'rs*, 106 N. Y. 64; *People v. Medical Soc.*, 32 N. Y. 187; *People v. New York Masons Ben. Soc.*, 3 Hun (N. Y.) 361; *Wachtel v. Noah Widows, etc.*, Ben. Soc., 84 N. Y. 28, 38 Am. Rep. 478; *People v. Sailors' Snug Harbor*, 54 Barb. (N. Y.) 532; *People v. Fire Com'rs*, 72 N. Y. 445; *Armataque v. Fisher*, 74 Hun (N. Y.) 167.

North Carolina.—*Delacy v. Neuse River Nav. Co.*, 1 Hawks (N. Car.) 274, 9 Am. Dec. 636.

Ohio.—*State v. Bryce*, 7 Ohio, pt. 2, 82.

Pennsylvania.—*Black & White Smiths' Soc. v. Vandyke, 2 Whart.* (Pa.) 309, 30 Am. Dec. 263; *Com. v. Pennsylvania Ben. Inst.*, 2 S. & R. (Pa.) 141.

Rhode Island.—*Sleeper v. Franklin Lyceum*, 7 R. I. 523.

3. Charges must be Preferred.—*Rex v. Lyme Regis*, Doug. 179; *Armataque v. Fisher*, 74 Hun (N. Y.) 167; *Andrews v. King*, 77 Me. 224; *Devault v. Camden*, 48 N. J. L. 433; *Ayers v. Newark*, 49 N. J. L. 170; *State v. Cape May Point* (N. J. L. 1892), 25 Atl. Rep. 259; *Board of Aldermen v. Darrow*, 13 Colo. 460, 16 Am. St. Rep. 215; *State v. Shakspeare*, 43 La. Ann. 92; *Tompert v. Lithgow*, 1 Bush (Ky.) 176; *People v. Higgins*, 15 Ill. 110. In this last case the court held that in stating the cause assigned for the removal of an officer of a corporation, it is not necessary that it should be stated in the precise language of the statute specifying the grounds for a removal, but it is sufficient if substantially embraced within it. See also, to same effect, *State v. Duluth*, 53 Minn. 238; *State v. Lupton*, 64 Mo. 415, 27 Am. Rep. 253; *Andrews v. King*, 77 Me. 224.

Cause Stated.—A charge by the removing body, which stated that they deemed the accused "incompetent for the proper and creditable performance of the duties assigned to and required of him," is not a specific or sufficient charge under a provision requiring "the cause for removal to be stated." *People v. Starks*, 33 Hun (N. Y.) 384.

Under a statute prohibiting any officer from being directly or indirectly interested in any contract with a city, and making a wilful violation thereof cause for removal, the court held that in preferring a charge thereunder, it was necessary to allege a wilful violation of its provisions. *State v. Ballard*, 10 Wash. 4.

4. Opportunity for Defense—England.—*Reg. v. Archbishop of Canterbury*, 1 El. & Bl. 545, 102 E. C. L. 545; *Rex v. Liverpool*, 2

Entitled to Counsel.—The accused is also entitled to be represented by counsel, and to cross-examine witnesses and to except to evidence against him.¹

IV. PRIVATE CORPORATIONS—1. In General.—The removal of the officers of private corporations is generally governed by local statutes or corporate by-laws.²

By the Common Law, every corporation has, as incident to its existence, the power to remove its officers for cause; the courts have no jurisdiction to order the removal.³

Directors Appointed for Definite Term.—In an English case, it was held that a joint-stock company whose directors are appointed for a definite period, has no inherent power to remove them before the expiration of that period.⁴

Officers or Agents Holding at Pleasure may be removed without cause or notice.⁵

2. By-laws Governing Removal.—Where the by-laws of the corporation govern the removal of its officers, they are charged with notice of the existence of such by-laws.⁶

Burr. 734; *Rex v. Richardson*, 1 Burr. 540; *Rex v. Chalke*, 1 Ld. Raym. 226.

Colorado.—Board of Aldermen *v. Darrow*, 13 Colo. 460, 16 Am. St. Rep. 215.

Maine.—*Andrews v. King*, 77 Me. 224.

Massachusetts.—*Murdock v. Phillips Academy*, 12 Pick. (Mass.) 244.

Michigan.—*Dullam v. Willson*, 53 Mich. 392, 51 Am. Rep. 128.

New Jersey.—*Devault v. Camden*, 48 N. J. L. 433; *Ayers v. Newark*, 49 N. J. L. 170; *State v. Cape May Point* (N. J. 1892), 25 Atl. Rep. 259.

New York.—*Armatage v. Fisher*, 74 Hun (N. Y.) 167.

In *Hopkins v. Scott*, 38 Neb. 662, the accused officer appeared and obtained a continuance of the proceedings, and, on the adjourned day, proceeded without objection as to the limited time he had to prepare for defense. It was held that not having made the objection at the time of the proceeding, it was too late to urge insufficient time on error to the Supreme Court.

1. Entitled to Counsel.—Board of Aldermen *v. Darrow*, 13 Colo. 460, 16 Am. St. Rep. 215; *Andrews v. King*, 77 Me. 224; *Armatage v. Fisher*, 74 Hun (N. Y.) 167.

Opportunity to Explain.—Where a power of removal simply requires that an opportunity for explanation be given, it does not contemplate a formal trial. The officer is, however, entitled to reasonable time to make such explanation. *People v. MacLean*, 58 Hun (N. Y.) 152.

Procedure Not Provided.—Where the power of amotion is vested in an officer, and no special means of procedure are provided by law, the means necessary to effectuate the power pass as incidents of the grant. *State v. Walbridge*, 119 Mo. 383; *Ex p. Marmaduke*, 91 Mo. 262, 60 Am. Rep. 250; *State v. Vincennes University*, 5 Ind. 77; *Grover v. Huckins*, 26 Mich. 476.

And the law will imply that notice of proceedings to amove was intended. *State v. Walbridge*, 119 Mo. 383; *Laughlin v. Fairbanks*, 8 Mo. 370; *Wickham v. Page*, 49 Mo. 526; *Brown v. Weatherby*, 71 Mo. 152.

2. See also the various state statutes relative thereto, and the titles OFFICERS AND

AGENTS (OF PRIVATE CORPORATIONS); BY-LAWS.

3. Power of Removal Inherent.—*Neall v. Hill*, 16 Cal. 146, 76 Am. Dec. 508; *Bayless v. Orne*, 1 Freem. Ch. (Miss.) 161; *Adamantine Brick Co. v. Woodruff, McArthur & M. (D. C.)* 318; *Medical, etc., Soc. v. Weatherly*, 75 Ala. 248, 10 Am. & Eng. Corp. Cas. 26.

4. Dismissal of Directors—Alteration of Articles of Association.—*Imperial Hydropathic Hotel Co. v. Hampson*, 23 Ch. Div. 1. Here it was held further that if the articles of association of a company contain no power to remove directors before the expiration of their period of office, but authorize the shareholders by special resolution to alter any of the articles, there must be a separate special resolution altering the articles so as to give power to remove directors before a resolution may be passed to remove any of them.

5. Hunter v. Sun Mut. Ins. Co., 26 La. Ann. 13; *Douglass v. Merchants Ins. Co.*, 118 N. Y. 484.

6. Removal Regulated by By-Laws.—*Hunter v. Sun Mut. Ins. Co.*, 26 La. Ann. 13. In this case the officer was employed by the defendant for one year from February, 1869, and on the expiration of that term he was engaged by the defendant for another year. He was discharged in April of the second year without cause, and brought his action to recover damages for an alleged breach of contract. The by-laws of the company provided that "the tenure of all the officers of this corporation shall be during the pleasure of a majority of the board of directors." The court refused to grant the prayer of the petitioner, on the ground that the officer so employed was presumed to have known of the existence of the by-laws, and that it was a part of his contract, and the law governing his rights in that respect, and, therefore, the "plaintiff must know the precarious tenure of his position."

In *Douglass v. Merchants' Ins. Co.*, 118 N. Y. 484, the plaintiff, on January 1, 1857, entered defendant's service as secretary at a yearly salary. He continued to so serve until January 19, 1885, when he was, by defendant's board of directors, removed, and his successor

3. Power Avoided by Contract.—A corporation may lose its general power of removal contained in its charter, by making a special contract to the contrary.¹

V. EFFECT OF AMOTION—When Legal.—The effect of a legal amotion *ipso facto* vacates the office.²

When Illegal—Reinstatement.—Where an officer in the actual and lawful possession of his office has been illegally removed therefrom, he may of course, in a proper proceeding, be restored thereto.³

Recovery of Salary.—As to the right of an illegally-amoved officer to recover from the municipality the salary or fees of his office during the period of his removal, the authorities are irreconcilable, some jurisdictions granting the relief,⁴ others denying it.⁵ But where an officer *de facto* has received the

was appointed. He brought an action to recover, as damages, his salary for the remainder of that year. Defendant's by-laws, which went into effect prior to January 1, 1857, provided that the officers of the corporation "shall respectively hold their offices during the pleasure of the board of directors and until the appointment of a successor, either permanently or *pro tem*." The plaintiff was held chargeable with notice of the by-law, and not entitled to maintain the action. For a detailed discussion of this branch of the subject, see the title BY-LAWS.

1. *Martino v. Commerce F. Ins. Co.*, 47 N. Y. Super. Ct. 520.

In *Soldiers' Orphans' Home v. Shaffer*, 63 Ill. 243, the plaintiff's charter gave the trustees power to remove any officer or employee of the corporation if the interests of the institution required the removal. The plaintiff, by special contract, entered into an agreement with the corporation for a year, and the court, in that case, held that the corporation thereby lost its general power of removal contained in its charter.

2. Dill. Munc. Corp. (4th ed.), § 256.

3. Illegal Amotion—Reinstatement.—*Leeds v. Atlantic City*, 52 N. J. L. 332, 30 Am. & Eng. Corp. Cas. 288; *Cross v. West Virginia*, etc., R. Co., 34 W. Va. 742, 33 Am. & Eng. Corp. Cas. 191; *Medical, etc., Soc. v. Weatherly*, 75 Ala. 248, 10 Am. & Eng. Corp. Cas. 26; *Fuller v. Plainfield Academic School*, 6 Conn. 532; *Burr v. Norton*, 25 Conn. 103; *State v. Shakspeare*, 43 La. Ann. 92; *St. Louis County Ct. v. Sparks*, 10 Mo. 118, 45 Am. Dec. 355; *Strong, Petitioner*, 20 Pick. (Mass.) 484; *Com. v. Guardians of Poor*, 6 S. & R. (Pa.) 469; *State v. Watertown*, 9 Wis. 254.

For this branch of the subject, see the titles CERTIORARI; MANDAMUS; QUO WARRANTO; in the ENCYCLOPEDIA OF PLEADING AND PRACTICE.

4. Illegal Amotion—Recovery of Salary Allowed.—*Carroll v. Siebenthaler*, 37 Cal. 193; *Dorsey v. Smyth*, 28 Cal. 21; *Stratton v. Oulton*, 28 Cal. 44; *Andrews v. Portland*, 79 Me. 484, 10 Am. St. Rep. 280; *Matthews v. Copiah County*, 53 Miss. 715, 24 Am. Rep. 715; *Memphis v. Woodward*, 12 Heisk. (Tenn.) 499, 27 Am. Rep. 750; *State v. Carr*, 129 Ind. 44; *Glascok v. Lyons*, 20 Ind. 1, 83 Am. Dec. 299; *Douglas v. State*, 31 Ind. 429; *McCue v. Wapello County*, 56 Iowa 698, 41 Am. Dec. 134.

Where the officer *de facto* has received no salary, the officer *de jure* may recover it from the municipality. *Comstock v. Grand Rapids*, 40 Mich. 397; *Wayne County v. Benoit*, 20 Mich. 176.

5. Illegal Amotion—Recovery of Salary Denied.—*State v. Milne*, 36 Neb. 301; *Shaw v. Pima County* (Arizona 1888), 18 Pac. Rep. 273; *Parker v. Dakota County*, 4 Minn. 59; *State v. Clark*, 52 Mo. 508; *Shannon v. Portsmouth*, 54 N. H. 183; *Farrell v. Bridgeport*, 45 Conn. 191; *Gorman v. Boise County*, 1 Idaho 655; *Saline County v. Anderson*, 20 Kan. 298, 27 Am. Rep. 171; *Steubenville v. Culp*, 38 Ohio St. 18, 43 Am. Rep. 417; *Nichols v. MacLean*, 101 N. Y. 527, 54 Am. Rep. 730.

The court, in *McVeany v. New York*, 80 N. Y. 185, 36 Am. Rep. 600, 59 How. Pr. (N. Y.) 106, citing *Dolan v. New York*, 68 N. Y. 274, 23 Am. Rep. 168, said: "Where the office had been taken by a usurper who rendered the services due from it and for a time received from the municipality the compensation provided by law * * * it was held that for so much of the salary as had been paid to the intruder before the judgment of ouster, the officer *de jure* could not recover. This conclusion was reached by the consideration that the duty put upon fiscal officers to pay official salaries could not safely be performed, unless they are justified in acting upon the apparent title of claimants, inasmuch as they would otherwise be placed in peril of deciding wrongly who was the officer *de jure*, and of putting the governmental authority, of which they were the disbursing agents, to the hazard of a compulsory payment of salary a second time. But it was also held in that case that for so much of the salary accruing due before the judgment in favor of the officer *de jure*, and which had not been paid to the intruder, the officer *de jure* was entitled to recover. It was recognized that the salary is the compensation for the rendition of services; but it was also seen, that so much of the salary had not been paid to any one; that the city had had the benefit of the services, though rendered by an intruder; that he could not recover therefor; that there was no equity in freeing the municipality entirely from the payment of it; and it was held consistent with all rules, to treat the services as having been rendered by the intruder in the stead of the officer *de jure*, and to permit the latter to recover on that assumption."

emoluments of the office, it is generally held that the officer *de jure*, upon his reinstatement, may recover the same from him.¹

AMOUNT.—See note 2.

AMOUNT IN CONTROVERSY.—See vol. 1, ENCYC. OF PLEADING AND PRACTICE, p. 702.

AMOUNTING.—See note 3.

AMUSEMENT. (See also ENTERTAINMENT and the title THEATRES.)—This term signifies diversion, recreation.⁴

Continuing, the court said: "It is then to be deduced * * * that, as a general principle, the rendition of official service must precede a right to demand and recover the compensation given by law to the officer; that the disbursing officer of a municipality is protected from a second payment of that compensation, and so is his superior, when he has once made payment to one actually in the office, discharging the duties of it with color of title, with his right thereto not determined against him by a competent tribunal; that when there has been such an adjudication, any amount of compensation for services rendered, not paid to him, is due and payable to the one adjudged to be the officer *de jure*, and may be recovered by the latter of the municipality."

Notice to Disbursing Officer.—After an adjudication in favor of the officer *de jure* and notice of the same to the disbursing officer of the municipality, if he still continues to pay to the officer *de facto*, the officer *de jure* may recover his salary from the municipality from the date of such notice. *Nichols v. MacLean*, 101 N. Y. 533, 54 Am. Rep. 730; *McVeany v. New York*, 80 N. Y. 185, 36 Am. Rep. 600, 59 How. Pr. (N. Y.) 106. See also *State v. Carr*, 129 Ind. 44.

1. When De Facto Officer has Received the Emoluments.—*U. S. v. Addison*, 6 Wall. (U. S.) 291; *State v. Clark*, 52 Mo. 508; *Dolan v. New York*, 68 N. Y. 274, 23 Am. Rep. 168; *Dorsey v. Smyth*, 28 Cal. 21; *Douglass v. State*, 31 Ind. 429; *Glascock v. Lyons*, 20 Ind. 1, 83 Am. Dec. 299; *People v. Miller*, 24 Mich. 459, 9 Am. Rep. 131.

In *Nichols v. MacLean*, 101 N. Y. 527, 54 Am. Rep. 730, the plaintiff was duly appointed police commissioner of the city of New York. Subsequently, he was unlawfully removed by the mayor, and the defendant appointed for the unexpired term. The proceedings of removal were judicially annulled, and he resumed the duties of his office. During the time of his exclusion from the office, he was willing and ready to perform his duty. The defendant drew the salary of the office during the time he held the same. The court allowed the plaintiff to recover from the defendant the amount of the salary which he had received. *Compare Stuhr v. Curran*, 44 N. J. L. 181, 43 Am. Rep. 353.

Measure of Damages.—In actions of this kind, the measure of damages, as a general rule, is the salary or fees of the office received by the officer *de facto*. *Nichols v. MacLean*, 101 N. Y. 526, 54 Am. Rep. 730; *Dolan v. New York*, 68 N. Y. 274, 23 Am. Rep. 168; *Lawlor v. Alton*, 8 Ir. C. L. R. 160; *Douglass*

v. State, 31 Ind. 429; *People v. Miller*, 24 Mich. 458, 9 Am. Rep. 131; *Dorsey v. Smyth*, 28 Cal. 21; *U. S. v. Addison*, 6 Wall. (U. S.) 291; *Andrews v. Portland*, 79 Me. 484, 10 Am. St. Rep. 280; *Bier v. Gorrell*, 30 W. Va. 95, 8 Am. St. Rep. 17.

In *Mayfield v. Moore*, 53 Ill. 428, 5 Am. Rep. 52, it was held that if the officer *de facto* assumes the office under an apparent claim of right, he is only liable for fees earned, less the necessary expense in earning them.

Counsel Fees.—While damages necessarily resulting from an illegal motion may be recovered, counsel fees expended in defending the charges against the officer so removed are not such damages as he is entitled to recover. *Shaw v. Macon*, 19 Ga. 468.

2. Whole Amount of Capital Stock.—These words, as used in the act authorizing the taxation of stockholders in a bank, have reference to the value of the stock, not the amount of nominal capital. *People v. Tax Com'rs*, 69 N. Y. 91.

Amount Owed.—The court said of these words, as used in a mechanic's-lien law, that it would be entirely too narrow a construction to refer the word *amount* to money only; that the word *amount* was plainly used in the sense of "substance," the legislative intent being that the value which the contractor is to have is to be reached. *Anderson v. Huff*, 49 N. J. Eq. 349.

Amount of Insurance.—These words were held equivalent to "the sum for which the life was insured." *Simpson v. Virginia L. Ins. Co.*, 115 N. Car. 396.

3. Amounting—Definite Idea of Value.—In *Carr v. Lackland*, 112 Mo. 457, it was held that the words "securities amounting to a certain sum" were not a representation that such securities would be of that value. The court said: "The word *amounting* never carries with it a definite idea of value; it implies an aggregate or sum of two or more things—a quantity or a number. The insolvent notes of a bank may amount to more than those that are solvent. Nothing to the contrary appearing, we must presume that the parties used the word in its ordinary sense, meaning thereby that the express or face value of the securities, when added together, aggregated the sum of \$50,250."

4. Dancing School.—A statute prohibiting any public show, *amusement*, etc., without a license, does not apply to a school for instruction in dancing, although admittance thereto is paid for on each evening. *Com. v. Gee*, 6 Cush. (Mass.) 175.

Aquarium.—But an aquarium filled with glass

AN. (See also **A**; **THE**.)—See note 1.

ANÆSTHETIC.—An anæsthetic is defined to be that which produces insensibility to pain.²

ANALOGOUS.—Containing the same material constituents.³

ANARCHY. (See the titles **CONSPIRACY**; **HOMICIDE**; **LABOR COMBINATIONS**.)—Anarchy is the absence of government. It is a state of society where there is no law or supreme power.⁴

ANCESTOR. (See the title **SUCCESSION**; and see that title also as to "First Purchaser," and the maxim "*Seisina facit stipitem*." See also **HEIRS**; **PREDECESSORS**.)—The term "ancestor," in its technical meaning, and as used in the statutes of descent, means any one from whom an estate is inherited. Its meaning is not confined to the lineal progenitors, as has sometimes been insisted.⁵

tanks for the exhibition of marine fish and animals is a place of *amusement* within the Sunday Law. *Warner v. Brighton Aquarium Co.*, L. R. 10 Exch. 291; *Terry v. Brighton Aquarium Co.*, L. R. 10 Q. B. 306.

Circus.—So a circus would fall under the general term *amusements*. *Jacko v. State*, 22 Ala. 75.

1. **An Act of Bankruptcy.**—*An* is sometimes read in the most absolute sense as meaning "any whatsoever." Thus *Cotton, L. J.*, in *Ex p. Pratt*, 53 L. J. Ch. 614, says: "I am of the opinion that the expression '*an act of bankruptcy*' includes everything which by legislative enactment is made an act of bankruptcy, whether by this act or by some other act passed before it came into operation."

2. **Webst. Dict.** This definition was quoted in the charge of the trial court in *State v. Baldwin*, 36 Kan. 20, and was held no error.

3. A statute provided that *analogous* forms might be used. It was held that this meant only those that contained every material constituent. *Smith v. State*, 63 Ala. 58.

4. *Spies v. People*, 122 Ill. 254. In this case the court further says: "If the conspiracy had for its object the destruction of the law and the government, and of the police and militia as the representatives of law and government, it had for its object the bringing about of practical *anarchy*. Whether or not the defendants were *anarchists* may have been a proper circumstance to be considered in connection with all the other circumstances in the case, with a view of showing what connection, if any, they had with the conspiracy and what were their purposes in joining it."

5. **Ancestor.**—*Bailey v. Bailey*, 25 Mich. 185; *Den v. De Hart*, 3 N. J. L. 73; *McCarthy v. Marsh*, 5 N. Y. 263; *Wheeler v. Clutterbuck*, 52 N. Y. 67; *Conkling v. Brown*, 57 Barb. (N. Y.) 269a (opinion by Hon. William Inglis and Charles O'Connor, Esq.); *Armstrong v. Moran*, 1 Bradf. (N. Y.) 318; *Emanuel v. Ennis*, 48 N. Y. Super. Ct. 430; *Brower v. Hunt*, 18 Ohio St. 311; *Brewster v. Benedict*, 14 Ohio 368; *Current v. Taylor*, 19 Ohio 36; *Clark v. Shailer*, 46 Conn. 119.

The term *ancestor* means any one from whom an estate is immediately inherited. *Murphy v. Henry*, 35 Ind. 442; *Wheeler v. Clutterbuck*, 52 N. Y. 67; *Buckingham v. Jacques*, 37 Conn. 402. The term *ancestor* means

merely the person from whom the estate passes, and not a progenitor as in popular acceptance. *Bailey v. Bailey*, 25 Mich. 185. In interpreting the Ohio statute of 1831, regulating descents and the distribution of personal estates in that state, the court, by *Warden, J.*, said: "That the word *ancestor*, as used in this act, is not to be understood as when used in common parlance, is well settled in Ohio. * * * The *ancestor* meant by our statute is any one from whom the estate is inheritable, and the *ancestor* from whom it must in law be understood to have come to the intestate is he from whom it was immediately inherited." *Prickett v. Parker*, 3 Ohio St. 394.

In *Zetland v. Lord Advocate*, L. R. 3 App. Cas. 520, it was said: "The word *ancestor* does not mean, either etymologically or technically, a lineal *ancestor* only; in illustration of which proposition, I may refer to a passage in *Comyns' Digest* as to the English writ of '*Mort d'Ancestor*;' which (it is said) 'does not lie upon the death of any *ancestor*, except a father, mother, brother, sister, uncle, aunt, nephew, or niece; for, upon the death of another *ancestor*, an *aiel*, *besaiel*, or *cosinage*, lies.' 1 Com. Dig. (5th ed.), p. 705, tit. *Assise*, C. 1."

Ancestor is he from whom, in contemplation of law, the estate has descended to the person last seised, taking the nearest first, and so proceeding in the ascending line. *Den v. De Hart*, 3 N. J. L. 73.

Uncle.—In accordance with this view, it was held that an uncle of the intestate from whom the latter inherited, was his *ancestor*. *Brewster v. Benedict*, 14 Ohio 385.

Brother.—And likewise a brother has been held to be an *ancestor*. *Prickett v. Parker*, 3 Ohio St. 394.

Child.—It was said by *Field, J.*, in *Lavery v. Egan*, 143 Mass. 389: "After the rule was adopted that inheritances might ascend, the *ancestor* was the person from whom the inheritance devolved upon the heir, and a child might be the *ancestor* of his parent."

Contra.—The word *ancestors*, derived from *antecessores*, designates the ascendants of the intestate in the right line, as father and mother, grandfather and grandmother, and does not include collateral relatives as brothers and sisters (2 Bouv. Inst. 355; Bouv. Law Dict.; 2 Bl. Com. 209). *Valentine v. Wetherill*, 31 Barb. (N. Y.) 659.

As sometimes employed, it is synonymous with "kindred," and embraces all from whom a title could be derived by descent.¹

ANCHOR.—By this term is meant an instrument for holding a vessel or other floating body.²

Same—Illegitimate Child—Ancestor of Mother.—A *Massachusetts* statute provided that an illegitimate child should be considered as heir of his mother and of any maternal ancestor. It was held that such a child could not inherit from the collateral kindred of the mother. The court said: "The words 'maternal ancestor' are manifestly limited to progenitors, or ancestors in the direct ascending line, according to their common meaning, and the only sense in which the word ancestor is used throughout the statute of descents, the rules of which statute are declared to be those of the statute of distributions also." *Pratt v. Atwood*, 108 Mass. 42.

Same—Descent from Aliens. (See also the title **ALIENS**.)—The twenty-second section of the chapter of the *New York Revised Statutes*, relative to the descent of real property, which provides that no person capable of inheriting under the provisions of that chapter shall be precluded from such inheritance by reason of the alienism of any ancestor of such person, is broad enough to remove a disability arising from the alienism of the father and grandfather of the person claiming the inheritance; but it does not remove the disability of a person who, in tracing his pedigree and consanguinity as collateral heir of the person dying seised of the premises, must trace it immediately through the blood of the father of the latter, an alien, and who was not an ancestor of the claimant. The court said: "I am aware that the term *collateral ancestors* is sometimes used to designate uncles and aunts, and other collateral antecessors of the person spoken of, who are not, in fact, his ancestors. But the word *ancestors*, in its ordinary import and meaning, only includes those from whom the person spoken of is lineally descended, either on the father's or mother's side. And whenever this word is intended to be used in a sense which is different from its ordinary import of lineal ascendants, or in such enlarged sense of antecessors, so as to embrace all the blood relatives of the person referred to who have preceded him, it is qualified or enlarged by some other term to show that it is not used in its natural sense merely." *Banks v. Walker*, 3 Barb. Ch. (N. Y.) 438, *overruled* in *McCarthy v. Marsh*, 5 N. Y. 263. The court, in this latter case, said: "In most of our English dictionaries the word ancestor is defined to be 'one from whom a person descends,' and some of the law dictionaries agree substantially in this definition. But this is its popular and not its legal meaning. * * * Mr. Burrill, in his law dictionary, * * * defines it as 'the person last seised of an estate of inheritance and from whom such estate is transmitted to the heir.'"

1. Synonymous with Kindred.—*Greenlee v. Davis*, 19 Ind. 62. See also *Burgwyn v. Devereux*, 1 Ired. (N. Car.) 583; *Osborne v. Widenhouse*, 3 Jones Eq. (N. Car.) 238.

Provision that Half Blood shall Inherit Only when They Are the Blood of the Ancestor from Whom the Estate is Derived. (See also the title **SUCCESSION**.)—Under such a provision, it was held that the word ancestor must be construed to embrace all persons from whom a title by descent could be derived under any circumstances; that is, to be synonymous with "kindred." The court said: "The intent of the statute must govern its construction; and from the whole enactment, it may be readily inferred that the legislature did not mean to employ the word ancestor in its usually defined meaning, but to use it as synonymous with 'kindred.'" *Greenlee v. Davis*, 19 Ind. 60. See also *Brewster v. Benedict*, 14 Ohio 385.

Same—Husband or Wife.—So a husband or wife, from whom property descends, is within the meaning of the statute an ancestor. *Cornett v. Hough*, 136 Ind. 391, *citing Orr v. White*, 106 Ind. 341; *Greenlee v. Davis*, 19 Ind. 60; *Barnes v. Loyd*, 37 Ind. 523; *Murphy v. Henry*, 35 Ind. 442; *Fletcher v. Holmes*, 32 Ind. 497; *Brown v. Harmon*, 73 Ind. 412.

Same—Remote Ancestor.—The ancestor intended by the statute, with regard to the distribution of ancestral estates, is the one from whom the estate immediately, and not the one from whom it remotely, descended. *Buckingham v. Jacques*, 37 Conn. 402; *Clark v. Shailer*, 46 Conn. 123; *Gardner v. Collins*, 2 Pet. (U. S.) 58; *Curren v. Taylor*, 19 Ohio 36; *Prickett v. Parker*, 3 Ohio St. 394; *Wheeler v. Clutterbuck*, 52 N. Y. 67.

Whether Equivalent to Parents.—In *Mitchell v. Thorne*, 134 N. Y. 540, it was said: "The word ancestor is an ambiguous one, broad enough to include, but not necessarily including, parents, grandparents, and all persons in the ascending line, as far as relationship can be traced. 'Descendant' is an antonym of ancestor, but is not a synonym of 'heir.' It is plain that the allegation that the ancestors of the plaintiffs are buried in this yard is not equivalent to an allegation that the plaintiffs' parents were there buried, or that the plaintiffs are the heirs of the persons there buried. No one is the heir of all of his ancestors."

2. Anchor Watch. (See also the title **NAVIGATION**.)—Defined by Totten in the *Naval Text-book and Dictionary*, p. 443, as "a watch of three or four men kept constantly on deck, and stationed at one of the anchors, while riding at single anchor, to see that the stoppers, painters, cables, and buoy ropes are ready for immediate use;" by Dana in his *Dictionary of Sea Terms*, p. 129, as "a small watch of one or two men kept while in port." It is not the duty of such a watch to take any active measures to get the vessel out of the way of an approaching vessel in broad daylight when the approaching vessel is under full command, nor even to hail the approaching vessel in order to avoid a collision. *The Lady Franklin*, 2 Lowell (U. S.) 220.

ANCIENT.—"Ancient" is a correlative term. It has for its correlate, as standing in opposition, the term "modern."¹

One man is a sufficient anchor watch. The Brig Rival, 1 Sprague (U. S.) 128.

Lying at Anchor. (See also the title NAVIGATION.)—By a vessel *lying at anchor*, it is generally understood that she is floating upon the water, but is held by her cable and *anchor*. Reid v. Lancaster F. Ins. Co., 19 Hun (N.Y.) 284, in which case it was held that a vessel beached cannot be said to be *lying at anchor*, and her owner cannot recover for her destruction while so beached, on a policy of insurance which covers her while *lying at anchor*. This case was upheld upon appeal in Reid v. Lancaster F. Ins. Co., 90 N. Y. 382, where it is said: "There was no dispute about the facts relative to the situation and condition of the vessel, but it is argued that the phrase *lying at anchor* has a technical meaning and is a technical phrase, requiring explanation by evidence, and so subject to the judgment and control of the jury, and evidence was offered to show its meaning, which was objected to and rejected. We see no just reason for holding that the words *lying at anchor* or 'unoccupied,' as used in the policy, have any other than their ordinary and familiar meaning, or are used in any special sense. The terms of the policy indicate very plainly an intention to limit the insurance to a particular period during the running of the policy. The risk is assumed while the vessel is plying in certain waters, or *lying at anchor* or at any bulkhead, dock, or pier, and while not unoccupied for more than twenty days. The risk was taken while the vessel was in use, or ready for use and awaiting employment, or, if laid up for the want of it, at least occupied. The language certainly did not contemplate a liability when the vessel was beached, when its furniture was removed, when it had no occupant, and practically, for the time being, was laid up and abandoned."

Same—Fastened to a Pierhead.—A vessel fastened to a pierhead is not *lying at anchor*, and

2 C. of L.—21

therefore is not liable for wharfage under the provision of the *New York Act 1860* (c. 254, Laws 1860, amended by c. 405, Laws 1875) which authorizes the collection of "half the usual wharfage for every vessel *lying at anchor* within any slip," although the vessel, attached to an adjacent pier, occupies the greater part of the slip between the piers. Walsh v. New York Floating Dry Dock Co., 77 N. Y. 448.

Anchorage Toll.—*Anchorage* is defined by Lord Hale, De Portibus Maris 74, to be "a prestation or toll for every *anchor* cast there; and sometimes though there be no *anchor*. And this doth in truth properly and *prima facie* arise from or in respect of the propriety in the soil, and is an evidence of it; but yet is not so always, but grows due in respect of the franchise." Free Fishers v. Gann, 13 C. B. N. S. 853, 106 E. C. L. 853, in which case *anchorage* was held to exist against a vessel anchored even two miles from the shore, where there was no case of necessity arising from distress. This case was reversed in Gann v. Free Fishers, 11 H. L. Cas. 192, on the ground that there was no proof that the place where the *anchorage* was made was ever within a port. Lord Hale's definition was again approved, however, in Foreman v. Free Fishers, L. R. 4 H. L. 281, where the case of Gann v. Free Fishers, 11 H. L. Cas. 192, is distinguished. See also Colchester v. Brooke, 7 Q. B. 355, 53 E. C. L. 355.

Anchoring or Supporting a Wall.—As to evidence showing what was meant by these terms in a building contract, see Ryder v. Kinsey (Minn. 1895), 64 N. W. Rep. 94. See also the title WORKING CONTRACTS.

1. Garner v. State, 5 Yerg. (Tenn.) 160.

Ancient Feud.—An *ancient* feud is an estate descended to one from his remote ancestors. Den v. De Hart, 3 N. J. L. 77.

Ancient Instruments.—See the title ANCIENT DOCUMENTS.

ANCIENT DOCUMENTS.

BY PHILIP P. WELLS.

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I. DEFINITION.—An ancient document, as this term is used in the law of evidence, is a document which is not less than thirty years old.¹

The Term Includes deeds, wills, leases, bonds, powers of attorney, receipts, letters, and all other documents which are, from their nature, evidence of the matters of fact in issue in any particular case.²

1. *Whitman v. Heneberry*, 73 Ill. 109; 1 Greenl. on Evidence, § 144; 1 Taylor on Evidence, § 87; Bouvier's Law Dict.

A deed not more than twenty-four years old is not ancient. *Mapes v. Leal*, 27 Tex. 345.

A Less Definite Period seems to have been formerly required as the test of ancient documents. Thus in *Benson v. Olive*, Bunb. 284, decided in 1730, a deed of forty years was admitted as ancient, while another of thirty-six years was objected to, and *per curiam*: "This deed was not admitted to be read; for though sometimes thirty-five or even thirty years has been thought sufficient, yet not where it is objected to; but the usual rule is forty years."

Forty years is stated as the test in Comyns's Digest, title Evidence (B. 2). See also *Isack v. Clarke*, 1 Rolle 132.

In *Porter v. Gordon* (MS. 11 Geo. II. K. B.), 12 Vin. Abr. 57, pl. 9, a deed thirty-six years old was admitted, over objection, as ancient, the court saying that "there was no fixed rule about it, but that it had often been allowed where the deed was but twenty-five or thirty years old."

In *Everley v. Stoner*, 2 Yeates (Pa.) 122, a deed twenty-eight years and five months old

was admitted in evidence as ancient upon the authority of the case just cited from Viner's Abridgment.

But in *Jackson v. Blanshan*, 3 Johns. (N. Y.) 298, 3 Am. Dec. 485, Kent, C. J., declared that "the rule requiring thirty years as the test of an ancient deed is an old and well-settled rule of evidence." In the same case, Spencer, J., said: "The ancient rule required the lapse of sixty years before a deed proved itself; this rule has been narrowed to thirty years." As to the sixty-year rule here referred to, see *James v. Trollop*, Skin. 239, 2 Mod. 320.

2. The following authorities establish the admissibility of the several kinds of ancient documents mentioned:

Deeds.—*Henthorn v. Doe*, 1 Blackf. (Ind.) 157; *Cook v. Totton*, 6 Dana (Ky.) 108; *Thruston v. Masterson*, 9 Dana (Ky.) 228; *Morris v. Callanan*, 105 Mass. 129.

Wills.—*M'Kenire v. Fraser*, 9 Ves. Jr. 5; *Doe v. Wolley*, 8 B. & C. 22, 15 E. C. L. 150; *Fetherly v. Waggoner*, 11 Wend. (N. Y.) 599; *Jackson v. Luquere*, 5 Cow. (N. Y.) 221.

Leases.—*Clarkson v. Woodhouse*, 3 Doug. 189, 26 E. C. L. 74; *Plaxton v. Dare*, 10 B. &

II. HOW AGE OF DOCUMENT COMPUTED—1. **Time Reckoned from Date of Execution.**—In computing the age of a document for the purpose of determining whether it is an ancient writing within the rules of evidence, the time is, in general, reckoned from the date of execution, but in some jurisdictions a contrary rule prevails as to wills under certain circumstances.¹

C. 17, 21 E. C. L. 15; Hewlett v. Cock, 7 Wend. (N. Y.) 371.

Bonds.—*Slater v. Hodgson, 9 Q. B. 727, 58 E. C. L. 727; Walton v. Coulson, 1 McLean (U. S.) 120; Coulson v. Walton, 9 Pet. (U. S.) 62; Bennett v. Runyon, 4 Dana (Ky.) 422; Huddy v. Harryman, 3 Har. & M. (Md.) 581.*

Powers of Attorney.—*Winn v. Patterson, 9 Pet. (U. S.) 663.*

Letters and Receipts.—*Roe v. Rawlings, 7 East 279; Manby v. Curtis, 1 Price 225; Bell v. Brewster, 44 Ohio St. 690; McReynolds v. Longenberger, 57 Pa. St. 13.*

Licenses.—*Rogers v. Allen, 1 Campb. 311; Boston v. Richardson, 105 Mass. 351.*

Old Records.—*Goodwin v. Jack, 62 Me. 414; Little v. Downing, 37 N. H. 355.*

Proceedings in Ancient Suits.—*Freeman v. Phillips, 4 M. & S. 486; Price v. Woodhouse, 3 Exch. 616.*

Steward's Books.—*Wynne v. Tyrwhitt, 4 B. & Ald. 376, 6 E. C. L. 524; Bertie v. Beaumont, 2 Price 303.*

Certificates of Pauper's Settlement.—*Rex v. Netherthong Tp., 2 M. & S. 337; Rex v. Whitchurch, 7 B. & C. 573, 14 E. C. L. 99; Rex v. Farringdon, 2 T. R. 471; Rex v. Ryton, 5 T. R. 259.*

Parish Books.—*Plaxton v. Dare, 10 B. & C. 17, 21 E. C. L. 15.*

Signature to Pay Roll of a Military Company.—*Bell v. Brewster, 44 Ohio St. 690.*

Case Stated for Opinion of Counsel.—*Bishop of Meath v. Winchester, 3 Bing. N. Cas. 183, 32 E. C. L. 90.*

Chartulary of an Abbey.—*Bullen v. Michel, 4 Dow. 297.*

Terriers.—*Croughton v. Blake, 12 M. & W. 205.*

Entries in Family Bible.—*Hubbard v. Lees, L. R. 1. Exch. 255.*

Maps and Surveys.—In an action for cutting timber, where the location of a town line is in issue, an ancient document purporting to be a field book with surveys of the town is admissible. *Aldrich v. Griffith, 66 Vt. 390.*

And in ejectment, what purports to be and has long been recognized as the proprietor's records and field book of the district wherein the land lies, is admissible to prove acquiescence in the division of lands therein described. *Hart v. Gage, 6 Vt. 170.*

But on an issue to try the boundary of two parishes, a map of one parish made apparently by the parson, but not signed by any parish officer, is inadmissible. *Earl v. Lewis, 4 Esp. 1.*

In *Boston Water Power Co. v. Hanlon, 132 Mass. 483*, which was a writ of entry to recover land, the plottings for plans and the field notes of a surveyor were held inadmissible to establish a boundary line between the parties. The court said that ancient maps, plans, and deeds are admissible, although between stran-

gers, because "they are of such a character as usually accompany transfers of title or acts of possession, and purport to form a part of actual transactions referring to coexisting subjects by which their truth can be tested, and there is deemed to be a presumption that they are not fabricated. But plottings for plans and field notes are memoranda only, which may never have been acted upon. They are preparations for a transaction which may never have taken place. The fact that they are so full that plans could be made from them is not important."

In *Holt v. Maverick, 5 Tex. Civ. App. 650*, surveyors' memoranda indorsed on a land warrant were held admissible to prove the location of the land.

Copies, etc.—An ancient power of attorney to convey land, if lost, may be proved by a certified copy. *Winn v. Patterson, 9 Pet. (U. S.) 667.*

All is presumed to have been rightly done in the execution of a lost ancient indenture of apprenticeship, although the proper officers show that no such instrument appears to have been stamped or enrolled as required by law. *Rex v. Long Buckby, 7 East 45.*

Where the necessary seal is missing from what purports to be an ancient exemplified copy of the record of commissioners appointed to fix the limits of a municipal corporation, the seal will be presumed to have been lost, and the document is admissible, *Beverly v. Craven, 2 M. & Rob. 140*; also an ancient copy of a decree in chancery fixing the customs of a manor is admissible, *Price v. Woodhouse, 3 Exch. 616*; also an ancient copy of a lost vicar's endowment, *Tucker v. Wilkins, 4 Sim. 241.*

The contents of ancient tax receipts, accidentally burned, may be proved by oral testimony to defeat a tax title. *McReynolds v. Longenberger, 57 Pa. St. 33.*

Where a certified copy from the record is admissible by statute in the same manner as the original, the regular execution of the original is presumed from the copy. *Holmes v. Coryell, 58 Tex. 680.*

But an examined copy of an existing ancient instrument is inadmissible without proof of the execution of the original. If the party cannot produce the original he should prove its execution by circumstances, such as long possession under it, marks of age upon the paper itself, etc. *Schunior v. Russell, 83 Tex. 95.*

1. Reckoning Time from Date of Execution.

—The authorities on this point are cases of wills.

The established doctrine in *England* is that "the rule of computing thirty years from the date of a deed is equally applicable to a will." *Per Lord Tenterden, in Doe v. Wolley, 8 B. & C. 22, 15 E. C. L. 150 (at nisi*

2. Time Reckoned to Day of Introduction in Evidence.—Furthermore, the time is computed up to the day when the instrument is introduced in evidence, and an instrument thirty years old at that time enjoys the privilege, although it may have been less than thirty years old when the suit was begun.¹

III. PROOF OF ANCIENT DOCUMENTS—1. General Rule—Prove Themselves.—The general rule of evidence is that an ancient document proves itself, and is admissible in evidence without proof of its authenticity or execution by calling the attesting witnesses, or by proving their handwriting, or otherwise.²

prius, sub. nom. Doe v. Deakin, 3 C. & P. 402, 14 E. C. L. 369; M'Kenire v. Fraser, 9 Ves. Jr. 5; Man v. Ricketts, 7 Beav. 93.

In *New York*, however, it has been held that in the case of wills, the thirty years begins, not at the date of the instrument, but at the testator's death, at least where possession under the instrument without other circumstances is relied upon. *Staring v. Bowen*, 6 Barb. (N. Y.) 109. See *Jackson v. Luquere*, 5 Cow. (N. Y.) 221; *Jackson v. Laroway*, 3 Johns. Cas. (N. Y.) 283; *Jackson v. Blanshan*, 3 Johns. (N. Y.) 292, 3 Am. Dec. 485; *Hewlett v. Cock*, 7 Wend. (N. Y.) 371.

In *Pennsylvania* the rule established in the *New York* courts has been approved. *Shaller v. Brand*, 6 Binn. (Pa.) 439, 6 Am. Dec. 482. See also *infra*, this title, *Possession or Action under the Document*.

1. Time Computed to Day of Introduction in Evidence.—*Gardner v. Granniss*, 57 Ga. 555; *Johnson v. Shaw*, 41 Tex. 428 (*sub. nom.* *Johnson v. Timmons*, 50 Tex. 521); *Bass v. Sevier*, 58 Tex. 567.

In *Johnson v. Shaw*, 41 Tex. 428, the instrument was only ten years old when the suit began, and thereafter more than twenty years elapsed before the trial.

2. Ancient Document Proves Itself—England.—*Doe v. Burdett*, 4 Ad. & El. 19, 31 E. C. L. 18; *Hubbard v. Lees*, L. R. 1 Exch. 255.

United States.—*Winn v. Patterson*, 9 Pet. (U. S.) 674; *Applegate v. Lexington, etc., County Min. Co.*, 117 U. S. 263.

Alabama.—*Beall v. Dearing*, 7 Ala. 124; *Doe v. Eslava*, 11 Ala. 1028; *Carter v. Doe*, 21 Ala. 91; *Alexander v. Wheeler*, 78 Ala. 167.

Georgia.—*Settle v. Alison*, 8 Ga. 201, 52 Am. Dec. 393; *Doe v. Roe*, 31 Ga. 593; *Weitman v. Thiot*, 64 Ga. 11; *King v. Sears*, 91 Ga. 577.

Kentucky.—*Bennett v. Runyon*, 4 Dana (Ky.) 422; *Cook v. Totton*, 6 Dana (Ky.) 108; *Thruston v. Masterson*, 9 Dana (Ky.) 233; *Winston v. Gwathmey*, 8 B. Mon. (Ky.) 19; *Hedger v. Ward*, 15 B. Mon. (Ky.) 106.

Indiana.—*Henthorn v. Doe*, 1 Blackf. (Ind.) 157.

Maine.—*Crane v. Marshall*, 16 Me. 27, 33 Am. Dec. 631; *Goodwin v. Jack*, 62 Me. 414.

Maryland.—*Hoddy v. Harryman*, 3 Har. & M. (Md.) 581.

Massachusetts.—*Stockbridge v. West Stockbridge*, 14 Mass. 257; *Tolman v. Emerson*, 4 Pick. (Mass.) 160.

Michigan.—*King v. Merritt*, 67 Mich. 194.

New Hampshire.—*Clark v. Wood*, 34 N. H. 447.

New York.—*Jackson v. Laroway*, 3 Johns. Cas. (N. Y.) 286; *Doe v. Phelps*, 9 Johns.

(N. Y.) 169; *Doe v. Campbell*, 10 Johns. (N. Y.) 475; *Jackson v. Luquere*, 5 Cow. (N. Y.) 226; *Fetherly v. Waggoner*, 11 Wend. (N. Y.) 602.

Pennsylvania.—*Zeigler v. Houtz*, 1 W. & S. (Pa.) 533.

South Carolina.—*Duncan v. Beard*, 2 Nott. & M. (S. Car.) 400.

Exception to Rule as to Hearsay Evidence.—

The rule as to the admissibility of ancient instruments is usually treated by the text writers as an exception to the rule of evidence excluding hearsay evidence. See 1 Phil. on Evid. (5th Am. ed. by Cowen & Hill) *281; 1 Taylor Evid., § 658; 1 Greenleaf Evid., § 144.

The presumption in favor of ancient documents is one of those arising from lapse of time, in accordance with the maxim, *Ex diuturnitate temporis omnia præsumuntur rite et solemniter esse acta*, 1 Greenl. Evid., §§ 20, 21; and is founded "on the great difficulty, nay impossibility, of proving the handwriting of the party after such a lapse of time." *Wynne v. Tyrwhitt*, 4 B. & Ald. 376, 6 E. C. L. 524.

Presumptions in Favor of Ancient Document.—

"It is presumed that the signature, and every other part of such document which purports to be in the handwriting of a particular person, is in that person's handwriting, and in case of a document executed or attested that it was duly executed or attested." Stephens Dig. of Evid. 139.

Illustrations—Presumption as to Death of Witnesses.—Proof of execution or authenticity is dispensed with because the witnesses are presumed to be dead. *Winn v. Patterson*, 9 Pet. (U. S.) 674; *Lunn v. Scarborough*, 6 Tex. Civ. App. 15.

The presumption is conclusive, and the witnesses need not be called though proved to be living, *Barr v. Gratz*, 4 Wheat. (U. S.) 217; and within the jurisdiction of the court, *Jackson v. Christman*, 4 Wend. (N. Y.) 277; and present in court, Anonymous, cited in *Marsh v. Collnett*, 2 Esp. 665. To compel the calling of a living witness would be "a trap for a nonsuit." *Doe v. Wolley*, 8 B. & C. 22, 15 E. C. L. 150.

In *Tolman v. Emerson*, 4 Pick. (Mass.) 160 there is a dictum that the subscribing witnesses to an ancient instrument must be called if living. See also *McGennis v. Allison*, 10 S. & R. (Pa.) 197; but in the last-named case the circumstances were not such as to warrant the admission of the instrument under the rule.

Signature to Deed Not by Grantor.—If, as to an ancient deed coming from the possession of the heirs of the grantee, it appears

But this rule of evidence is not applicable unless there is an absence of all *indicia* of fraud or invalidity on the face of the instrument, and unless it comes from a proper custody; and, in some instances, unless possession has been held or action taken in accordance with its provisions. The prerequisites to the application of the rule will now be examined.

2. Prerequisites to Application of Rule—*a. NO FRAUD OR INVALIDITY APPARENT ON FACE OF INSTRUMENT.*—If the instrument is on its face invalid or fraudulent, or if it bears upon its face *indicia* of fraud, such as erasures and interlineations, the presumption of its authenticity and genuineness is overcome, and it must be proved in the usual way.¹

that the names of one or more of the grantors, who could not write, are in the handwriting of a person then present, and not a party to the deed or in interest, in the absence of evidence of fraud the presumption is that the signatures were made in the presence of the parties, by virtue of an oral direction from them, in which event the signatures are those of the parties as principals. *Hogans v. Caruth*, 19 Fla. 84.

Deed Signed by Two only of Three Executors.—Where an ancient deed is signed by two only of three executors, the refusal of the third or his inability to join will be presumed. *Fleming v. Burnham*, 36 Hun (N. Y.) 456.

Ancient Certificate—Officers' Authority.—So officers are presumed to have been duly sworn before executing an ancient certificate, although there was proof of their being sworn after its execution. *Rex v. Whitchurch*, 7 B. & C. 573, 14 E. C. L. 99.

Ancient Record—Only One Witness.—A certified copy from record of an ancient deed showing only one witness to the execution was presumed duly executed, although two were necessary. It was presumed that the recording clerk had omitted the name of one witness, and that after thirty years he was dead, and could not be called to testify. *Dodge v. Briggs*, 27 Fed. Rep. 160.

Corporation Seal.—The seal on an ancient document purporting to be that of an extinct corporation need not be proved. *Hoopess v. Auburn Water-Works Co.*, 37 Hun (N. Y.) 568. But it is otherwise if the corporation is not extinct. *Rex v. Bathwick*, 2 B. & Ad. 648, 22 E. C. L. 155.

Comparison of Handwriting.—Though the general rule as to the proof of an ancient instrument as stated in the text is true, cases may occur where, in order to establish identity, it will be necessary to prove the handwriting. 2 Taylor on Ev., § 1874. In that event, proof of such handwriting may be made by producing other authentic ancient writings, with which the witnesses, whether expert or not, and the court and jury may directly compare the document in dispute. *Davies v. Lowndes*, 7 Scott N. R. 168; *Roe v. Rawlings*, 7 East 282, note, *per* Le Blanc, J.; *Morewood v. Wood*, 14 East 328, note; *Doe v. Tarver*, R. & M. 143, 21 E. C. L. 401; *Taylor v. Cook*, 8 Price 650.

Moreover, it is permissible to prove such handwriting by a witness who has become familiar with it from frequent inspection of other authentic ancient documents, though

they are not produced in court. *Fitzwalter Peerage Case*, 10 Cl. & F. 193; *Doe v. Davies*, 10 Q. B. 314, 59 E. C. L. 314; *Strother v. Lucas*, 6 Pet. (U. S.) 763; *Jackson v. Brooks*, 8 Wend. (N. Y.) 426; *Willson v. Betts*, 4 Den. (N. Y.) 201; *Sweigart v. Richards*, 8 Pa. St. 436; *Turnipseed v. Hawkins*, 1 McCord (S. Car.) 272; *Cantey v. Platt*, 2 McCord (S. Car.) 260.

Thus, where the surveyor who made an ancient survey was dead, the plat was admitted upon the testimony of a surveyor who was familiar with the works and the handwriting of the former, and who swore to the similarity. *Turnipseed v. Hawkins*, 1 McCord (S. Car.) 272.

In *Sweigart v. Richards*, 8 Pa. St. 436, it was held that, to prove the handwriting of a person who had been dead upwards of forty years, witnesses may speak from a comparison with signatures and writings in family records admitted by the family to be in such person's handwriting, from letters in the possession of his family purporting to be signed by him, and from official documents received in the proper office and acted upon as genuine.

Where, on a claim to an ancient peerage, a family pedigree produced from the proper custody, and purporting to have been made by an ancestor of the claimant, was offered in evidence, it was held that the handwriting might be proved by the claimant's solicitor, who said he had acquired a knowledge of the character of the ancestor's handwriting from having had occasion from time to time, in the course of his business for the claimant, to examine several deeds and other documents written or signed by the ancestor, and which came to the claimant together with property formerly belonging to that ancestor. *Fitzwalter Peerage Case*, 10 Cl. & F. 193. In the same case, however, where a witness said that from the few inspections he had had of two or three other documents, which were proved to be of the same ancestor's writing, he had formed in his mind such a standard of the character of his handwriting as to be able, without immediate comparison with those documents, to say whether any other document that might be produced before him was or was not in the same handwriting, it was held that the evidence was inadmissible on the ground that the witness was not sufficiently familiar with the handwriting.

1. Erasures or Interlineations raise a presumption of fraud which overcomes the presumption of genuineness arising from the

b. MUST COME FROM PROPER CUSTODY.—And, moreover, it must be produced at the trial from a proper custody, that is, a custody wherein it might reasonably be expected to be found, before strict proof can be dispensed with. But the custody need not be the most proper.¹

antiquity of the instrument. *Starkie on Evid.* 523; *Ridgeley v. Johnson*, 11 Barb. (N. Y.) 540.

Purpose of Mutilation Not Apparent.—But when the purpose of the mutilation of an ancient deed is not apparent, and enough is left to show that it is a deed executed in conveyance of an estate according to articles of agreement already in evidence, it should be admitted. The mutilation may affect the weight of the evidence, but not its admissibility. *Per Lord Tindal in Trimbletown v. Kemmis*, 9 Cl. & F. 776.

Alteration Not Affecting Instrument.—In a bond to convey land, the erasure of "state of North Carolina" and the substitution therefor of "state of Virginia," and the erasure and rewriting of the obligor's name, since they do not advance the interest of the obligee or increase the obligation, do not affect the bond's validity or admissibility. *Walton v. Coulson*, 1 McLean (U. S.) 122 (on appeal, *sub. nom. Coulson v. Walton*, 9 Pet. (U. S.) 62).

An Ancient Memorandum of a Surveyor, indorsed on a recorded land warrant, though erased, is admissible without authentication, for the erasure in this case raises a presumption of genuineness. *Holt v. Maverick*, 5 Tex. Civ. App. 650.

Deed Insufficient on Its Face.—A married woman's deed insufficient on its face to convey title is inadmissible, though ancient, *Boyle v. Chambers*, 32 Mo. 46; also an administrator's deed made by order of court, when neither notice to the parties interested nor the jurisdiction of the court appears by recital or otherwise, *Fell v. Young*, 63 Ill. 106. See also *Meegan v. Boyle*, 19 How. (U. S.) 149.

The Burden of Proof under the *Texas* practice is on the party filing an affidavit of forgery against an ancient deed otherwise admissible, *McWhirter v. Allen*, 1 Tex. Civ. App. 649; *Pendleton v. Robertson* (Tex. Civ. App. 1895), 32 S. W. Rep. 442; *Chamberlain v. Showalter*, 5 Tex. Civ. App. 226; *Masterson v. Todd*, 6 Tex. Civ. App. 131; *Norton v. Conner* (Tex. 1890), 14 S. W. Rep. 193; *Lumpkin v. Silliman*, 79 Tex. 165; even if the instrument is proved merely by certified copy, *Holmes v. Coryell*, 58 Tex. 680.

But when There is a Conflict of Evidence the question is for the jury. *Holt v. Maverick*, 5 Tex. Civ. App. 650; *McCelvey v. Cryer* (Tex. Civ. App. 1894), 28 S. W. Rep. 691.

Whether Suspicious Instrument is to be Received—Question for the Court.—Where an instrument purporting to have been executed more than thirty years is offered as an ancient instrument, and there is evidence tending to show that its date has been changed, it has been held that it is for the court to determine whether the instrument bears such marks of suspicion as to justify its rejection

as an ancient instrument, and that, being admitted, the jury must accept it as at least *prima facie* an ancient instrument. *Wisdom v. Reeves* (Ala. 1895), 18 So. Rep. 13, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 565 *et seq.*

1. Proper Custody Raises Presumption of Genuineness.—The careful preservation of an instrument by persons interested in the subject-matter raises an inference of genuineness; but if it is in the custody of strangers, or even in the proper custody but thrown aside as of little value, there is an inference against it. 2 Phil. Evid., §§ 203–205, *Cowen & Hill's* notes, p. 366. Evidence of the custody of an ancient deed is given only to afford the judge a reasonable assurance of its authenticity. *Doe v. Phillips*, 8 Q. B. 160, 55 E. C. L. 160; *Whitman v. Heneberry*, 73 Ill. 109; *Roe v. Rawlings*, 7 East 291; *Chelsea Waterworks v. Cowper*, 1 Esp. 275; 1 Greenl. Evid., § 570.

Any Proper Custody Sufficient—Illustrations.—Documents are said to be in proper custody if they are in the place in which and under the care of the person with whom they would naturally be; but no custody is improper if it is proved to have a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable. *Stephens Dig. of Evid.*, art. 88.

The muniment room of the owner of lands formerly belonging to a suppressed abbey is a proper custody for the chartulary of the abbey, though the most proper custody would be the Augmentation Office. *Bullen v. Michel*, 4 Dow. 320.

A former bishop's paper relating to the diocese, found with others relating thereto among his family papers, is in proper custody when the registry office of the diocese for reasons unknown does not contain papers of so ancient a date as the one in question. *Bishop of Meath v. Winchester*, 3 Bing. N. Cas. 183, 32 E. C. L. 90.

The office where the business of registrar of a diocese is carried on is a proper custody for a terrier, although the cathedral muniment room might be the best place of deposit. *Croughton v. Blake*, 12 M. & W. 207.

But a landholder in a parish affected by a terrier is an improper custodian thereof, *Atkins v. Hatton*, 2 Anstr. 386; while the registry of the dean and chapter is proper, *Miller v. Foster*, 2 Anstr. 387, note; as is that of a claimant of tithes in the parish, *Tucker v. Wilkins*, 4 Sim. 241.

A testator's widow is a proper custodian of an unproved will, since it is not necessary that the custody from which an ancient document comes should be strictly according to the legal right; it is enough if it be brought from a place of deposit where, in the ordinary course of things, such a document, if genuine, might reasonably be expected to be found. *Doe v. Pearce*, 2 M. & Rob. 240.

c. POSSESSION OR ACTION UNDER THE DOCUMENT.—Where an ancient instrument is introduced in evidence to prove a right or claim thereunder, it is a question how far it is necessary to produce proof of some act done, or possession enjoyed, in accordance with its terms.

Doctrine in England.—In some of the earlier English cases where the document was very ancient, such proof was dispensed with on the ground that

Parties.—In ordinary cases, where the instrument is produced by one having an interest in it, or where the party who offers it in evidence is the proper depository, no evidence of custody is necessary, *Starkie Evid.* 525; such as a bond indorsed with a written assignment to the party producing it, *Bennett v. Runyon*, 4 Dana (Ky.) 422; a deed by the party claiming and occupying under it, *Crane v. Marshall*, 16 Me. 27, 33 Am. Dec. 631.

A defendant in a suit for tithes is not a proper custodian of a receipt for tithes in the same parish between strangers, *Manby v. Curtis*, 1 Price 225 (*Wood, B., dissenting*); but if the custodian bears the same family name as the receiptee it is admissible, *Bertie v. Beaumont*, 2 Price 303.

Documents respecting a parish, which come into the hands of the plaintiff's attorney from the son of the last incumbent of the living, are from a proper custody, and the son need not be called; his kinship is sufficient. *Earl v. Lewis*, 4 Esp. 1. But a book containing entries of customary payments in a parish in lieu of tithes, from the custody of the defendant, a grandson of a former rector, is inadmissible unless his custody is explained, or the book shown to have been among his grandfather's papers. *Randolph v. Gordon*, 5 Price 312.

So the custody of a party to the suit, who received the instrument from a friend as a curiosity, is insufficient. *Swinerton v. Stafford*, 3 Taunt. 91.

Attorneys and Counsel.—The plaintiff's attorney or counsel is a proper custodian of an instrument under which he claims. *Doe v. Phillips*, 8 Q. B. 160, 55 E. C. L. 160; *Doe v. Keeling*, 11 Q. B. 884, 63 E. C. L. 884. *Contra*, *Evans v. Rees*, 10 Ad. & El. 151, 37 E. C. L. 80.

Custodian of Family Letters, Books, etc.—A daughter who receives her deceased mother's keys and papers is a proper custodian of letters received by the mother. *Doe v. Beynon*, L. R. 4 P. & D. 193. See also *Bell v. Brewster*, 44 Ohio St. 690; *Hubbard v. Lees*, L. R. 1 Exch. 255.

The grantee's family is the proper custody for a deed, *Pettingell v. Boynton*, 139 Mass. 244; and the testator's family for a will, *McClaskey v. Barr*, 47 Fed. Rep. 173.

And if the instrument be found in the muniment room, or among the papers of a party having an interest therein, who might be expected to have preserved it, a proper custody is shown. *Doe v. Pulman*, 3 Q. B. 622, 43 E. C. L. 895; *Roe v. Rawlings*, 7 East 279; *Starkie on Evid.* 522.

The steward of the claimant of an estate is a proper custodian of papers relating thereto. *Trimlestown v. Kemmis*, 9 Cl. & F. 776 (*per Lord Tindal*). So also is a substituted agent

of a power of attorney containing a power of substitution. *Williams v. Conger*, 49 Tex. 582.

Libraries, Museums, and Private Collectors of manuscripts, unconnected with the matters in dispute, are improper custodians; *e. g.*, the British Museum, *Swinerton v. Stafford*, 3 Taunt. 91; the Herald's Office, *Lygon v. Strutt*, 2 Anstr. 602; a private collector of unimpeachable character, even though the circumstances convince any mind of the instrument's authenticity, *Potts v. Durant*, 3 Anstr. 789.

In *Lygon v. Strutt*, 2 Anstr. 602, the document in question purported to enumerate the possessions of a suppressed monastery, and was finally admitted by consent of counsel.

But in *Goodwin v. Jack*, 62 Me. 414, where a boundary line between private parties was in issue, records of the proprietors of the district, containing copies of letters concerning a survey authorized by them, and of a field book of said survey, and an ancient copy of a plan indorsed by the surveyor to the effect that the original was drawn at the request of the proprietors, were offered in evidence. Proof of the former existence of the original plan was offered. The papers had been in the possession of a claimant of land by title from the proprietors, and on his death the muniments of the proprietary were deposited with the Maine Historical Society, from whose custody they were produced at the trial, and there being no legal custodian of the records of the proprietors, this was held to be a proper custody.

The town clerk is a proper custodian of an ancient book purporting to be a field book with surveys of the town, and proved to have been in his office with the town records for many years. *Aldrich v. Griffith*, 66 Vt. 404.

Further Illustrations of Proper Custody are: Deeds on file in a court of justice as exhibits, *Applegate v. Lexington*, etc., County Min. Co., 117 U. S. 261; expired lease in the hands of the lessor, *Rees v. Walters*, 3 M. & W. 527; tax receipts in the hands of the administrator of defendant's predecessor in title, *McReynolds v. Longenberger*, 57 Pa. St. 33; the payroll of a military company, with records of the federal government, *Bell v. Brewster*, 44 Ohio St. 690; pauper's certificates of settlement, etc., in the hands of overseers of the poor, *Rex v. Netherthong Tp.*, 2 M. & S. 337; or of a workhouse master, *Slater v. Hodgson*, 9 Q. B. 727, 58 E. C. L. 727. Such a certificate was admitted without proof of custody in *Rex v. Ryton*, 5 T. R. 259.

Proper Custody a Question for the Court.—The question of proper custody is one to be determined by the trial judge, *Stephens Dig. of Evid.* 139; and his decision will not be interfered with on motion for a new trial unless it is clearly wrong, *Rees v. Walters*, 3 M. & W. 527.

the nature of the case rendered its production almost impossible.¹ Later decisions have admitted ancient documents purporting upon their face to show exercise of ownership, such as a lease or license, without proof of possession or action under them, as being in themselves acts of ownership and proof of possession.² The true doctrine in *England* seems to be that the absence of such proof goes only to the weight of the evidence, and not to its admissibility.³ Accordingly, to give any weight to ancient documents, it must be shown that possession has followed similar documents, or that there has been actual enjoyment in accordance with the title to which the documents relate.⁴

Doctrine in United States.—Instances where this question has arisen in this country have occurred mainly in the case of deeds for the conveyance of real estate. It is well settled that evidence of possession alone may be a sufficient authentication of a deed purporting to be ancient.⁵ There is much

1. *Clarkson v. Woodhouse*, 5 T. R. 412, note; *Rogers v. Allen*, 1 Campb. 311; *Doe v. Pulman*, 3 Q. B. 622, 43 E. C. L. 895; *M'Kenire v. Fraser*, 9 Ves. Jr. 5.

Leases.—Thus in *Clarkson v. Woodhouse*, 5 T. R. 412, note, which was tried in 1782, leases dated in 1670 and 1702 were admitted in evidence, while a lease dated 1730 was rejected. As to the two older leases, the court ruled that their antiquity rendered it unnecessary to prove acts done, because it was impossible to give evidence of enjoyment under such old instruments.

A Will may be received in evidence under the same circumstances. *M'Kenire v. Fraser*, 9 Ves. Jr. 5.

Bond.—In *Forbes v. Wale*, 1 W. Bl. 532, the plaintiff insisted on reading in evidence, without proof of execution, a bond of thirty years' standing; but the defendant objected that the instrument could not be read till proved, there being no payment of interest or any other mark of authenticity, and that if the length of the date was alone sufficient to establish it, a knave had nothing to do but to forge a bond with a variance of date. Lord Mansfield, C. J., allowed the distinction and directed the bond to be proved. In commenting upon the above case, however, in *Chelsea Water-works v. Cowper*, 1 Esp. 275, Lord Kenyon said that Lord Mansfield placed the ground of the decision on the fact that the bond was not found in the proper custody.

2. *Bristow v. Cormican*, L. R. 3 App. Cas. 653; *Malcomson v. O'Dea*, 10 H. L. Cas. 614.

"Old Leases have always been considered to be admissible as being evidence of acts of ownership. I understand this to rest on the principle, that when at a distant period, as to which there is no more direct evidence available, you find a person claiming to be the owner of property, and willing to make himself responsible as lessor for the title to it, and another person willing to agree to give rent for the property, and to enter into a solemn engagement as a tenant of it, admitting his landlord's title, these circumstances are of themselves admissible as evidence of the title. They are real transactions between man and man, not intelligible except on the footing of title, or at least an honest belief in title. The payment of rent under

such a lease is a farther and additional fact also admissible as evidence on the same principle." *Bristow v. Cormican*, L. R. 3 App. Cas. 653, *per* Lord Cairns.

3. *Rogers v. Allen*, 1 Campb. 311; *Malcomson v. O'Dea*, 10 H. L. Cas. 614; 1 Tayl. Ev., § 665.

If the Instrument Bears Date Post Litem Motam, however ancient, some evidence of correspondent acting is always required, even in cases where traditionary evidence is receivable. Thus, upon a question concerning the right of the corporation of Cambridge to receive toll, an award whereby the freemen of Northampton were discharged of toll at Cambridge, in consideration of an annual payment by the corporation of Northampton to the corporation of Cambridge, was considered to be inadmissible in evidence, on the ground that payment of the composition had not been proved. *Brett v. Beales*, M. & M. 418, 22 E. C. L. 346.

4. *Rogers v. Allen*, 1 Campb. 311; *Malcomson v. O'Dea*, 10 H. L. Cas. 614.

5. Evidence of Possession Sufficient.—*Georgia.*—*Bell v. McCawley*, 29 Ga. 355.

Kentucky.—*Winston v. Gwathmey*, 8 B. Mon. (Ky.) 19.

Maine.—*Crane v. Marshall*, 16 Me. 29, 33 Am. Dec. 631.

Maryland.—*Joce v. Harris*, 1 Har. & M. (Md.) 196; *Hoddy v. Harryman*, 3 Har. & M. (Md.) 581.

Massachusetts.—*Green v. Chelsea*, 24 Pick. (Mass.) 71; *Stockbridge v. West Stockbridge*, 14 Mass. 259.

New Hampshire.—*Waldron v. Tuttle*, 4 N. H. 371; *Clark v. Wood*, 34 N. H. 447.

New York.—*Hoopes v. Auburn Water-Works Co.*, 37 Hun (N. Y.) 571; *Doe v. Phelps*, 9 Johns. (N. Y.) 169; *Doe v. Campbell*, 10 Johns. (N. Y.) 475.

Pennsylvania.—*Zeigler v. Hontz*, 1 W. & S. (Pa.) 533.

South Carolina.—*Thompson v. Bullock*, 1 Bay (S. Car.) 364.

Vermont.—*Townsend v. Downer*, 32 Vt. 183; *Middlebury Bank v. Rutland*, 33 Vt. 429. See also *Roberts v. Stanton*, 2 Munf. (Va.) 129, 5 Am. Dec. 463.

Wills.—In *Jackson v. Luquere*, 5 Cow. (N. Y.) 221, it was held that possession for thirty

diversity of opinion, however, as to whether proof of possession under the deed is indispensable to its admission in evidence. In some states it is held to be absolutely necessary,¹ but the rule which seems to be supported by the modern tendency of decisions, is that an ancient deed may be given in evidence where no possession is shown, if there is some other satisfactory corroborative evidence of its authenticity.²

years under a will entitles it to be read as an ancient will without further proof, the same as a deed. See also *Staring v. Bowen*, 6 Barb. (N. Y.) 109.

The Document may be Read in Evidence before Proof of possession is offered. *Doe v. Passingham*, 2 C. & P. 440, 12 E. C. L. 209; *Burgin v. Chenault*, 9 B. Mon. (Ky.) 287; *Shaller v. Brand*, 6 Binn. (Pa.) 435, 6 Am. Dec. 482.

In *Doe v. Passingham*, 2 C. & P. 440, 12 E. C. L. 209, it was held to be no objection to a will more than thirty years old being read in evidence, that possession had not followed it, because the court could not know, until made acquainted with the contents of the will by hearing it read, how it directed the possession to go.

In *Burgin v. Chenault*, 9 B. Mon. (Ky.) 285, Breck, J., in delivering the opinion of the court, said: "Although the fact did not appear when the deed was offered, that the grantee had held and claimed under it, and been in possession of the land, yet, as that fact would unquestionably render it competent, * * * the court was right in permitting it to be read, in anticipation that it would so appear during the trial, and if it should not, that it might be excluded."

1. In Some States Possession Necessary.—*Hall v. Gittings*, 2 Har. & J. (Md.) 380; *Homer v. Cilley*, 14 N. H. 98. See also *Clark v. Wood*, 34 N. H. 447; *Middleton v. Mass*, 2 Nott. & M. (S. Car.) 55; *Duncan v. Beard*, 2 Nott. & M. (S. Car.) 400; *Crane v. Marshall*, 16 Me. 29, 33 Am. Dec. 631. Compare *Brown v. Wood*, 6 Rich. Eq. (S. Car.) 155; *Middlebury Bank v. Rutland*, 33 Vt. 414.

Georgia.—In *Gardner v. Granniss*, 57 Ga. 555, it was held that actual possession of land under, and in pursuance of, the ancient document in question, need not be proved where there was satisfactory evidence that the deed actually existed and had passed through the clerk's office more than thirty years before the trial; and some evidence, such as the handwriting of an attesting witness, tending to show actual execution; and when it furthermore appeared that there was no adverse possession at the date of the deed, nor for nineteen years thereafter. See also *Thursby v. Myers*, 57 Ga. 155.

What the law on this question is at present in Georgia, under § 2700 of the Code, declaring that a deed more than thirty years old, having the appearance of genuineness on inspection, and coming from the proper custody, if possession has been consistent therewith, is admissible in evidence without proof of execution, is not decided. See *Pridgen v. Green*, 80 Ga. 737.

Pennsylvania.—In delivering the opinion of the court in *Williams v. Hillegas*, 5 Pa. St.

492, Bell, J., said: "It must be confessed that in Pennsylvania the leaning of the determinations is in favor of the more rigid rule which refuses to accept of anything short of actual possession as corroborative of the supposed deed; still I think the precise point has never been expressly decided with us in a case necessarily calling for it, though certainly we have *dicta* seemingly hostile to the alternative mode of authentication." See also *McGennis v. Allison*, 10 S. & R. (Pa.) 197; *Shaller v. Brand*, 6 Binn. (Pa.) 435, 6 Am. Dec. 482; *Zeigler v. Houtz*, 1 W. & S. (Pa.) 533.

New York.—The decisions on this question in New York are in great confusion. The following cases hold that possession is absolutely necessary to establish the authenticity of an ancient deed. *Jackson v. Blanshan*, 3 Johns. (N. Y.) 299, 3 Am. Dec. 485; *Crowder v. Hopkins*, 10 Paige (N. Y.) 183; *Jackson v. Davis*, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451; *Jackson v. Christman*, 4 Wend. (N. Y.) 277; *Northrop v. Wright*, 7 Hill (N. Y.) 476; *Troup v. Hurlbut*, 10 Barb. (N. Y.) 354; *Ridgeley v. Johnson*, 11 Barb. (N. Y.) 527.

On the other hand, it is held that possession is not indispensable, but that the authenticity of the deed may be established by other satisfactory corroborative evidence. *Jackson v. Laroway*, 3 Johns. Cas. (N. Y.) 283; *Hewlett v. Cock*, 7 Wend. (N. Y.) 371; *Jackson v. Lamb*, 7 Cow. (N. Y.) 431; *Jackson v. Luquere*, 5 Cow. (N. Y.) 221; *Ensign v. McKinney*, 30 Hun (N. Y.) 254.

In *Willson v. Betts*, 4 Den. (N. Y.) 201, *Bronson, C. J.*, said that other facts besides possession might be sufficient to raise the presumption that an ancient deed was genuine, but he thought that nothing would justify such presumption but acts done under the deed, or the recognition of its validity by those having an interest in the opposite direction.

2. United States.—*Barr v. Gratz*, 4 Wheat. (U. S.) 213; *Applegate v. Lexington, etc.*, County Min. Co., 117 U. S. 255; *Fulkerson v. Holmes*, 117 U. S. 389.

Illinois.—*Whitman v. Heneberry*, 73 Ill. 109. Compare *Smith v. Rankin*, 20 Ill. 14.

Kentucky.—*Harlan v. Howard*, 79 Ky. 373, distinguishing *Thruston v. Masterson*, 9 Dana (Ky.) 228; *Winston v. Gwathmey*, 8 B. Mon. (Ky.) 20; *Cook v. Totton*, 6 Dana (Ky.) 109.

New Jersey.—*Havens v. Sea Shore Land Co.*, 47 N. J. Eq. 365.

Texas.—*Stroud v. Springfield*, 28 Tex. 649; *Ammons v. Dwyer*, 78 Tex. 639; *Johnson v. Timmons*, 50 Tex. 521; *Holmes v. Coryell*, 58 Tex. 680; *Parker v. Chancellor*, 73 Tex. 475; *Crain v. Huntington*, 81 Tex. 614; *Chamberlain v. Showalter*, 5 Tex. Civ. App. 226; *Lunn v. Scarborough*, 6 Tex. Civ. App. 15.

Length of Possession Necessary.—It seems to be the prevailing doctrine in this country that the length of possession necessary, where that alone is relied upon, is thirty years;¹ but where there is other corroborative evidence, this rule will be relaxed.²

Possession of Part of Premises.—It has been laid down as a rule in *New York* that evidence of possession of part of the premises is sufficient.³

d. PROOF OF ANTIQUITY REQUIRED.—Facts and circumstances establishing the age of the document at thirty years or more, are necessary to its admissibility under the rule. It is, in general, not enough that the instrument purports to be ancient.⁴

Virginia.—*Caruthers v. Eldridge*, 12 Gratt. (Va.) 670, *overruling* *Dishazer v. Maitland*, 12 Leigh (Va.) 524.

See also *Nowlin v. Burwell*, 75 Va. 551; *Boston v. Richardson*, 105 Mass. 351.

The rule which was stated by Radcliff, J., in *Jackson v. Laroway*, 3 Johns. Cas. (N. Y.) 286, and which has been followed in several states, is as follows: "The general rule on this subject I take to be that a deed appearing to be of the age of thirty years may be given in evidence without proof of its execution, if the possession be shown to have accompanied it, or where no possession has accompanied it, if such account be given of the deed as may be reasonably expected under all the circumstances of the case, and will afford the presumption that it is genuine."

Payment of Taxes for many years on the land in dispute has been held to be sufficient corroborative evidence. *Fulkerson v. Holmes*, 117 U. S. 389; *Whitman v. Heneberry*, 73 Ill. 113. Compare *Homer v. Cilley*, 14 N. H. 97.

Also the Assertion of the Deed in a Chancery Suit as a ground of title. *Barr v. Gratz*, 4 Wheat. (U. S.) 221.

So a Mere Assertion of Claim under the Instrument, although possession be under another contract. *Walton v. Coulson*, 1 McLean (U. S.) 120, *affirmed sub. nom.* *Coulson v. Walton*, 9 Pet. (U. S.) 62.

Wild and Uncultivated Lands.—In case of wild and uncultivated lands, it is well settled that other circumstances may be received in lieu of evidence of possession. *Jackson v. Laroway*, 3 Johns. Cas. (N. Y.) 283; *Havens v. Sea Shore Land Co.*, 47 N. J. Eq. 365.

And this rule holds true even in those states where possession under the instrument is ordinarily required. *Pridgen v. Green*, 80 Ga. 737; *Williams v. Hillegas*, 5 Pa. St. 492. Compare *Middlebury Bank v. Rutland*, 33 Vt. 414.

Thus in *Williams v. Hillegas*, 5 Pa. St. 492, it was held that payment of taxes for over thirty years is in such a case sufficient evidence of possession.

1. *Staring v. Bowen*, 6 Barb. (N. Y.) 109; *Shaler v. Brand*, 6 Binn. (Pa.) 435. See also *Nixon v. Porter*, 34 Miss. 706; *Nowlin v. Burrell*, 75 Va. 551. Compare *Wagner v. Aiton*, Rice (S. Car.) 100.

In *New Hampshire* possession for thirteen years has been held to be insufficient, and it was said that possession for at least twenty years, the period of limitation, must be shown. *Homer v. Cilley*, 14 N. H. 98.

2. *Nixon v. Porter*, 34 Miss. 706; *Jackson v. Luquere*, 5 Cow. (N. Y.) 221. Compare *Jackson v. Blanshan*, 3 Johns. (N. Y.) 292, 3 Am. Dec. 485.

Thus, where a deed for the conveyance of real estate was offered in evidence, it was held that the circumstance of possession by the grantee for a less time than thirty years, coupled with the acknowledgment of the grantor that he had executed the deed at the time it bore date, was sufficient to characterize it as an ancient document of more than thirty years' standing, and therefore to dispense with the strict rules in the case. *Nixon v. Porter*, 34 Miss. 706, 69 Am. Dec. 408.

3. *Jackson v. Luquere*, 5 Cow. (N. Y.) 221; *Jackson v. Davis*, 5 Cow. (N. Y.) 123, 15 Am. Dec. 451.

4. *Whitman v. Heneberry*, 73 Ill. 109; *Fairly v. Fairly*, 38 Miss. 280. See also *Kennard v. Withrow* (Tex. Civ. App. 1894), 28 S. W. Rep. 226.

In the Absence of Circumstances raising a contrary presumption, the date of execution is presumed to be that expressed in the instrument. *Doe v. Wolley*, 8 B. & C. 22, 15 E. C. L. 150; *Stephens Dig. of Evid.*, § 88.

Possession for Thirty Years, in accordance with the provisions of a deed, raises an inference that it is thirty years old. *Robinson v. Craig*, 1 Hill (S. Car.) 389.

Other Circumstances than Possession may be sufficient, such as:

Indorsements of probate certificates thereon, the handwriting of such certificates being proved, and this though the certificates are unofficial, *Jackson v. Laroway*, 3 Johns. Cas. (N. Y.) 283; the recording of the instrument thirty years before trial, *Whitman v. Heneberry*, 73 Ill. 109; *Fulkerson v. Holmes*, 117 U. S. 396; *Applegate v. Lexington*, etc., County Min. Co., 117 U. S. 262; handwriting, *Bullen v. Michel*, 4 Dow. 297.

The records of a court may be used to prove the antiquity of an instrument which has been kept therein for more than thirty years as an exhibit. *Applegate v. Lexington*, etc., County Min. Co., 117 U. S. 262.

But where the instrument has been recorded only sixteen years, a certified copy is inadmissible without proof of execution. The registration, as well as the instrument itself, must be ancient. *Davis v. Pearson*, 6 Tex. Civ. App. 593. See also *Brown v. Simpson*, 67 Tex. 225.

Where the deeds in question purport to be ancient, having been recorded twenty-nine years, and a deed subsequently dated and

IV. PURPOSES FOR WHICH USED IN EVIDENCE.—Ancient documents are most frequently introduced in evidence by parties thereto, or their privies, as the basis of a claim of right asserted thereunder; but they are admissible for any other purpose, and may be introduced by parties not privy to them, to the same extent as other instruments duly authenticated, or witnesses duly qualified to speak to the matters in issue.¹

dependent on them has been recorded forty years, antiquity is sufficiently made out. *Quinn v. Eagleston*, 108 Ill. 248.

Proof of Age by Expert Testimony.—In *England* it has been held that an expert may give his opinion as to the probable period at which an ancient document was written. *Tracy Peerage Case*, 10 Cl. & F. 154; *Doe v. Suckermore*, 5 Ad. & El. 703, 31 E. C. L. 406.

Thus, where in the case of a claimant to a peerage depending upon the genuineness of entries written in an old prayer book, and dated 1728 and 1729, several witnesses, whose occupations for a long time had made them so conversant with manuscript of different ages, that they could take on themselves to name the period in which any manuscript previous to the year 1700 was written, were all of opinion that the entries were written in the early part and before the middle of the last century, and at or about the period of their date, it was held that such evidence might be admitted, though it was held to be small testimony and hardly entitled to any weight. *Tracy Peerage Case*, 10 Cl. & F. 154.

1. See *supra*, this title, *Possession or Action under the Document*, for illustrations of instruments introduced by parties claiming under them.

Illustrations—for What Purposes Introduced—To Disprove Custom.—An ancient deed between the lord of a manor and his copyholders, reciting and confirming the custom of the manor, is admissible in a suit between their successors and privies, to disprove an alleged custom not recited therein. *Anglesey v. Hatherton*, 10 M. & W. 238.

So are a vicar's endowment and a terrier to disprove a *modus* in lieu of tithes. *Tucker v. Wilkins*, 4 Sim. 241.

To Establish Boundaries.—A lease of the land in controversy is admissible to prove a parish boundary. *Plaxton v. Dare*, 10 B. & C. 17, 21 E. C. L. 15.

So also are plans and deeds *inter alios*, to establish a county boundary. *Drury v. Midland R. Co.*, 127 Mass. 581.

And even to establish a disputed private boundary where the papers purport to convey land adjoining that in issue. *Sparhawk v. Bullard*, 1 Met. (Mass.) 95; *Morris v. Callanan*, 105 Mass. 129; *Adams v. Stanyan*, 24 N. H. 405; *Dobson v. Finley*, 8 Jones (N. Car.) 495.

To Identify Lands.—An ancient deed is admissible to identify the land therein conveyed with that in issue. *King v. Sears*, 91 Ga. 577.

To Show Amount of Rents.—A letter received by a former life tenant, apparently from a person having intimate knowledge of the estate, is admissible to show the amount of

the ancient rents therein. *Roe v. Rawlings*, 7 East 279.

To Prove Sufficiency of Power to Execute Deed.—And in general the recital in a deed or other instrument of a power conferred upon the person executing the same, and necessary to the due execution thereof, is evidence of the existence of such power. *Deery v. Cray*, 5 Wall. (U. S.) 805; *Doe v. Phelps*, 9 Johns. (N. Y.) 169; *Doe v. Campbell*, 10 Johns. (N. Y.) 475; *Johnson v. Shaw*, 41 Tex. 428; *Storrey v. Flanagan*, 57 Tex. 649; *Smith v. Swan*, 2 Tex. Civ. App. 563; *Davis v. Pearson*, 6 Tex. Civ. App. 593.

And the jury should be charged that such recital establishes a presumption of law that the power was duly executed as recited. *Johnson v. Timmons*, 50 Tex. 535. See also *Hall v. Gittings*, 2 Har. & J. (Md.) 112.

To Establish Pedigree, Identity, etc.—A letter from the former head of a family was admitted when the legitimacy of a member of the family was in issue. *Beer v. Ward*, cited in *Starkie on Evid.* 522.

A recital in a deed that the grantor is the only son and heir of a person proved to have been seised during life is admissible to prove that fact. *Fulkerson v. Holmes*, 117 U. S. 398.

The letters of a testator to his daughter are admissible to show his relation with her when a legacy to her is claimed by an illegitimate daughter having the same name. *Doe v. Beynon*, L. R. 4 P. & D. 193.

And a will is admissible to establish the identity of the testator's children named therein. *McClaskey v. Barr*, 47 Fed. Rep. 173.

And so of entries in a family Bible to prove pedigree. *Hubbard v. Lees*, L. R. 1 Exch. 255.

In *Bell v. Brewster*, 44 Ohio St. 690, which was a suit to quiet title, the identity of the plaintiff's ancestor, Levi Brewster, with one Robson L. Broome, who died seised of the premises, was in issue. Papers in the handwriting of Broome were put in evidence, and the plaintiff introduced (1) a letter purporting to have been written seventy-seven years before by Levi Brewster to his brother, (2) the pay roll of a military company purporting to have been signed by said Brewster, with evidence that he had belonged to the company; and offered to prove by experts in handwriting the identity of Brewster and Broome. These writings were held admissible as ancient documents for that purpose. This case was cited with approval in *McClaskey v. Barr*, 47 Fed. Rep. 169.

To Prove Settlement.—And an indenture of apprenticeship may be received to prove the settlement of a party thereto. *Rex v. Long Buckby*, 7 East 45.

Ancient Documents Purporting to Constitute Acts of Ownership are admissible to prove

V. WHEN INSUFFICIENTLY ACCOUNTED FOR, OR NOT TECHNICALLY ANCIENT.—

When an ancient document is insufficiently accounted for, so that some proof of execution or authenticity is necessary, or where an instrument not ancient is yet sufficiently old to make such proof difficult, very slight proof is sufficient in comparison with that required concerning very recent transactions.¹

ANCIENT LIGHTS. (See also the titles EASEMENTS; LIGHT AND AIR; PRESCRIPTION.)—In *England* openings in a house for air and light which have been used unobstructed for upwards of twenty years, acquire a prescriptive right, and may not afterwards be obstructed, even by buildings erected by an adjoining landowner upon his own land. Windows thus privileged are technically termed "ancient lights." The doctrine of "ancient lights" has been adopted in a few of the *United States*; in others, it has been distinctly repudiated; in others again, it is an open question. But the general current of American jurisprudence is against it, as being a rule of the common law which was not suited to the condition of our colonial ancestors, and which, therefore, cannot be deemed to have been brought thither by them.²

ANCIENT RENT.—That shall be deemed an "ancient rent" which was the rent at the time the power was reserved, or when the last lease before was made, if the estate was not then under lease.³

ANCIENT STATUTES.—See the title STATUTES.

ANCILLARY ADMINISTRATION.—See the title FOREIGN EXECUTORS AND ADMINISTRATORS, and see generally the title EXECUTORS AND ADMINISTRATORS.

AND—I. IN GENERAL.—"And" is a particle which expresses the relation of addition. It may connect words merely, as, "Three and four are seven;" or full sentences, as, "The sun shines and the air is mild."⁴

ownership, *e. g.*: Licenses to fish, as evidence of the licensor's exclusive rights of fishing, *Malcomson v. O'Dea*, 10 H. L. Cas. 593; a lease, as evidence of title in the lessor; *Doe v. Pulman*, 3 Q. B. 622, 43 E. C. L. 895; licenses to erect a fish stand, as evidence of the lessor's title to the lands, *Boston v. Richardson*, 105 Mass. 351.

And see *Rogers v. Allen*, 1 Campb. 309; *Bristow v. Cormican*, L. R. 3 App. Cas. 641; *Clarkson v. Woodhouse*, 3 Doug. 189, 26 E. C. L. 74.

In *quare impedit* against a bishop to recover an advowson within his diocese, a case stated for the opinion of counsel by a former bishop, and introduced by the plaintiff to prove facts concerning the advowson recited therein, was held to be admissible. *Bishop of Meath v. Winchester*, 3 Bing. N. Cas. 183, 32 E. C. L. 90.

1. *Walton v. Coulson*, 1 McLean (U. S.) 124 (on appeal, *sub. nom.* *Coulson v. Walton*, 9 Pet. (U. S.) 71); *Winn v. Patterson*, 9 Pet. (U. S.) 674; *Clarke v. Courtney*, 5 Pet. (U. S.) 344; *Jackson v. Blanshan*, 3 Johns. (N. Y.) 292, 3 Am. Dec. 485; *Jackson v. Brooks*, 8 Wend. (N. Y.) 426; *Jackson v. Burton*, 11 Johns. (N. Y.) 64; *Everley v. Stoner*, 2 Yeates (Pa.) 122; *Thomas v. Horlocker*, 1 Dall. (Pa.) 14; *Sweigart v. Richards*, 8 Pa. St. 436; *Doe v. Tarver*, R. & M. 141, 21 E. C. L. 399.

2. *Abbott's Law Dict.*

3. *Doe v. Lock*, 2 Ad. & El. 705, 29 E. C. L. 181; *Orby v. Mohun*, 2 Vern. 531.

4. Webster's Dict., cited in the dissenting opinion of Thornton, J., in *Hyatt v. Allen*, 54 Cal. 367. See also *Reese's Appeal*, 122 Pa. St. 416.

Addition.—*And* does not mean "or," or imply that that which precedes is the same as that which follows. *And* signifies an addition, that something is to follow in addition to that which precedes. *Lane v. Kolb*, 92 Ala. 665.

And is defined as signifying that a word or part of a sentence is to be added to what precedes. *State Board of Assessors v. New Jersey Cent. R. Co.*, 48 N. J. L. 352.

Same—And Family.—For a certain consideration, defendant agreed to board "the party of the first part *and* his family, consisting of two adult persons." It was held that the obligation was to board two persons of the lessor's family besides himself. The court said: "By the express terms of the lease defendant agrees to board the first party, *and*, *add*, or in addition thereto, two adult persons. Hence defendant undertook to board three adults. The construction contended for by appellant does violence to the language used. If the defendant agreed to board only two persons, then what follows *and*, in the sentence, includes a part of what precedes, and the word *and* does not mean something added or in addition to what has gone before. The court, we think, placed the proper construction upon the lease, and did not err in rejecting proof of extrinsic facts explanatory of it." *O'Brien v. Carson*, 42 Iowa 554.

Same—As Well As.—The conjunction *and*

The character & stands for "and," and has been so recognized by the courts.¹

II. "AND" READ AS "OR," AND VICE VERSA—Statutes and Wills. (See also the titles STATUTES; WILLS.)—In order to effectuate the intention of the testator or legislature, the word "and" is sometimes construed to mean "or," and *vice versa*. This construction, however, is never resorted to, except for strong reasons. Indeed, to say that "or" can ever mean "and," seems to be an inaccurate expression. It should rather be said that for strong reasons and in conformity with a clear intention, "or" has been changed or removed, and "and" substituted in its place, or *vice versa*.²

expresses the relation of addition, and means "as well as." Porter v. Moores, 4 Heisk. (Tenn.) 19.

"And, in Addition to That," at the commencement of a clause in a will, was held to import the introduction of new and distinct matter. Hart v. White, 26 Vt. 260.

Clauses of Similar Meaning.—The copulative *and* generally connects clauses of similar meaning and form of construction, dependent upon the principal sentence or clause; or, as laid down in the books, "where two terms connected refer jointly to a third, they must be adapted to it and to each other, both in sense and form." Brown Inst. 201; National German American Bank v. Rayman, 6 Dakota 402.

"And Being" Equivalent to "Which Is."—In a description of land, *i. e.*, "*and being the land*," the words "*and being*" were held equivalent to "which is." Prentice v. Northern Pac. R. Co., 154 U. S. 174.

Sawing and Lumber.—A promise to pay in sawing and lumber will be apportioned equally if the parties cannot agree, and neither has the right to fix the proportion. Fredenburg v. Turner, 37 Mich. 402.

"And of This He Puts Himself upon the Country," means that the truth of the fact so stated the party desires to have tried by a jury. Bell v. Yates, 33 Barb. (N. Y.) 629 (*quoting* 2 Chit. Pl. 450).

1. Hunt v. Smith, 9 Kan. 153; Com. v. Clark, 4 Cush. (Mass.) 596; Brown v. State, 16 Tex. App. 245; Malton v. State, 29 Tex. App. 527.

And So Forth, or &c. (See also ETC., & ENCYC. OF PLEADING AND PRACTICE, title SIMILITER.)—In a plea held to take the place of a *similiter*, being construed to mean "every necessary matter that ought to be expressed." Everitt v. De Groff, 1 Cow. (N. Y.) 213. See Sayer v. Pocock, Cowp. 407; Birton v. Mandel, Cro. Jac. 67; Harris' Case, Cro. Jac. 502; Reeder v. Bloom, 2 Bing. 384, 9 E. C. L. 440; Wilkes v. Williams, 8 T. R. 631; Bryan v. Bates, 15 Ill. 87.

2. "You will find it said in some cases that 'or' means *and*; but 'or' never does mean *and* [so also and never does mean "or"] unless there is a context which shows that 'or' is used for *and* by mistake. Suppose a testator said, 'I give the black cow on which I usually ride to A B,' and he usually rode on a black horse. Of course the horse would pass, but I do not think even a modern annotator of cases would put in the marginal note that 'cow' means

'horse.' You correct the wrong word used by the testator, by the context." Jessel, M. R., in Morgan v. Thomas, 51 L. J. Q. B. Div. 557, 9 Q. B. Div. 643.

"Or" Read as "And"—Wills.—In the following cases, "or" was read as *and*:

England.—Soulle v. Gerrard, Moore 422, Cro. Eliz. 525; Price v. Hunt, Pollex. 645; *In re* Merrick's Trusts, L. R. 1 Eq. 558; Green v. Harvey, 1 Hare 428; Incorporated Soc. v. Richards, 1 Dr. & War. 258; Greenway v. Greenway, 2 De G. F. & J. 139; Barker v. Suretees, 2 Stra. 1175; *In re* Philps' Will, L. R. 7 Eq. 153; Miles v. Dyer, 5 Sim. 435, 8 Sim. 330; Denn v. Kemeys, 9 East 366; Parkin v. Knight, 15 Sim. 83; Shand v. Kidd, 19 Beav. 310; Maude v. Maude, 22 Beav. 290; Bentley v. Meech, 25 Beav. 197; Greated v. Greated, 26 Beav. 626.

Illinois.—Boyles v. McMurphy, 55 Ill. 239. **New York.**—Van Vechten v. Pearson, 5 Paige (N. Y.) 512; Jackson v. Blanshan, 6 Johns. (N. Y.) 54, 5 Am. Dec. 188.

Pennsylvania.—Sorver v. Berndt, 10 Pa. St. 214; Murray v. Keyes, 35 Pa. St. 391.

Same—Examples.—Where there was a devise over in case the first taker should marry any woman without a competent marriage portion, or without the consent of the trustees, "or" was construed *and*. Long v. Dennis, 4 Burr. 2052.

Where the devise over was in case of the first taker's death or want of issue, "or" was construed *and*. Monkhouse v. Monkhouse, 3 Sim. 119.

In a devise of land to two in equal shares, and to their heirs and assigns, with the condition that if either shall "die under age or intestate," his share shall go to the survivor, the word "or" should be construed *and*; and, that the survivor may take, the other must have died both under age and intestate. Den v. Mugway, 15 N. J. L. 330. See *infra*, Under Age or without Issue.

"And" Read as "Or"—Wills.—In the following cases *and* was read as "or":

England.—Prebble v. Boghurst, 1 Swanst. 330; Jackson v. Jackson, 1 Ves. 217; Maberly v. Strobe, 3 Ves. Jr. 450; Bell v. Phyn, 7 Ves. Jr. 458; *In re* Merrick's Trusts, L. R. 1 Eq. 558; Maynard v. Wright, 26 Beav. 285. **Maryland.**—Briesch v. McCauley, 7 Gill (Md.) 196.

Missouri.—Maguire v. Moore, 108 Mo. 267.

New Jersey.—Shimer v. Shimer, 50 N. J. Eq. 300.

Under Age or without Issue—Under Age and without Issue.—Where a gift to an infant is followed by a gift over if the infant should die under age or without issue, "or" is construed as "and," so that the gift over does not take effect unless both events happen, i. e., it would not take effect were the infant to reach full age and die without leaving issue, nor would it take effect if the infant

New York.—O'Hara v. Dever, 2 Keyes (N. Y.) 558; Roome v. Phillips, 24 N. Y. 470.

Pennsylvania.—Engelfried v. Woelpart, 1 Yeates (Pa.) 41.

South Carolina.—Duncan v. Harper, 4 S. Car. 76.

Same—Examples.—The testator gave, bequeathed, and devised all the rest, residue, and remainder of his estate, both real and personal, to his son and daughter, to be divided between them, share and share alike, subject, nevertheless, to the "dower and thirds of his wife," etc. It was held that the dower estate only of the wife in his lands was referred to, and being construed to mean "or," O'Hara v. Dever, 2 Keyes (N. Y.) 558.

Clause 5 of a will read thus: "I give to Edward P. East and his legitimate children forever, the farm I purchased of Savage, upon condition that he will pay to Eliza P. Scott one hundred and thirty dollars annually as long as she lives, and will also pay what he owes me; but if he [will not pay the annuity to Eliza P. Scott, and what he owes me, and] shall die leaving no legitimate child, I then give the farm to Eliza Frances Scott and her children forever; but if she die leaving no child, I then give the farm to my nieces," etc. Edward P. East paid what he owed the testator, and the annuity to Eliza P. Scott up to his death, intestate, leaving personalty ample to pay the annuity during her life, but no legitimate child. B. H. East, his maternal half brother, claimed the farm as his heir at law. It was held, in order to effectuate the testator's manifest intention, that the words in italics and within brackets might be rejected as serving no intelligent purpose; but if they were used for the purpose of emphasis, then the copulative *and* at the end of the italicized words must be construed as the disjunctive "or." East v. Garrett, 84 Va. 523.

"And" Read as "Or"—Statutes.—In the following cases, *and* was read as "or:"

England.—Fowler v. Padget, 7 T. R. 510; Townsend v. Read, 10 C. B. N. S. 308, 100 E. C. L. 308; Reg. v. Northampton, 6 B. & S. 670, 118 E. C. L. 670.

Canada.—Boag v. Lewis, 1 U. C. Q. B. 357. *United States.*—U. S. v. Fisk, 3 Wall. (U. S.) 445.

Alabama.—Hilliard v. Binford, 10 Ala. 996; Porter v. State, 58 Ala. 66.

California.—People v. Pool, 27 Cal. 581.

Dakota.—People v. Sweetser, 1 Dakota 295.

Illinois.—Boyles v. McMurphy, 55 Ill. 236.

Indiana.—Smith v. Madison, 7 Ind. 86;

M'Call v. Trevor, 4 Blackf. (Ind.) 496.

Iowa.—Eisfeld v. Kenworth, 50 Iowa 389;

Williams v. Poor, 65 Iowa 415.

Maine.—Collins Granite Co. v. Devereux, 72 Me. 423.

New Hampshire.—Bay State Iron Co. v. Goodall, 39 N. H. 234, 75 Am. Dec. 219.

North Carolina.—Hughes v. Smith, 64 N. Car. 493.

Ohio.—State v. Covington, 29 Ohio St. 115.

Pennsylvania.—Willinck v. Morris, 3 Yeates (Pa.) 117.

Texas.—Robinson v. Brinson, 20 Tex. 438.

Vermont.—Hoyt v. Swift, 13 Vt. 129, 37

Am. Dec. 586; Fish v. Field, 19 Vt. 141.

West Virginia.—State v. Cain, 9 W. Va. 569.

Same—Charter of a Corporation.—Where the charter of a corporation authorized it to loan money upon personal security *and* the pledge of goods and chattels, it was held that by *and*, "or" was meant. Missouri Loan Bank v. How, 56 Mo. 58.

Same—Constitutional Provision.—The *West Virginia* Constitution provides that no person shall be deprived of life, liberty, or property "without due process of law *and* the judgment of his peers." It was held that *and* must be read "or." Jelly v. Dils, 27 W. Va. 274.

Same—Liability of Stockholders.—The *Iowa* Code provided that stockholders should be liable where there was a failure to comply with the requisites of the statute in regard to organization *and* publicity. It was held that *and* should be read "or," and that the stockholders were liable where they failed to comply with the provisions, either as to publicity or organization. Eisfeld v. Kenworth, 50 Iowa 390. See also the title STOCKHOLDERS.

Same—To Avoid Repeal.—*And* was construed to mean "or," for which it had been substituted in codifying former statutes, where its conjunctive sense would operate a repeal. Hughes v. Smith, 64 N. Car. 493. See also State v. Brandt, 41 Iowa 593, where "or" was read *and*, to avoid a repeal by implication.

"Or" Read as "And"—Statutes.—In the following cases, "or" was read as *and*:

England.—Reg. v. Shiles, 1 Q. B. 919, 41 E. C. L. 839; Metropolitan Board of Works v. Steed, 8 Q. B. Div. 448.

United States.—U. S. v. Fisk, 3 Wall. (U. S.) 445; Union Ins. Co. v. U. S. 6 Wall. (U. S.) 759.

California.—McConky v. Alameda County, 56 Cal. 83.

Iowa.—State v. Brandt, 41 Iowa 593.

Maryland.—Hammond v. Denton, 1 Har. & M. (Md.) 200.

Michigan.—Scott v. Jackson First Free Methodist Church, 50 Mich. 531.

Missouri.—State v. Bulling, 100 Mo. 93.

New Jersey.—Hopper v. Hopper, 21 N. J. L. 543.

North Carolina.—Morgan v. Smith, 77 N. Car. 37.

Pennsylvania.—Parke v. Kleeber, 37 Pa. St. 251; Willinck v. Morris, 3 Yeates (Pa.) 117; Bollin v. Shiner, 12 Pa. St. 205; Murray

left issue, though he died before coming of age. The reason assigned for this construction is, that if "or" were not read "and," it might happen that the first taker might marry and die under age leaving issue, in which case the gift over would take effect and the issue would be disinherited, an event which the testator surely could never have intended. It will be observed that this

v. Keyes, 35 Pa. St. 384; *Rigoney v. Nelson*, 73 Pa. St. 332.

West Virginia.—*State v. Cain*, 9 W. Va. 569.

Wisconsin.—*Atty.-Gen. v. West Wisconsin R. Co.*, 36 Wis. 466.

Same—Conflict with Constitution.—It is the general rule of construction, that whenever an act of the legislature can be so construed and applied as to avoid conflict with the constitution such construction should be adopted, and, in order to avoid such a conflict, the word "or" may be read *and*. *State v. Pool*, 74 N. Car. 405.

Same—Forcible Entry and Detainer. (See also the title FORCIBLE ENTRY AND DETAINER.)—"Or" means *and* in the clause "unlawful or forcible entry," in the forcible entry law of *Wisconsin*. *Winterfield v. Stauss*, 24 Wis. 394. See also *O'Connell v. Gillespie*, 17 Ind. 459; *Burgett v. Bothwell*, 86 Ind. 151; *Terrell v. Lamar*, 1 Wis. 8.

Same—Act of Congress.—The expression "claim growing out of, or dependent upon, any treaty stipulation," in *United States Rev. Stat.*, was held to mean "growing out of *and* dependent upon," etc. *Weld v. U. S.*, 16 Wash. L. Rep. 171.

Same—Misprint.—"Or" in a statute was read *and*, where it was evidently a misprint. *Sparrow v. Davidson College*, 77 N. Car. 35.

"And" Not Read as "Or"—Wills.—In the following cases, *and* was not read as "or":

England.—*Doe v. Rawding*, 2 B. & Ald. 447; *In re Kirkbride's Trusts*, L. R. 2 Eq. 400; *Coates v. Hart*, 3 De G. J. & S. 504; *Grey v. Pearson*, 6 H. L. Cas. 61; *Turner v. Moor*, 6 Ves. Jr. 559; *Wingfield v. Wingfield*, 9 Ch. Div. 658; *Reed v. Braithwaite*, L. R. 11 Eq. 517; *Doe v. Jessep*, 12 East 288; *Seccombe v. Edwards*, 28 Beav. 440; *Barker v. Young*, 33 Beav. 353.

Connecticut.—*Shepard v. Shepard*, 57 Conn. 28.

Maine.—*Keniston v. Adams*, 80 Me. 290; *Butterfield v. Haskins*, 33 Me. 392.

New Jersey.—*Ely v. Ely*, 20 N. J. Eq. 43.

New York.—*Phyfe v. Phyfe*, 3 Bradf. (N. Y.) 52.

Pennsylvania.—*Denn v. Woodward*, 1 Yeates (Pa.) 316; *Cheesman v. Wilt*, 1 Yeates (Pa.) 411.

And is never construed to mean "or," except when the context of the will favors it. *Armstrong v. Moran*, 1 Bradf. (N. Y.) 314.

"And" Not Read "Or"—Wills.—In *Denn v. Woodward*, 1 Yeates (Pa.) 319, the court said: "In construing a will no word is to be rejected which is not repugnant to the general intent. Courts of justice will transpose the clauses of a will, and construe 'or' to be *and*, and *and* to be 'or,' only in such cases when it is absolutely necessary so to do to support the evident meaning of the tes-

tator. But they cannot arbitrarily expunge or alter words without such apparent necessity. In the will before us the sense of the testator is clear and entire from the words he has used."

"Or" Not Read as "And"—Wills.—In the following cases, "or" was not read as *and*: *England*.—*Montagu v. Nucella*, 1 Russ. 171; *Woodward v. Glassbrook*, 2 Vern 388; *Holland v. Wood*, L. R. 11 Eq. 96; *Hawksworth v. Hawksworth*, 27 Beav. 1.

Georgia.—*Robertson v. Johnston*, 24 Ga. 110.

Kentucky.—*Robb v. Belt*, 12 B. Mon. (Ky.) 647.

New Jersey.—*Holcomb v. Lake*, 24 N. J. L. 686; *Courter v. Stagg*, 27 N. J. Eq. 305; *Cody v. Bunn*, 46 N. J. Eq. 131.

New York.—*Miller v. Philip*, 5 Paige (N. Y.) 574.

North Carolina.—*Harrison v. Bowe*, 3 Jones Eq. (N. Car.) 478.

Where a testator having left his estate to his son, further provided that the son "should maintain his two sisters until they marry or be sufficiently provided for," it was held that "or" could not be read *and*, and that the daughters were only entitled to maintenance until marriage. *Harrison v. Bowe*, 3 Jones Eq. (N. Car.) 478.

"And" Not Read "Or"—Statutes.—In the following cases, *and* was not read as "or": *Buck v. Danzenbacker*, 37 N. J. L. 361.

In Constitution.—*Com. v. Kilgore*, 82 Pa. St. 398; *U. S. v. Ten Cases of Shawls*, 2 Paine (U. S.) 162; *Lane v. Kolb*, 92 Ala. 665; *Merchants, etc., Bank v. McKellar*, 44 La. Ann. 945; *State v. Beauchleigh*, 97 Mo. 497; *Washington v. Corinth*, 55 Vt. 468; *Jones v. Com.*, 80 Va. 20; *Leftwich v. Neal*, 7 W. Va. 575.

A statute and the condition in the treasurer's bond requiring him to "account for *and* pay over" moneys, do not create two distinct grounds of liability; but the accounting is merely preliminary to the payment. The court said: "The respondent's counsel attempts to sustain the complaint by dividing the clause of the statute, requiring him to account for and pay over moneys coming to his hands, into two distinct grounds of liability. But this construction cannot prevail. He is required to account merely as preliminary to paying over. The latter is the essential thing. And the words 'to account for *and* pay over' are used in the section fixing the condition of the treasurer's bond, to describe his duty in respect to paying properly at all times, and to ascertaining and paying over whatever balance may be in his hands whenever called upon lawfully by any person entitled to receive it. So long as there is no default in paying over, it was not the design of that clause to create a distinct ground of action for not accounting." *Franklin v. Kirby*, 25 Wis. 498.

reasoning does not apply to the first case, viz., where the first taker attains his majority and dies without issue, although this, too, is held to defeat the gift over.¹ The same rules apply where the gift over is upon condition that

Same—A Local Option Statute required, as a prerequisite to submitting the question to the people, that a petition should be presented to the judge of the probate court, signed by fifty or more persons who were "resident householders and freeholders." It was held that *and* would not be read "or," and that the petitioners must be both householders and freeholders. *Miller v. Jones*, 80 Ala. 95.

Same—Revenue Law.—So in a revenue law, the court refused to construe *and* to mean "or," following the general rule that such a statute is to be construed most strongly against the government. *Rice v. U. S.*, 10 U. S. App. 674.

"Or" Not Read as "And"—Statutes.—In the following cases "or" was not read *and*: *Board of Health v. Farmers' Manure, etc., Co.*, 4 Exch. Div. 306; *Prim v. Smith*, 20 Q. B. Div. 644; *In re Huggins*, 22 Q. B. Div. 277; *Reg. v. Phillips*, L. R. 1 Q. B. 659; *Green v. Wood*, 7 Q. B. 178, 53 E. C. L. 178; *Reg. v. Pocock*, 8 Q. B. 729, 55 E. C. L. 729; *Com. v. Hadcraft*, 6 Bush (Ky.) 91; *Crow v. Beardsley*, 68 Mo. 435; *State v. Nauert*, 2 Mo. App. 295; *Burgert v. Borchert*, 59 Mo. 80; *Hale v. Sweet*, 40 N. Y. 97; *Moody v. Levy*, 58 Tex. 532.

So a provision in a statute, "unless judgment shall have been signed or execution issued," cannot be read "unless judgment shall have been signed *and* execution issued." *Green v. Wood*, 7 Q. B. 178, 53 E. C. L. 178.

1. **"Or" Read as "And"—"Under Age or without Issue"**—*England*.—*Price v. Hunt*, Pollex. 645; *Soule v. Gerrard*, Moore 422, Cro. Eliz. 525; *Eastman v. Baker*, 1 Taunt. 174; *Frammingham v. Brand*, 1 Wils. 140; *Barker v. Suretees*, 2 Stra. 1175; *Woodward v. Glassbrook*, 2 Vern. 388; *Walsh v. Peterson*, 3 Atk. 193; *Wright v. Kemp*, 3 T. R. 470; *Weddell v. Mundy*, 6 Ves. Jr. 343; *Denn v. Kemeys*, 9 East 366; *Right v. Day*, 16 East 67; *Morris v. Morris*, 17 Beav. 198.

United States.—*Arnold v. Buffum*, 2 Mason (U. S.) 208.

Connecticut.—*Williams v. Dickerson*, 2 Root (Conn.) 191, 1 Am. Dec. 66; *Phelps v. Bates*, 54 Conn. 11.

Georgia.—*Robertson v. Johnston*, 24 Ga. 110; *Tennell v. Ford*, 30 Ga. 707.

Illinois.—*Kindig v. Deardorff*, 39 Ill. 300.

Maine.—*Sayward v. Sayward*, 7 Me. 216, 22 Am. Dec. 191.

Maryland.—*Watkins v. Sears*, 3 Gill (Md.) 496; *Raborg v. Hammond*, 2 Har. & G. (Md.) 42; *Briesch v. McCauley*, 7 Gill (Md.) 196; *Beall v. Deale*, 7 Gill & J. (Md.) 216; *Janney v. Sprigg*, 7 Gill (Md.) 197, 48 Am. Dec. 557; *Neal v. Cosden*, 34 Md. 427; *Carpenter v. Boulden*, 48 Md. 129.

Massachusetts.—*Parker v. Parker*, 5 Met. (Mass.) 134; *Hunt v. Hunt*, 11 Met. (Mass.) 98; *Carpenter v. Heard*, 14 Pick. (Mass.) 449.

New Jersey.—*Den v. Taylor*, 5 N. J. L. 482; *Den v. Mugway*, 5 N. J. L. 330; *Nevi-*

son v. Taylor, 8 N. J. L. 47; *Den v. English*, 17 N. J. L. 280; *Den v. Allaire*, 20 N. J. L. 19.

North Carolina.—*Turner v. Whitted*, 2 Hawks (N. Car.) 613.

Ohio.—*Ward v. Barrows*, 2 Ohio St. 251.

Pennsylvania.—*Hauer v. Sheetz*, 2 Binn. (Pa.) 532, 3 S. & R. (Pa.) 487; *Scott v. Price*, 2 S. & R. (Pa.) 59, 7 Am. Dec. 629; *Holmes v. Holmes*, 5 Binn. (Pa.) 252; *Beltzhoover v. Costen*, 7 Pa. St. 13; *Doebler's Appeal*, 64 Pa. St. 14.

South Carolina.—*Munro v. Holmes*, 1 Brev. (S. Car.) 319; *Waller v. Ward*, 2 Spears (S. Car.) 786; *Witsell v. Mitchell*, 3 Rich. (S. Car.) 289; *Shands v. Rogers*, 7 Rich. Eq. (S. Car.) 422.

Wisconsin.—*Baker v. McLeod*, 79 Wis. 544. *Contra*, *Woodward v. Glassbrook*, 2 Vern. 388.

Where the words were "in case my daughter should happen to die before she come of age, or have lawful heir of her body, then over," it was held that "or" must be read *and*; otherwise, if the daughter had issue and died before she attained the age of twenty-one, the estate would have gone from the child. *Ray v. Enslin*, 2 Mass. 561.

Same—Jackson v. Blanshan.—It has been held that where a testator makes a devise to an infant, and provides for another disposition if the infant should die before arriving at full age or without issue, the word "or" should be construed as *and*, so that the devise over would not take effect where the infant reaches full age and dies without leaving issue. *Jackson v. Blanshan*, 6 Johns. (N. Y.) 54, 5 Am. Dec. 188. *Kent, C. J.*, said: "The point seemed to have been definitively settled when the case of *Fairfield v. Morgan*, 2 B. & P. N. R. 38, so late as the year 1805, was brought from the K. B. in Ireland, before the House of Lords. That was precisely on the same point which arose in the case of *Moore*, and which had never ceased, for two centuries and a half, to be a subject of contention. A devised lands to B, but 'if he should die before he attained the age of twenty-one, or without issue living at his death,' then a devise over to C. B attained the age of twenty-one, and died without issue. It was held first in the C. B., and then in the K. B. in Ireland, and finally in the House of Lords in England, that 'or' must be construed as *and*, and that the devise over to C did not take effect. The case received great consideration and discussion, and, notwithstanding the very able arguments of Mr. Plumer and Mr. Hargrave, in favor of the grammatical sense of the word, the lords, upon the opinion of the judges, affirmed the judgment below. The question was again agitated about three years afterwards in the K. B., *Denn v. Kemeys*, 9 East 366, and the disjunctive sense of the word 'or' feebly endeavored to be supported, but the

the first taker dies under age or unmarried. For a fuller exposition of this subject, see the title *WILLS*.

Penal Statutes.—In accordance with the general rule that penal statutes are to be construed in favor of the accused, the word “or” will not, in general, be construed “and,” or *vice versa*, where the effect would be to aggravate the offense, or would be to the disadvantage of the accused.¹ And, following

decision of *Fairfield v. Morgan*, 2 B. & P. N. R. 38, was considered as closing the controversy forever. It is now to be hoped that the question on the construction of those words in a will, will never hereafter be revived. It is important that when a question of this kind has become once settled (and it is almost immaterial which way), it should not be disturbed, for it grows into a landmark of property.”

Same—“And” Read “Or.”—One devised his estate to his son S., “provided and on condition he lives to the age of twenty-one years, *and* has issue of his body lawfully begotten; but in case he shall die under the age of twenty-one years and without issue as aforesaid,” then to his son E. and his heirs. The *and* in the first part of the devise was construed to mean “or,” in order to carry into effect the intent of the testator. The court said: “We have just stated the reason given in the above cited cases, for substituting the word *and* for the word ‘or,’ where the contingencies on which the devise over is to take effect are expressed disjunctively; namely, that if they were construed in that manner, the case might often happen that the first devisee might marry and die under age, leaving issue; the devise over would then take effect, and the issue be thus disinherited; an event which the testator surely could never have intended. Now, to prevent such an undesigned and unwelcome consequence, and to render the law consistent with itself, the word *and* in the sentence immediately following the devise to Samuel should be construed ‘or;’ for if not so construed, then also if Samuel had died under age, leaving issue, they could have derived no benefit from the devise to their father, although the devise over never did or could take effect; and thus the whole devise would be completely frustrated. The same reason operates with equal force in both cases, and the same rule of construction, we apprehend, ought to operate in both. In *Price v. Hunt*, Pollex. 645, it was decided that ‘or’ is to be taken for *and*, and *and* is to be taken for ‘or,’ as may best comport with the intent and meaning of the devise or grant.” *Sayward v. Sayward*, 7 Me. 210, 22 Am. Dec. 191.

Same—Life Estate.—In *Cooke v. Mirehouse*, 34 Beav. 27, there was a devise to A for life when he should attain thirty-one and after his death to his eldest son in fee; in case A should not live to that age, *or* not have any son, then in trust for B for life on attaining thirty-one and after his death to his eldest son in fee, and in case of failure to the eldest son of the testator's daughter in fee. A attained thirty-one and died without having had issue, and B also died without having had issue. It was

held that “or” could not be read *and*, and that the eldest son of the daughter took the estate.

Same—Estate Tail.—In *Mortimer v. Hartley*, 6 Exch. 61, it was held that this rule did not apply where the first estate was an estate tail. See also *Woodward v. Glassbrook*, 2 Vern. 388; *Brownsword v. Edwards*, 2 Ves. 249. But see *Waller v. Ward*, 1 Spears (S. Car.) 786; *Holcomb v. Lake*, 25 N. J. L. 605. In this last case the court referred to *Mortimer v. Hartley*, 6 Exch. 61, but said they could see no reason for the distinction there made between a fee and an estate tail.

Under Age and without Issue.—And so, where the words were “if they shall die under age *and* without issue,” both events must happen. *Cheesman v. Wilt*, 1 Yeates (Pa.) 411. *In re Sanders’ Trusts*, L. R. 1 Eq. 675; *Doe v. Jessep*, 12 East 288; *Coates v. Hart*, 3 De G. J. & S. 504; *Grey v. Pearson*, 6 H. L. Cas. 61; *Secombe v. Edwards*, 28 Beav. 440; *Reed v. Braithwaite*, L. R. 11 Eq. 517; *Butterfield v. Haskins*, 33 Me. 392. See also *Doe v. Rawding*, 2 B. & Ald. 447.

But in *Seabrook v. Mikell*, Cheves Eq. (S. Car.) 80, where land was devised to a person for life, with remainder to his issue, and if he should die “under age *and* without leaving lawful issue living at his death,” then over, the word *and* was construed to mean “or,” so as to give the remainder over, upon the death of the first taker without issue after he became of age. *Compare Brownsword v. Edwards*, 2 Ves. 243.

1. *In re Clew*, 8 Q. B. Div. 511; *State v. Kansas City, etc.*, R. Co., 54 Ark. 546.

Fine or Imprisonment. (See also the titles *FINES AND PENALTIES*; *PUNISHMENT*.)—Thus where a statute provides that a party guilty of the offense created by it shall be fined or imprisoned, the court has no power to both fine *and* imprison. *State v. Walters*, 97 N. Car. 489, 2 Am. St. Rep. 310. To the same effect is *State v. Kearney*, 1 Hawks (N. Car.) 53.

Fine and Imprisonment.—By *Massachusetts Gen. Stat.*, c. 87, § 7, the punishment for keeping a place deemed a common nuisance under section 6 was by fine not exceeding one thousand dollars, *or* imprisonment not exceeding one year. The statute of 1863, c. 73, gave jurisdiction of such offense to police courts concurrently with the Superior Court, and provided in section 2 that whenever a police court should exercise final jurisdiction therein the punishment should be limited to a fine not exceeding one hundred dollars *and* imprisonment not exceeding one year. It was held that the statute did not empower police courts to punish the offense with both fine and imprisonment. *Com. v. Griffin*, 105 Mass. 185.

the same rule of construction, the word "and" has been construed "or" in favor of the accused.¹ But there are cases where "and" has been construed "or," and "or" "and," even though such construction operated against the interests of the defendant.²

III. OTHER INSTRUMENTS.—Courts have applied or refused to apply this construction of "or" as "and" and *vice versa*, to other instruments besides statutes and wills, in order to carry out the manifest intention of the parties. For example, the question has arisen in the following instances: in a marine insurance policy;³ in a note;⁴ in bonds;⁵ in a rule of court;⁶ in deeds;⁷ in a grant

In *U. S. v. Vickery*, 1 Har. & J. (Md.) 427, it was held that where fine and imprisonment are prescribed for an offense, the courts are bound to inflict both.

"Or" Read "And" in Favor of Accused.—As criminal statutes are construed strictly and in favor of the defendant, "or" may be read *and*. *State v. Custer*, 65 N. Car. 342; *Bollin v. Shiner*, 12 Pa. St. 205. And see *State v. Brandt*, 41 Iowa 614.

In a statute to punish the burning of jails, it was held that the word "or" before "maliciously" must be construed *and*, so that the burning must be both wilful and malicious to constitute the offense provided against. *State v. Mitchell*, 5 Ired. (N. Car.) 350.

"Or," in a statute imposing punishment if any person shall place obstructions in a water course, whereby the flow of water is lessened, or navigation impeded, was read *and*. *State v. Pool*, 74 N. Car. 402.

Same—The Phrase "Break or Enter."—This expression in the *Pennsylvania* Act of 1860, § 135, defining burglary, means "break *and* enter." *Rolland v. Com.*, 82 Pa. St. 326, 22 Am. Rep. 758.

Same—Vagrancy.—In the *North Carolina* Act of 1866, c. 42, which prescribes that "Any person who may be able to labor and has no apparent means of subsistence, and neglects to apply himself to some honest occupation for the support of himself and his family, if he have one; *or* shall be found spending his time in dissipation, or gaming, or sauntering about without employment, * * * shall be," etc., the word "or" in the beginning of the second paragraph must be construed *and*. *State v. Custer*, 65 N. Car. 339.

Criminal Statutes—"And" Not Read "Or."—But that *and* cannot be construed "or" in such a statute, against the interest of the accused, see *Buck v. Danzenbacker*, 37 N. J. L. 361; *State v. Drake*, 30 N. J. L. 422; *Thomas v. State*, 51 Ark. 138; *Thomas v. State*, 54 Ark. 584; *U. S. v. Ten Cases of Shawls*, 2 Paine (U. S.) 162.

1. *Com. v. Griffin*, 105 Mass. 185. In *State v. Smith*, 46 Iowa 670, where the statute ran, "If the father and mother expose their child," it was held, in order to avoid an absurdity, that *and* should be read "or," and that the offense may be committed by either parent. So in *State v. Myers*, 10 Iowa 44, "or" was construed to mean *and*, although this construction operated against the accused.

2. **"And" Read "Or"—Criminal Statutes.**—Where a statute provided that for every violation "of the first *and* second sections of this act," there should be a certain penalty, it

was held that a person was liable for a violation of either section, *and* and "or" being convertible. *People v. Sweetser*, 1 Dakota 296. To the same effect is *Streeter v. People*, 69 Ill. 595. And see *Porter v. State*, 58 Ala. 66; *State v. Myers*, 10 Iowa 448; *Fowler v. Padgett*, 7 T. R. 510.

3. **Marine Insurance Policy.**—Insurance was effected on a ship in the United States. At the foot of the policy was this memorandum: "Should this vessel and cargo be insured in England, this policy is to be canceled." The court said: "It is not uncommon, in papers written without much attention to technical and grammatical rules, to find *and* used for 'or,' and 'or' for *and* (*Rees v. Abbott*, Cowp. 832). In this case neither word alone would have clearly expressed the intent of the parties. They intended that if vessel and cargo, or either of them, should be insured in *England*, this policy should attach only on what should remain uninsured by such policy effected in *England*." *Davis v. Boardman*, 12 Mass. 83.

4. **Bills and Notes.**—In a recital in a note, "or" was read *and*, where such appeared to be the plain intention. *Lloyd v. Lynchburg Nat. Bank*, 86 Va. 690.

5. **Bonds—"Or" as "And."**—In a bond to A B, administrator, "or" C D, administratrix, the word "or" means *and*. *Brittin v. Mitchell*, 4 Ark. 92. See also *Parker v. Carson*, 64 N. Car. 563; *Richmond v. Woodward*, 32 Vt. 833.

"Or" Not Construed "And"—Revenue Bonds.—*Dumont v. U. S.*, 98 U. S. 142.

Appeal Bonds.—An appeal bond is not objectionable merely because the condition is, *inter alia*, for the payment of "all costs that have or shall accrue," etc., instead of "*and* shall accrue," etc. *McCall v. Trevor*, 4 Blackf. (Ind.) 496.

It is no objection to an appeal bond, that it is conditioned to prosecute the appeal with effect *or* perform the judgment, sentence, or decree of the Supreme Court, instead of "*and* perform the judgment," etc., the word used in the statute. *Robinson v. Brinson*, 20 Tex. 438.

Bond—"And" Read "Or."—*Chicago, etc., R. Co. v. Bartlett*, 120 Ill. 603.

6. **Rule of Court—"Or" Read "And."**—Where, by a rule of court, the plaintiff was permitted to amend his bill "upon proof by affidavit that the same is not made for the purpose of vexation or delay, *or* that the matter of the proposed amendment is material," etc., it was held that the last "or" was to be read *and*. *Toomey v. Hughes*, 25 W. N. C. (Pa.) 66.

7. **Deeds—"And" Read "Or."**—A grantor conveyed all his right, interest, and estate in

of public land;¹ in a by-law;² in an indictment;³ in contracts;⁴ in affidavits;⁵

and to all the estate, real, personal or mixed, of which J. C. and J. C., Jr., died seised or possessed. It was argued that this would pass only all the joint estate of J. C. and J. C., Jr. The court held that *and* was to be read "or," and that the grantor's interest in the estate passed, whether the interests of J. C. and J. C., Jr., were joint or several. *Litchfield v. Cudworth*, 15 Pick. (Mass.) 23.

Thus, in deeds, *and* may be construed "or" where, from the whole instrument, such appears to have been the intent of the grantor. *Jackson v. Topping*, 1 Wend. (N. Y.) 388, 19 Am. Dec. 515. See also *Wright v. Kent*, 3 T. R. 470; *Long Island R. Co. v. Conklin*, 32 Barb. (N. Y.) 385.

A covenant to make a new lease to A *and* his assigns, has been held equivalent to a covenant to make a new lease to A or his assigns. *Chapman v. Dalton*, Plowd. 289.

Deeds—"Or" Construed "And."—*Wright v. Kemp*, 3 T. R. 470.

Deeds—"And" Not Read "Or."—*Thomas v. Perry*, Pet. (C. C.) 56.

Deed Poll—"Or" Read "And."—A reservation of a right of way by a grantor in a deed poll, to himself or his heirs, was construed to be a reservation to himself *and* his heirs. *White v. Crawford*, 10 Mass. 183.

1. Grant of Public Land—"And" Read "Or."—In *Sargent v. Simpson*, 8 Me. 148, *and* was construed "or" in a grant of public land to effectuate the intent.

2. By-Laws—"Or" Read as "And."—The by-laws of an incorporated company provided that the directors "should serve for the term of one year or until such time as their successors should be elected." It was held that the word "or" should be read as *and*, and that one who had been duly elected must be considered liable as a director until it should be shown by him that a successor was elected. *Chemical Nat. Bank v. Colwell*, 14 Daly (N. Y.) 361.

3. Indictment.—As to charging an offense, where the statute uses the disjunctive "or" by employing the conjunctive *and*, see ENCYC. OF PLEADING AND PRACTICE, title INDICTMENTS.

A complaint charged the defendant with selling intoxicating liquors without an appointment, *and* also without any other authority. It was contended that, as either an appointment or other authority was sufficient for his defense, the complaint was defective. This contention the court refused to sustain. *Com. v. Keefe*, 7 Gray (Mass.) 335; *Com. v. Murphy*, 2 Gray (Mass.) 510; *Com. v. Clapp*, 5 Gray (Mass.) 97.

Indictment—"Or" Not Read "And."—In *Tompkins v. State*, 4 Tex. App. 161, an indictment was held defective where "or" was used instead of *and*.

Indictment—"And" Not Read "Or."—A *Kentucky* statute made it an offense to sell liquor to a minor "without the written consent or request" of the parent. It was held that an indictment charging a sale "without then and there having the written consent *and* re-

quest" of the parent was defective in that it required the defendant to have not only the written consent, but also the written request. *Com. v. Hadcraft*, 6 Bush (Ky.) 91.

4. "Or" Not Read "And"—Contract.—It was held that shipping articles for a voyage "from Philadelphia to Gibraltar, other ports in Europe, or South America, and back to Philadelphia," authorized a voyage directly from Gibraltar to South America without proceeding to any intermediate European port, but not a return afterwards from there to a European port. The court said: "'Or' is a disjunctive particle; in its ordinary signification it corresponds to 'either,' meaning one or the other of two, but not both. If this meaning be taken from it, I know of no other word in our language to supply it. It is true that this word has sometimes been construed to mean *and* when this was clearly necessary to give effect to some clause in a will, or some legislative provision. In such cases it has been forced out of its proper meaning to effect these purposes, but never to change a contract at pleasure. Indeed, it seems to be an inaccurate expression to say that 'or' can ever mean *and*. It should rather be said that, for strong reasons, and in conformity with a clear intention, 'or' has been changed or removed, and *and* substituted in its place." *Douglass v. Eyre*, Gilp. (U. S.) 147.

"And" Not Read "Or."—A promise to pay in sawing and lumber will not be construed as a promise to pay in lumber or sawing at the option of either party. *Fredenburg v. Turner*, 37 Mich. 402.

"And Elsewhere" (in a Maritime Contract).—Where a seaman's shipping articles specified a voyage to "Curagoa and elsewhere," it was held that *and* was not disjunctive, and that the master had no election by which he might change the voyage to some other port than Curagoa. Any other construction would be contrary to the provisions of the Act of Congress which requires a specification of the voyage. "The terms '*and* elsewhere,'" says Judge Winchester, "must therefore be construed as subordinate to the voyage specified, and can only authorize the pursuing such a course as may be necessary to accomplish the principal voyage, or, in other words, to import no more than the law would imply as incidental to the main contract." Opinion on the Construction of Maritime Contracts, 1 Hall's Am. Law Jour. 209.

5. Affidavit—"And" Not Read "Or."—Thus where an insolvent act required the insolvent debtor to make affidavit that he had not at any time or in any manner whatever disposed of or made over any part of his estate for the future benefit of himself or family, an affidavit reading "for the future benefit of himself *and* family" was held insufficient. *Hale v. Sweet*, 40 N. Y. 97.

Where a statute required that an affidavit under the attachment law should state that the attachment was not sued out for the purpose of injuring or harassing the said defendant, and an affidavit was made containing this

in instructions;¹ in a resolution by directors of a corporation;² in a petition;³ in a complaint for surety to keep the peace;⁴ in an ordinance.⁵

ANEW.—The primary meaning of "anew" is over again. To hear and try a case anew is to try it over again.⁶

ANGER. (See also the title HOMICIDE.)—Anger is a violent passion of the mind excited by real or supposed injury offered to one's self or to a relative or friend.⁷

ANGOSTURA. (See also the title TRADE-MARKS.)—See note 8.

ANGUISH.—Extreme pain, either of body or mind; synonymous with "agony, d'stress, pang, torment," etc.⁹

language: "This attachment is not sued out for the purpose of injuring *and* harassing the said defendant," it was held that a motion to quash was properly sustained, the affidavit not being made in compliance with the statute. *Moody v. Levy*, 58 Tex. 532. *Compare Com. v. Hadcraft*, 6 Bush (Ky.) 91; *Tompkins v. State*, 4 Tex. App. 161.

1. Instruction.—The use of *and* instead of "or," where it was apparent that it was a clerical error of the trial court, was held immaterial. *Heard v. State*, 70 Ga. 597.

Same—Error.—In *Wilson v. Wheeling*, 19 W. Va. 349, 42 Am. Rep. 780, the use of *and* instead of "or" was held error.

Fraudulent Conveyances.—A statute declared that conveyances made with intent to hinder, delay, or defraud creditors, should be void. It was held that an instruction that the jury should find for the defendant unless the conveyance was made to hinder, delay, *and* defraud creditors, was erroneous. *Crow v. Beardsley*, 68 Mo. 435. See also *Burgert v. Borchert*, 59 Mo. 80.

Instruction—"And" Read "Or."—Where, in an action for damages for injuries caused by a defective sidewalk, the trial court instructed that if the defendant purposely and carelessly stepped into the hole, he could not recover, the appellate court held that by *and*, the trial judge meant "or." *Hall v. Fond du Lac*, 42 Wis. 281.

2. Resolution by Directors of a Corporation.—A resolution of the directors of a corporation authorized certain officers to secure "any *and* all other creditors" by mortgages. It was held that this did not require a mortgage to secure all other creditors, as *and* should be read "or." *Brown v. Grand Rapids Parlor Furniture Co.*, 58 Fed. Rep. 286, 16 U. S. App. 221.

3. Petition—"Or" Read "And."—A petition to the probate court for authority to sell a decedent's estate alleged that it was of a character "liable to waste or to be consumed by fire." It was held that "or" should be read *and*. *Harris v. Parker*, 41 Ala. 616.

4. Complaint for Surety to Keep the Peace—"Or" Read "And."—In *Conklin v. State*, 8 Ind. 458, it was held that a complaint for surety of the peace was not necessarily bad for alternativeness arising from the use of "or" instead of *and*.

5. Ordinance—"And" Not Read as "Or."—*Philadelphia v. Arrott*, 8 Phila. (Pa.) 41.

6. Neil v. Case, 25 Kan. 514, 37 Am. Rep. 259.

Trial.—A trial *anew* is a trial *de novo*. *Ostrom v. Tarver* (Tex. Civ. App. 1895), 29 S. W. Rep. 70. See ENCYC. PLEADING AND PRACTICE, title NEW TRIAL.

7. Eanes v. State, 10 Tex. App. 447, citing Webster's Dictionary. The court further said in that case: "It is not necessarily rage, nor transport of passion, nor delirium, though it may be inflamed into such conditions. (Webster's Dictionary). These are but higher and more demonstrative and uncontrollable types of its existence. It too often happens that the uneducated mind will confound the cause with the higher degrees, and require that the same external exhibitions shall indicate its presence. Such is not the fact. Anger may exist without any violent ebullition of passion, or even outward expression, and yet to such an extent as to render the mind incapable of cool reflection. It may present all 'the torrent's smoothness ere it dash below,' and its *indicia* are as varied as are the varied faces and dispositions of men."

8. "The word *angostura* has long been used in medical and scientific works to designate the bark of a South American tree having well-known medical properties. The following definition of this word is given in Murray's New English Dictionary: '*Angustura*, or *Angostura*, a town on the Orinoco, now called Ciudad Bolivar. It gives its name to a bark, valuable as a febrifuge and tonic, the produce of *Galipea* or *Cusparia febrifuga*.'" *Siebert v. Abbott*, 72 Hun (N. Y.) 246.

9. Cook v. Missouri Pac. R. Co., 19 Mo. App. 334. See also the title DAMAGES.

ANIMALS.

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For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: ABATEMENT OF NUISANCES, vol. 1, p. 63; AGISTMENT; BAILMENTS; BRANDS AND BRANDING; CHATTEL MORTGAGES; CARRIERS OF LIVE STOCK; CONTRIBUTORY NEGLIGENCE; CONVERSION; CROSSINGS; CRUELTY TO ANIMALS; DAMAGES; EXEMPLARY DAMAGES; FENCES; FISH AND FISHERIES; GAME AND GAME LAWS; HIGHWAYS; HERD LAWS; HORSES; INJURIES TO ANIMALS; LARCENY; LIENS; LIVERY-STABLE KEEPERS; MUNICIPAL CORPORATIONS; NEGLIGENCE; NUISANCES; ORDINANCES; POLICE POWER; SALES; TAXATION; TRESPASS.

I. PROPERTY IN ANIMALS—1. Wild Animals—*a.* IN GENERAL.—The general ownership of wild animals, or animals *feræ naturæ*, so far as they are capable of such ownership, is in the state, not as a proprietor, but in its collective sovereign capacity, as the representative and for the benefit of all its people in common.¹

Private Right of Property may be Acquired.—Animals *feræ naturæ*, when reclaimed by the art and power of man, are the subject of a qualified property,² and, during the existence of this qualified property, it is, as a general rule, under the protection of the law, the same as any other property, and every invasion of it is redressed in the same manner.³

Right of Property—How Acquired.—Actual bodily seizure is not indispensable to acquire this right of qualified property. Securing or intercepting such animals in a manner so as to deprive them of their natural liberty and render escape impossible, will be deemed to give possession of them to those who, by their industry and labor, have used such means of apprehending them.⁴

1. General Ownership in State.—*Geer v. Connecticut*, 16 Sup. Ct. Rep. 604, *affirming* *State v. Geer*, 61 Conn. 144; *Ex p. Maier*, 103 Cal. 476; *State v. Rodman*, 58 Minn. 393. See also *Magner v. People*, 97 Ill. 320.

In *Ex p. Maier*, 103 Cal. 476, it is held that "the wild game within a state belongs to the people in their collective sovereign capacity. It is not the subject of private ownership, except in so far as the people may elect to make it so; and they may, if they see fit, absolutely prohibit the taking of it, or any traffic or commerce in it, if deemed necessary for its protection or preservation, or the public good." *Quoted and approved* in *Geer v. Connecticut*, 16 Sup. Ct. Rep. 604, *affirming* *State v. Geer*, 61 Conn. 144.

In *England* the property in game at large is in the king. 2 Bl. Com. 409. See *Magner v. People*, 97 Ill. 320.

2. Wild Animals Reclaimed.—4 Black. Com. 588; *Goff v. Kilts*, 15 Wend. (N. Y.) 550.

This property right is said to exist *per industriam hominis*. 4 Black. Com. 588. A qualified property may also subsist with relation to animals *feræ naturæ*, *ratione impotentiae*, on account of their own inability, as in the case of young animals or birds, when the owner of the soil where they are has a qualified property in them until they can fly or run away. 4 Black. Com. 590.

3. Goff v. Kilts, 15 Wend. (N. Y.) 550.

4. Right of Property—How Acquired.—"Actual bodily seizure is not indispensable to acquire right to or possession of wild animals; * * * the mortal wounding of such beast, by one not abandoning his pursuit, may, with the utmost propriety, be deemed possession of

him, since thereby the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control. So, also, encompassing and securing such animals with nets and toils, or otherwise intercepting them in such a manner as to deprive them of their natural liberty and render escape impossible, may justly be deemed to give possession of them to those persons who, by their industry and labor, have used such means of apprehending them." The court, *per* Tompkins, J., in *Pierson v. Post*, 3 Cai. (N. Y.) 175, 2 Am. Dec. 264.

Capture of Wild Animals.—Wild animals, when captured and so under the control of the capturer that they cannot escape, are the property of the one who captured them. *Bacon's Abr.* 431; *State v. House*, 65 N. Car. 315, 6 Am. Rep. 744.

Pursuit Alone will Give No Right of property in wild animals, or animals *feræ naturæ*, and no action will lie against a man for killing and taking an animal of this kind when pursued by, and in view of, the person who first started it. *Pierson v. Post*, 3 Cai. (N. Y.) 175, 2 Am. Dec. 264; *Buster v. Newkirk*, 20 Johns. (N. Y.) 75. In *Charlebois v. Raymond*, 12 L. C. J. 55, however, it is held that a person who has chased a wild animal and wounded it, is the first occupant so long as he remains in pursuit, and the owner of it should it be caught or killed.

Animal Killed on Owner's Land.—The owner of land has property in animals killed thereon, and may maintain an action for their conversion. *Blades v. Higgs*, 11 H. L. Cas.

When Right of Property Ceases.—The property right continues only so long as the

621, 34 L. J. C. P. 286, 11 Jur. N. S. 701, 12 L. T. N. S. 615; *Rigg v. Lonsdale*, 1 H. & N. 923. See also *Re Long Point Co. v. Anderson*, 19 Ont. Rep. 487.

But if game is started on the ground of B, and it escapes to the ground of C, and is there killed, the property is in the hunter who kills it. *Churchward v. Studdy*, 14 East 249; *Sutton v. Moody*, 1 Ld. Raym. 250; *Blades v. Higgs*, 11 H. L. Cas. 621, 34 L. J. C. P. 286; 11 Jur. N. S. 701, 12 L. T. N. S. 615.

Bees.—Bees are *feræ naturæ*, but when hived and reclaimed, a person may have a qualified property in them by the law of nature. Occupation, that is hiving or enclosing them, gives property in them. *Goff v. Kilts*, 15 Wend. (N. Y.) 550; *Gillet v. Mason*, 7 Johns. (N. Y.) 16; *Rexroth v. Coon*, 15 R. I. 35, 2 Am. St. Rep. 863. See also *State v. Murphy*, 8 Blackf. (Ind.) 498.

An unreclaimed swarm, like all other wild animals, belongs to the first occupant—in other words, to the person who first hives them; but if a swarm fly from the hive of an owner, his qualified property continues so long as he can keep them in sight and possesses the power to pursue them. 2 Bl. Com. 393; *Merrills v. Goodwin*, 1 Root (Conn.) 209; *Goff v. Kilts*, 15 Wend. (N. Y.) 550; *Rexroth v. Coon*, 15 R. I. 35, 2 Am. St. Rep. 863.

Tree Containing Swarm of Bees.—Finding bees in a tree on another's land gives the finder no right to the bees or the tree. *Merrills v. Goodwin*, 1 Root (Conn.) 209.

The bees belong to the owner of the land where the tree stands. *Ferguson v. Miller*, 1 Cow. (N. Y.) 243, 13 Am. Dec. 519; *Goff v. Kilts*, 15 Wend. (N. Y.) 550.

But if they have been reclaimed, and their owner is able to identify his property, they do not belong to the owner of the soil, but to him who had the former possession. *Goff v. Kilts*, 15 Wend. (N. Y.) 550.

Finding a bee-tree on the land of another, containing a swarm of bees, and marking the trees with the initials of the finder's name, is not reclaiming the bees, nor does it vest in the finder any exclusive right of property in them, nor can he maintain trespass against a person for cutting down the tree and taking the bees and honey therein. *Gillet v. Mason*, 7 Johns. (N. Y.) 16. See also *Merrills v. Goodwin*, 1 Root (Conn.) 209.

And a license from the owner to the finder to carry away the bees does not vest title until the licensee takes possession, and another, who subsequently gets a license, may take the bees without being liable in trespass to the finder. *Ferguson v. Miller*, 1 Cow. (N. Y.) 243, 13 Am. Dec. 519.

He may maintain, however, an action against one who, even under a subsequent license, interferes while he is actually engaged in cutting down the tree. *Adams v. Burton*, 43 Vt. 36.

Buffaloes.—A buffalo captured when young, and reared with domestic cattle, so that it is tame, is a subject of property, and for any

trespass committed by it the owner is liable, and for any injury done to it by others he can recover damages. *Ulery v. Jones*, 81 Ill. 403.

Deer Are Feræ Naturæ, and where a person killed upon his own land, which adjoined that of the plaintiff, a deer, one of the progeny of certain deer imported by the plaintiff and defendant, and allowed to run at large, it was held that the deer, having been killed on defendant's land, belonged to him. *Re Long Point Co. v. Anderson*, 19 Ont. Rep. 487.

Doves.—Doves are *feræ naturæ*, and if killed by a stranger when feeding on the ground of a proprietor, it seems that the latter may maintain trespass for the injury. *Com. v. Chace*, 9 Pick. (Mass.) 15, 19 Am. Dec. 349.

As to the larceny of doves and pigeons, see *infra*, this title, *Wild Animals—Larceny*.

Oysters.—Oysters planted in a bed, clearly separated and marked out, are property, and an action may be maintained against one who takes them. *Fleet v. Hegeman*, 14 Wend. (N. Y.) 42; *Decker v. Fisher*, 4 Barb. (N. Y.) 592; *Lowndes v. Dickerson*, 34 Barb. (N. Y.) 586; *State v. Taylor*, 27 N. J. L. 117, 72 Am. Dec. 347. But not where the owner has no means of identifying them. *Shepard v. Levenson*, 2 N. J. L. 369.

Nor where the buoys marking the bed were carried away, and had not been replaced for several years. *Brinckerhoff v. Starkins*, 11 Barb. (N. Y.) 248. See the title FISH AND FISHERIES.

Property in Whale.—If a whale is killed, anchored, and left with marks of appropriation, it is, by law and custom, the property of the captor, even if it drifts away from the place of anchorage. *Taber v. Jenny*, 1 Sprague (U. S.) 315; *Littledale v. Scaith*, 1 Taunt. 243, note; *Aberdeen Arctic Co. v. Sutter*, 4 Macg. H. L. Cas. 355.

Property in a whale is in those who first iron or lance it with implements by which it can be identified. *Swift v. Gifford*, 2 Lowell (U. S.) 110; *Ghen v. Rich*, 8 Fed. Rep. 159; *Bartlett v. Budd*, 1 Lowell (U. S.) 223.

Usage and Custom in this Respect Generally Control.—Where it is customary to kill whales with bomb-lances, and they sink to the bottom, and after two or three days float to the surface, a usage that they shall belong to the person who killed them, no matter by whom found, is enforceable. *Ghen v. Rich*, 8 Fed. Rep. 159. See also *Swift v. Gifford*, 2 Lowell (U. S.) 110.

Casting Seine around Shoal of Fish.—Where the plaintiff, while fishing, cast a seine around a shoal of mackerel, with the exception of an opening, it was held that his possession was so complete as to enable him to maintain an action of trespass against one who entered and took the fish. *Young v. Hichens*, 6 Q. B. 606, 51 E. C. L. 606; *Stevens v. Jeacocks*, 11 Q. B. 731, 63 E. C. L. 731.

Wild Geese which have become domesticated, and have lost their power or disposition to fly away, are the property of the person who

animal is in the keeping and possession of man, and if at any time it regains its natural liberty without the *animus revertendi* it ceases.¹

Absolute Property in Game when Killed.—Every owner of land has a common-law right to kill and take all such game animals *feræ naturæ* as may be found on his land, and as soon as this right is exercised, the animal so killed or caught becomes the absolute property of the owner of the soil.²

tames them, and this property is not lost by the fact that they stray away. *Amory v. Flynn*, 10 Johns. (N. Y.) 102, 6 Am. Dec. 316.

Singing Birds.—Property may be acquired in a canary, *Manning v. Mitcherson*, 69 Ga. 447, 47 Am. Rep. 764; or a mocking-bird, *Haywood v. State*, 41 Ark. 479.

Disturbing Wild Fowl.—Rooks are *feræ naturæ*, and no action can be maintained for disturbing them. *Hannam v. Mockett*, 2 B. & C. 934, 9 E. C. L. 280.

But where ducks were decoyed to the pond of another, it was held that an action would lie for disturbing them, for the reason that ducks are a known article of food, and that a person keeping up a decoy expends money and employs skill in taking that which is of use to the public. *Keeble v. Hickeringill*, 11 East 574, note.

1. When Right of Property in Wild Animals Ceases.—4 Black. Com. 588; *Goff v. Kilts*, 15 Wend. (N. Y.) 550.

The Animus Revertendi is Only to be Known by the usual custom or habit of the animal of returning. The law will therefore extend the right of possession farther than mere manual occupation, as in the case of carrier pigeons or a hawk when pursuing his quarry in his owner's presence. 4 Black. Com. 588–589.

Presumption.—Domestic animals are always presumed to have *animus revertendi*. *People v. Kaatz*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 129.

2. Killing Animals on One's Own Land.—*Blades v. Higgs*, 11 H. L. Cas. 621, 34 L. J. C. P. 286, 11 Jur. N. S. 701, 12 L. T. N. S. 615.

This right is said in law to exist *ratione soli*. A similar right may exist, *ratione privilegii*, or *propter privilegium*, which is the right or privilege of taking animals *feræ naturæ* on the lands of another; and in like manner the game, when killed or taken by virtue of the privilege, becomes the absolute property of the owner of the franchise. 4 Black. Com. 591; *Blades v. Higgs*, 11 H. L. Cas. 621, 34 L. J. C. P. 286, 11 Jur. N. S. 701, 12 L. T. N. S. 615. See also *Re Long Point Co. v. Anderson*, 19 Ont. Rep. 487. In the case first cited, *Westbury, L. C.*, said: "When it is said by writers on the common law of England that there is a qualified or special right of property in game, that is in animals *feræ naturæ* which are fit for the food of man, whilst they continue in their wild state, I apprehend that the word 'property' can mean no more than the exclusive right to catch, kill, and appropriate such animals, which is sometimes called by the law a reduction of them into possession." Lord Chelmsford, in the same case, extends the doctrine to all wild animals by saying: "With respect to wild and unclaimed animals, therefore, there can be no doubt that

no property exists in them so long as they remain in the state of nature. It is also equally certain that when killed or reclaimed by the owner of the land on which they are found, or by his authority, they become at once his property, absolutely when they are killed, and in a qualified manner when they are reclaimed." See the title GAME AND GAME LAWS.

Principles Established—Illustrations.—The following principles are deduced from the authorities: First, if A starts a hare in the ground of B, and hunts it and kills it there, the property continues all the while in B. In the case thus put, it must, of course, be taken that A has hunted and killed the hare without leave or license of B, and, therefore, that it is a wrongful act of A which enures to the benefit of the true owner, to-wit: B, the owner of the soil. *Blades v. Higgs*, 11 H. L. Cas. 621, 34 L. J. C. P. 286, 11 Jur. N. S. 701, 12 L. T. N. S. 615; *Sutton v. Moody*, 1 Ld. Raym. 250. See also *The Coney's Case*, Godf. 122; *Graham v. Ewart*, 11 Exch. 326, 25 L. J. Exch. 42; *Lonsdale v. Rigg*, 11 Exch. 669, 26 L. J. Exch. 196, 1 H. & N. 923.

Second, if A starts a hare in the ground of B (who is entitled *ratione soli* only), and hunts it into the ground of C, and there kills it, the property is in the hunter; for it cannot be in B, who is entitled *ratione soli* and not *ratione privilegii*, for the hare was not killed upon his land; and cannot be in C, for the game was not originally found in his possession, but was only driven upon his ground by the chase and pursuit of the hunter. *Sutton v. Moody*, 1 Ld. Raym. 250. *Churchward v. Studdy*, 14 East 249; *Blades v. Higgs*, 11 H. L. Cas. 621, 34 L. J. C. P. 286, 11 Jur. N. S. 701, 12 L. T. N. S. 615.

In this case, however, Lord Chelmsford questions this proposition as stated by Lord Holt in the early case of *Sutton v. Moody*, 1 Ld. Raym. 250, and says: "It would appear to me to be more in accordance with principle to hold that if the trespasser deprived the owner of the land where the game was started, of his right to claim the property, by unlawfully killing it on the land of another to which he had driven it, he converted it into a subject of property for that other owner, and not for himself."

These propositions prove clearly that game found and killed by a trespasser under such circumstances that it would be the absolute property of the owner of the soil if it had been found and killed by such owner instead of by the trespasser, does in law become the absolute property of the proprietor of the soil or privilege immediately on its being so caught and killed by the trespasser. *Blades v. Higgs*, 11 H. L. Cas. 621, 34 L. J.

b. CANNOT BE ACQUIRED BY TRESPASSER.—The act of reducing an animal *feræ naturæ* into possession, where title is thereby created, must not be wrongful. And if such an act is effected by one who is at the moment a trespasser, no title to the property is created.¹

c. LARCENY.—By the Common Law, there can be no larceny of animals *feræ naturæ*, or wild animals unreclaimed.² When reclaimed, they become the subject of this offense, provided they are considered as useful or fit for food.³

Civil Action.—While at common law the taking from another's possession an animal *feræ naturæ* would not be criminal, the right of the owner would be protected by a civil action.⁴

C. P. 286, 11 Jur. N. S. 701, 12 L. T. N. S. 615; Sutton v. Moody, 1 Ld. Raym. 250.

1. **Trespassers.**—Blades v. Higgs, 11 H. L. Cas. 621, 34 L. J. C. P. 286, 11 Jur. N. S. 701, 12 L. T. N. S. 615; Rexroth v. Coon, 15 R. I. 35, 2 Am. St. Rep. 863.

Where a Stranger, without Permission, entered upon the land of another and killed rabbits, and immediately sold them to a third person, it was held that the servants of the landowner were justified in taking possession of them as the property of their owner. Blades v. Higgs, 11 H. L. Cas. 621, 34 L. J. C. P. 286, 11 Jur. N. S. 701, 12 L. T. N. S. 615.

So, where a Trespasser Placed a Box in a Tree on Another's Land, for Bees to Hive in, it was held that he could not maintain trover against a third person for taking bees and honey from the box. Rexroth v. Coon, 15 R. I. 35, 2 Am. St. Rep. 863.

2. **Larceny in Case of Wild Animals.**—Haywood v. State, 41 Ark. 479; Warren v. State, 1 Greene (Iowa) 106.

3. 4 Bl. Com. 292, 293; Haywood v. State, 41 Ark. 479; Harvey v. Com., 23 Gratt. (Va.) 941.

Bees.—Bees, when in the possession of their owner, are the subject of larceny. Harvey v. Com., 23 Gratt. (Va.) 941; State v. Murphy, 8 Blackf. (Ind.) 499.

But so long as wild bees remain in the tree where they have been hived, notwithstanding the tree is upon the land of an individual, and he has confined them in it, they are not the subject of a felony. Wallis v. Mease, 3 Binn. (Pa.) 546.

Doves.—Doves are *feræ naturæ*, and, as such, are not the subject of larceny, except when in the care and custody of the owner, as when in a dovecote or pigeon house, or when in the nest before they are able to fly. Com. v. Chace, 9 Pick. (Mass.) 15, 19 Am. Dec. 348.

Pigeons Kept in an Ordinary Dovecote, having liberty of ingress and egress at all times, may be the subjects of larceny. Reg. v. Cheafor, 8 Eng. L. & Eq. 598, 5 Cox C. C. 367, 21 L. J. 43, 15 Jur. 1065.

And in Rex v. Brooks, 4 C. & P. 131, 19 E. C. L. 308, the test was applied that, if the pigeons were so far trained that they came home every night, they would be reclaimed, and therefore the subject of larceny.

However, in the Case of Carrier Pigeons, the right of property continues when they are absent from the home of their owner, and flying across the country in process of training. 23 Albany L. J. 482.

Pheasants which have been reared by a hen,

having never been wild, are objects of property, so that the stealing of them is larceny. Reg. v. Garnham, 8 Cox C. C. 451, 2 F. & F. 347; Reg. v. Cory, 10 Cox C. C. 23.

Coon.—A coon comes under the denomination of animals *feræ naturæ*, and is not the subject of larceny. Warren v. State, 1 Greene (Iowa) 106.

This case, however, is criticised in Haywood v. State, 41 Ark. 479, on the ground that in some localities these animals are regarded as proper for food, and, under such circumstances, would be the subject of larceny.

Ferret.—A ferret, though tame, is not the subject of larceny. Rex v. Searing, 3 R. & R. C. C. 351.

Fish.—Fish, unless reclaimed, confined, or dead, and valuable for food, are not to be considered the subject of larceny. State v. Krider, 78 N. Car. 481.

Animal in Trap.—Where a sable is caught in a trap and stolen therefrom, the theft will not be larceny. Norton v. Ladd, 5 N. H. 203, 20 Am. Dec. 573.

The contrary is laid down in State v. House, 65 N. Car. 315, 6 Am. Rep. 744, where it was held to be larceny to take an otter from a trap, for the reason that it is valuable for its fur.

Singing Birds.—Property rights may be acquired in singing birds, such as a canary. Manning v. Mitcherson, 69 Ga. 447, 47 Am. Rep. 764.

Likewise, a tame mocking bird may be a subject of property, and the taking of the same will be larceny. Haywood v. State, 41 Ark. 479.

Product of Labor.—Although there is generally no property in unreclaimed wild animals, when they have been killed and labor bestowed thereon, the product of such labor, as the skin, becomes a subject of larceny. Norton v. Ladd, 5 N. H. 203, 20 Am. Dec. 573; Reg. v. Gallears, 1 Den. C. C. 501.

So it seems that the stealing of the skin of a dog would be larceny, whereas stealing the live dog would not constitute larceny, as dogs are considered at common law of a base nature, and not the subject of larceny. Rex v. Halloway, 1 C. & P. 127, 11 E. C. L. 341.

Oysters, if planted in beds properly designated, are the subject of larceny. State v. Taylor, 27 N. J. L. 117, 72 Am. Dec. 347.

4. 4 Blackf. 293; Warren v. State, 1 Greene (Iowa) 106.

Things of a base nature, in contemplation of law, as cats, bears, foxes, monkeys, ferrets,

2. Domestic Animals—*a.* IN GENERAL.—In animals which are of a tame and domestic nature, a man may have absolute property.¹

Reason of the Rule.—This is for the reason that they continue perpetually in the occupation of the owner, and will not stray from his house or person unless by accident or fraudulent enticement, in either of which cases the owner does not lose his property.²

b. LARCENY.—At common law, larceny may be committed of all valuable domestic animals, as horses and other beasts of burden, and of all animals *domitæ naturæ*, which serve for food, as cattle, swine, poultry, and the like.³

etc., cannot, by the common law, be the subject of larceny, although a man may have a property in them which the law will protect by a civil action. Hawk. P. C., bk. 1, c. 33, § 23; 4 Black. Com. 292-293; 1 Car. & P. 128, note; Norton v. Ladd, 5 N. H. 203, 20 Am. Dec. 573.

1. 2 Bl. Com. 390.

2. 2 Bl. Com. 390; Blair v. Forehand, 100 Mass. 140, 1 Am. Rep. 94, 97 Am. Dec. 82.

Animus Revertendi Presumed.—Domestic animals are always presumed to have *animus revertendi*. People v. Kaatz, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 129.

Animal Defined.—The word "animal" in its common acceptation includes all irrational beings. Com. v. Tumer, 145 Mass. 296.

A domestic fowl is an animal. State v. Bruner, 111 Ind. 98.

So the words "bird or animal" embrace game cocks. People v. Klock, 48 Hun (N. Y.) 275.

But under a statute (Act of Congress, May, 1866, "imposing a duty on live animals"), birds and fowls are not embraced in the term "animals." Reiche v. Smythe, 13 Wall. (U. S.) 162.

Definition of Terms.—The word "cattle" usually includes horses and sheep, Louisville, etc., R. Co. v. Ballard, 2 Metc. (Ky.) 177; as well as a cow, steer, or ox, Robertson v. State, 1 Tex. App. 311.

It will also include a pig, Child v. Hearn, L. R. 9 Exch. 176; or a horse, State v. Hambleton, 22 Mo. 452.

The word "cow" is the generic name of the bovine species, Pullen v. State, 11 Tex. App. 90; but is not included in the term "bull," Oil v. Rowley, 69 Ill. 473.

Buffaloes, though domesticated, are not cattle. State v. Crenshaw, 22 Mo. 457.

The word "stock," in agriculture, means domestic animals collected, raised, or used on a farm. State v. Clark, 65 Iowa 336.

The word "hog" is held to mean swine of either sex. Matson v. Aiona, 7 Hawaiian 158.

The term "horse" embraces generally all the classes and sexes, Taylor v. State, 44 Ga. 263; and is descriptive of the genus of the animal, and not of the sex or character when changed by artificial means, so a gelding is within the meaning, Baldwin v. People, 2 Ill. 304; Pullen v. State, 11 Tex. App. 90.

But when statutes use the terms horse, gelding, mare, etc., an indictment for stealing one will not warrant a conviction for stealing another. See the titles HORSES; STATUTES.

3. Larceny of Domestic Animals.—4 Black. Com. 292; Blair v. Forehand, 100 Mass. 140,

1 Am. Rep. 94, 97 Am. Dec. 82; State v. Turner, 66 N. Car. 618.

In State v. Turner, 66 N. Car. 618, the court, by Boiden, J., quoting Bishop's Crim. Law, § 787-788, says: "Domestic animals and fowls, such as horses, oxen, sheep, hens, peafowls, turkeys, and the like, being tame in their nature, are the subject of larceny on precisely the same grounds as other personal property."

"Beasts which have been thoroughly tamed and are used for burden or husbandry, or for food, such as horses, cattle, and sheep, are as truly property of intrinsic value, and entitled to the same protection, as any kind of goods." The court, per Gray, J., in Blair v. Forehand, 100 Mass. 140, 1 Am. Rep. 94, 97 Am. Dec. 82; quoted and approved in Wilton v. Weston, 48 Conn. 336. See the title LARCENY.

Domestic Fowls generally are the subject of larceny, Com. v. Beaman, 8 Gray (Mass.) 497; as turkeys, Com. v. Beaman, 8 Gray (Mass.) 497; State v. Turner, 66 N. Car. 618; and peacocks, Com. v. Beaman, 8 Gray (Mass.) 497.

But turkeys which are running wild, and not in the custody, control, or possession of any one, are not the subject of larceny, although the parent stock was originally imported. King v. Manu, 4 Hawaiian 409.

Larceny—Stray Cattle.—The rule that larceny cannot be committed in the case of goods accidentally lost, and the owner of which the finder really supposes cannot be ascertained, is not applicable to cattle which have strayed from an enclosure to the public highway; and where cattle were found upon the public highway, under such circumstances, and were driven by the finder to market, with the intention of converting them to his own use, he was adjudged guilty of larceny. People v. Kaatz, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 139.

Larceny by False Pretext.—Larceny may be by obtaining an animal by false pretext, with intent to deprive the owner of the value of the property, and appropriating it to the use and benefit of the taker. Dow v. State, 12 Tex. App. 343; Atterberry v. State, 19 Tex. App. 406. See also Baldwin v. People, 2 Ill. 304; State v. Gazell, 30 Mo. 92; People v. Kaatz, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 129.

Possession as Evidence.—It is a well-settled principle that, if a man be found in possession of stolen animals, the law will presume him to be the thief, in the absence of satisfactory explanation. Atzroth v. State, 10 Fla. 207.

Dogs.—At common law, there could be no larceny of a dog.¹

Statutory Changes.—In many jurisdictions the common-law rule has been changed by statute, either by specifically enacting that the felonious taking of a dog is larceny,² or upon the ground that a dog is a "domesticated animal,"³ "personal property,"⁴ or "a thing of value,"⁵ under the several larceny acts.

In a *Utah* case it is said that the recent possession of stolen stock seems not, in the western states, sufficient to warrant a conviction, or, at any rate, if the identification is not positive, the rule of recent possession should not apply. *People v. Swasey*, 6 *Utah* 93.

1. Dogs as Subject of Larceny—Common-law Rule.—4 *Black. Com.* 293.

Alabama.—*Ward v. State*, 48 *Ala.* 161, 17 *Am. Rep.* 31.

Arkansas.—*Haywood v. State*, 41 *Ark.* 479.

Indiana.—*State v. Doe*, 79 *Ind.* 9, 41 *Am. Rep.* 599; *Mitchell v. Williams*, 27 *Ind.* 62.

New Hampshire.—*State v. M'Duffie*, 34 *N. H.* 523, 69 *Am. Dec.* 516.

New York.—*People v. Campbell*, 4 *Park. Cr. Rep.* (N. Y. Gen. Sessions) 386.

North Carolina.—*State v. Holder*, 81 *N. Car.* 527, 31 *Am. Rep.* 517.

Ohio.—*State v. Lymus*, 26 *Ohio St.* 400, 20 *Am. Rep.* 772.

Pennsylvania.—*Findlay v. Bear*, 8 *S. & R. (Pa.)* 571.

Texas.—*Ex p. Cooper*, 3 *Tex. App.* 489, 30 *Am. Rep.* 152; *State v. Marshall*, 13 *Tex.* 55.

"Dogs and cats, even in a state of domestication, never wholly lose their wild natures and destructive instincts, and are kept either for uses which depend on retaining and calling into action those very natures and instincts, or else for the mere whim or pleasure of the owner; and, therefore, although a man might have such a right of property in a dog as to maintain trespass or trover for unlawfully taking or destroying it, yet he was held, in the phrase of the books, to have 'no absolute and valuable property' therein, which could be the subject of a prosecution for larceny at common law, or even, according to some authorities, of an action of detinue or replevin, or a distress for rent, or which would make him responsible for the trespasses of his dog on the lands of other persons as he would be for the trespasses of his cattle." The court, *per Gray, J.*, in *Blair v. Forehand*, 100 *Mass.* 140, 1 *Am. Rep.* 94, 97 *Am. Dec.* 82, *quoted and approved* in *Wilton v. Weston*, 48 *Conn.* 336. See also *Ex p. Cooper*, 3 *Tex. App.* 489, 30 *Am. Rep.* 152.

Taxing Dogs as Affecting Question of Larceny.

—It seems, however, that if dogs are taxed for revenue purposes, it is a strong circumstance to show intent on the part of the legislature to abrogate the common-law rule, and make them the subject of larceny like any other personal property. *State v. Doe*, 79 *Ind.* 9, 41 *Am. Rep.* 599; *Mullaly v. People*, 86 *N. Y.* 365; *People v. McMaster*, 10 *Abb. Pr. N. S. (N. Y. Supreme Ct.)* 132.

Civil Action for Injury to Dog.—While at common law there could be no larceny of a dog, yet a property right was recognized in a dog so that the owner could bring a civil action for an invasion of such right, and an

action of trover could be brought for its conversion. *Binstead v. Buck*, 2 *W. Bl.* 1117; *Parker v. Mise*, 27 *Ala.* 480, 62 *Am. Dec.* 776; *Ward v. State*, 48 *Ala.* 161, 17 *Am. Rep.* 31; *Haywood v. State*, 41 *Ark.* 479; *Cummings v. Perham*, 1 *Met. (Mass.)* 555; *State v. M'Duffie*, 34 *N. H.* 523, 69 *Am. Dec.* 516; *Mullaly v. People*, 86 *N. Y.* 365; *Dodson v. Mock*, 4 *Dev. & B. (N. Car.)* 146, 32 *Am. Dec.* 677; *State v. Latham*, 13 *Ired. (N. Car.)* 33; *State v. Lymus*, 26 *Ohio St.* 400, 20 *Am. Rep.* 772.

And dogs would pass as assets to the executor or administrator of a deceased owner. *Mullaly v. People*, 86 *N. Y.* 365.

2. Statutes—England.—10 *George III.*, c. 18; *Rex v. Helps*, 3 *M. & S.* 331.

See, as referring to this statute, *Wheatley v. Harris*, 4 *Sneed (Tenn.)* 468, 70 *Am. Dec.* 258; *U. S. v. Gideon*, 1 *Minn.* 292; *State v. M'Duffie*, 34 *N. H.* 523, 69 *Am. Dec.* 516; *People v. Campbell*, 4 *Park. Cr. Rep.* (N. Y. Gen. Sessions) 386; *State v. Brown*, 9 *Baxt. (Tenn.)* 53, 40 *Am. Rep.* 81.

3. Statutes—"Domesticated Animal."—*Hurley v. State*, 30 *Tex. App.* 333.

As a general rule, dogs are recognized as domestic animals. *Shaw v. Craft*, 37 *Fed. Rep.* 317; *State v. Giles*, 125 *Ind.* 125; *Dodson v. Mock*, 4 *Dev. & B. (N. Car.)* 146, 32 *Am. Dec.* 677; *State v. M'Duffie*, 34 *N. H.* 526, 69 *Am. Dec.* 516; *Hurley v. State*, 30 *Tex. App.* 333.

But see *State v. Harriman*, 75 *Me.* 562, 46 *Am. Rep.* 423, where the court, by Danforth, J., said: "It will be perceived that originally the dog belonged to the class of animals *feræ naturæ*, and that, up to the present time, the law has treated him as continuing in that class, and has never recognized him as belonging to the domestic class."

Burglary with Intent to Steal Dog.—In *State v. Yates*, 10 *Crim. Law Mag.* 439, it is held that a dog is a "thing of value," and burglary may be committed by breaking and entering with intent to steal a dog. See also *Hurley v. State*, 30 *Tex. App.* 333.

4. Statutes—"Personal Property."—*Harrington v. Miles*, 11 *Kan.* 481, 15 *Am. Rep.* 355; *Mullaly v. People*, 86 *N. Y.* 365; *People v. Maloney*, 1 *Park. Cr. Rep.* (N. Y. Supreme Ct.) 593; *People v. Campbell*, 4 *Park. Cr. Rep.* (N. Y. Gen. Sessions) 386; *State v. Brown*, 9 *Baxt. (Tenn.)* 53, 40 *Am. Rep.* 81.

In *Harrington v. Miles*, 11 *Kan.* 481, 15 *Am. Rep.* 355, it is held that a dog comes under the title of "personal property" or a "thing of value."

"Goods and Chattels."—A dog is not included in the general words "goods and chattels" in a statute making it a larceny to feloniously steal and take such goods and chattels. *Findlay v. Bear*, 8 *S. & R. (Pa.)* 571.

5. Statutes—"Thing of Value."—*State v. Yates*, 37 *Albany L. J.* 232, 10 *Crim. L. Mag.*

3. Right to Increase of Animals—*a*. GENERALLY.—The general rule is, that the offspring, or increase of female animals, rest under the same title or ownership that the dam is subject to at the time of parturition.¹ This is by virtue of the maxim, *partus sequitur ventrem*.²

443. See *contra*, before change in statute, *State v. Lymus*, 26 Ohio St. 400, 20 Am. Rep. 772.

Dog as Property—Value.—It seems at common law that the law would take notice of a mastiff, hound, spaniel, or tumbler as a thing of value. *Ireland v. Higgins*, Cro. Eliz. 125; *Wright v. Ramscot*, 1 Saund. 84.

Dogs have always been held by the American courts to be entitled to less legal regard and protection than more harmless and useful domestic animals. *Putnam v. Payne*, 13 Johns. (N. Y.) 312; *Brown v. Carpenter*, 26 Vt. 638, 62 Am. Dec. 603; *Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175; *Blair v. Forehand*, 100 Mass. 141, 1 Am. Rep. 94, 97 Am. Dec. 82; *Ex p. Cooper*, 3 Tex. App. 489, 30 Am. Rep. 152.

And under state statutes, varying somewhat in their terms, the question whether a dog is such property as to render the slayer of one subject to a criminal prosecution, has been decided both ways. *Patton v. State*, 93 Ga. 115.

In the following cases, it is held that under such statutes there is no property in a dog: *State v. Harriman*, 75 Me. 562, 46 Am. Rep. 423; *U. S. v. Gideon*, 1 Minn. 292; *State v. Marshall*, 13 Tex. 55.

Contra.—*State v. Sumner*, 2 Ind. 377; *Wheatley v. Harris*, 4 Sneed (Tenn.) 468, 70 Am. Dec. 258; *State v. Latham*, 13 Ired. (N. Car.) 33. See the title INJURIES TO ANIMALS.

A dog is property within the meaning of the fifth amendment to the United States Constitution, which forbids any person being deprived of his property without process of law. *Jenkins v. Ballantyne*, 8 Utah 245.

See the following authorities which recognize a property in dogs, and that they have a value: *Heisrodt v. Hackett*, 34 Mich. 283, 22 Am. Rep. 529; *Ten Hopen v. Walker*, 96 Mich. 236. See also *Washington v. Meigs*, 1 MacArthur (D. C.) 53; *Brent v. Kimball*, 60 Ill. 211, 14 Am. Rep. 35; *Uhlein v. Cromack*, 109 Mass. 273.

1. Increase Follows the Dam.—2 Bl. Com. 390.

United States.—*Arkansas Valley Land, etc., Co. v. Mann*, 130 U. S. 78; *Fowler v. Merrill*, 11 How. (U. S.) 375; *Pyeatt v. Powell*, 51 Fed. Rep. 551.

Alabama.—*Meyer v. Cook*, 85 Ala. 417; *Gans v. Williams*, 62 Ala. 41.

Illinois.—*Hazelbaker v. Goodfellow*, 64 Ill. 238.

Kansas.—*Morse v. Patterson*, 1 Kan. App. 577.

Maine.—*Hanson v. Millett*, 55 Me. 184.

Michigan.—*Kellogg v. Lovely*, 46 Mich. 131, 41 Am. Rep. 151.

Missouri.—*Edmonston v. Wilson*, 49 Mo. App. 494; *White v. Storms*, 21 Mo. App. 288; *Herndon v. Herndon*, 27 Mo. 421; *Lewis v. Davis*, 3 Mo. 133, 23 Am. Dec. 698; *Stewart*

v. Ball, 33 Mo. 154; *Rogers v. Gage*, 59 Mo. App. 107.

North Carolina.—*Tyson v. Simpson*, 2 Hayw. (N. Car.) 147.

Vermont.—*Leavitt v. Jones*, 54 Vt. 423, 41 Am. Rep. 849; *Wolcott v. Hamilton*, 61 Vt. 79.

The Increase of the Increase ad Infinitum belongs to the owner of the female animal. *Tyson v. Simpson*, 2 Hayw. (N. Car.) 147.

2. *Meyer v. Cook*, 85 Ala. 417; *Gans v. Williams*, 62 Ala. 41; *Hull v. Hull*, 48 Conn. 250, 40 Am. Rep. 165; *Hughes v. Graves*, 1 Litt. (Ky.) 317.

Sale of Unborn Animal.—In *M'Carty v. Blevins*, 5 Yerg. (Tenn.) 195, 26 Am. Dec. 262, it was held that where A agrees with B that the foal of A's mare shall belong to C, a good title rests in the latter when parturition from the mother takes place, though A, immediately after the colt was born, sold and delivered it to D.

To same effect, see *Hull v. Hull*, 48 Conn. 250, 40 Am. Rep. 165.

And when A told B that if he would take one of his mares to horse and pay for the same, the foal should be his property, which B did, and afterwards had the complete and uncontrolled possession of the foal, it was held that the property thereby became vested in B as against the execution creditors of A. *Linnendoll v. Doe*, 14 Johns. (N. Y.) 222.

So an agreement for a valuable consideration to deliver to the plaintiff the first female colt which a certain mare owned by the defendant might produce, vests a property in the colt in the plaintiff, upon the principle that there may be a valid sale where the title is not actually in the grantor, if it is in him potentially, as being a thing accessory to something which he actually has. *Tonville v. Casey*, 1 Murph. (N. Car.) 389.

And a promise to deliver the increase of animals is a good consideration for their use. *Putnam v. Wyley*, 8 Johns. (N. Y.) 432, 5 Am. Dec. 346.

Colt Foaled after Levy on Dam.—A colt foaled after a levy on the mother, by virtue of an execution, the mother being in the possession of the officer, is as much in the possession of the constable as the mother, and the property rights therein are the same as in the mother. *Talbot v. Magee*, 59 Mo. App. 347.

Conversion of Animal with Foal.—It seems that where an animal with foal is converted by a trespasser, and, pending a suit to recover for the wrong, the animal is delivered of young, the proper course is to bring the fact of the increase to the knowledge of the jury, and if there is a failure to do this, there can be no future redress. *Garth v. Everett*, 16 Mo. 490.

Contract Lien on Unborn.—Where a mare was served by a stallion for the purpose of raising a colt, and the owner of the former

Limited Ownership in Dam.—By the common law, if one has a limited property in animals, the natural increase thereof during the continuance of the temporary proprietorship belongs to the usufructuary or owner of the limited interest.¹

Tenant for Life.—A tenant for life of animals is entitled to their increase during his term.²

b. BETWEEN MORTGAGOR AND MORTGAGEE.—It is a well-settled rule that, as between mortgagor and mortgagee, when the rights of innocent third parties have not intervened, if the dam, at the time of parturition, be under mortgage incumbrance, the offspring passes immediately under the same incumbrance.³

agreed in writing to pay the owner of the latter a certain sum twelve months after date if the mare proved with foal, "colt holden for payment," it was held that the written agreement created a contract lien in the nature of a mortgage. *Sawyer v. Gerrish*, 70 Me. 254, 35 Am. Rep. 323.

Dam in Possession of Husband, Belonging to Wife.—The natural increase of animals owned by a married woman belong to her, although they are kept on a farm belonging to her husband. *Hanson v. Millett*, 55 Me. 184.

1. *Garth v. Everett*, 16 Mo. 490; *Stewart v. Ball*, 33 Mo. 154; *Putnam v. Wyley*, 8 Johns. (N. Y.) 432, 5 Am. Dec. 346; *Concklin v. Havens*, 12 Johns. (N. Y.) 314.

Sale of Dam on Condition.—Where a mare was sold on condition, it was held that the vendor continued to be the owner of her colts until performance of the condition. *Buckmaster v. Smith*, 22 Vt. 203; *Elmore v. Fitzpatrick*, 56 Ala. 400.

Placing Mare in Pasture.—Putting a mare to pasture in consideration of her services, was held not to create a temporary ownership in the person with whom she was so placed, so as to entitle him to the increase, for the reason "that there was clearly no hiring for a definite time, to constitute the defendant a temporary owner, which was necessary to entitle him to the increase." *Allen v. Allen*, 2 P. & W. (Pa.) 166.

Loan of Stock.—Where a father loaned cows to his married daughter, retaining the title in himself so as to prevent the cows from being sold by her husband or attached by his creditors, it was held that the father owned the increase. *Orser v. Storms*, 9 Cow. (N. Y.) 687, 18 Am. Dec. 543.

2. **Rights of Life Tenant.**—*Saunders v. Haughton*, 8 Ired. Eq. (N. Car.) 221, 57 Am. Dec. 581; *Smith v. Barham*, 2 Dev. Eq. (N. Car.) 420, 25 Am. Dec. 721; *Perry v. Terrel*, 1 Dev. & B. Eq. (N. Car.) 441; *Pointdexter v. Blackburn*, 1 Ired. Eq. (N. Car.) 286; *Glasgow v. Flowers*, 1 Hayw. (N. Car.) 233; *Forsey v. Luton*, 2 Head (Tenn.) 183; *Woods v. Sullivan*, 1 Swan (Tenn.) 507.

This Rule is Based on the Ground that, the right of the owner of the particular estate being unlimited during its continuance, the profits arising from it during that time belong to him as owner of the estate. He takes the issue as incident to his ownership of the property, out of which the issue comes, and can hold it against those entitled after the termination of his estate. *Major v. Herndon*, 78 Ky. 123; *Lyne v. Cleveland*, 1 Bush (Ky.) 80.

3. **Right to the Increase, as between Mortgagor and Mortgagee—United States.**—*Fowler v. Merrill*, 11 How. (U. S.) 375; *Pyeatt v. Powell*, 51 Fed. Rep. 551.

Alabama.—*Dyer v. State*, 88 Ala. 229; *Meyer v. Cook*, 85 Ala. 417; *Gans v. Williams*, 62 Ala. 41.

Illinois.—*Gundy v. Biteler*, 6 Ill. App. 510.

Kentucky.—*Hughes v. Graves*, 1 Litt. (Ky.) 317; *Forman v. Proctor*, 9 B. Mon. (Ky.) 124.

Maryland.—*Evans v. Merriken*, 8 Gill & J. (Md.) 39; *Cahoon v. Miers*, 67 Md. 573.

Michigan.—*Kellogg v. Lovely*, 46 Mich. 131, 41 Am. Rep. 151.

Texas.—*First Nat. Bank v. Western Mortg., etc., Co.*, 86 Tex. 636, reversing, on another point, 6 Tex. Civ. App. 59. See also *Edwards v. Osman*, 84 Tex. 659, where the question is apparently undecided.

Wisconsin.—*Funk v. Paul*, 64 Wis. 35, 54 Am. Rep. 576.

Vermont.—*Leavitt v. Jones*, 54 Vt. 423, 41 Am. Rep. 849.

Offspring Ceasing to Follow the Dam.—In *Meyer v. Cook*, 85 Ala. 417, the court, by Stone, C. J., said: "The attempt has been made to draw a distinction when, during the time the property remained with the mortgagor, the offspring so increased in strength and maturity as to cease to follow the dam. In such case, it has been contended that the mortgage ceases to bind the offspring. We are at a loss to conjecture on what principle such a distinction can be maintained. We apprehend, however, that all such seeming rulings rest on an entirely different principle. The exception has been allowed only in favor of bona fide purchasers who, finding such offspring in the possession of the mortgagor, arbiter of its own movements, and not following its dam, purchased and paid for the same, without notice of the mortgage lien. Such offspring not being mentioned in any recorded mortgage, and there being nothing visible to put the purchaser on inquiry, it was ruled that it would be a fraud on him to take from him the property he had bought and paid for in good faith, and without notice." *Citing Winter v. Landphere*, 42 Iowa 471; *Kellogg v. Lovely*, 46 Mich. 131, 41 Am. Rep. 151.

In *Kellogg v. Lovely*, 46 Mich. 131, 41 Am. Rep. 151, it was held that where a colt was not weaned, the mortgagee could take it with the dam under the mortgage, but it seems that the court went no further in its holding. In *Darling v. Wilson*, 60 N. H. 59, 49 Am. Rep. 305, there is a dictum to the effect that where there is nothing in a

c. BETWEEN MORTGAGEE AND THIRD PARTIES.—As a general rule, where a mortgage is silent as to the increase, it will cover such increase as against innocent third parties only until the young are past the period of nurture.¹

Attaching Creditors and Subsequent Mortgagees.—Attaching creditors² and subsequent mortgagees,³ under this rule, are allowed priority over the first mortgagee.

mortgage showing an intention to create a lien upon the increase of stock mortgaged, the lien existing only as an incident to the mortgage would, as between the parties, continue so long only as was necessary for the suitable nurture of the increase. This dictum, however, is criticised in *Funk v. Paul*, 64 Wis. 41, 54 Am. Rep. 576, and the statement made that it cannot be sustained upon sound principles.

1. **Right to the Increase, as between Mortgagee and Third Parties.**—*Darling v. Wilson*, 60 N. H. 59, 49 Am. Rep. 305; *Funk v. Paul*, 64 Wis. 35, 54 Am. Rep. 576; *Enright v. Dodge*, 64 Vt. 502.

Illustrations.—In *Nicholson v. Temple*, 20 New Bruns. 248, a colt was held to be covered by a bill of sale, as against attaching creditors, without reference to the question of nurture, although the colt remained in the possession of the grantor.

Where a mortgage of two cows, duly recorded, failed to include the increase, and the mortgagor sold the increase when eighteen months old, it was held that the mortgage would not defeat the sale. *Winter v. Landphere*, 42 Iowa 471.

In *Gundy v. Biteler*, 6 Ill. App. 510, it is held that a party purchasing the increase before the mortgage debt becomes due, acquires no greater interest than the mortgagor had.

Purchaser with Notice of Mortgage on Dam.—Where a mortgage covered "one brown mare twelve or thirteen years old," containing no reference as to increase, although the mare was with foal at the date of the mortgage, and a purchaser of the foal when four months old, and weaned, was told that the mare was mortgaged but that the colt was not mortgaged, it was held that if the mortgagee had title to the colt by reason of the mortgage on the mother, such title was inoperative as against the purchaser or an attaching creditor. *Enright v. Dodge*, 64 Vt. 502.

The Period of Nurture.—In *Forman v. Proctor*, 9 B. Mon. (Ky.) 124, it was held that the mortgage must be regarded as covering and including "for a reasonable time" the produce or descendants of the female animals conveyed by the mortgage, these being incident to the legal title and the right of immediate possession vested in the mortgagee, for whom the mortgagor holds the possession.

The "reasonable time" in *Funk v. Paul*, 64 Wis. 40, 54 Am. Rep. 576, is held to mean the period during which the young follow their mother for nurture, that is, until the young are weaned or should be weaned according to the course of nature or the custom of those who raise animals of the kind in question. See also *Rogers v. Highland*, 69 Iowa 504, 58 Am. Rep. 230.

2. **Rights of Attaching Creditors.**—*Rogers v. Highland*, 69 Iowa 504, 58 Am. Rep. 230.

Dam must Conceive Prior to Date of Mortgage.

—In *Thorpe v. Cowles*, 55 Iowa 408, the court instructed the jury as follows: "To entitle the plaintiffs [mortgagees] to recover the possession [against attaching creditors of mortgagor] of such of said stock as were the increase, or young, of the stock covered by the mortgage, they must establish the fact that such young was conceived by their dams, or mothers, prior to the date of said mortgage, or else that after said mortgage, the said mothers and their increase were in the open possession and control of plaintiffs." On appeal, the court said: "No exception was taken, or objection is made, by either party to this instruction. It must be regarded as presenting the law of this case," thus leaving the future application of the instruction apparently undecided.

3. **Rights of Junior Mortgagees.**—*Edmonston v. Wilson*, 49 Mo. App. 491; *Rogers v. Gage*, 59 Mo. App. 107.

Where a mortgage described an animal as one bay mare in foal, etc., it was held that the purchaser of the mare's colt, when between five and six months old, and still following the dam, will be presumed to know that the mortgage was given during the pregnancy of its mother, and that the colt, too, was subject to the lien of the instrument. *Edmonston v. Wilson*, 49 Mo. App. 491.

In *Rogers v. Gage*, 59 Mo. App. 107, the court, by Ellison, J., said: "In the case before us, the mortgage says nothing of increase of the animals, and though the animals claimed by defendants under the subsequent mortgages are, in fact, the increase of the animals described in plaintiff's prior mortgages, yet there is nothing in the prior mortgages to so indicate. And we, therefore, hold that under such a mortgage, when the increase of the animals therein conveyed have passed beyond the period of nurture (so that the very character and situation of the property itself would not be notice), the mortgage will not cover such increase as against a subsequent mortgagee of such increase." *Citing Meyer v. Cook*, 85 Ala. 417; *Winter v. Landphere*, 42 Iowa 471; *Kellogg v. Lovely*, 46 Mich. 131, 41 Am. Rep. 151; *Darling v. Wilson*, 60 N. H. 59, 49 Am. Rep. 305; *Funk v. Paul*, 64 Wis. 35, 54 Am. Rep. 576.

In *First Nat. Bank v. Western Mortg., etc., Co.*, 86 Tex. 636, reversing 6 Tex. Civ. App. 636, a mortgage was executed upon "my herd of fifteen hundred cattle, * * * each and all of such cattle being marked and branded with the following mark and brand, * * * and consisting of bulls and breeding and grazing cattle of one year old and upwards." A second mortgage was given upon the whole herd, and it was held that the description in the first mortgage included the increase, excepting

II. LIABILITY FOR INJURIES BY ANIMALS—1. Wild Animals—*a. GENERALLY.*

—The owner of wild animals, or animals *feræ naturæ*, is, as a general rule, liable for all injuries done by them.¹

b. KNOWLEDGE OF VICIOUSNESS PRESUMED.—It is not necessary to prove that the owner had knowledge of the vicious nature of the animal causing the injury, as he is conclusively presumed to have such knowledge.²

such as were under one year old, which were subject to the claim of the second mortgage.

1. Liability of Owner for Damages by Wild Animals—General Rule.—*Filburn v. People's Palace, etc., Co.*, 25 Q. B. Div. 258; *Jackson v. Smithson*, 15 M. & W. 563; *Congress, etc., Spring Co. v. Edgar*, 99 U. S. 651; *Decker v. Gammon*, 44 Me. 322, 69 Am. Dec. 99.

In *Congress, etc., Spring Co. v. Edgar*, 99 U. S. 645, the court, by Clifford, J., said: "Animals *feræ naturæ*, as a class, are known to be mischievous, and the rule is well settled, that whoever undertakes to keep such an animal in places of public resort is or may be liable for the injuries inflicted by it on a party who is not guilty of negligence, and is otherwise without fault. Compensation in such a case may be claimed of the owner or keeper for the injury; and it is an established rule * * * that it is not necessary to aver negligence in the owner or keeper, as the burden is upon the defendant to disprove that implied imputation."

"Though the owner have no particular notice that he did any such thing before, yet if he be a beast that is *feræ naturæ*, if he get loose and do harm to any person, the owner is liable to an action for the damages." 1 Hale P. C. 430.

Duty of Owner.—Animals *feræ naturæ*, such as lions, tigers, and bears, are universally recognized as dangerous; and it is the duty of those who own or keep them, to keep them in such a manner as to prevent them from doing harm under any circumstances, whether provoked, as they are liable to be, or not provoked. There must be security against them under all circumstances. *Vredenburg v. Behan*, 33 La. Ann. 627.

Illustrations.—Where a bear, which was kept by the members of an incorporated club, slipped its collar and so injured a man that he died, a recovery was allowed, although it appeared that a boy in the employ of the deceased teased the bear by setting a dog on him, and while thus worried, he twisted his collar off, and in chasing the dog, encountered the deceased. *Vredenburg v. Behan*, 33 La. Ann. 627.

In *Filburn v. People's Palace, etc., Co.*, 25 Q. B. Div. 258, the exhibitor of an elephant was held liable for injuries done by the animal, and it was held that his liability for damages was not affected by his ignorance of the dangerous character of the elephant.

But where a horse was frightened by an elephant passing along the highway, in charge of a keeper, it was held that, to render the owners of the animal liable for the damages sustained, it would be necessary to show not only that such is the effect of the appearance of an elephant, upon horses in general, but

also that the owners knew or had notice of it. *Scribner v. Kelley*, 38 Barb. (N. Y.) 14.

Wolf—Monkey—Deer.—The owners of a wolf, *Manger v. Shipman*, 30 Neb. 352; a monkey, *May v. Burdett*, 9 Q. B. 101, 58 E. C. L. 101; and a buck, *Congress, etc., Spring Co. v. Edgar*, 99 U. S. 654, have been held liable for injuries done by those animals.

Bees Attacking Horses.—The owner of bees is not liable for any accidental injury they may do. Thus, where, in an action against the owner of bees, for an injury done by them to horses while traveling along the highway past the place where the bees were kept, it appeared that the bees had been kept in the same situation for eight or nine years, and there was no proof of any injury ever having been done by them; but, on the contrary, witnesses residing in the neighborhood testified that they had been in the habit of passing the place frequently without molestation; it was held that this rebutted the idea of any notice to the defendant, either from the nature of bees or otherwise, that it would be dangerous to keep them in that situation, and that the defendant was not liable. *Earl v. Van Alstine*, 8 Barb. (N. Y.) 630.

Liability of Wife of Owner of Wild Animal.—Where a bear belonging to several persons escaped from the premises on which it was kept, and injured the plaintiff, the premises being owned by the wife of one of the owners of the bear, it was held that, as the wife had the rights of a *feme sole*, and might have had the bear removed therefrom, and had not done so, she was liable to the plaintiff for the injury complained of. *Shaw v. McCreary*, 19 Ont. Rep. 39.

2. Presumption of Knowledge of Vicious Nature of Animal.—*Besozzi v. Harris*, 1 F. & F. 92; *Moss v. Pardridge*, 9 Ill. App. 490; *Decker v. Gammon*, 44 Me. 322, 69 Am. Dec. 99; *Com. v. Fourteen Hogs*, 10 S. & R. (Pa.) 393.

Proof that the animal is of a savage and ferocious nature is equivalent to proof of express notice. In such cases notice is presumed. *Earl v. Van Alstine*, 8 Barb. (N. Y.) 634.

And in the case of wild and savage animals *feræ naturæ*, as lions, tigers, bears, etc., the owner is conclusively presumed to have notice that they are vicious and dangerous, and if he neglects to keep them properly secured, he is liable for injuries committed by them, without any proof of his knowledge of their viciousness. *Moss v. Pardridge*, 9 Ill. App. 492.

Animals Domesticated to Some Extent.—"Certain animals *feræ naturæ* may doubtless be domesticated to such an extent as to be classed, in respect to the liability of the owner for injuries they commit, with the

Negligence Presumed.—Neither is it necessary to show that the owner was negligent in permitting the animal to be at large, for he is bound to keep it secured at his peril.¹

2. Domestic Animals—*a*. IN GENERAL.—It is a well-settled rule that, if a person keeps an animal *mansuetæ naturæ*, of a ferocious or vicious disposition, accustomed to attack mankind or injure property, and knowing that it is possessed of such disposition or vicious propensity, he is bound to restrain such animal at his peril, and if he allows it to escape or go at large, he is liable for all injury it may inflict upon the person or property of others by reason of such vicious disposition.²

class known as tame or domestic animals; but inasmuch as they are liable to relapse into their wild habits and to become mischievous, the rule is that if they do so, and the owner becomes notified of their vicious habit, they are included in the same rule as if they had never been domesticated, the gist of the action in such a case, as in the case of untamed wild animals, being not merely the negligent keeping of the animal, but the keeping of the same with knowledge of the vicious and mischievous propensity of the animal." The court, *per* Clifford, J., in Congress, etc., Spring Co. v. Edgar, 99 U. S. 653, citing Wharton on Neg., § 922; Decker v. Gammon, 44 Me. 322, 69 Am. Dec. 99.

In Vredenburg v. Behan, 33 La. Ann. 627, a case where an action was brought for personal injuries committed by a bear, it was held that "it does not matter that an animal of this kind may be to some extent tame and domesticated; the natural wildness and ferocity of his nature but sleeps, and is liable to be awakened at any moment suddenly and unexpectedly."

Dangerous Animal—Evidence.—A properly-qualified witness may testify that a certain animal is dangerous; thus, an expert witness may testify that in his opinion a male deer in the fall of the year is a dangerous animal. Congress, etc., Spring Co. v. Edgar, 99 U. S. 655.

1. Presumption of Negligence on Part of Owner.—Laverone v. Mangianti, 41 Cal. 138, 10 Am. Rep. 269; Decker v. Gammon, 44 Me. 322, 69 Am. Dec. 99; Scribner v. Kelley, 38 Barb. (N. Y.) 15.

"The owner of beasts that are *feræ naturæ* must always keep them up at his peril, and an action lies without notice of the quality of the beasts." Rex v. Huggins, 2 Ld. Raym. 1583; Decker v. Gammon, 44 Me. 328, 69 Am. Dec. 99.

2. Liability of Owner for Injuries Done by Domestic Animals—England.—Blackman v. Simmons, 3 C. & P. 138, 14 E. C. L. 243; Rex v. Huggins, 2 Ld. Raym. 1583; May v. Burdett, 9 Q. B. 101, 58 E. C. L. 101.

United States.—Congress, etc., Spring Co. v. Edgar, 99 U. S. 654.

Alabama.—Durden v. Barnett, 7 Ala. 169. *California.*—Laverone v. Mangianti, 41 Cal. 138, 10 Am. Rep. 269.

Illinois.—Pickering v. Orange, 2 Ill. 492, 32 Am. Dec. 35.

Indiana.—Graham v. Payne, 122 Ind. 410; Dockerty v. Hutson, 125 Ind. 102.

Louisiana.—McGuire v. Ringrose, 41 La. Ann. 1029; Montgomery v. Koester, 35 La. Ann. 1091, 48 Am. Rep. 253.

Maine.—Decker v. Gammon, 44 Me. 325, 69 Am. Dec. 99.

Maryland.—Twigg v. Ryland, 62 Md. 380, 50 Am. Rep. 226.

Massachusetts.—Lyons v. Merrick, 105 Mass. 71.

Michigan.—Knowles v. Mulder, 74 Mich. 202, 16 Am. St. Rep. 627.

New York.—Keshan v. Gates, 2 Thomp. & C. (N. Y.) 288; Buckley v. Leonard, 4 Den. (N. Y.) 500; Koney v. Ward, 2 Daly (N. Y.) 295, 36 How. Pr. (N. Y.) 255.

For the Application of the General Rule as to Injuries by Dogs, see *infra*, this title, *Injuries by Dogs*.

As to the Liability of Agisters and Bailees for injuries by animals in their possession, see respectively the titles AGISTMENT; BAILMENTS.

In Marble v. Ross, 124 Mass. 44, the court, *per* Morton, J., said: "The law imposes a stringent responsibility upon a man who knowingly keeps a vicious and dangerous animal. He is liable to any person who, without contributory negligence on his part, is injured by such animal, and he cannot exonerate himself by showing that he used care in keeping and restraining the animal. He takes the risk of being able to keep him safely, so that he shall not injure others. The owner's negligence is in keeping the animal, knowing that it is dangerous."

In Earhart v. Youngblood, 27 Pa. St. 331, the court, by Lowrie, J., said: "The rule is very plain and very just that the owner of an animal known to be vicious must take sufficient precautions that it shall do no injury to the public; it must be so confined that strangers may pursue their own objects with security from it. The public are entitled to act upon the presumption that all dangerous animals are properly confined, and are therefore exonerated from any special caution against them, except when, without right, they go upon their owner's land, and within the place where they may be lawfully kept."

In Kinmouth v. McDougall (Supreme Ct.), 19 N. Y. Supp. 771, *affirmed* in 139 N. Y. 612, the court, by Mayham, P. J., said: "The rule is so well settled as to be elementary, that one who keeps a domestic animal which is accustomed to attack or injure mankind, with a knowledge of such vicious propensities, is liable to an action for damages at the suit

Gist of the Action.—The gist of the action is the keeping the animal with

of a party injured by such animal." *Citing* Muller v. McKesson, 73 N. Y. 196, 29 Am. Rep. 123; Loomis v. Terry, 17 Wend. (N. Y.) 497, 31 Am. Dec. 306; Oakes v. Spaulding, 40 Vt. 347, 94 Am. Dec. 404.

This Rule, However, would Probably Not Apply where the plaintiff was wrongfully on the premises of the defendant, and the animal was so kept and restrained by the owner that no injury would have come to the plaintiff but for his illegal act. *Kinmouth v. McDougall*, (Supreme Ct.) 19 N. Y. Supp. 771, *affirmed* in 139 N. Y. 612.

Duty to Restrain—Negligence Presumed.—Where an animal is concededly vicious, the duty of his owner to restrain him is imperative, and the want of actual negligence will not relieve from the consequences of failure to make the restraint effectual. Negligence in such a case is conclusively presumed. *Rogers v. Rogers* (Supreme Ct.), 4 N. Y. St. Rep. 373; *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123; *Lynch v. McNally*, 73 N. Y. 347; *Keenan v. Gutta Percha*, etc., Mfg. Co. 46 Hun (N. Y.) 544, *affirmed* in 120 N. Y. 627.

Vicious Animal Defined.—"A vicious animal is any individual of a vicious species, or a vicious individual of a harmless species." *Phillips v. Dewald*, 79 Ga. 732, 11 Am. St. Rep. 458.

Vicious Propensity Defined.—"By vicious propensity is [intended] a propensity to do any act that might endanger the safety of the persons and property of others in a given situation. Not such only as would impair the utility of the animal for the purpose for which it was kept." The court, *per* Grover, J., in *Dickson v. McCoy*, 39 N. Y. 400.

And the court, by Mullin, P. J., in *Keshan v. Gates*, 2 Thomp. & C. (N. Y.) 288, explaining this, says: "It seems to me that the vicious habits or propensities which the owner of an animal must (when known to him) guard against, are such as are directly dangerous, such as kicking and biting in horses, and hooking in horned animals, and biting in dogs. These habits or propensities may be indulged in at any moment, and are inevitably dangerous."

And in *Evans v. McDermott*, 49 N. J. L. 163, 60 Am. Rep. 602, in the case of a dog, it is held that a mischievous propensity is a propensity from which injury is the result.

Duty of Owner to Give Notice.—An owner should give notice to persons dealing with the animal, of its vicious propensities, when he knows that serious injury would be inflicted if the animal should take occasion to indulge therein. *Keshan v. Gates*, 2 Thomp. & C. (N. Y.) 290. See also *Ohlweiler v. Lohmann*, 82 Wis. 198.

Leaving Horse near Walk.—Where a horse was left standing in a street, adjacent to a sidewalk, and bit a passer-by, it was held that the owner of the horse was not liable for the injury thus occasioned, it not appearing that the horse was or had ever been of a vicious nature, or that the owner had any reason to apprehend that the animal would become

dangerous. *Reed v. Southern Express Co.*, 95 Ga. 108, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 578.

Vicious Cow.—It is the duty of the owner of a vicious cow, who has knowledge of the propensity of the animal, to restrain it, and he is, in case of failure to do so, liable for the damage it does. *Coggswell v. Baldwin*, 15 Vt. 404, 40 Am. Dec. 686.

Animal Insecurely Fastened.—It is negligence and want of ordinary care for a person to keep a vicious bull, knowing his viciousness, insecurely tethered on his own land, but within reach of a road which the public has been accustomed to use, although not a highway, and the owner will be liable for any injury the bull may do to a passer on the road. *Glidden v. Moore*, 14 Neb. 84, 45 Am. Rep. 98.

But where a Bull was Confined, and its character known to a person who carelessly left the gate of its inclosure open, and the animal escaped and injured him, it was held that no damages were recoverable. *Earhart v. Youngblood*, 27 Pa. St. 331.

Horse Usually Muzzled.—Where a horse was standing upon the sidewalk, hitched to a wagon, and plaintiff, who was passing, although aware of the vicious propensity of the animal, and knowing that he was usually muzzled, endeavored to pass in front of the animal, without observing that he was not muzzled, and was bitten, it was held that his act was not such contributory negligence as would prevent a recovery for the injuries received. *Koney v. Ward*, 2 Daly (N. Y.) 295, 36 How. Pr. (N. Y.) 255.

Trespassing Colt Killed by Mule.—Where defendant's mule was known to be vicious, and the owner permitted it to run at large, and it killed plaintiff's colt, the defendant was held liable for damages, notwithstanding the colt was technically a trespasser upon the land of another person. *Hill v. Applegate*, 40 Kan. 31.

Freedom of Pasture.—To give a known mischievous or vicious animal the freedom of a pasture field, thereby affording to him an opportunity to injure and molest any person who may have occasion to go into or pass through the field, is not such confinement as the law regards in this class of cases. *Graham v. Payne*, 122 Ind. 403.

Thus, in *Marble v. Ross*, 124 Mass. 44, which was an action for damages for injuries from a stag owned by the defendant, the court said: "In the case at bar, it appeared that the defendant knowingly kept a vicious and dangerous stag in a large pasture, and the plaintiffs' intestate, while in the pasture, was attacked and injured by it. The defendant requested the court to rule that, if the plaintiffs' intestate was a trespasser in the pasture, they could not recover. We are of opinion that the court rightly refused this ruling. The mere fact that the intestate was upon the defendant's land without his consent would not defeat the right of action. The unlawful character of his act did not contribute

knowledge of its vicious propensities;¹ and on proof of this, a *prima facie* liability is established.²

b. TRESPASSING ANIMALS—STOCK—(1) In General.—Every unwarrantable entry by a person or his cattle on the land of another is a trespass, and a person is equally answerable for the trespass of his cattle as of himself.³

Common-law Rule as to Restraining.—It is a general rule of the common law that every man is bound to keep his cattle on his own land; no man is bound to

to his injury, or affect the defendant's negligence." See also *Graham v. Payne*, 122 Ind. 403, and *Brown v. Carpenter*, 26 Vt. 638, 62 Am. Dec. 603.

Stallions, as a class, are commonly known to have vicious propensities. *McIlvaine v. Lantz*, 100 Pa. St. 586, 45 Am. Rep. 400.

And the owner of a stallion is bound to take notice of the general propensities of the class to which it belongs. *Hammond v. Melton*, 42 Ill. App. 186.

One who drives a vicious and unmanageable stallion into a crowd of vehicles, in a place set apart for them at a fair, and, knowing the vicious propensities of the horse, strikes him with a whip, thereby causing him to leap on and injure an occupant of a wagon, is liable for such injury. *Clore v. McIntire*, 120 Ind. 262.

Where a stallion straying upon the highway was the cause of an injury to a person driving thereon, and an action was brought to recover damages for the injury, wherein the negligence alleged on the part of the defendant was the failure to properly confine the animal, it was held that having regard to the well-known propensities of young stallions, even if the fence was such as was common among farmers, and usually considered safe, it was a question for the jury to determine whether the fence was sufficient. *McIlvaine v. Lantz*, 100 Pa. St. 586, 45 Am. Rep. 400.

Greater care is required to be taken of a stallion than a mare, as the degree of care is always in proportion to the danger to be apprehended; it is a question for the jury. *Meredith v. Reed*, 26 Ind. 334.

But where a vicious stallion is kept so that he cannot have access to persons, or commit injuries, one who, having knowledge of his habits, goes within his reach and is injured, cannot recover. *Buckley v. Gee*, 55 Ill. App. 388.

Owner and Bailee—Liability.—The owner of a dangerous animal, having knowledge of its dangerous character, cannot, by delivering possession to his bailee, escape liability for damages resulting from the trespass of such animal. The gravamen of the action is the keeping of the vicious animal with knowledge of its propensities, and the owner of the animal keeps it when in the possession of his bailee. If the owner and keeper are tenants in common of the animal, the owner will also be liable. *Lettis v. Horning*, 67 Hun (N. Y.) 627. See also *Oakes v. Spaulding*, 40 Vt. 347, 94 Am. Dec. 404.

See *Marsh v. Hand*, 120 N. Y. 315, where the defendants, who were the executors of the will of A, were held not liable for injuries done by an animal purchased by one who was

working under contract a farm of which A died seised, upon the ground that the animal which caused the injury was purchased without their knowledge and consent.

In *Frammell v. Little*, 16 Ind. 251, it is held that a person having in charge as bailee a horse known to be dangerous is responsible for its safe keeping as to the public, as much as if he was the owner. See also *Lawlor v. French*, 14 Misc. Rep. (N. Y. C. Pl.) 497.

1. Gist of the Action.—*May v. Burdett*, 9 Q. B. 103, 58 E. C. L. 103; *Popplewell v. Pierce*, 10 Cush. (Mass.) 509; *Twigg v. Ryland*, 62 Md. 380, 50 Am. Rep. 226.

The gist of the action is not the manner of keeping the vicious animal, but keeping him with knowledge of his vicious propensity. *Hammond v. Melton*, 42 Ill. App. 186. In other words, the *scienter* is the gist of the action. *Beckett v. Beckett*, 48 Mo. 396.

In *Williams v. Moray*, 74 Ind. 25, 39 Am. Rep. 76, however, it is held that the gist of the action is a failure to keep the animal secured.

And in *Stumps v. Kelley*, 22 Ill. 140, it is held that the principle of responsibility on the part of an owner of an animal accustomed to commit injury to mankind, he knowing its vicious propensities, is imposed for all injuries it may inflict, and is recognized by the divine and civil as well as by the common law.

2. When Prima Facie Case Established.—*May v. Burdett*, 9 Q. B. 103, 58 E. C. L. 103; *Twigg v. Ryland*, 62 Md. 380, 50 Am. Rep. 226; *Brooks v. Taylor*, 65 Mich. 208; *Meibus v. Dodge*, 38 Wis. 300, 20 Am. Rep. 6.

Brooks v. Taylor, 65 Mich. 208, was an action for injuries inflicted by a bull, and it was held that the negligence in such a case consists in keeping such an animal after notice of its dangerous habits; and whoever keeps an animal accustomed to attack and injure mankind is *prima facie* liable in an action on the case at the suit of any person injured, without any averment of negligence or default in securing and taking care of the animal. If in such a case it is shown, as a matter of defense, that the plaintiff wilfully provoked the animal, or was grossly negligent in going near it, with knowledge of its vicious habits, he cannot recover.

3. Trespassing Animals—General Rule.—3 Bl. Com. 209, 211; *Wells v. Howell*, 19 Johns. (N. Y.) 385; *Holladay v. Marsh*, 3 Wend. (N. Y.) 143, 20 Am. Dec. 678; *Noyes v. Colby*, 30 N. H. 143.

It is a trespass if the cattle of one cross into the land of another. *Sturtevant v. Merrill*, 33 Me. 62. See also *Noyes v. Colby*, 30 N. H. 143. See the title **FENCES**.

fence his close against an adjoining field, but every man is bound to keep his cattle in his own field at his peril.¹

1. Duty to Confine Cattle.—Common-law Rule
—*England*.—Star v. Rookesby, 1 Salk. 335; Ricketts v. East & West India Docks, etc., R. Co., 12 Eng. L. & Eq. 520.

Alabama.—Gresham v. Taylor, 51 Ala. 505.
Illinois.—Common-law rule reenacted by statute. Birket v. Williams, 30 Ill. App. 451; D'Arcy v. Miller, 86 Ill. 102, 29 Am. Rep. 11; Bulpit v. Matthews, 145 Ill. 345, affirming 42 Ill. App. 561; McKowan v. Harmon, 56 Ill. App. 368; Lee v. Burk, 15 Ill. App. 651, distinguishing Seeley v. Peters, 10 Ill. 130.

For early cases holding a contrary view as to the common law, before the adoption of the statute, see Oil v. Rowley, 69 Ill. 469; Seeley v. Peters, 10 Ill. 130; Headen v. Rust, 39 Ill. 186; Westgate v. Carr, 43 Ill. 450; Stoner v. Shugart, 45 Ill. 76; Chicago, etc., R. Co. v. Patchin, 16 Ill. 198; Misner v. Lighthall, 13 Ill. 609.

Indiana.—Myers v. Dodd, 9 Ind. 290, 68 Am. Dec. 624; Lafayette, etc., R. Co. v. Shriner, 6 Ind. 141; Indianapolis, etc., R. Co. v. McClure, 26 Ind. 370; Pittsburgh, etc., R. Co. v. Stuart, 71 Ind. 500; Clark v. Stipp, 75 Ind. 114; Michigan Southern, etc., R. Co. v. Fisher, 27 Ind. 96.

Kansas.—Baker v. Robbins, 9 Kan. 303. But see Darling v. Rodgers, 7 Kan. 592; Union Pac. R. Co. v. Rollins, 5 Kan. 167. See also Markin v. Priddy, 39 Kan. 462, as corrected by Markin v. Priddy, 40 Kan. 684.

Maine.—Webber v. Closson, 35 Me. 26; Heath v. Ricker, 2 Me. 408.

Maryland.—Baltimore, etc., R. Co. v. Lamborn, 12 Md. 257.

Massachusetts.—Rust v. Low, 6 Mass. 90; Maynard v. Boston, etc., R. Co., 115 Mass. 458, 15 Am. Rep. 119; Lyons v. Merrick, 105 Mass. 71.

Michigan.—Johnson v. Wing, 3 Mich. 163.

Minnesota.—Locke v. First Div. St. Paul, etc., R. Co., 15 Minn. 350.

New Hampshire.—Mills v. Stark, 4 N. H. 512, 17 Am. Dec. 444; Lawrence v. Combs, 37 N. H. 331, 72 Am. Dec. 332; Page v. Olcott, 13 N. H. 399.

New Jersey.—Vandegrift v. Rediker, 22 N. J. L. 185, 51 Am. Dec. 262; Cox v. Robbins, 9 N. J. L. 384.

New York.—Tonawanda R. Co. v. Munger, 5 Den. (N. Y.) 255, 49 Am. Dec. 239; Stafford v. Ingersol, 3 Hill (N. Y.) 38; Angell v. Hill (Supreme Ct.), 18 N. Y. Supp. 824, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 895; Phillips v. Covell, 79 Hun (N. Y.) 210.

Rhode Island.—Tower v. Providence, etc., R. Co., 2 R. I. 404.

Wisconsin.—McCall v. Chamberlain, 13 Wis. 637; Harrison v. Brown, 5 Wis. 27.

See the titles FENCES and HERD LAWS.

In Clark v. Brown, 18 Wend. (N. Y.) 213, the court, by Walworth, Ch., said: "The owner of cattle [at common law] was bound at his peril to restrain them so as to prevent

them from trespassing upon the lands of his neighbor, and if he neglected to do so, he was not only precluded from recovering damages for any injury which the cattle might sustain by going upon the lands of others, but he was himself liable to make compensation for the trespass committed by his cattle." Citing Rust v. Low, 6 Mass. 94; Little v. Lathrop, 5 Me. 356; Bush v. Brainard, 1 Cow. (N. Y.) 78; Holladay v. Marsh, 3 Wend. (N. Y.) 142, 20 Am. Dec. 678.

In Little v. Lathrop, 5 Me. 356, Mellen, C. J., stated the common-law duties of the owner of cattle to restrain them, as follows: 1. At common law, a man, though not bound to fence against an adjoining close, was still bound at his peril to keep his cattle on his own close. 2. At common law, when a man was obliged by prescription to fence his close, he was not obliged to fence against any cattle but those which were rightfully in the adjoining close.

Adjoining Owners.—At common law, in the case of adjoining proprietors, where the cattle of one are found trespassing upon the land of the other, the owner of the cattle, to excuse himself, must show not only that the fences which the other proprietor was bound to maintain were out of repair, but also that the cattle passed over such defective fences. So, where the boundary fence between adjoining proprietors had been divided, and distinct portions assigned to each to erect and maintain, and it appeared, in an action brought by one of them for an injury by the cattle of the other, that both portions of the fence were out of repair, and it was not shown over what part the cattle passed to the plaintiff's land, it was held that the plaintiff was entitled to recover. Deyo v. Stewart, 4 Den. (N. Y.) 101.

As to the Liability of Adjacent Owners under the law of partition fences, see generally the title FENCES.

Liability between Landlord and Tenant.—The owner of cattle is not liable for damages done by them while trespassing upon the lands of another, when the cattle are in the possession and under the control of the tenant to whom both farm and cattle have been leased. Van Slyck v. Snell, 6 Lans. (N. Y.) 299; Atwater v. Lowe, 39 Hun (N. Y.) 150; Moulton v. Moore, 56 Vt. 701.

"The owner of cattle kept on land of another, but remaining in his own care and control, is liable for their trespasses on land of a third person; but if the owner or occupant of the land has the custody, he and not the owner of the cattle is liable." The court, per Allen, J., in Kennett v. Durgin, 59 N. H. 560.

Cow Let at Large by Stranger.—Where defendant's cow was turned out of the pasture by a stranger and driven in the direction of the plaintiff's close, and, being left alone, strayed upon it and committed the trespass complained of, it was held that an action of trespass would lie against the owner of the cow. Noyes v. Colby, 30 N. H. 143.

Statutory Changes.—In many jurisdictions, the common-law rule is not in force, as it is inconsistent with either general or local statutes in reference to estrays, inclosures, and trespassing by cattle, which, in effect, treat lands uninclosed as common pasture, and require the owner or occupier of lands seeking protection from trespasses by cattle running at large, to inclose against them.¹

1. Statutory Enactments—United States.—*Lazarus v. Phelps*, 152 U. S. 81 construing a Texas statute.

Alabama.—*Joiner v. Winston*, 68 Ala. 129; *Wilhite v. Speakman*, 79 Ala. 400; *Mobile, etc., R. Co. v. Williams*, 53 Ala. 597; *Nashville, etc., R. Co. v. Peacock*, 25 Ala. 229; *Crosby v. Hawthorn*, 25 Ala. 221.

Arkansas.—*Little Rock, etc., R. Co. v. Finley*, 37 Ark. 562.

California.—Common-law rule not recognized. *Merritt v. Hill*, 104 Cal. 184. See also *Hahn v. Garratt*, 69 Cal. 147; *Comerford v. Dupuy*, 17 Cal. 308; *Waters v. Moss*, 12 Cal. 535; 73 Am. Dec. 561; *Logan v. Gedney*, 38 Cal. 581.

Colorado.—*Nuckolls v. Gaut*, 12 Colo. 363; *Morris v. Fraker*, 5 Colo. 425. But as to sheep, see *Williard v. Mathesus*, 7 Colo. 76. Hogs are prohibited by statute from running at large. *Denver, etc., R. Co. v. Stewart*, 1 Colo. App. 227.

Connecticut.—*Studwell v. Ritch*, 14 Conn. 295; *Wright v. Wright*, 21 Conn. 329; *Hine v. Wooding*, 37 Conn. 123; but in this last case it is held that the common law is still in force as to unruly cattle. Compare *Biffel v. Southworth*, 1 Root (Conn.) 269.

Dakota.—*Sprague v. Fremont, etc., R. Co.*, 6 Dakota 86.

Florida.—*Savannah, etc., R. Co. v. Geiger*, 21 Fla. 669, 58 Am. Rep. 697.

Georgia.—*Georgia R., etc., Co. v. Neely*, 56 Ga. 540; *Macon, etc., R. Co. v. Lester*, 30 Ga. 911.

Iowa.—*Henry v. Dubuque, etc., R. Co.*, 2 Iowa 288; *Kennedy v. Dubuque, etc., R. Co.*, 2 Iowa 521; *Frazier v. Nortinus*, 34 Iowa 82; *Herold v. Meyers*, 20 Iowa 378; *Wagner v. Bissell*, 3 Iowa 396; *Heath v. Coltenback*, 5 Iowa 490; *Alger v. Mississippi, etc., R. Co.*, 10 Iowa 268; *Russell v. Hanley*, 20 Iowa 219, 89 Am. Dec. 535; *Harrison v. Adamson*, 76 Iowa 337.

Mississippi.—*Anderson v. Locke*, 64 Miss. 283; *Vicksburg, etc., R. Co. v. Patton*, 31 Miss. 156, 66 Am. Dec. 552; *New Orleans, etc., R. Co. v. Field*, 46 Miss. 573.

Missouri.—*Gorman v. Pacific R. Co.*, 26 Mo. 441; *O'Riley v. Diss*, 41 Mo. App. 184; *Heald v. Grier*, 12 Mo. App. 556; *Kertz v. Dolde*, 7 Mo. App. 564; *Kaes v. Missouri Pac. R. Co.*, 6 Mo. App. 397; *Hannibal, etc., R. Co. v. Kenney*, 41 Mo. 271; *Bradford v. Floyd*, 8 Mo. 207.

Montana.—*Smith v. Williams*, 2 Mont. 195.

Nebraska.—*Delaney v. Errickson*, 11 Neb. 533.

Nevada.—*Chase v. Chase*, 15 Nev. 259.

North Carolina.—*Laws v. North Carolina R. Co.*, 7 Jones (N. Car.) 468; *Runyan v. Patterson*, 87 N. Car. 343; *Jones v. Wither- spoon*, 7 Jones (N. Car.) 555, 78 Am. Dec.

263; *Burgwyn v. Whitfield*, 81 N. Car. 261.

Ohio.—*Cranston v. Cincinnati, etc., R. Co.*, 1 Handy (Ohio) 193; *Kerwhacker v. Cleveland, etc., R. Co.*, 3 Ohio St. 172; *Cincinnati, etc., R. Co. v. Waterson*, 4 Ohio St. 424; *Marietta, etc., R. Co. v. Stephenson*, 24 Ohio St. 48.

Oregon.—See *Bileu v. Paisley*, 18 Oregon 47, where the question is undecided. See also *French v. Cresswell*, 13 Oregon 422; *Campbell v. Bridwell*, 5 Oregon 311.

Pennsylvania.—*Race v. Snyder*, 30 Pa. Leg. Int. (Pa.) 361; *Gregg v. Gregg*, 55 Pa. St. 227; *New York, etc., R. Co. v. Skinner*, 19 Pa. St. 298.

But as to adjoining landowners when they agree not to make any common division fence, each is liable to the other for trespasses by his cattle. *Milligan v. Wehinger*, 68 Pa. St. 235.

As to trespass by hogs, see *Mitchell v. Wolf*, 46 Pa. St. 147; *Stewart v. Benninger*, 138 Pa. St. 437.

South Carolina.—*Murray v. South Carolina R. Co.*, 10 Rich. (S. Car.) 227, 70 Am. Dec. 219; *Fripp v. Hasell*, 1 Strobb. (S. Car.) 173.

Texas.—*Lazarus v. Phelps*, 152 U. S. 81; *Sabine, etc., R. Co. v. Johnson*, 65 Tex. 389; *Davis v. Davis*, 70 Tex. 123; *Pace v. Potter*, 85 Tex. 473, citing 7 AM. AND ENG. ENCYC. OF LAW (1st ed.) 889; *Clarendon Land Investment Agency Co. v. McClelland*, 86 Tex. 179.

West Virginia.—Common law not recognized, except as to dangerous and unruly cattle. *Blaine v. Chesapeake, etc., R. Co.*, 9 W. Va. 252; *Baylor v. Baltimore, etc., R. Co.*, 9 W. Va. 270.

See generally the titles FENCES and HERD LAWS.

Public Lands.—There is an implied license growing out of nearly one hundred years user, that public lands of the United States, especially the prairie lands, where the native grass is suited to the raising of cattle, shall be free to those who wish to pasture thereon, when uninclosed. *Buford v. Houtz*, 133 U. S. 320.

Must Show a Good Fence.—In those jurisdictions where the common-law rule is abrogated by statute, or has failed of recognition, the owner of crops can recover for damages done thereto by the trespasses of cattle, only when the crops are, at the time of the trespass, inclosed by good and sufficient fences.

California.—*Comerford v. Dupuy*, 17 Cal. 308.

Colorado.—*Nuckolls v. Gaut*, 12 Colo. 363; *Morris v. Fraker*, 5 Colo. 425.

Connecticut.—*Wright v. Wright*, 21 Conn. 329.

Iowa.—*Frazier v. Nortinus*, 34 Iowa 82; *Noble v. Chase*, 60 Iowa 261.

In the Case of Wilful Trespass, however, as where cattle are driven upon the uninclosed lands of another, the trespasser will be liable for damages.¹

(2) *Right to Drive Off Trespassing Animals*.—Every person has a lawful right to drive trespassing animals from his property, using such force as is commensurate with, and strictly limited by, the existing necessity.² This

Kansas.—Larkin *v.* Taylor, 5 Kan. 444.

Missouri.—Mann *v.* Williamson, 70 Mo. 661.

Montana.—Smith *v.* Williams, 2 Mont. 195.

Nevada.—Chase *v.* Chase, 15 Nev. 259.

North Carolina.—Runyan *v.* Patterson, 87 N. Car. 343; Jones *v.* Witherspoon, 7 Jones (N. Car.) 555, 78 Am. Dec. 263.

Ohio.—Phelps *v.* Cousins, 29 Ohio St. 135.

Tennessee.—Polk *v.* Lane, 4 Yerg. (Tenn.) 36.

Texas.—Heironimus *v.* Duncan (Tex. Civ. App. 1895), 33 S. W. Rep. 287.

But where Roaming Cattle belonging to one person break through a lawful fence and enter upon the land of another, the owner of the land can recover from the owner of the cattle for injuries resulting from such trespass, notwithstanding such land was not entirely surrounded by a lawful fence. Rice *v.* Nagle, 14 Kan. 498.

And in *Tennessee* it is provided by statute that the owner of notoriously-mischievous stock who permits them to run at large shall be liable for any damage they may do, so that in regard to trespasses by such animals it is not necessary to show a good fence as a prerequisite to the recovery of damages. Smith *v.* Jones (Tenn. 1895), 32 S. W. Rep. 200.

Trespass from Day to Day—Action.—Where a trespass is continuous, and from day to day, the injured party cannot divide it up into several causes of action, either with respect to the means by which the trespass is committed, or the time of its commission, so as to maintain separate actions or proceedings for such cause of action. De La Guerra *v.* Newhall, 53 Cal. 141.

1. **Wilful Trespass**.—Harrison *v.* Adamson, 76 Iowa 337; Erbes *v.* Wehmeyer, 69 Iowa 85; Broadwell *v.* Wilcox, 22 Iowa 568, 92 Am. Dec. 404; Powers *v.* Kindt, 13 Kan. 74; Delaney *v.* Erickson, 11 Neb. 533.

In Harrison *v.* Adamson, 76 Iowa 337, the court, by Beck, J., said: "It is quite a different thing when cattle not running at large, but in the charge and under the control of a herdsman, the employee and agent of their owner, are driven and kept upon uninclosed land against the will of the landowner, and with full knowledge of the owner of the cattle. In that case, the trespasser takes and appropriates the use of the land for pasture, and is held by the law liable therefor. In the other case, where the cattle, being at large without the act or knowledge of the owner, go upon the land, the owner is not liable, for the reason that he committed no trespass, and has not knowingly appropriated the use of the land."

2. **Right to Drive Off Trespassing Stock—Degree of Force Justified**.—*Alabama*.—Thompson *v.* State, 67 Ala. 106, 42 Am. Rep. 101.

Delaware.—Richardson *v.* Carr 1 Harr. (Del.) 142, 25 Am. Dec. 65.

Illinois.—Avery *v.* People, 11 Ill. App. 332; Snap *v.* People, 19 Ill. 80, 68 Am. Dec. 582; Spray *v.* Ammerman, 66 Ill. 309.

Indiana.—Amick *v.* O'Hara, 6 Blackf. (Ind.) 258; Tyner *v.* Cory, 5 Ind. 216.

Iowa.—Aspegren *v.* Kotas (Iowa 1894), 59 N. W. Rep. 273.

Maryland.—Knott *v.* Digges, 6 Har. & J. (Md.) 230.

Michigan.—Wood *v.* LaRue, 9 Mich. 158.

Missouri.—Heald *v.* Grier, 12 Mo. App. 556; Totten *v.* Cole, 33 Mo. 138, 82 Am. Dec. 157.

Nebraska.—Cook *v.* Pickrel, 20 Neb. 433.

New Hampshire.—McIntire *v.* Plaisted, 57 N. H. 606.

New York.—Smith *v.* Waldorf, 13 Hun (N. Y.) 127.

Texas.—Jobe *v.* Houston (Tex. Civ. App. 1893), 23 S. W. Rep. 408; Ford *v.* Taggart, 4 Tex. 492.

Vermont.—Clark *v.* Adams, 18 Vt. 425, 46 Am. Dec. 161; Davis *v.* Campbell, 23 Vt. 236; Ladue *v.* Branch, 42 Vt. 574.

Wisconsin.—Tobin *v.* Deal, 60 Wis. 87, 50 Am. Rep. 345.

Using Dogs to Drive Off Cattle.—In Tobin *v.* Deal, 60 Wis. 87, 50 Am. Rep. 345, the court, by Cole, C. J., said: "A person finding cattle wrongfully upon his land * * * has the right to drive them off by any of the ordinary means to which a prudent man would naturally resort, and may use a dog for that purpose, unless there is something in the size or habits of the dog, or in the mode of setting him on, or pursuing, which would negative the idea of ordinary care and prudence." Citing Wood *v.* LaRue, 9 Mich. 158; Totten *v.* Cole, 33 Mo. 138, 82 Am. Dec. 157; Clark *v.* Adams, 18 Vt. 425, 46 Am. Dec. 161; Davis *v.* Campbell, 23 Vt. 236.

Shooting or Wounding Trespassing Cattle.—In Snap *v.* People, 19 Ill. 80, 68 Am. Dec. 582, the court, by Caton, C. J., said: "It is a violation of the common law * * * for a person to shoot or wound stock found trespassing upon his premises. He may expel them from his premises, and use the necessary force for that purpose, doing them no unnecessary damage, * * * but the law of right, as well as humanity, forbids him to inflict an unnecessary injury upon the brute. The owner of the animal may be liable for the damage committed by it, but the injured party may not inflict injury in return."

Degree of Care—Question for Jury.—It is for the jury to determine whether the means used in driving away trespassing animals were reasonable and necessary in the defense of property. McIntire *v.* Plaisted, 57 N. H. 606.

Turning Trespassing Animal Loose.—Where a horse is found trespassing, it may be turned into the highway, and the party will incur no

right exists purely upon the principle of prevention, and not for the purpose of redressing an injury already perpetrated.¹

No Right to Kill.—It is not lawful for the owner of land to kill domestic fowls or animals found trespassing thereon; and if he does so, he will be liable for the resulting damages.²

(3) *Seizure Damage Feasant*.—(a) **Generally—Common-law Rule.**—A person finding the animals of another trespassing on his grounds *damage feasant* may by the rules of the common law, distrain them until satisfaction for the damage done shall be made by the owner of the animals.³

liability from its straying away. *Knour v. Wagoner*, 16 Ind. 414; *Stevens v. Curtis*, 18 Pick. (Mass.) 227; *Cory v. Little*, 6 N. H. 213, 25 Am. Dec. 458; *Gilson v. Fisk*, 8 N. H. 404; *Palmer v. Silverthorn*, 32 Pa. St. 65; *Humphrey v. Douglass*, 10 Vt. 71, 33 Am. Dec. 177; *Tobin v. Deal*, 60 Wis. 87, 50 Am. Rep. 345. See also *Story v. Robinson*, 32 Cal. 206.

"But when cattle escape through a defect in defendant's fence, or in consequence of defendant's taking down a sufficient division fence which the plaintiff is bound to maintain, the defendant then cannot drive them into the highway, but must return them to the close whence they escaped, or he will be deemed a trespasser." *Cole, C. J.*, in *Tobin v. Deal*, 60 Wis. 87, 50 Am. Rep. 345, citing *Carruthers v. Hollis*, 8 Ad. & El. 113, 35 E. C. L. 344; *Roby v. Reed*, 39 N. H. 461.

While a person has a right to turn trespassing animals into the highway, he has no right to drive them so far away as to cause their loss. *Knour v. Wagoner*, 16 Ind. 414.

For a general discussion of the liability for injuries to trespassing animals, see the title INJURIES TO ANIMALS.

1. *Thompson v. State*, 67 Ala. 106, 42 Am. Rep. 101; *Bost v. Minges*, 64 N. Car. 44.

2. **Limitation upon Right—May Not Kill Trespassing Animals.**—*Johnson v. Patterson*, 14 Conn. 1, 35 Am. Dec. 96; *Reis v. Stratton*, 23 Ill. App. 314; *Clark v. Keliher*, 107 Mass. 406; *Gillum v. Sisson*, 53 Mo. App. 516; *Matthews v. Fiestel*, 2 E. D. Smith (N. Y.) 90; *McKay v. Woodle*, 6 Ired. (N. Car.) 352; *Bost v. Minges*, 64 N. Car. 44.

In the Case, However, of an Animal Attacking Another, when necessary to protect the life of the animal attacked the trespassing animal may be killed, and the defense of property will be a sufficient justification. *Livermore v. Batchelder*, 141 Mass. 179.

For a general discussion as to the liability for injuries to trespassing animals, see the title INJURIES TO ANIMALS.

3. **Seizure Damage Feasant—Right to Distrain.**—3 Black. Com. 7; *Hamlin v. Mack*, 33 Mich. 103; *Cook v. Gregg*, 46 N. Y. 439.

The damage in respect of which trespassing animals may be distrained *damage feasant* is not confined to damage solely to the freehold, but includes injuries to other animals. *Boden v. Roscoe* (1894), 1 Q. B. 608.

Grounds and Extent of Common-law Rule.—

In *Rockwell v. Nearing*, 35 N. Y. 302, reversing 44 Barb. (N. Y.) 472, the court, by Porter, J., said: "The right to distrain property *damage feasant* was one which existed at

common law, and it was recognized and regulated by statute, as well in this state as in England. The proceeding was always purely remedial. The party distraining was authorized to detain the property in pledge for the payment of his damages. By seizing it at the time and on the premises where the injury was committed, he was enabled to secure redress for an actual wrong against an unknown or irresponsible owner. If the animal escaped from his premises, though he was fresh in pursuit, his right of distress was gone. The party making the seizure was required to have the damages promptly appraised by the fenceviewers, upon a view of the premises and the examination of competent witnesses. * * * The party distraining was bound to give notice to the owner, if known, to enable him to replevy or redeem the property before the sale. The remedy by distress was cumulative, and satisfaction obtained in this mode was a bar to an action for damages." Citing 3 Bac. Abr., tit. Distress; *Colden v. Eldred*, 15 Johns. (N. Y.) 220.

See the titles HERD LAWS; IMPOUNDING; and *infra*, this title, *Estrays*.

How Confined.—The taking of an animal *damage feasant* and continuing it in the barn of the taker is sufficient to constitute a lawful distress *damage feasant*. *Hamlin v. Mack*, 33 Mich. 103.

Duty of Owner to Prevent Damage.—The owner of property injured by cattle *damage feasant* is bound to exercise ordinary care to prevent the damage. As a man has no right to carelessly look on at the destruction of property, it is his duty to use reasonable care to prevent such destruction, and if he fails to use ordinary care, he cannot recover for the injury which, by ordinary care, he might have prevented. What constitutes the proper degree of care under a given state of circumstances, is a question of fact for the jury. *Little v. McGuire*, 38 Iowa 560; *Hallock v. Hughes*, 42 Iowa 516.

Distraining Animals in Highway.—Animals doing damage on the highways were not distrainable at common law, or, at least, since the enactment of 52 Hen. III. *Taylor v. Welbey*, 36 Wis. 42.

Damage by Animals Passing on Highway.—In *Hartford v. Brady*, 114 Mass. 466, 19 Am. Rep. 377, the court, by Devens, C. J., said: "Inasmuch as the highways have been set apart, among other things, that cattle may be driven thereon, and as, from the nature of such animals, it is impossible, even with care, to keep them upon the highways, unless the adjoining land is properly fenced,

Test of Right to Distrain.—The test of the right to distrain animals *damage feasant* is, that if the owner of the land on which the trespass is committed cannot maintain an action for the trespass, he will have no right of distraint.¹

Must Take Them in the Act.—If animals are seized *damage feasant*, they must be taken while on the lands where the damage is done.²

(b) **Statutory Regulation.**—The proceedings upon the distress of animals are usually regulated by statute, and provision is generally made for a summary appraisal of the damage done by the animals and the sale of them for the payment of the assessed damages.³

it has been settled that the owner of unfenced lands upon such ways cannot seize as *damage feasant*, or sustain an action for the injury caused by, cattle that wander thereupon, if reasonable care has been used in driving them along the highway, or if they have so escaped, having been properly managed, if reasonable effort has been made to remove them." *Citing Goodwyn v. Cheveley*, 4 H. & N. 631; *Dovaston v. Payne*, 2 H. Bl. 527; *Stackpole v. Healy*, 16 Mass. 33; 8 Am. Dec. 121; *Lyman v. Gipson*, 18 Pick. (Mass.) 422; *Little v. Lathrop*, 5 Me. 356; *Lord v. Wormwood*, 29 Me. 282, 50 Am. Dec. 586; *Avery v. Maxwell*, 4 N. H. 36; *Mills v. Stark*, 4 N. H. 512, 17 Am. Dec. 444.

1. Test of the Right to Distrain.—*Oil v. Rowley*, 69 Ill. 469; *Dickson v. Parker*, 3 How. (Miss.) 219, 34 Am. Dec. 78.

"If, then, a person cannot recover damages for the trespasses of his neighbor's cattle unless they break through a lawful fence, he cannot take them *damage feasant* and hold them until amends shall be made, as there is no injury requiring amends to be made." The court, *per* Walker, J., in *Oil v. Rowley*, 69 Ill. 469.

Every person may distrain cattle doing damage on his close, unless the owner can claim protection under a statute requiring the lands trespassed upon to be fenced. *Rust v. Low*, 6 Mass. 94; *Holladay v. Marsh*, 3 Wend. (N. Y.) 142, 20 Am. Dec. 678.

In those jurisdictions where the common law as to restraining animals is not recognized, and it is the duty of landowners to fence against animals running at large, there can be no right of distraint unless the landowner can show a proper inclosure of the fields trespassed upon. *Oil v. Rowley*, 69 Ill. 469.

No person has a right to distrain cattle which were lawfully upon adjoining land, and have escaped therefrom in consequence of his own neglect to maintain his part of the division fence. *Cox v. Chester*, 77 Mich. 494.

To justify distraining cattle *damage feasant*, the person distraining must show actual possession of the land trespassed upon. *Orser v. Storms*, 9 Cow. (N. Y.) 687, 18 Am. Dec. 543.

2. When the Right must be Exercised.—*Lindon v. Hooper*, 1 Cowp. 414; *Holden v. Torrey*, 31 Vt. 690; *Warring v. Cripps*, 23 Wis. 460.

"Distraining Cattle Doing Damage," says Lord Mansfield, in *Lindon v. Hooper*, 1 Cowp. 414, "is a summary execution in the first instance. The distrainer must take care to be

formally right. He must seize them in the act, upon the spot. For if they escape or are driven out of the land, though after view, he cannot distrain them." See also *Clement v. Milner*, 3 Esp. 95.

Animals Returning and Again Doing Damage.

—It appears from these authorities that if the person elects to distrain cattle for doing damage, he must take them while upon his land, for if once off the land, although they escape while he is in pursuit of them, he cannot distrain them. The animals must be distrained while doing the damage, and only for the injury they are doing. And if they have done damage and gone off, and return and are again doing damage, they can only be distrained for the damage done the second time. *Warring v. Cripps*, 23 Wis. 460; *Graham v. Spettigue*, 12 Ont. App. 261.

3. Statutory Regulation.—*Cook v. Gregg*, 46 N. Y. 439. See the titles HERD LAWS and IMPOUNDING, this work. And for questions of procedure, see the title ESTRAYS, *ENCYCLOPEDIA PLEADING AND PRACTICE*.

The remedy by distress given by statute is generally considered cumulative, and the person injured may, if he please, pursue the common-law remedy by action of trespass. *Colden v. Eldred*, 15 Johns. (N. Y.) 220.

Indiana.—The common-law rules as to the seizure of animals *damage feasant* have been superseded by statute in this state. *Blizzard v. Walker*, 32 Ind. 437; *Little v. Swafford* (Ind. App. 1895), 42 N. E. Rep. 245.

There must Be a Lawful Fence.—In some jurisdictions, by statute, the right to sell beasts *damage feasant* is given only in cases where the injury was done to lands inclosed with a lawful and sufficient fence. *Maine* Stat. 1821, c. 128, § 9; *Heath v. Ricker*, 2 Me. 408; *Iowa* Code, § 1454; *Syford v. Shriver*, 61 Iowa 155. And if the lands of the distrainer in such a case are not inclosed by a lawful fence, he has no right to distrain, and, if he does so, the possession which he acquires, is unlawful, and he becomes a trespasser. *Syford v. Shriver*, 61 Iowa 155.

In those jurisdictions where the common-law rule regarding fencing of animals is not recognized, in order to justify the distraining of cattle under estray laws it must be pleaded and shown that the animals have broken through a lawful fence. *Storms v. White*, 23 Mo. App. 31.

Under a statute (*Indiana* Rev. Stat. 1881, § 4837) providing that "when any domestic animal shall break into the inclosure of any person, such person * * * may take up such animal as if an estray, whether the owner be

Constitutionality of Such Statutes.—Statutes which provide for the seizure of animals *damage feasant*, and their sale if not redeemed within the proper time, are generally considered as a police regulation and properly within the scope of governmental powers, and not in violation of the constitutional provision that no person shall be deprived of life, liberty, or property, but by due process of law.¹

(c) **When Distrainer Liable as Trespasser.**—Where statutes provide for the taking of trespassing animals *damage feasant*, all proceedings must be strictly in conformity thereto, or the distrainer will be liable as a trespasser *ab initio*.²

known to him or not," it is held that the right to distrain and treat trespassing animals as estrays where such animals escape from their owner, is confined to cases where such animals break into an inclosure, and does not apply where they wander upon the inclosed lands of another. *Anderson v. Worley*, 104 Ind. 165.

But in those jurisdictions where the law requires the owner of cattle to keep them fenced, to justify the distress of cattle *damage feasant* it is not necessary to show that the lands were inclosed, except against an adjoining owner. *Drew v. Spaulding*, 45 N. H. 472.

Rights of Person Distraining.—Under a statute (*Wisconsin Rev. Stat.*, c. 51, §§ 1-3) which gives the distrainer of trespassing animals twenty-four hours within which to apply to a justice of the peace for the appointment of appraisers of damages, if he retains the custody of the animal during that time, either in the public pound or on his own premises, and takes proper care of it, his possession is lawful, and no action can be commenced against him within twenty-four hours to deprive him of that possession. *Pettit v. May*, 34 Wis. 666.

Doing Damage within the Inclosure.—Under a statute (*Wisconsin Rev. Stat.*, c. 51, § 1) giving a right to distrain animals "doing damage within the inclosure," it is held that where plaintiff's horse was destroying the fence surrounding defendant's inclosure, he was liable to be distrained as doing damage within the inclosure. *Pettit v. May*, 34 Wis. 666.

In *Crocker v. Mann*, 3 Mo. 472, 26 Am. Dec. 684, it is held that the right of distress for breaking a fence does not exist, as the remedy is by statute to recover damages for the breaking.

Owner Presumed to Take Notice of the Amount of Damages Assessed.—Under a statute (*Iowa Code*, § 1454) which provides that "when two or more trustees have assembled, they shall proceed to view and assess the damages and the amount to be paid for keeping the stock, and if the person or persons owning such distrained stock refuse to pay such damages so assessed, the trustees shall post up notices * * * that said stock * * * will be sold" at a stated time and place, it was held that such trustees may proceed to sell the animals and pay the damages legally assessed, without giving the owner notice of the amount of such damages, as the owner is presumed to take notice of the amount of the damages assessed, and to pay them without demand. *Miller v. Dale*, 72 Iowa 470.

1. Constitutionality of the Statutes.—*Dillard v. Webb*, 55 Ala. 468.

Statutes which have for their purpose the prevention of animals from running at large in public highways, and authorize the seizure of cattle trespassing upon private inclosures when entering from the highway, as well as when running at large thereon, are generally held to be constitutional. *Leavitt v. Thompson*, 52 N. Y. 62, reversing 56 Barb. (N. Y.) 542; *Campbell v. Evans*, 45 N. Y. 356; *Cook v. Gregg*, 46 N. Y. 439; *Jones v. Sheldon*, 50 N. Y. 477.

Thus, a statute authorizing the seizure of animals trespassing on a private inclosure or upon a public highway is constitutional and valid. (*Laws New York 1867*, c. 814, as amended by *Laws 1862*, c. 459); *Squares v. Campbell*, 41 How. Pr. (N. Y. Supreme Ct.) 193.

In *Campbell v. Evans*, 45 N. Y. 356, it was held that the statute under consideration (*Laws New York 1867*, c. 814), an act to prevent animals from running at large in public highways, and creating a short bar to actions arising under the act, and providing for the sale of animals so distrained, was not violative of the constitution of the state declaring that no person should be deprived of life, liberty, or property without process of law. To same effect, see *Cook v. Gregg*, 46 N. Y. 439.

2. Statutes must be Strictly Complied with.—*Irwin v. Mattox*, 138 Pa. St. 466. See the title IMPOUNDING.

One who seizes animals *damage feasant*, and fails to comply with the requirements of the statute relative thereto, is liable as a trespasser *ab initio*. *Armbruster v. Wilson*, 43 Hun (N. Y.) 261.

In *Fitzwater v. Stout*, 16 Pa. St. 22, it was held that where trespassing cattle were distrained, a failure to proceed under a distraining statute would make the taker-up a trespasser *ab initio* and responsible in damages to the owner of the cattle.

In *Henry v. Richardson*, 7 Watts (Pa.) 557, however, it is held, it seems, that mere failure to pursue the course laid down by statute regarding estrays will not make the taker-up liable in trover, unless he uses the stray, or refuses to deliver it up on demand. But see *Ray v. Davison*, 24 Mo. 280.

Failure to Give Notice.—Where trespassing cattle, whose owner is known, are taken *damage feasant*, it is the duty of the injured party to give notice thereof to the owner of the stray if he can be found. Neglect to give such notice to the owner when known will, as a general rule, work a forfeiture of all damages, and entitle the owner to the possession

c. **ANIMALS ON HIGHWAY.**—At common law, it was not unlawful for horses and cattle to be at large on the highway, and the owner of such animals was liable only for such damage as in the ordinary sequence of events might be expected to occur therefrom.¹

of the estray without liability for the damages. *Vandamager v. Wood*, 1 Ashm. (Pa.) 203.

The contrary, however, has been held. See *Young v. Rand*, 18 N. H. 569; *Kimball v. Adams*, 3 N. H. 182.

Under *Massachusetts* Gen. Stat., c. 25, § 2729, where a person takes animals *damage feasant* and delivers them to the poundkeeper, it is the duty of the distrainer to give notice, and if he omits to do so, he will be liable as a trespasser *ab initio*. *Merrick v. Work*, 10 Allen (Mass.) 544; *Sherman v. Braman*, 13 Met. (Mass.) 407.

In *Moore v. Robbins*, 7 Vt. 363, it is held that if notice is given within twenty-four hours after the taking of animals *damage feasant*, and delivery to the poundkeeper, it is sufficient.

Subsequent Abuse of Power.—In the case of a distress authorized by the common law or by statute, any subsequent abuse of the power conferred renders the party liable as a trespasser *ab initio*. The *Six Carpenters Case*, 8 Coke 146; *Rockwell v. Nearing*, 35 N. Y. 302, reversing 44 Barb. (N. Y.) 472; *Sackrider v. McDonald*, 10 Johns. (N. Y.) 253; *Dumont v. Smith*, 4 Den. (N. Y.) 320.

In *Bagshaw v. Goward*, Cro. Jac. 147, the defendant distrained *damage feasant* and worked the animal, and it was held that he was a trespasser *ab initio*.

In *Pratt v. Petrie*, 2 Johns. (N. Y.) 191, an animal was taken *damage feasant*, and was impounded before the damage was appraised, contrary to a statute requiring the person distraining, as soon as he conveniently may, and within twenty-four hours, to have fence-viewers appraise the damage. It was held that, by reason of such neglect, he would be considered as a trespasser *ab initio*. See also *Sackrider v. McDonald*, 10 Johns. (N. Y.) 253.

Not Liable after Animal is Impounded.—A private person who impounds in a town pound a beast taken *damage feasant* is not liable for any injury which it may receive from cattle confined in the same pound. *Brightman v. Grinnell*, 9 Pick. (Mass.) 14.

1. Animals at Large on Highway.—Common-law Rule.—*Cox v. Burbridge*, 13 C. B. N. S. 430, 106 E. C. L. 430; *Bowyer v. Burlew*, 3 Thomp. & C. (N. Y.) 362; *Holden v. Shattuck*, 34 Vt. 336, 80 Am. Dec. 684.

As to the Liability of Municipal Corporations for animals running at large in the street, see the title **MUNICIPAL CORPORATIONS**.

Where a Horse was Set Loose on a Street to go, as he was accustomed to do, from one stable to another, and in his passage playfully kicked over the plaintiff, a little child, it was held that it was not necessary to show that the horse was of a vicious nature, or accustomed to kick or injure mankind, and that the fault upon which the action was based was not that of the horse, but that of the owner in suffering the horse to go at large. *Dickson*

v. McCoy, 39 N. Y. 400. See also *Wasmuth v. Butler*, 86 Hun (N. Y.) 1. But in *Chase v. McDonald*, 25 U. C. C. P. 129, it was held, in a similar case, that it was necessary to show that the animal was vicious, and that the owner had knowledge of its viciousness.

Under *New York* Laws 1869, c. 424, relating to animals in highways, it is unlawful for the owner of a horse to allow it to run at large in the highway, and he is liable for all damages it may do. *Bowyer v. Burlew*, 3 Thomp. & C. (N. Y.) 362.

In *Holden v. Shattuck*, 34 Vt. 336, 80 Am. Dec. 684, the court, by Barrett, J., said: "The mere fact of a domestic animal, as a cow or a horse, being in the highway in this manner cannot be regarded as unlawful—a breach of duty—rendering the owner liable for all injurious consequences that may accidentally flow therefrom. Something more must exist in concurrence with that fact, in order to predicate fault in the owner that will render him thus liable. If the animal have the character and habit of peaceableness and quietude, it is impossible to say that there would be any breach of duty, at suitable times—as in the open day, and in the ordinary course of the use of highways in farming neighborhoods, to permit, either by design or by accident, such animal to be loose in the highway within the limits of his own farm. There may be times and occasions when it would be a culpable fault so to do, and would subject the owner to such damage as might result therefrom; for instance, to permit animals to occupy the highway by night, with the likelihood of their lying down for their rest in the travel path, and by thus obstructing it, causing accident and damage. But in such cases, the question of fault would have to be submitted to the jury upon all the circumstances, under proper instructions, as to the respective relative rights and duties of the landowner and the public."

In *Barnes v. Chapin*, 4 Allen (Mass.) 444, 81 Am. Dec. 710, a colt, while following its dam, which was led by her owner in a highway, was kicked and killed by a mare which had been turned loose in the highway without a keeper, and the owner was held liable, on the ground that he was in fault in permitting his mare to go at large on the highway without a keeper.

The owner of a cow, knowing its vicious propensity to hook, will be liable for any damage done, although it be on the highway. *Coggsell v. Baldwin*, 15 Vt. 404, 40 Am. Dec. 686.

In Streets of a City.—If the owner of a horse suffers it to go at large in the streets of a city, he is answerable for injury done by it to an individual, without proof that the owner knew the horse to be vicious. *Goodman v. Gay*, 15 Pa. St. 188, 53 Am. Dec. 589.

Driving Animals on Street.—Persons driving animals through the streets of cities or towns are bound to use the utmost diligence and care to avoid injuries to passers-by.¹

Thus, in *Dickson v. McCoy*, 39 N. Y. 400, the plaintiff, a child of ten years, was passing along the sidewalk of a populous street in front of the defendant's stable, when the defendant's horse came out loose and unattended, and in passing, kicked the plaintiff. The proof as to the disposition of the horse was that it was young and playful, but not vicious. The court left it to the jury to find, upon the evidence, whether the defendant was or was not guilty of negligence in permitting the horse to be at large. The jury found for the plaintiff, and their verdict was sustained on appeal.

Runaway Team.—If the runaway of a team on a public highway is due to the viciousness of the horses, and the owner has knowledge of their viciousness, he is liable for the damages resulting from the runaway. *Hall v. Huber*, 61 Mo. App. 384.

Thus, where there was evidence to show that a horse had, to the knowledge of his owner, run away on several occasions, it was held that it was the duty of the owner, knowing that the horse was liable to run away, to secure him, if he left him standing in the street, or to put him in charge of a person capable of taking care of him, and that the omission to do so was negligence for which the owner was liable. *Frazer v. Kimler*, 2 Hun (N. Y.) 514.

See the titles NEGLIGENCE; CONTRIBUTORY NEGLIGENCE.

1. Driving Animals through Streets—Duty and Liability.—*Ficken v. Jones*, 28 Cal. 618; *Eichel v. Senhenn*, 2 Ind. App. 208.

A person injured, while in the exercise of due care, by a cow driven at the time by one who was not in the exercise of due care, and knew that the cow was vicious, may recover for the injury against the driver of the cow. *Hewes v. McNamara*, 106 Mass. 281.

In an action to recover damages for injuries to persons, done by cattle while being driven through the streets of the city, when the plaintiff has proved that he has sustained injury without fault on his part he has made a case of *prima facie* negligence, and the burden is on the defendant of showing himself to be not in fault. In such a case, the defendant may show that the persons employed by him were persons of competent skill. *Ficken v. Jones*, 28 Cal. 618. But in *Curtis v. Schlosser*, 3 Pa. Dist. Rep. 598, it is held that where it is not shown that the animal is known to be dangerous, it is necessary to show negligence on the part of the owner.

A Man Has a Right to Drive His Cattle along the Public Highways, and if, in exercising this right, he uses ordinary care and diligence, and the cattle escape into the adjoining inclosures without his fault, he is not liable for any damage they may do, provided he immediately pursues and drives them off as soon as possible. *Dovaston v. Payne*, 2 H. Bl. 527; *Stackpole v. Healy*, 16 Mass. 35, 8 Am. Dec. 121; *Mills v. Stark*, 4 N. H. 512, 17

Am. Dec. 444; *Tonawanda R. Co. v. Munger*, 5 Den. (N. Y.) 255, 49 Am. Dec. 239; *Rightmire v. Shepard* (Supreme Ct.), 36 N. Y. St. Rep. 768.

In *McDonnell v. Pittsfield, etc., R. Corp.*, 115 Mass. 565, the court, by Devens, J., said: "The principle of the common law, which requires that each should keep his cattle on his own land, is so far modified as to hold the owner not liable for the trespass of his cattle which, passing along the highway, and being properly managed therein, casually wander into the unfenced lots bounding thereon, provided he removes them with reasonable promptness. But the cattle are not, in such case, lawfully upon such lots. They are there only under such circumstances that their trespass, being casual, and such as could not have been prevented by reasonable care, is held excusable, and this is all. That they should be rightfully and lawfully upon land, the authority or consent of the owner of the close is necessary, and even if he is without a remedy for the injury they may cause him, the owner of the cattle does not acquire his rights as against the owners of adjoining closes. If, after entering upon his close, they proceed into another adjoining thereto, they are there trespassers, and an action may be maintained for such trespass, by the owner of the second close, even if his fence was insufficient, and if he was also bound to fence as against the owner of the first close. Being thus bound, he is only bound to fence against cattle rightfully on the first close." *Citing Rust v. Low*, 6 Mass. 90; *Stackpole v. Healy*, 16 Mass. 33, 8 Am. Dec. 121. See also *Hartford v. Brady*, 114 Mass. 466, 19 Am. Rep. 377; *Lord v. Wormwood*, 29 Me. 282, 50 Am. Dec. 586; *Avery v. Maxwell*, 4 N. H. 36; *Mills v. Stark*, 4 N. H. 512, 17 Am. Dec. 444.

Driving Bull in Street.—It is a matter of common knowledge that a bull is an excitable and powerful animal, and that if, from accidental or unexpected cause, he should become excited while led or driven through a public street, he might be dangerous. *Hudson v. Roberts*, 6 Exch. 697; *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692.

A wild bull, two and a half years old, is a dangerous animal to be driven along a public street, and it is a question for the jury to say whether such driving, with knowledge of the ferocious disposition of the animal, the animal's head being tied to one foot, was negligence. *Barnum v. Terpening*, 75 Mich. 557.

The fact that a bull had never attacked any one, prior to the injury complained of, will not bar a recovery, but is a circumstance which may be considered by the jury as bearing upon the question of negligence. *Barnum v. Terpening*, 75 Mich. 557.

And in an action for personal injuries inflicted by a bull while running at large, evidence to the effect that the defendant knew the animal was vicious, as well as its general

Animals Unlawfully on Highway.—It is generally held that where, in violation of statute, horses or cattle are, by the owner, turned loose, or permitted to be at large in a public street, he is liable for any resulting injury or trespass, without reference to the question of previous knowledge of their vicious disposition or character.¹

character, is competent. *Meier v. Shrunk*, 79 Iowa 17.

Where an accident results from driving a bull along the street, not properly attended or controlled, it is not necessary to prove, to make out a *prima facie* case, that the owner had previous knowledge of the vicious propensity of the animal. *Baird v. Vaughn* (Tenn. 1890), 15 S. W. Rep. 734.

Contributory Negligence—Assisting Person in Danger.—Where a person, while walking along the street, hears a cry for help, and sees a man being attacked by a bull, and goes near enough, but does not attempt to assist the man, because he is afraid of the animal, and it attacks and injures him, it is a question for the jury to say, in an action for such injury, whether the plaintiff was in the exercise of due care. *Linnehan v. Sampson*, 126 Mass. 506, 30 Am. Rep. 692.

1. Animals on Highway in Violation of Statute.—*Jewett v. Gage*, 55 Me. 538, 92 Am. Dec. 615; *Shipley v. Colclough*, 81 Mich. 624, 21 Am. St. Rep. 546; *Bott v. Pratt*, 33 Minn. 323, 53 Am. Rep. 47; *Bowyer v. Burlew*, 3 Thomp. & C. (N. Y.) 362.

Where the owner or possessor of hogs allows them to run at large, in violation of a statute, he does so at his peril. Thus, where a horse was frightened by a hog in the highway, it was held that the owner, or the person who had control of the hog, was liable for the injury, although he did not know that the hog was in the highway at the time of such injury. *Jewett v. Gage*, 55 Me. 538, 92 Am. Dec. 615.

Prima Facie Negligence.—Under *Rhode Island Gen. Stat.*, c. 96, the presence of a horse in a highway, loose and unattended, is *prima facie* negligence on the part of the owner. *Fallon v. O'Brien*, 12 R. I. 518, 34 Am. Rep. 713.

In *Marsland v. Murray*, 148 Mass. 91, 12 Am. St. Rep. 520, an action was brought to recover for personal injuries received by a boy four or five years old. It was conceded that defendant's horse was improperly in the highway, unattended, and near the boy's home. The evidence was that screams were heard, and the boy was seen lying back of the horse's heels, and afterwards near the horse, and covered with blood, running towards the house. It seems that the wound was such as might have been caused by a blow from a horse's shoe, and it was held that the jury was warranted in finding that the injury was caused by a kick by the defendant's horse.

But see *Cox v. Burbridge*, 13 C. B. N. S. 430, 160 E. C. L. 430, in which case it was held that, where defendant's horse was on a highway and kicked the plaintiff, a child who was there playing, there being no evidence to show how the horse came on the spot, or what induced him to kick the child, or that he

was accustomed to kick, there was no evidence from which the jury would be justified in inferring that the owner of the horse had been guilty of actionable negligence.

In *Moynaham v. Wheeler*, 117 N. Y. 285, this rule is apparently limited by the following holding: Plaintiff was knocked down and injured in a city street by a cow belonging to the defendant. The cow was being led through the streets by a skilled driver, by a rope around her horns, when two dogs violently seized upon and frightened her, causing her to run away, and, while thus beyond the control of the driver, she inflicted the injury complained of; and it was held that, while it was not lawful for a cow to run at large in any street or public place (*Laws New York 1872*, c. 776), the apparent violation of the law was explained; and, in the absence of any evidence of knowledge on the part of the defendant that the cow was unruly, or had previously done similar acts, he was not, under the circumstances, liable.

And in *Zumstein v. Shrumm*, 22 Ont. App. 263, it was held that where a turkey, without negligence on the part of its owner, strayed upon the highway, contrary to a by-law of the municipality, and frightened a horse so that it ran away, the owner was not liable, as the bird simply acted as an ordinary domestic fowl.

In *Cotton v. Maurer*, 1 Thomp. & C. (N. Y.) 481, it was held that, where a statute provides that it shall not be lawful for animals to run at large in the highway, and the owner of cattle is bound to prevent them from running at large, contrary to such provisions, when such prevention is possible within the ordinary limits of human prudence, it will be no defense to an action to recover a penalty under the statute, that the cattle have escaped from the owner's premises by the breaking down of fences by an unruly cow belonging to him, or by reason of defective fences.

Proof of Public Road Not Necessary.—In an action brought to recover damages sustained by a bull running at large, it is not necessary to show that the highway where the animal was at the time of the injury was legally established, but it is sufficient to show that the road was open to the public, and used by the public as a highway. *Meier v. Shrunk*, 79 Iowa 17.

A person has no right to put a dangerous animal in a place where he knows the public are in the habit of traveling, whether such place be a public street or not. *Mahoney v. Dwyer*, 84 Hun (N. Y.) 348.

Right to Depasture in Highway.—The owner of land adjoining a highway, and who owns to the centre thereof, has a right to depasture his land in the highway, but he cannot, in virtue of this right, be exempted from the duty of preventing his animals from

d. PROOF OF SCIENTER—WHEN NECESSARY.—If domestic animals are rightfully in the place where they do the injury complained of, the owner will not be liable unless he had knowledge of the vicious propensity of such animals; and in an action for such injuries, knowledge on the part of the owner must be alleged and proved.¹

going at large thereon, without the care of the keeper, under a general statute (*Massachusetts* Gen. Stat., c. 25, § 21) applicable to animals running at large. *Parker v. Jones*, 1 Allen (Mass.) 270. See also, as to the right to depasture in highway, *Stackpole v. Healy*, 16 Mass. 33, 8 Am. Dec. 121; *Hardenburgh v. Lockwood*, 25 Barb. (N. Y.) 9; *Jackson v. Rutland*, etc., R. Co., 25 Vt. 150, 60 Am. Dec. 246.

In *Johnson v. Wing*, 3 Mich. 163, and *Harrison v. Brown*, 5 Wis. 27, it is held that the people have no right to depasture in the highway. See the title *HIGHWAYS*.

1. Domestic Animals Rightfully in the Place.—*England*.—*Cox v. Burbridge*, 13 C. B. N. S. 430, 106 E. C. L. 430; *Buxendin v. Sharp*, 2 Salk. 662; *Card v. Case*, 5 C. B. 632, 57 E. C. L. 632; *Mason v. Keeling*, 12 Mod. 332; *Hudson v. Roberts*, 6 Exch. 697; *Hogan v. Sharpe*, 7 C. & P. 755, 32 E. C. L. 720; *Rex v. Huggins*, 2 Ld. Raym. 1583.

United States.—Congress, etc., *Spring Co. v. Edgar*, 99 U. S. 654.

Alabama.—*Durden v. Barnett*, 7 Ala. 169; *Smith v. Causey*, 22 Ala. 568.

California.—*Finney v. Curtis*, 78 Cal. 498.

District of Columbia.—*Murphy v. Preston*, 5 Mackey (D. C.) 514.

Georgia.—*Reed v. Southern Express Co.*, 95 Ga. 108, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 578.

Illinois.—*Kightlinger v. Egan*, 75 Ill. 141; *Brent v. Kimball*, 60 Ill. 211, 14 Am. Rep. 35; *Mareau v. Vanatta*, 88 Ill. 132; *Hammond v. Melton*, 42 Ill. App. 186; *Wormley v. Gregg*, 65 Ill. 251. But see *Illinois* Laws 1853, p. 124, as to dogs; and *Burke v. Daley*, 32 Ill. App. 326; *Moss v. Pardridge*, 9 Ill. App. 490; *Dvorak v. Maloch*, 41 Ill. App. 131.

Indiana.—*Klenberg v. Russell*, 125 Ind. 531; *Page v. Hollingsworth*, 7 Ind. 318; *Clanin v. Fagan*, 124 Ind. 304.

Kentucky.—*Murray v. Young*, 12 Bush (Ky.) 337.

Louisiana.—*Montgomery v. Koester*, 35 La. Ann. 1091, 48 Am. Rep. 253; *McGuire v. Ringrose*, 41 La. Ann. 1029.

Maine.—*Decker v. Gammon*, 44 Me. 322, 69 Am. Dec. 99.

Maryland.—*Twigg v. Ryland*, 62 Md. 380, 50 Am. Rep. 226.

Massachusetts.—*Le Forest v. Tolman*, 117 Mass. 109, 19 Am. Rep. 400.

Michigan.—*Brooks v. Taylor*, 65 Mich. 208.

Missouri.—*Staetter v. McArthur*, 33 Mo. App. 218.

Nebraska.—*Durrell v. Johnson*, 31 Neb. 796.

New Hampshire.—*Kittredge v. Elliott*, 16 N. H. 77, 41 Am. Dec. 717.

New Jersey.—*Angus v. Radin*, 5 N. J. L. 941, 8 Am. Dec. 626; *Evans v. McDermott*, 49 N. J. L. 163, 60 Am. Rep. 602; *Smith v. Donohue*, 49 N. J. L. 548, 60 Am. Rep. 652.

New York.—*Van Leuven v. Lyke*, 1 N. Y. 515, 49 Am. Dec. 346, affirming 4 Den. (N. Y.) 127; *Earl v. Van Alstine*, 8 Barb. (N. Y.) 630; *Laherty v. Hogan*, (C. Pl.) 1 N. Y. St. Rep. 84; *Moynahan v. Wheeler*, 117 N. Y. 285; *Rogers v. Rogers* (Supreme Ct.), 4 N. Y. St. Rep. 373; *Vrooman v. Lawyer*, 13 Johns. (N. Y.) 339; *Auchmuty v. Ham*, 1 Den. (N. Y.) 495; *Dickson v. McCoy*, 39 N. Y. 400; *Rider v. White*, 65 N. Y. 54, 22 Am. Rep. 600; *Fairchild v. Bentley*, 30 Barb. (N. Y.) 147.

North Carolina.—*Cockerham v. Nixon*, 11 Ired. (N. Car.) 269.

Ohio.—*Morgan v. Hudnell* (Ohio 1895), 40 N. E. Rep. 716.

Oklahoma.—*Meegan v. McKay*, 1 Okla. 59.

Oregon.—*Dufer v. Cully*, 3 Oregon 377.

Vermont.—*Scott v. Grover*, 56 Vt. 499, 48 Am. Rep. 814.

Wisconsin.—*Dearth v. Baker*, 22 Wis. 73; *Kertschacke v. Ludwig*, 28 Wis. 430; *Slinger v. Henheman*, 38 Wis. 504.

As to the Application of this Rule to Injuries by Dogs, see *infra*, this title, *Injuries by Dogs*.

Evidence of Viciousness.—"One act may sometimes furnish as convincing proof of the viciousness of an animal as a dozen, and the jury are therefore allowed to make the inference from a single act. * * * The rule is, that as soon as the owner knows, or has good reason to believe, that the animal is likely to do mischief, he must take care of him. It makes no difference whether this ground of suspicion arises from one act or from repeated acts. The only restriction is, that the act done must be such as to furnish a reasonable inference that the animal is likely to commit an act of the kind complained of." *Pearson, J.*, in *Cockerham v. Nixon*, 11 Ired. (N. Car.) 269.

"The habit of an animal is in its nature a continuous fact, to be shown by proof of successive acts of a similar kind: Evidence having been first offered to show that the horse had been restive and unmanageable previous to the occasion in question, testimony that he subsequently manifested a similar disposition was competent to prove that his previous conduct was not accidental or unusual, but frequent, and the result of a fixed habit at the time of the accident." *Bigelow, C. J.*, in *Todd v. Rowley*, 8 Allen (Mass.) 51. *Quoted and approved* by *Gray, J.*, in *Kennon v. Gilmer*, 131 U. S. 22. To the same effect, see *Maggi v. Cutts*, 123 Mass. 535, and *Chamberlain v. Enfield*, 43 N. H. 356.

It is not necessary to show that, prior to the accident complained of, a horse had done mischief similar to that complained of, and that the defendant knew it, as it is sufficient to show that the disposition and conduct of the horse would lead a reasonable mind to

When Animal is a Trespasser.—Where the animal causing the injury is a trespasser, the owner will be liable, although he had no previous knowledge of the viciousness of the animal.¹

infer that the horse would act as it did at the time complained of. *McGarry v. New York, etc., R. Co.* (Super. Ct.), 18 N. Y. Supp. 195.

One attempt of a bull to gore was held sufficient evidence of viciousness, in *Cockerham v. Nixon*, 11 Ired. (N. Car.) 269.

Scienter—Evidence of.—Whatever is calculated to establish the dangerous propensity of an animal in a sufficient degree is proper to establish a *scienter*. *M'Caskill v. Elliot*, 5 Strobb. (S. Car.) 196, 53 Am. Dec. 706.

"It Is the Propensity to Commit the Mischief that constitutes the danger, and therefore it is sufficient if the owner has seen or heard enough to convince a man of ordinary prudence of the animal's inclination to commit the class of injuries complained of. The question in each case is, whether the notice was sufficient to put the owner on his guard, and to require him as an ordinarily prudent man to anticipate the injury which has actually occurred. Hence, it is unnecessary to prove more than that he has good cause for supposing that the animal may so conduct." *Blodgett, J.*, in *Reynolds v. Hussey*, 64 N. H. 64.

"The Requisite Scienter does not necessarily depend upon the knowledge of the owner of an animal liable to be vicious, that it has actually made an attack and inflicted an injury upon a person. It is sufficient that he is advised that it is ferocious and ugly, and that there is reasonable ground to apprehend that it will do such injury if permitted." *Bradley, J.*, in *Rogers v. Rogers* (Supreme Ct.), 4 N. Y. St. Rep. 373, citing *Rider v. White*, 65 N. Y. 54, 22 Am. Rep. 600; *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123; *M'Caskill v. Elliot*, 5 Strobb. (S. Car.) 196, 53 Am. Dec. 706.

Proof that a bull was led by a chain attached to its nose, with a stick attached to keep him away from the man in charge, if such facts were known to the defendant, is competent as bearing upon the defendant's knowledge of the viciousness of the animal. *Brooks v. Taylor*, 65 Mich. 208.

In an action against the owner of a bull for an injury inflicted upon the plaintiff, who was passing along the road, it appeared that the plaintiff wore a red handkerchief, which irritated the animal and caused the attack, and that after the accident the defendant had said that the red handkerchief had caused the injury, as he knew that a bull would run at anything red; it was held that this was sufficient evidence to go to the jury, that the defendant had knowledge of the vicious nature of the animal. *Hudson v. Roberts*, 6 Exch. 697.

In an action for injury to the plaintiff, caused by the defendant's horse striking him with his fore feet, evidence that the animal had the vicious propensity to injure others by kicking with his hind feet, of which propensity the defendant had knowledge, may be received. *Reynolds v. Hussey*, 64 N. H. 64.

Actual Notice Not Necessary.—Actual notice to a keeper or owner of a vicious horse is not necessary. It will be sufficient to show that such owner or keeper, in the exercise of due care, would have known of the vicious propensities of the animal. *Lawlor v. French*, 14 Misc. Rep. (N. Y. C. Pl.) 497. See also *Turner v. Craighead*, 63 N. Y. St. Rep. 853.

Docile Conduct after Injury.—Evidence touching docile conduct of a horse, after the injury complained of, is incompetent. *Knickerbocker Ice Co. v. DeHaas*, 37 Ill. App. 195.

Knowledge of Servant.—Knowledge of the viciousness of a horse, on the part of one who is merely employed to feed and take care of the animal in the stable, will not be imputed to the owner. *Shaver v. New York, etc., Transp. Co.*, 31 Hun (N. Y.) 55.

But notice of the vicious disposition of a horse, given to the superintendent of a stable and to hostlers having other hostlers in their charge, will be notice to the owner. *McGarry v. New York, etc., R. Co.* (Super. Ct.), 18 N. Y. Supp. 195.

Hearsay Evidence of Viciousness.—What a witness has heard regarding the vicious propensities of a horse is inadmissible. *Keshan v. Gates*, 2 Thomp. & C. (N. Y.) 288.

1. Rule where the Animal is a Trespasser—United States.—Congress, etc., *Spring Co. v. Edgar*, 99 U. S. 654; *Mosier v. Beale*, 43 Fed. Rep. 358.

Alabama.—*Gresham v. Taylor*, 51 Ala. 505.

Georgia.—*Reed v. Southern Express Co.*, 95 Ga. 108, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 578.

Indiana.—*Page v. Hollingsworth*, 7 Ind. 319.

Maine.—*Decker v. Gammon*, 44 Me. 324, 69 Am. Dec. 99.

Massachusetts.—*Lyons v. Merrick*, 105 Mass. 71.

Missouri.—*Beckett v. Beckett*, 48 Mo. 396.

New Jersey.—*Angus v. Radin*, 5 N. J. L. 941, 8 Am. Dec. 626.

New York.—*Van Leuven v. Lyke*, 1 N. Y. 515, 49 Am. Dec. 346, affirming 4 Den. (N. Y.) 127; *Dunckle v. Kocker*, 11 Barb. (N. Y.) 387; *Keshan v. Gates*, 2 Thomp. & C. (N. Y.) 288; *Malone v. Knowlton* (Supreme Ct.), 15 N. Y. Supp. 506; *Marsh v. Hand*, 120 N. Y. 315; *Kinmouth v. McDougall*, 139 N. Y. 612, affirming 19 N. Y. Supp. 771.

Ohio.—*Morgan v. Hudnell* (Ohio 1895), 40 N. E. Rep. 716.

Oregon.—*Dufer v. Cully*, 3 Oregon 377.

Vermont.—*Scott v. Grover*, 56 Vt. 499, 48 Am. Rep. 814.

In *Dolph v. Ferris*, 7 W. & S. (Pa.) 369, 42 Am. Dec. 246, it was held that where a bull went into the field of a neighbor of the owner, and gored his horse till it died, this created a liability on the part of the owner of the bull to pay for the horse without regard to his being aware of any vicious propensity in the bull or otherwise. The ground of the decision was, that the animal was naturally

Exception in the Case of Dogs.—A possible exception, however, to the last rule is recognized in the case of dogs.¹

c. INJURIES BY DOGS—(1) *In General*.—The Owner of a Vicious Dog, knowing of his dangerous propensities, is bound to keep him secure at his peril, and if any one, without negligence on his part, is injured by the animal, the owner will be liable for all the damages sustained.²

inclined to roam, and often guilty of mischief, and that therefore it was the duty of the owner to keep it on his own land. This holding is approved in *Paff v. Slack*, 7 Pa. St. 254, and *Goodman v. Gay*, 15 Pa. St. 188, 53 Am. Dec. 589.

In *Angus v. Radin*, 5 N. J. L. 940, 8 Am. Dec. 626, an action was brought to recover damages, where oxen had broken into an inclosure and killed a cow, upon the ground that the owner of the oxen had neglected to confine his oxen, and that they were trespassing at the time of the commission of the injury; and it was held that the owner was liable, although it was not alleged or proved that he knew or had notice of the propensities of his oxen to commit such an injury.

1. See *infra*, this title, *Injuries by Dogs*.

2. **Vicious Dogs—General Rule as to Liability.**—*England*.—*Hogan v. Sharpe*, 7 C. & P. 755, 32 E. C. L. 720; *Beck v. Dyson*, 4 Campb. 198; *Jones v. Perry*, 2 Esp. 482; *Mason v. Keeling*, 12 Mod. 332.

United States.—*Shaw v. Craft*, 37 Fed. Rep. 317.

Alabama.—*Durden v. Barnett*, 7 Ala. 169; *Strouse v. Leipf*, 101 Ala. 433.

California.—*Laverone v. Mangianti*, 41 Cal. 139, 10 Am. Rep. 269.

Colorado.—*Melsheimer v. Sullivan*, 1 Colo. App. 22.

Delaware.—*Jones v. Carey*, 9 Houst. (Del.) 214.

Illinois.—*Garrison v. Barnes*, 42 Ill. App. 21.

Iowa.—*Marsel v. Bowman*, 62 Iowa 57.

Massachusetts.—*Searles v. Ladd*, 123 Mass. 580; *Parkenson v. Bemis*, 153 Mass. 280.

New Jersey.—*Smith v. Donohue*, 49 N. J. L. 548, 60 Am. Rep. 652, *State v. Remhoff*, 55 N. J. L. 475; *Perkins v. Mossman*, 44 N. J. L. 579.

New York.—*Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123; *Lynch v. McNally*, 73 N. Y. 347; *Keenan v. Gutta Percha, etc., Mfg. Co.*, 46 Hun (N. Y.) 544, affirmed in 120 N. Y. 627; *Kelly v. Tilton*, 2 Abb. App. Dec. (N. Y.) 495; *Brice v. Bauer*, 108 N. Y. 428, 2 Am. St. Rep. 454; *Turner v. Craighead*, 83 Hun (N. Y.) 112; *Jacoby v. Ockerhausen* (Supreme Ct.), 13 N. Y. Supp. 499, affirmed in 129 N. Y. 649.

North Carolina.—*Harris v. Fisher*, 115 N. Car. 318, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 584.

Pennsylvania.—*Mann v. Weiand*, 81* Pa. St. 243.

Vermont.—*Adams v. Hall*, 2 Vt. 9, 19 Am. Dec. 690; *Brown v. Carpenter*, 26 Vt. 638, 62 Am. Dec. 603; *Marsh v. Jones*, 21 Vt. 378, 52 Am. Dec. 67.

In *Jenkins v. Turner*, 1 Ld. Raym. 109, it is held that if a man keeps a dog which is accustomed to bite sheep, and the owner

knows it, and notwithstanding keeps the dog, which afterwards bites a horse, it is actionable, because the owner, after notice of the first mischief, ought to have destroyed the dog, or prevented it from doing any more injury.

Owner Practically an Insurer.—The owner of a vicious dog keeps it at his own risk, being, without regard to care or negligence, an insurer against all the harm which he might have reasonably expected to ensue. *M'Cas-kill v. Elliot*, 5 Strobb. (S. Car.) 196, 53 Am. Dec. 706.

But in *Shaw v. Craft*, 37 Fed. Rep. 317, it is held that dogs used upon a farm are regarded as domestic animals, and are presumed not to be vicious or to have bad or dangerous habits, and the owner or harbinger is not liable for their vicious acts unless he has knowledge of their vicious character. Nor is he to be regarded an absolute insurer that they will not become vicious and contract habits of pursuing or chasing passers on adjacent highways.

"Accustomed to Bite," Defined.—In *Godeau v. Blood*, 52 Vt. 254, 36 Am. Rep. 751, the court, by Redfield, C. J., said: "The formula used in text-books, and in forms given for pleadings in such cases, 'accustomed to bite,' does not mean that the keeper of a ferocious dog is exempt from all duty of restraint until the dog has effectually mangled or killed at least one person. But as he is held to be a man of common vigilance and care, if he had good reason to believe, from his knowledge of the ferocious nature and propensity of the dog, that there was ground to apprehend that he would, under some circumstances, bite a person, then the duty of restraint attached, and to omit it was negligence."

And in *Staetter v. McArthur*, 33 Mo. App. 218, the court, by Rombauer, P. J., quoting and approving the above, says: "This language, however, was used in reference to a dog which had previously bitten a horse, without provocation, twice, * * * which, in numerous instances, had attacked other dogs without any provocation whatever, and which, in the language of one of the witnesses, was the 'most ferocious kind of a dog.' We are inclined to go further, * * * and to hold, with some authorities, that proof of the mischievous character of an animal, and previous knowledge thereof by the owner or keeper, is sufficient to sustain a recovery, even though the animal was neither malicious nor ferocious. It is immaterial to the victim whether the dog bit him in play or in malice." Citing *Oakes v. Spaulding*, 40 Vt. 347, 94 Am. Dec. 404; *Evans v. McDermott*, 49 N. J. L. 163, 60 Am. Rep. 602.

Vicious Dog a Nuisance.—A ferocious dog liable to injure person or property is a nuisance, and keeping it after notice of such

Gist of the Action.—The gist of the action is the keeping of the animal

liability is so wrongful that the owner is chargeable for any neglect to keep it with such care that it cannot do any injury to a person who is not essentially at fault. *Mann v. Weiland*, 81* Pa. St. 243; *Munn v. Reed*, 4 Allen (Mass.) 432.

And the same rule applies with reference to injuries from vicious dogs, as in reference to other nuisances. *Hewes v. McNamara*, 106 Mass. 281; *Fish v. Skut*, 21 Barb. (N. Y.) 333; *Mann v. Weiland*, 81* Pa. St. 243; *Marsh v. Jones*, 21 Vt. 378, 52 Am. Dec. 67.

Therefore the keeping of a vicious dog near a public highway, endangering the safety of persons passing thereon, is a nuisance operating as an obstruction, and renders the person knowingly keeping it there liable to indictment, and also liable to an action in favor of any person injured thereby. *Mann v. Weiland*, 81* Pa. St. 243; *Granger v. Findley*, 7 Ir. C. L. R. 417.

See the titles ABATEMENT OF NUISANCES, 1 AM. AND ENG. ENCYC. OF LAW 84; NUISANCES.

Right to Keep a Dog.—A person has a right to keep a dog or any other animal, provided it is kept under restraint, so that persons pursuing their ordinary or lawful vocations are not exposed to danger. *Logue v. Link*, 4 E. D. Smith (N. Y.) 63; *Werner v. Winterbottom*, 56 N. Y. Super. Ct. 126.

Watchdog.—A man may keep a dog for the necessary defense of his house, garden, or fields, yet if the dog is vicious, and the owner is aware of the fact, if he permits it to be at large upon the highway, he is liable for whatever damage it may do. *State v. Remhoff*, 55 N. J. L. 475.

Dog Accustomed to Bite Strangers.—Where an innkeeper kept a dog that was accustomed to bite strangers who put teams under the inn shed, he was held liable to a guest who there placed a team and was injured by the dog. *Fairchild v. Bentley*, 30 Barb. (N. Y.) 147. See *infra*, this title, *Injury by Dogs—Contributory Negligence as a Defense*.

Keeping Dog in Violation of Ordinance.—Where a dog was allowed to remain upon a sidewalk, in violation of a city ordinance, and while there, attacked a person, it was held that the fact that the dog was there, in breach of a city ordinance, would not of itself permit a recovery, and that the owner of the dog was subject only to the penalty for a breach of the ordinance, and to make him liable for the injury, the plaintiff must show *scienter*. *Smith v. Donohue*, 49 N. J. L. 548, 60 Am. Dec. 652. See also *Durant v. Palmer*, 29 N. J. L. 544.

Injury without Vicious Intent on Part of Dog.—Under *Massachusetts* Pub. Stat., c. 102, § 9, making the owner or keeper of a dog liable for injury done by it to a person in the exercise of due care, the owner is liable, although such injury was done in play, and without any vicious intent on the part of the dog. *Hathaway v. Tinkham*, 148 Mass. 85.

Duty of Owner.—After notice of the viciousness of a dog, it thereupon becomes the duty

of the owner to so keep the animal as to guard against a repetition of similar conduct. He is bound to secure it at all events, and is liable to parties afterwards injured if the mode he has adopted to secure proves insufficient. *Jones v. Perry*, 2 Esp. 482; *Mason v. Keeling*, 12 Mod. 332; *Shaw v. Craft*, 37 Fed. Rep. 317; *Melsheimer v. Sullivan*, 1 Colo. App. 22; *Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175; *Marsel v. Bowman*, 62 Iowa 57; *Mann v. Weiland*, 81* Pa. St. 243.

He must see that the dog is so secured that persons lawfully going upon his premises, or along the highways, will not be bitten, *Sylvester v. Maag*, 155 Pa. St. 225; since he is as much liable, if he keeps a dog on his own premises and suffers him to be loose, as if the dog were at the time in the highway, *Pierret v. Moller*, 3 E. D. Smith (N. Y.) 574. See *infra*, this article, *Injuries by Dogs—Contributory Negligence as a Defense*.

Dog Killing Dog.—In an action to recover damages for injuries to the plaintiff's dog, inflicted by the defendant's dog, it was held that whatever might have been the character and habits of the defendant's dog, it was necessary for the plaintiff to prove that it was the aggressor, or in the wrong, in that particular fight; and if the plaintiff's dog provoked the quarrel and caused the fight, the defendant, as owner of the other dog, could not be made responsible for the consequences; and the cases in which dogs have attacked human beings who were trespassers, and their owners have been held liable, were not applicable to the case of one dog attacking another. A distinction should be observed, however, between keeping a dog which is dangerous to human life, and one which is unwilling to have strange dogs upon its master's premises and is in the habit of attacking and driving them off; and it seems that it is not a general rule that when two dogs fight, and one is killed, the owner can have satisfaction for his loss from the owner of the victorious dog. *Wiley v. Slater*, 22 Barb. (N. Y.) 506.

Where a dog which has the vicious habit of attacking and biting other dogs, without being incited to do so, is suffered to go at large, and attacks and kills the dog of a person lawfully coming upon the premises where he is, his owner is liable in damages for the value of the dog so killed, where it can be shown that such owner had knowledge of the viciousness of the dog. *Wheeler v. Brant*, 23 Barb. (N. Y.) 324.

But where defendant's dog was following her along the street, and it ran into an adjoining yard and there seized and killed the plaintiff's dog, it was held that there could be no recovery, as the act of the dog was not attributable to any active or passive volition on the part of the defendant. *Buck v. Moore*, 35 Hun (N. Y.) 338.

Dog Injuring Trespassing Cow.—Where a cow strayed into the yard of a railroad company, which was full of timber and a very dangerous place, and at night dogs were turned into the yard, and they chased the cow, so injuring

with knowledge of its vicious propensities.¹

A Prima Facie Liability.—So that one who keeps a dangerous dog with knowledge of its vicious propensities incurs a *prima facie* liability for any injury caused by it.²

Proof of Negligence Not Necessary.—And proof of negligence on the part of the defendant is not necessary, as it will be presumed.³

Dog as a Trespasser.—It seems that a different rule applies to trespassing dogs from that applying to other domestic animals, as the owner of a dog, independent of statute, is not generally liable for an injury committed by it when trespassing, unless he had previous knowledge of its vicious propensities.⁴

her that it was necessary for her to be killed, it was held that the company was not liable for the damages. *Leseman v. South Carolina R. Co.*, 4 Rich. (S. Car.) 413.

Killing Unlicensed Dog—Authority to Persons—Killing by Another Dog.—A *Michigan* statute authorized any person to kill any dog going at large and unlicensed, etc. It was held that the authority given by this law to persons could not by construction be so extended as to include animals also; the statute contemplated the exercise of some judgment by the person to determine, before killing the dog, whether it was properly licensed and collared, and could have no application to the case of the killing of one dog by another. *Heisrodt v. Hackett*, 34 Mich. 283, 22 Am. Rep. 529. This statute has since been repealed. See *How. Stat. (Mich.)*, c. 61, §§ 2634–2869.

1. Gist of Action—Keeping Dog with Knowledge of its Viciousness.—*Melsheimer v. Sullivan*, 1 Colo. App. 22; *Partlow v. Haggarty*, 35 Ind. 178; *Murray v. Young*, 12 Bush (Ky.) 337; *Laherty v. Hogan*, 13 Daly (N. Y.) 533; *Wheeler v. Brant*, 23 Barb. (N. Y.) 324; *Lynch v. McNally*, 7 Daly (N. Y.) 128, *affirmed* 73 N. Y. 347; *Mann v. Weiland*, 81* Pa. St. 243; *Meibus v. Dodge*, 38 Wis. 300, 20 Am. Rep. 6; *Wood v. Vaughan*, 28 New Bruns. 472.

But in *Fake v. Addicks*, 45 Minn. 37, 22 Am. St. Rep. 716, it is held that the gravamen of the action is the neglect of the owner of an animal, known by him to be vicious and liable to attack and injure people, to restrain him so as to prevent the risk of damage.

2. Prima Facie Liable.—*Woolf v. Chalker*, 31 Conn. 121, 81 Am. Dec. 175; *Williams v. Moray*, 74 Ind. 25, 39 Am. Rep. 76; *Kelly v. Tilton*, 2 Abb. App. Dec. (N. Y.) 495; *Lynch v. McNally*, 7 Daly (N. Y.) 128, *affirmed* in 73 N. Y. 347.

In *Keenan v. Gutta Percha*, etc., Mfg. Co., 46 Hun (N. Y.) 544, *affirmed* in 120 N. Y. 627, the court, by Dykman, J., said: "The Court of Appeals in our state in the two cases of *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123, and *Lynch v. McNally*, 73 N. Y. 347, has placed the law upon a sound and humane basis by deciding that one who keeps a vicious dog, with knowledge of its propensities, is liable for injuries caused by it; and that negligence, in the ordinary sense of the word, is not an element of the cause of action, nor is contributory negligence a defense. In the interests of humanity the useless, vicious dogs should be extirpated, and

liability for all mischief they may perpetrate is a penalty none too severe for the person who keeps them alive with knowledge of their propensities."

An Absolute Liability.—The language used in some cases, "that from the vicious propensity, and the knowledge of the owner, negligence will be presumed," and in others "that the owner is *prima facie* liable," does not mean that the presumption or *prima facie* case may be rebutted by proof of any amount of care on the part of the owner in keeping or restraining the animal; unless he can be relieved by some act or omission on the part of the person injured, his liability is absolute. *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123.

So that, after the owner of a vicious dog has notice of his dangerous propensities, he cannot exonerate himself by showing that he used care in keeping and restraining the animal, for he assumes the risk of keeping him securely. *Melsheimer v. Sullivan*, 1 Colo. App. 22.

3. Presumption of Negligence.—*Lynch v. McNally*, 7 Daly (N. Y.) 128, *affirmed* in 73 N. Y. 347; *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123; *Kelly v. Tilton*, 2 Abb. App. Dec. (N. Y.) 495.

Where it is alleged in the declaration that the owner or keeper of a dog had knowledge of its viciousness, it is not necessary to allege that he negligently allowed the dog to run at large. *Snow v. McCracken* (Mich. 1895), 64 N. W. Rep. 866.

In *Earl v. Van Alstine*, 8 Barb. (N. Y.) 630, the court, by Selden, J., thus formulates the rules: 1. "One who owns or keeps an animal of any kind becomes liable for any injury the animal may do, only on the ground of some actual or presumed negligence on his part. 2. It is essential to the proof of negligence, and sufficient evidence thereof, that the owner be shown to have had notice of the propensity of the animal to do mischief. 3. Proof that the animal is of a savage and ferocious nature is equivalent to proof of express notice." *Quoted and approved* in *Staetter v. McArthur*, 33 Mo. App. 218, and *Melsheimer v. Sullivan*, 1 Colo. App. 22.

4. Liability for Trespassing Dog.—*Read v. Edwards*, 17 C. B. N. S. 245, 112 E. C. L. 245; *Brown v. Giles*, 1 C. & P. 118, 11 E. C. L. 337; *Beckwith v. Shordike*, 4 Burr. 2092; *Smith v. Donohue*, 49 N. J. L. 548, 60 Am. Rep. 652.

(2) *Proof of Scienter Necessary*—(a) *Generally*.—In order that a person injured by a dog may recover, it must be shown that the defendant had knowledge of the vicious propensities of the animal;¹ and, as to the latter, proof that the animal is of a savage and ferocious nature is equivalent to express notice.²

In Many States Statutes have been Enacted enlarging the common-law liability of owners or keepers of dogs, so that it is no longer necessary in such jurisdictions to show that the owner had knowledge of the dangerous character and vicious propensities of the animal.³

(b) *How Shown*.—The *scienter* may be established by attendant circumstances, without the necessity in all cases of proving prior cases of injury.⁴

But in *Chunot v. Larson*, 43 Wis. 536, it was held (Ryan, J., *dissenting*) that one whose dog, while trespassing upon the close of another, kills a domestic animal of the owner of the close, is liable to pay a full compensation for the injury, although he had no previous knowledge of any vicious propensity of the dog.

Where the Dog Is with Its Owner and Both are Trespassers, the owner will be liable without proof of *scienter*. *Beckwith v. Shordike*, 4 Burr. 2092; *Green v. Doyle*, 21 Ill. App. 205.

1. *General Rule—Proof of Knowledge of Viciousness Necessary—England*.—*Smith v. Pelah*, 2 Stra. 1264; *Hogan v. Sharpe*, 7 C. & P. 755; 32 E. C. L. 720; *Sarch v. Malkin*, M. & M. 505; *Beck v. Dyson*, 4 Campb. 198; *Buxendin v. Sharp*, 2 Salk. 662; *Jenkins v. Turner*, 1 Ld. Raym. 109; *Curtis v. Mills*, 5 C. & P. 489; 24 E. C. L. 421; *Brock v. Copeland*, 1 Esp. 203. *United States*.—*Shaw v. Craft*, 37 Fed. Rep. 317.

Alabama.—*Durden v. Barnett*, 7 Ala. 169.

Maryland.—*Goode v. Martin*, 57 Md. 606, 40 Am. Rep. 448.

Michigan.—*Kennett v. Engle* (Mich. 1895), 63 N. W. Rep. 1009.

New Jersey.—*Smith v. Donohue*, 49 N. J. L. 548, 60 Am. Rep. 652.

New York.—*Laherty v. Hogan*, 13 Daly (N. Y.) 533; *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123.

Pennsylvania.—*Henry v. Mulherrin*, 1 Pa. Dist. Rep. 607.

2. *Proof of Savage Nature of Dog Equivalent to Express Notice on Part of Owner*.—*Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123. See also *Earl v. Van Alstine*, 8 Barb. (N. Y.) 630; *Staetter v. McArthur*, 33 Mo. App. 218.

3. *Statutory Enactments—Kentucky*.—*Koestel v. Cunningham* (Ky. 1895), 30 S. W. 970. *Louisiana*.—*McGuire v. Ringrose*, 41 La. Ann. 1029.

Massachusetts.—*Pressey v. Wirth*, 3 Allen (Mass.) 191.

Michigan.—*Burnham v. Strother*, 66 Mich. 519; *Newton v. Gordon*, 72 Mich. 642; *Monroe v. Rose*, 38 Mich. 348.

New Hampshire.—*Orne v. Roberts*, 51 N. H. 110; *Chickering v. Lord* (N. H. 1894), 32 Atl. Rep. 773.

Ohio.—*Flack v. Humphreys*, 24 Ohio St. 330.

Wisconsin.—*Schaller v. Connors*, 57 Wis. 321.

See also *O'Harra v. Miller*, 64 Iowa 462; *Kertschacke v. Ludwig*, 28 Wis. 430.

Origin of the Statutes.—The enactment of these statutes apparently resulted from the idea that much damage was done by dogs for which the injured person had no remedy, by reason of the practical difficulty of charging the owner with knowledge of the mischievous character of a dog, and, therefore, it was thought best to make the owner or keeper absolutely liable for injuries caused by his dog, without regard to the fact whether he had knowledge of the vicious character of the animal or not. *Orne v. Roberts*, 51 N. H. 110; *Quimby v. Woodbury*, 63 N. H. 370.

4. *How Scienter Shown—Attendant Circumstances*.—*Worth v. Gilling*, L. R. 2 C. P. 1; *Montgomery v. Koester*, 35 La. Ann. 1091, 48 Am. Rep. 253; *Strouse v. Leipf*, 101 Ala. 433, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 581; *Rider v. White*, 65 N. Y. 54, 22 Am. Rep. 600; *Brice v. Bird*, 108 N. Y. 428, 2 Am. St. Rep. 454; *Jacoby v. Ockerhausen* (Supreme Ct.), 13 N. Y. Supp. 499, *affirmed* in 129 N. Y. 649; *M'Caskill v. Elliot*, 5 Strobb. (S. Car.) 196, 53 Am. Dec. 706; *Robinson v. Marino*, 3 Wash. 434; *Fake v. Addicks*, 45 Minn. 37, 22 Am. St. Rep. 716.

It Is Not Necessary to Show that a Dog has Before Bitten a Person, if there are other clear attendant circumstances to show knowledge on the part of the owner, as where the animal furiously ran at passers-by, indicating a disposition to inflict an injury, and there was a sign erected on the premises, "Beware of the dog." *Rider v. White*, 65 N. Y. 54, 22 Am. Rep. 600. See also *Judge v. Cox*, 1 Stark. 285, 2 E. C. L. 114.

Question for Jury.—Evidence tending to prove the temper and vicious disposition of a dog, and the owner's knowledge, should be left to the jury. *Goode v. Martin*, 57 Md. 606, 40 Am. Rep. 448; *Campbell v. Brown*, 19 Pa. St. 359.

Producing Dog in Court.—In *Line v. Taylor*, 3 F. & F. 731, a dog was brought into court and inspected by the jury that they might judge of his disposition.

Keeping Dog Muzzled.—The fact that a dog is kept chained and muzzled by his keeper is strong evidence that the dog was, and was known to be, vicious, and that the safety of the public required its restraint. *Buckley v. Leonard*, 4 Den. (N. Y.) 500.

So, where the keeper of a dog had told his neighbors that it was unsafe to allow it to run

If, however, it is shown that a dog has once bitten a person and the owner had notice thereof, the proof of *scienter* will be complete.¹

at large, and had kept it confined a part of the time, and muzzled a part of the time when running at large, it is evidence tending to show *scienter* on the part of the keeper, and it will not be necessary to show that the dog has ever bitten mankind. *Godeau v. Blood*, 52 Vt. 251, 36 Am. Rep. 751.

Keeping Dog Confined.—Where watchdogs are kept for protection, the dangerous character and knowledge thereof may be inferred from their size, their actual conduct, the admitted purpose for which they are kept, and the care exercised in their custody. Where it appeared that it was the custom to chain up the dogs every morning at daylight, and loosen them only at night, this was held to establish the *scienter*. *Montgomery v. Koesler*, 35 La. Ann. 1091, 48 Am. Dec. 253. See also *Robinson v. Marino*, 3 Wash. 434; *Weber v. Hoag* (Supreme Ct.), 8 N. Y. Supp. 76.

And in *Jones v. Perry*, 2 Esp. 482, it is held that where the owner keeps his dog tied and does not permit him to run at large, it must be presumed that the dog is vicious, unruly, and not safe to be permitted to go abroad.

But see *Jennings v. D. G. Burton Co.*, 73 Hun (N. Y.) 545, where there is a dictum to the effect that it is not sufficient, in order to prove a dog to be vicious, to show that he was chained in a stable, and at times growled at persons passing by. And in *Genenz v. De Forest*, 49 Hun (N. Y.) 364, it is held that the fact that a dog barked at two girls passing on the highway, and ran towards them, but did nothing else, that he grabbed a coat hanging down from a man's shoulder, and that the dog was sometimes kept chained, was not sufficient proof of viciousness. But in this case it appears that the dog was very young.

1. Proof that Dog has Before Bitten a Person.—*Smith v. Pelah*, 2 Stra. 1264.

That a dog has once bitten a man is a circumstance from which the probability of its biting again may be inferred, but the same inference may be drawn with equal confidence from other indications of the dog's disposition. *M'Caskill v. Elliot*, 5 Strobb. (S. Car.) 196, 53 Am. Dec. 706.

But there is no rule which requires any particular number of instances of unprovoked biting in order to prove past mischievous propensities. *Arnold v. Norton*, 25 Conn. 92.

In *Kittredge v. Elliott*, 16 N. H. 77, 41 Am. Dec. 717, evidence of notice of one attack by a dog was held sufficient to charge the owner with all its subsequent acts. And in *Loomis v. Terry*, 17 Wend. (N. Y.) 496, 31 Am. Dec. 306, one instance seems to have been considered sufficient.

Proof of Good Disposition of Dog Inadmissible.—Evidence of the good character and disposition of the dog committing the injury is inadmissible after proof of the injury and knowledge of the owner that the dog has bitten other persons. *Kennett v. Engle* (Mich. 1895), 63 N. W. Rep. 1009; *Keenan v. Gutta Percha*, etc., Mfg. Co., 46 Hun (N. Y.)

544, affirmed in 120 N. Y. 627; *Buckley v. Leonard*, 4 Den. (N. Y.) 500; *Loomis v. Terry*, 17 Wend. (N. Y.) 496, 31 Am. Dec. 306.

So, where the owner of a dog which had bitten other persons had notice of such fact, and afterwards suffered him to go at large, when he bit the plaintiff, it was held to be no answer to the action for the injury to the plaintiff that the dog was generally considered inoffensive. *Buckley v. Leonard*, 4 Den. (N. Y.) 500.

And evidence tending to show that the dog in question at other times, and to other persons, was quiet and never offered to bite, is incompetent. *Linck v. Scheffel*, 32 Ill. App. 17.

But in *Mann v. Weiland*, 81* Pa. St. 243, it is held that "while the general good conduct of dogs cannot defeat the action established by evidence of the commission of two vicious acts, and notice thereof to the owner; yet, if there be a conflict of testimony in regard to those acts, the general conduct and habits of the dogs may be considered in determining the credit to be given to the witnesses."

Evidence of Bad Reputation of Dog Competent.—It is competent to show the general reputation of the animal for being vicious and dangerous, as tending to raise an inference that the owner had knowledge of his vicious propensities; as, that the dog had the general reputation of "chasing people in the road" and "annoying people passing in the road considerably," and that the "character of the dog did not seem to be very good." *Cameron v. Bryan*, 89 Iowa 214.

"If one keeps upon his premises a dog which has attacked or bitten a considerable number of persons coming upon or passing by them, and is notoriously cross and vicious, it may safely be assumed that the owner has some knowledge of the fact. The evidence of general repute is in such cases received, not to prove the particular fact of the dangerous propensity of the animal, but the public notoriety, and as tending to support the inference of knowledge, on the part of the owner, of such propensity." *Vanderburgh, J.*, in *Fake v. Addicks*, 45 Minn. 37, 22 Am. St. Rep. 716.

In *Jones v. Perry*, 2 Esp. 482, a witness was allowed to state that he had heard in the neighborhood that defendant's dog was bitten by a mad dog, on the ground that if such was the common report, a duty attached to the owner to keep the dog properly secured.

Implied Notice of Viciousness.—The owner of a domestic animal of vicious propensities may be chargeable with notice through his negligence to take note of its bad habits. *Knowles v. Mulder*, 74 Mich. 202, 16 Am. St. Rep. 627.

So, "if a person keeps an animal upon his place, and fails to exercise ordinary supervision over it, and lets it run, and fails to obtain the knowledge which ordinary supervision over it would give, he is chargeable with the same knowledge he would have obtained had he inquired and supervised in the ordinary and usual way." *Brown, P. J.*, in *Turner v. Craighead*, 83 Hun (N. Y.) 112.

In Some Instances, it has been held that the fact that the owner of a dog knew that it was of a savage and ferocious disposition is not of itself sufficient to make the owner liable in an action by one bitten by the dog; but, in order to charge the owner, he must have had knowledge of the dog's propensity to bite mankind.¹

(3) *Measure of Damages*.—Where a person is injured by a dog, the apprehension as to the evil results therefrom, pain and anguish, are proper matters for consideration in estimating damages.²

Notice to Servant—Notice to Master.—It is not absolutely necessary to show that the owner of an animal has notice or knowledge of its vicious propensities, as it has been held that notice to a person to whom the management of the defendant's business or the care and control of a dog are delegated, is sufficient to bring home knowledge to the master. *Applebee v. Percy*, L. R. 9 C. P. 647; *Baldwin v. Casella*, L. R. 7 Exch. 325.

But in *Stiles v. Cardiff Steam Nav. Co.*, 33 L. J. Q. B. 310, it was held that notice to porters or servants of the vicious propensity of a dog would not suffice, but if brought home to a person who had general management of the premises on which the dog was kept, it would be otherwise.

And in *Twigg v. Ryland*, 62 Md. 380, 50 Am. Rep. 226, it is held that a servant's knowledge of the vicious character of a dog accustomed to follow him about in his master's business, but not put in his charge by the master, is not chargeable to the master.

Proof that other servants than the one in charge knew of the vicious propensities of the dog is admissible. *Corliss v. Smith*, 53 Vt. 532.

And evidence that a dog has bitten another person, and that defendant's foreman had notice, is proper. *Keenan v. Gutta Percha, etc.*, Mfg. Co., 46 Hun (N. Y.) 544, *affirmed* in 120 N. Y. 627.

Notice to Agent.—Where an agent is employed with the general control and supervision of a farm belonging to his principal, the agent's knowledge of the vicious propensities of a dog kept by the principal on the farm is the knowledge of the principal, and evidence is admissible to show such knowledge in the agent for the purpose of charging the owner. *Corliss v. Smith*, 53 Vt. 532.

Notice to Wife of Owner.—In *Gladman v. Johnson*, 15 L. T. N. S. 476, 36 L. J. C. P. 153, it was held that where a wife assisted her husband in his business, and a customer had been bitten, and had informed her of the fact, and requested her to inform her husband, it must be presumed that she had given the information as requested, and that he therefore had knowledge that his dog was accustomed to bite.

Declarations of Wife Not Binding on Husband.—In an action for damages from the bite of a dog, declarations of the wife of the owner as to the character of the dog were not evidence as against the husband to show *scienter*, on the theory that even if she were his agent, her admission after the agency was over, of what had taken place, could not be received in evi-

dence. But it was held that the wife was not his agent, and that her declarations as to the character of the dog, as well as to the cause of the biting, were improperly received in evidence. *Logue v. Link*, 4 E. D. Smith (N. Y.) 63. See the title *ADMISSIONS*, vol. 1, p. 700.

1. *Keightlinger v. Egan*, 65 Ill. 235. See also *Kolb v. Klages*, 27 Ill. App. 531; *Flansburg v. Basin*, 3 Ill. App. 531.

2. **Matters to be Considered in Estimating Damages.**—*Cameron v. Bryan*, 89 Iowa 214; *Godeau v. Blood*, 52 Vt. 251, 36 Am. Rep. 751; *Robinson v. Marino*, 3 Wash. 434.

The fact that an injury occasioned by a dog will permanently disfigure the face of the person injured must be considered. *Cameron v. Bryan*, 89 Iowa, 214. See generally the title *DAMAGES*.

Evidence in Support of Damages—Physician.—It has been held not error to exclude a question to a physician, if he thought there would be any difficulty in the hands of a good physician in having the injured person walk in a reasonable time, but that it is not error to admit the testimony of the physician of his observation as to another case where paralysis resulted from a like injury. *Fitzgerald v. Dobson*, 78 Me. 559. It is also competent to ask a witness to state, from his knowledge as a surgeon and general practitioner, what was the probable cause of the wounds on the plaintiff. *Robinson v. Marino*, 3 Wash. 434.

Exemplary Damages.—Where it is shown that the owner is guilty of gross and criminal negligence in allowing a dog to run at large unmuzzled, such negligence as evinces a wanton disregard of the safety of others, exemplary damages may be awarded. *Meibus v. Dodge*, 38 Wis. 300, 20 Am. Rep. 6; *Falardeau v. Couture*, 2 L. C. J. 96.

In *Von Fragstein v. Windler*, 2 Mo. App. 598, where persons were attacked by vicious dogs belonging to one who knew their dangerous character, and allowed them to run at large, and the plaintiff's clothing was torn, his person injured, and parcels of goods in his possession destroyed, it was held that the limit of damages recoverable was not the value of the property injured or destroyed, but that exemplary or punitive damages might be recovered.

Even where it is not necessary to show *scienter*, by reason of a statute, knowledge of the owner as to the viciousness of the animal may be shown by way of aggravation. *Swift v. Applebone*, 23 Mich. 252.

In *Kentucky*, by statute, if the owner of a dog has knowledge of its viciousness, punitive damages may be recovered. *Koestel v. Cunningham* (Ky. 1895), 30 S. W. Rep. 970.

Statutes Allowing Double Damages.—In many jurisdictions, statutes have been enacted allowing double damages to be recovered,¹ but the damage must be sustained within the jurisdiction where the statute is in force.²

(4) *Contributory Negligence as a Defense.*—The better view is that contributory negligence, in its ordinary meaning, is not a good defense in an action to recover damages for injuries sustained from a vicious dog.³ But if a

But in *Keightlinger v. Egan*, 65 Ill. 235, it is held that the plaintiff is not, as a matter of course, entitled to punitive damages. The damages should be such as the plaintiff actually sustained.

Pain Resulting from Maltreatment of Wound.—Where a person was bitten by a dog, and by reason of unskilful treatment by his physician he suffered increased pain and was subject to additional expense, it was held that this was not a proper item of damage. *Moss v. Pardridge*, 9 Ill. App. 490.

Medical Attendance.—Reasonable expenses incurred for care and medical attendance, made necessary by the injury, may properly be included by the jury in their estimate of compensatory damages, and this, although such expenses have not been actually paid. *Flack v. Humphreys*, 24 Ohio St. 330.

Injury to Clothing.—Under a statute (*Wisconsin Rev. Stat.*, § 1620) making the owner or keeper of a dog liable for injury to person or property, etc., the injured person may recover, not only for injuries to the body, but also for clothes which he was wearing at the time. *Schaller v. Connors*, 57 Wis. 321. See also *Von Fragstein v. Windler*, 2 Mo. App. 598.

1. Statutes Authorizing Double Damages.—*Raymond v. Hodgson*, 161 Mass. 184; *Fitzgerald v. Dobson*, 78 Me. 559; *Smith v. Montgomery*, 52 Me. 178; *Newton v. Gordon*, 72 Mich. 642; *Chickering v. Lord* (N. H. 1894), 32 Atl. Rep. 773.

Remedial Statutes.—It is held that a statute (*Massachusetts Pub. Stat.*, c. 102, § 93) allowing a recovery of double damages is not penal, but remedial. *Raymond v. Hodgson*, 161 Mass. 185; *Le Forest v. Tolman*, 117 Mass. 109, 19 Am. Rep. 400.

And that the purpose of the statute in affixing a heavy penalty in case of such injuries is to protect all persons who, through no fault of their own, are exposed to attacks from dogs. *Munn v. Reed*, 4 Allen (Mass.) 431; *Raymond v. Hodgson*, 161 Mass. 184.

It is held, however, that the *Michigan* statute (*Comp. Laws 1871*, § 2065) allowing double damages in the case of injuries to sheep is penal in its consequences. *Elliott v. Herz*, 29 Mich. 202.

2. Le Forest v. Tolman, 117 Mass. 109, 19 Am. Rep. 400.

Thus, where a dog owned in Massachusetts committed an injury in the state of New Hampshire, it was held that no action would lie in Massachusetts under the statute giving double damages. *Le Forest v. Tolman*, 117 Mass. 109, 19 Am. Rep. 400.

3. Contributory Negligence as Defense.—*Woolf v. Chalker*, 31 Conn. 130, 81 Am. Dec. 175; *Jones v. Carey*, 9 Houst. (Del.) 214; *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123, *affirming* 10 Hun (N. Y.) 44;

Lynch v. McNally, 7 Daly (N. Y.) 128, *affirmed* in 73 N. Y. 347.

It seems, however, that negligence on the part of the plaintiff may be shown, but it goes only in mitigation of damages. *Lynch v. McNally*, 7 Daly (N. Y.) 128, *affirmed* in 73 N. Y. 347.

In *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123, *affirming* 10 Hun (N. Y.) 44, the court, by Church, C. J., said: "As negligence in the ordinary sense is not the ground of liability, so contributory negligence in its ordinary meaning is not a defense. These terms are not used in a strictly legal sense in this class of actions, but for convenience. There is considerable reason in favor of the doctrine of absolute liability for injuries produced by a savage dog, whose propensities are known to the owner, on the ground of its being in the interest of humanity, and out of regard to the sanctity of human life; but as these animals have different degrees of ferocity, and the rule must be a general one, I think, in view of all the authorities, that the rule of liability before indicated is a reasonable one, and that the owner cannot be relieved from it by any act of the person injured, unless it be one from which it can be affirmed that he caused the injury himself, with a full knowledge of its probable consequences."

And see *Woolf v. Chalker*, 31 Conn. 130, 81 Am. Dec. 175, where it is held that the owner is liable, irrespective of any questions of negligence on the part of the person injured.

But see *Chickering v. Lord* (N. H. 1894), 32 Atl. Rep. 773, where an action was brought under a statute (N. H. Pub. Stat., c. 118, § 10) which makes "the owner or keeper of a dog" liable in double damages for injuries done by it, and the court said: "In actions on the statute no question of care or negligence on the part of the dog's owner is involved. The utmost vigilance to prevent his dog from doing an injury affords him no defense. But he is not liable if the injured party by his negligence provokes, or by ordinary care could prevent, the action of the dog." *Citing* *Quimby v. Woodbury*, 63 N. H. 370.

In *Quimby v. Woodbury*, 63 N. H. 370, it is held that under a statute (N. H. Gen. Laws, c. 115, § 11) giving to a person injured by a dog double damages, except in cases where the person injured was engaged in the commission of a trespass or other tort, the doctrine of contributory negligence is applicable as at common law.

In *Indiana* it is necessary for the plaintiff to show that he was free from contributory negligence. *Williams v. Moray*, 74 Ind. 25, 39 Am. Rep. 76; *Eberhart v. Reister*, 96 Ind. 478.

person with knowledge of the evil propensities of a vicious dog wantonly excites him, or voluntarily and unnecessarily puts himself in the way of such an animal, he will be adjudged to have brought the injury upon himself, and will not be entitled to recover.¹

Negligence of Coservant—Doctrine Not Applicable.—As the owner of a vicious dog is bound to restrain it at his peril, and if it does damage negligence will be presumed, the rule, therefore, of the nonliability of a master to his servant for injuries occasioned by the negligence of a coservant will not shield the owner of a vicious dog from liability for injuries to a servant, where a fellow-servant was negligent in not properly fastening the animal, or in not giving notice of its being loose. *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123.

Servant Assuming Risk.—Where one entered the employ of a person keeping a dangerous dog and continued to work for him, with knowledge of the dog and the place where he was kept, it was held that he assumed the risk of being bitten; and where the employee went near the dog, which was chained, and was bitten, it was held that the employer was not liable. *Farley v. Picard*, 78 Hun (N. Y.) 560.

1. *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123, *affirming* 10 Hun (N. Y.) 44; *Werner v. Winterbottom*, 56 N. Y. Super. Ct. 126.

Person Inciting Attack.—"If a person with full knowledge of the evil propensities of an animal, wantonly excites him, or voluntarily and unnecessarily puts himself in the way of such an animal, he would be adjudged to have brought the injury upon himself, and ought not to be entitled to recover. In such a case, it cannot be said in a legal sense that the keeping of the animal, which is the gravamen of the offense, produced the injury." *Church, C. J.*, in *Muller v. McKesson*, 73 N. Y. 195, 29 Am. Rep. 123, *citing* *Blackman v. Simmons*, 3 C. & P. 138, 14 E. C. L. 243; *Brook v. Copeland*, 1 Esp. 203; *Bird v. Holbrook*, 4 Bing. 628; *Koney v. Ward*, 36 How. Pr. (N. Y. C. Pl.) 255; *Wheeler v. Brant*, 23 Barb. (N. Y.) 324; *Coggswell v. Baldwin*, 15 Vt. 404, 40 Am. Dec. 686.

To same effect, see *Brooks v. Taylor*, 65 Mich. 208.

So, it seems that if a person is grossly negligent in going near a dog, with knowledge of its vicious habits, he cannot recover. *Brooks v. Taylor*, 65 Mich. 208.

Provocation—Stepping on Dog.—Where a person voluntarily teases a vicious dog, and thus invites injury, knowing the consequences, he is not entitled to recover; but a mere accidental interference, as where a person inadvertently steps on a dog, constitutes no defense. *Fake v. Addicks*, 45 Minn. 37, 22 Am. St. Rep. 716.

Dog Biting in Self defense.—Where a dog is wantonly abused, it may lawfully defend itself, but it must do so at that time, and an attack several months after will not be justified on the theory of self-defense. *Keightlinger v. Egan*, 65 Ill. 235.

And so, evidence tending to show that the

plaintiff had at other times and places teased and worried the dog, is inadmissible. *Linck v. Scheffel*, 32 Ill. App. 17.

Boy Teasing Dog.—An action may be maintained for an injury done by a dog to a boy thirteen years of age, where it appears that the defendant's dog was about to cross a narrow foot bridge, which he had a right to cross, and the boy struck the dog with a stick, thereby inciting the dog to commit the injury. *Plumley v. Birge*, 124 Mass. 57, 26 Am. Rep. 645. The court held that the rule was, that the plaintiff was entitled to recover if he was in the exercise of that degree of care which, under like circumstances, would reasonably be expected of a boy of his years and capacity.

Stopping Dog Fight.—In order that a person who interfered with his dog and another dog which were fighting may maintain an action under *Massachusetts* Pub. Stat., c. 102, § 93, allowing double the amount of damages to be recovered, and making proof of *scienter* unnecessary, it is necessary to show that he was using due care, and it is a question for the jury whether the circumstances warranted his interference. *Raymond v. Hodgson*, 161 Mass. 184; *Matteson v. Strong*, 159 Mass. 497.

Leaving Dog in Sleigh.—Where the owner of a dog left it unsecured in his sleigh in the public street, knowing that the dog was ferocious and accustomed to bite people, and that on an occasion when so left, he had attacked a passer-by, and a child of seven years of age came to the sleigh and meddled with the whip, whereupon the dog attacked him, it was held that the defendant was liable for the injuries sustained by the child. *Meibus v. Dodge*, 38 Wis. 300, 20 Am. Rep. 6.

Injury to Trespasser.—It is no defense in an action brought against the owner of a vicious dog knowing of its dangerous propensity, to show that the person injured committed some trivial trespass in the field of the defendant, such as the gathering of berries upon the defendant's property. *Sherfey v. Bartley*, 4 Sneed (Tenn.) 58, 67 Am. Dec. 597.

In *Pierret v. Moller*, 3 E. D. Smith (N. Y.) 574, it is held that the fact that the plaintiff, when bitten by defendant's dog, was trespassing upon the premises of another person, does not affect the right of recovery.

And in *Loomis v. Terry*, 17 Wend. (N. Y.) 496, 31 Am. Dec. 306, the owner of a dog was held liable for damages done by the dog to the plaintiff's son who, at the time of the injury, was committing a trespass in hunting upon his grounds on Sunday. The court, by Cowen, J., said: "There can be no doubt that, as against a trespasser, a man may make any defensive erection, or keep any defensive animal which may be necessary to the protection of his grounds, provided he take due care to confine himself to necessity. But it has been held that, in these and the like cases,

(5) *Injuries to Sheep*.—At Common Law, no action could be maintained against the owner of a dog for killing sheep unless it was shown that the owner had knowledge of the vicious habits of the animal.¹

Statutes Abolishing Proof of *Scienter*.—In many jurisdictions, statutes have been enacted which either make the liability of the owner absolute, or in terms make proof of *scienter* unnecessary.²

the defendant shall not be justified, even as against a trespasser, unless he give notice that the instrument of mischief is in the way." *Quoted and approved in Meibus v. Dodge*, 38 Wis. 300, 20 Am. Rep. 6.

But in *Dandurand v. Pinsonneault*, 7 L. C. J. 131, it is held that the person injured must, in order to recover damages, have been in the place where injured without any intention of trespassing.

Trespasser—Dog Kept for Protection.—A man may keep a dog for the necessary defense of his house, his garden, or his fields, and may cautiously use him for that purpose in the nighttime; but if he permits a mischievous dog to be at large on his premises, and a person is bitten by him in the daytime, the owner is liable in damages. *Loomis v. Terry*, 17 Wend. (N. Y.) 497, 31 Am. Dec. 306.

In *Conway v. Grant*, 88 Ga. 40, it was held that one who, on a lawful visit, enters the back yard of another through an open gate, and is bitten by ferocious dogs running loose in the yard, of which he had no notice, has a right of action against the owner, if the latter knew that the dogs were accustomed to bite, and nevertheless permitted them to run loose in the yard with the gate left open.

But it Seems that in the Case of a Trespass in the Nighttime, the owner of the dog would not be liable for damages. Thus, in *Brock v. Copeland*, 1 Esp. 203, the defendant, who was a carpenter, kept a dog for the protection of his yard. The dog was tied up all day, and was at that time very quiet and gentle, but was let loose at night. The defendant's foreman went into the yard after it had been shut up for the night, and was bitten by the dog, and it was held that an action would not lie, as every person has a right to keep a dog for the protection of his house, and that the injury had arisen through plaintiff's own fault in incautiously going into the defendant's yard after it had been shut up.

The Test Seems to Be that a person cannot recover damages for an injury received from the bite of a dog placed in a yard for protection, unless he has such reasonable and justifiable cause for being in the place where the dog was, as might be pleaded in answer to an action for trespass. *Sarch v. Blackburn*, 4 C. & P. 297, 19 E. C. L. 394.

A Stranger Who, without Authority from the Owner of the premises, but at the invitation of one who is lawfully there by the license of the owner, enters thereon for a lawful purpose, is not a trespasser. *Kelly v. Tilton*, 2 Abb. App. Dec. (N. Y.) 495.

1. Dogs Injuring Sheep.—*Buck v. Moore*, 35 Hun (N. Y.) 338; *Smith v. Donohue*, 49 N. J. L. 550, 60 Am. Rep. 652.

The Reason of the Rule Was that the killing

and worrying of sheep could not be anticipated or expected to result from a dog running at large. *Buck v. Moore*, 35 Hun (N. Y.) 338.

In *New Jersey* no action can be maintained against the owner of a dog for killing sheep upon the land of another, unless *scienter* is shown. *Smith v. Donohue*, 49 N. J. L. 550, 60 Am. Rep. 652. And the same rule seems to obtain in *Kentucky*. *Murray v. Young*, 12 Bush (Ky.) 337. And in *Nova Scotia*. *McKenzie v. Blackmore*, 19 Nova Scotia 203.

2. Statutory Enactments—England.—See 28-29 Vict., c. 60.

Canada.—*Reg. v. Perrin*, 16 Ont. Rep. 446.

Connecticut.—*Russell v. Tomlinson*, 2 Conn. 206.

District of Columbia.—*Murphy v. Preston*, 5 Mackey (D. C.) 514.

Illinois.—*Brent v. Kimball*, 60 Ill. 211, 14 Am. Rep. 35. But see *Pickering v. Orange*, 2 Ill. 338, before enactment of statute.

Michigan.—*Monroe v. Rose*, 38 Mich. 348; *Trompen v. Verhage*, 54 Mich. 304; *Newton v. Gordon*, 72 Mich. 642.

Missouri.—*Jacobsmeier v. Poggemoeller*, 47 Mo. App. 560.

New Hampshire.—*East Kingston v. Towle*, 48 N. H. 57, 97 Am. Dec. 575, 2 Am. Rep. 174.

New York.—*Fish v. Skut*, 21 Barb. (N. Y.) 333; *Fairchild v. Bentley*, 30 Barb. (N. Y.) 147; *Auchmuty v. Ham*, 1 Den. (N. Y.) 498.

Ohio.—*Job v. Harlan*, 13 Ohio St. 485.

Pennsylvania.—*Kerr v. O'Connor*, 63 Pa. St. 341. But see *contra*, under former statute, *Campbell v. Brown*, 19 Pa. St. 359.

Tennessee.—*Dyer v. Hutchins*, 87 Tenn. 198.

The Statutes Merely Dispense with all Proof of *Scienter*, and do not, as a general rule, undertake to create a new or independent cause of action. They merely change the common-law rule, and impose a stricter liability. *Jacobsmeier v. Poggemoeller*, 47 Mo. App. 560.

Evidence of Title of Sheep.—The possession of sheep is *prima facie* evidence of their title so as to give a right to recover. *Fish v. Skut*, 21 Barb. (N. Y.) 333.

Chasing and Worrying Sheep.—Under a statute (1 *New York* Rev. Stat. 704, § 9) making "the owner or possessor of any dog that shall kill or wound any sheep or lamb" liable for the value of the sheep without proof of *scienter*, it is held that it applies only to killed or wounded sheep, and has no application where they are only chased and worried. In that case, *scienter* is necessary. *Auchmuty v. Ham*, 1 Den. (N. Y.) 495; *Osincup v. Nichols*, 49 Barb. (N. Y.) 145.

Evidence of *Scienter*.—Notice of a single act of mischief is sufficient evidence of the owner's knowledge of the animal's mischievous

(6) **Liability of Harboring of Dog.**—A person, although not the owner of a vicious dog, may make himself liable to others as owner, by knowingly keeping or harboring the dog upon his premises, after knowledge of his vicious propensities.¹

disposition. *Kittredge v. Elliott*, 16 N. H. 77, 41 Am. Dec. 717.

Mad Dog.—A statute (*Michigan Comp. Laws* 1871, § 2065, now *How. Stat.*, § 2119) making the owner liable for damage done by a dog to domestic animals does not apply to a rabid dog, as the injury from the bite of a rabid dog must be classed with those from inevitable accident, which the law always leaves to rest where they chance to fall, because, as no one is in fault, there is no basis for an assessment of damages against any one. *Elliott v. Herz*, 29 Mich. 202 (Graves, C. J., *dissenting*).

Identifying Dog by Its Bark.—In *Wilbur v. Hubbard*, 35 Barb. (N. Y.) 303, a dog was identified as one of two that committed the injury complained of, by witnesses acquainted with it, who only heard it bark in the lot in the nighttime, without seeing it; and it was held that it was for the jury to determine whether the dog had such a peculiar bark or voice that witnesses acquainted with the animal could satisfactorily identify it by hearing it bark in the night, without seeing it.

Evidence of Previous Character of Dog.—Under a statute making the owner of a dog liable for damage done, whether the dog is accustomed to kill or worry sheep, or not, the court, by Perley, C. J., in *East Kingston v. Towle*, 48 N. H. 65, 97 Am. Dec. 575, 2 Am. Rep. 174, said: "We are not acquainted with any rule of evidence which will allow the character of a dog, or the fact that he had killed or worried sheep before, to be admitted as evidence that he did the damage complained of in this suit. To show that he did this mischief, it is not competent to prove that he had done similar mischief before, more than it would be to prove that a defendant sued for an assault and battery had beaten other men before, or the same man." On this point, however, Doe, J., *dissented*.

But independent of statute, when proof of *scienter* is necessary, it is competent to show that the dogs in question were generally reported in the neighborhood to be vicious and destructive, as well as to show specific acts by the dogs in question upon stock owned by persons living in the neighborhood. *Murray v. Young*, 12 Bush (Ky.) 337.

Owner Killing Dog—Evidence of Identity.—It was proper to show, where there had been a former trial in the case, that, since the trial, the owner had killed the dog, as it might be inferred that the dog was killed to prevent proof of his identity, or that defendant believed he had killed the sheep, and had killed him to prevent further loss. *Carroll v. Weiler*, 1 Hun (N. Y.) 605.

Proof of Subsequent Injury Incompetent.—Evidence that, after the killing of the animals complained of, the dog subsequently attacked other animals, is incompetent. *Hale v. Van Dever*, 67 Mo. 732.

Measure of Damages.—The owner is liable for the full value of each sheep or lamb

wounded by his dog, under a statute (1 *New York Rev. Stat.* 704, § 9) making the owner of a dog liable for the value of any sheep killed or wounded, and, to entitle the owner to recover, it is not necessary to show that the sheep dies from the wounds. *Osincup v. Nichols*, 49 Barb. (N. Y.) 145.

1. Harboring of Vicious Dog—Rule as to Liability.—*England.*—*M'Kone v. Wood*, 5 C. & P. 1, 24 E. C. L. 187.

California.—*Wilkinson v. Parrott*, 32 Cal. 102.

Delaware.—*Jones v. Carey*, 9 Houst. (Del.) 214.

Maine.—*Smith v. Montgomery*, 52 Me. 178; *Mitchell v. Chase*, 87 Me. 172.

New York.—*Keenan v. Gutta Percha, etc.*, Mfg. Co., 46 Hun (N. Y.) 544, *affirmed* in 120 N. Y. 627; *Quilty v. Battie*, 135 N. Y. 201, *reversing* on another point 61 Hun (N. Y.) 164.

Pennsylvania.—*Snyder v. Patterson*, 161 Pa. St. 98.

Vermont.—*Marsh v. Jones*, 21 Vt. 378, 52 Am. Dec. 67.

Wisconsin.—*Schaller v. Connors*, 57 Wis. 321.

New Brunswick.—*Wood v. Vaughan*, 28 New Bruns. 472.

See also *Snow v. McCracken* (Mich. 1895), 64 N. W. Rep. 866.

In *M'Kone v. Wood*, 5 C. & P. 1, 24 E. C. L. 187, Lord Tenterden, C. J., said: "It is not material whether the defendant was the owner of the dog or not; if he kept it, that is sufficient; and the harboring a dog about one's premises, or allowing him to be or resort there, is a sufficient keeping of the dog to support this form of action. It was the defendant's duty either to have destroyed the dog, or to have sent him away as soon as he found that he was mischievous."

In *Barrett v. Malden, etc.*, R. Co., 3 Allen (Mass.) 101, the dog which did the injury complained of belonged to a person residing in the vicinity of the defendants' stables, and, during the absence of its owner, it was accustomed to stay at the stable three or four weeks at a time, and at other times was frequently seen there, sometimes following cars, and often following a conductor upon the defendants' cars; and the court refused to disturb a verdict of the jury rendering the defendants liable as keepers of the dog.

But in *Snyder v. Patterson*, 161 Pa. St. 98, the rule seems to be limited by the following holding: That there is no general rule that the owner of the premises on which a dog may be harbored is liable for its vicious acts, regardless of the age, employment, or home of its owner, or the circumstances under which the injury was inflicted. The question of liability must depend on the circumstances in each case.

In *New York*, under 1 Rev. Stat. 706, § 20, of the state, to charge one as a harboring of a dog,

f. **JOINT OWNERS—APPORTIONMENT OF DAMAGES.**—As a general rule, where damage is done by several animals belonging to different persons, each

it is necessary to show twenty days' possession previous to the injury complained of. *Jennings v. D. G. Burton Co.*, 73 Hun (N. Y.) 545.

It seems that a person will not be liable for injuries inflicted by a dog unless he controls, owns, or harbors him. *Fitzgerald v. Brophy*, 1 Pa. Co. Ct. Rep. 142.

Keeping on Premises of Another.—"While it is true that a person not the owner of a dog may be liable as its keeper, the mere fact that the dog is kept by its owner on the premises of another, with the knowledge or acquiescence or permission of the owner of such premises, does not of itself make the owner of said premises the keeper of the dog." *Morton, J.*, in *Whittemore v. Thomas*, 153 Mass. 347, citing *Collingill v. Haverhill*, 128 Mass. 218.

Thus, in *Auchmuty v. Ham*, 1 Den. (N. Y.) 495, it was held that the owner of a farm on which was employed a laborer who lived elsewhere and was accompanied to and from his work by a dog, which remained with him during the day on the farm, could not be considered as in possession of the dog so as to be liable under a statute which provided that any person in possession of a dog, or who suffered one to remain about his house for the space of twenty days, should be deemed its owner, and responsible for injuries committed by it.

"Owner or Keeper," Defined.—By "owner or keeper" of a dog is meant one who actually owns or claims to own a dog, or who maintains and controls and uses the dog of another. Thus, if a person harbors a dog, or permits his servant to keep such an animal on his premises, this will constitute such person a keeper of the animal. *Jacobsmeier v. Poggenmoeller*, 47 Mo. App. 560.

Under a statute making the keeper of a dog liable for all injuries occasioned by it, the word "keeper" is equivalent to "the person who harbors." *Cummings v. Riley*, 52 N. H. 368; *Barrett v. Malden, etc.*, R. Co., 3 Allen (Mass.) 101.

A keeper, within the meaning of a similar statute (*Michigan* How. Stat. 2119) is one who treats a dog as living at his house, and undertakes to control his actions, and, upon this question, the following charge to the jury was held correct: "A man may own a dog, and yet not be its keeper. One may take somebody's else dog to keep. For instance, a man may be from home, and temporarily or permanently have his dog cared for in another family; and whoever has him under these circumstances is the keeper of the animal." *Burnham v. Strother*, 66 Mich. 519.

The word "owner" will include the person in possession and control of the dog. *Hornbein v. Blanchard*, 4 Colo. App. 92.

The keeper of a dog may be liable for injuries occasioned by it, although he keeps it without the consent and against the wishes of the owner. *Mitchell v. Chase*, 87 Me. 172.

Exercising Rights of Ownership.—The keeping of a vicious animal and the exercising of rights of ownership over him, knowing his ferocity,

are sufficient to fix the liability of the keeper for damages done by the animal. *Hornbein v. Blanchard*, 4 Colo. App. 92.

Liability of Master—Dog Kept by Servant.—The master will not be chargeable with the acts of his servant in harboring a dog, unless he acts in the execution of the authority given by his master. Where, therefore, an action was brought to recover damages for the bite of a vicious dog belonging to a toll-keeper, it was held that the owner of the bridge, who employed the toll-keeper was not liable for the damage, as it did not appear that the defendant kept or harbored the dog, or authorized it to be so kept, nor that the demands of the business required the keeping of the dog. *Baker v. Kinsey*, 38 Cal. 631, 99 Am. Dec. 438.

An employer will not be considered as harboring a dog because he knows that his hired man, who occupies a separate residence on the farm, has one in his family, it appearing that the defendant knew nothing of the evil qualities of the dog. *Simpson v. Griggs*, 58 Hun (N. Y.) 393.

And in *Harris v. Fisher*, 115 N. Car. 318, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 584, it is held that, if the owner of premises, having knowledge of the vicious and dangerous character of a dog owned by his agent, permits the dog to run at large on the premises, he is liable for any damage that may be done by the dog to a passer-by; but that it would be otherwise if only the agent, and not the principal, had such knowledge, for the knowledge of the agent, not being within the scope of the agency, would not be the knowledge of the owner of the premises.

Harbored by Municipal Agent.—Where a dog was brought upon a poor-farm by a son of the steward, without authority, and the dog was afterwards maintained on the farm, and left there when the steward was succeeded by another, it was held that the ownership of the dog did not vest in the municipality. *Sproat v. Directors of Poor*, 145 Pa. St. 598. To same effect, see *Collingill v. Haverhill*, 128 Mass. 218.

Husband and Wife.—A wife will not be considered as necessarily the keeper of a dog which her husband owns and keeps on premises owned by her, and occupied by both, although she carries on a separate business upon the premises; and in a joint action against husband and wife for injuries inflicted by such dog, it is a question of fact for the jury whether the wife harbored the dog; and if it appears that the dog was kept there against the wife's consent, and that she did nothing towards keeping or protecting it, she will not be considered its keeper. *McLaughlin v. Kemp*, 152 Mass. 7. See also *Strouse v. Leipf*, 101 Ala. 433.

And in a similar case it appeared that the husband was the owner of the dog, and kept it upon premises owned by the wife, upon which they both resided, she paying the expenses of the household, and knowing of the

owner will be liable only for the damage committed by his own animal.¹ But it has been held that where it appears that the animals have equal powers of doing damage, and there are no circumstances to render it probable that greater injury was done by one than by another, each owner will be liable for an equal share of the damage.²

vicious propensities of the dog, and permitted it upon the premises, feeding and caring for it. There was no evidence that the husband had other property upon the premises, or that he was in possession as her tenant, or assumed to direct as to the domestic animals kept on the place, or that he knew of the vicious propensity of the dog; he was sought to be held solely on the ground of his marital liability towards his wife, and it was held that the wife was properly held liable. *Quilty v. Battie*, 135 N. Y. 201, reversing judgment as to husband, 61 Hun (N. Y.) 164.

But where a man at the head of a household occupies premises and supports his family, and with them several dogs which are kept on the place, the dogs, as to the public, are presumed to belong to him. *Bundschuh v. Mayer*, 81 Hun (N. Y.) 111.

Charge to Jury Held Correct—"If the defendant had the dog in his possession, and was harboring him on his premises as owners usually do with their dogs, then he is the owner within the meaning of the law. If the dog was only casually upon his premises, and was not being harbored by defendant as owners usually harbor their dogs, then he was not the owner. In determining how this was at the time of the alleged attack, you will consider the defendant's former treatment of the dog, his declarations concerning him, and the habit of the dog as to staying at the defendant's place." *O'Harra v. Miller*, 64 Iowa 462.

1. Damages by Several Animals Belonging to Different Persons.—*Russell v. Tomlinson*, 2 Conn. 206 (rule changed by Gen. Stat. 1888, § 3760); *Flansburg v. Basin*, 3 Ill. App. 531; *Westgate v. Carr*, 43 Ill. 450; *Denny v. Correll*, 9 Ind. 72; *Cogswell v. Murphy*, 46 Iowa 44; *Carroll v. Weiler*, 4 Thomp. & C. (N. Y.) 131; *Van Steenburgh v. Tobias*, 17 Wend. (N. Y.) 562, 31 Am. Dec. 310; *Auchmuty v. Ham*, 1 Den. (N. Y.) 495; *Dyer v. Hutchins*, 87 Tenn. 198; *Adams v. Hall*, 2 Vt. 9, 19 Am. Dec. 690. (The rule has been changed by statute in *Vermont*; see *Rowe v. Bird*, 48 Vt. 578.)

See also *Dooley v. 17,500 Head of Sheep* (Cal. 1894), 35 Pac. Rep. 1011; and see *Brady v. Ball*, 14 Ind. 317, where it is held that in an action for damages for an injury done by trespassing animals belonging jointly to several persons, the plaintiff may elect to sue all or only a part of the owners.

In *Russell v. Tomlinson*, 2 Conn. 206, the court, by Swift, C. J., said: "Owners are responsible for the mischief done by their dogs; but no man can be liable for the mischief done by the dog of another, unless he had some agency in causing the dog to do it. * * * It is true that there may be some difficulty in ascertaining, in separate actions, the *quantum* of damage done by the dog of each, but this can

be no reason why one man should be accountable for mischief done by the dog of another."

But in *Ozburn v. Adams*, 70 Ill. 291, where trespassing horses were owned by the defendants severally, and were kept together in a common herd under the joint control of all of the owners, it was held that the defendants were jointly liable.

"Owner or Keeper."—Under *Massachusetts* Pub. Stat., c. 102, § 93, making the "owner or keeper" of a dog liable for injuries occasioned by it, the owner and keeper are not jointly and severally liable, and after the recovery of a judgment for such an injury against one of them, which remains unsatisfied by reason of the judgment debtor taking the poor debtor's oath, an action cannot be maintained against the other for the same injury. *Galvin v. Parker*, 154 Mass. 346.

2. Equal Share of Damages.—*Partenheimer v. Van Order*, 20 Barb. (N. Y.) 479. In *Buddington v. Shearer*, 20 Pick. (Mass.) 479, in considering the question of damages done by dogs of different owners, it is held: "If it could be proved what damage was done by one dog, and what by the other, there would be no difficulty, and, on failure of such proof, each owner might be liable for an equal share of the damage if it should appear that the dogs were of equal power to do mischief, and there were no circumstances to render it probable that greater damage was done by one dog than by the other." *Quoted and approved* in *Partenheimer v. Van Order*, 20 Barb. (N. Y.) 479.

Where cows belonging to several owners commit a trespass upon the land of another, each owner is liable for the damage done by his own cow and for no more, and, in the absence of all proof as to the amount of damage done by each cow, the law will infer that they did equal damage. *Partenheimer v. Van Order*, 20 Barb. (N. Y.) 479.

And where two dogs of unequal size killed sheep, it was held that the jury had a right to say that the larger dog did more damage than the smaller one, and that their apportionment of the damage, if it could not be shown to be incorrect, would be conclusive. *Wilbur v. Hubbard*, 35 Barb. (N. Y.) 303.

According to the Number of Animals.—Where crops were trespassed upon and injured by cattle which belonged to two different parties, and it was impossible to distinguish between the damage done by cattle belonging to one owner and those belonging to the other, or to determine separately the amount of damages, the trial court apportioned the damages according to the number of cattle belonging to each owner, and allowed proportional damages, and it was held on appeal that such apportionment would not be disturbed. *Powers v. Kindt*, 13 Kan. 74.

Statutory Changes—Dogs Killing Sheep.—In some jurisdictions, in the case of injuries by dogs to sheep, statutes have been enacted by which each owner of a dog, doing damage with others, is chargeable with liability for the whole.¹

III. ESTRAYS—1. Definition.—An estray is defined as “any valuable animal, not wild, found wandering from its owner.”²

1. Sheep-killing Dogs—Statutes.—Worcester County v. Ashworth, 160 Mass. 186 (*contra*, before enactment of statute, Buddington v. Shearer, 20 Pick. (Mass.) 477); Kerr v. O'Connor, 63 Pa. St. 341; Rowe v. Bird, 48 Vt. 578; Remele v. Donahue, 54 Vt. 555. See also McAdams v. Sutton, 24 Ohio St. 333.

These statutes were passed for the reason that it is commonly impossible to determine the ownership of the dog or dogs that commit depredations on sheep, and the statutes contemplate the payment of the damages without waiting for such a determination. Worcester County v. Ashworth, 160 Mass. 186.

Dog Owned by Members of Partnership.—Where a dog is owned by a member of a firm, and is in the keeping of the firm, an action may properly be maintained against the owner as “owner and keeper,” under Maine Rev. Stat., c. 30, § 1, making the owner or keeper of a dog liable for damages done by it, and it is not necessary to join the other members of the firm. Grant v. Ricker, 74 Me. 487.

2. Estray Defined.—Kinney v. Roe, 70 Iowa 509.

See the titles **HERD LAWS** and **IMPOUNDING**. As to when animals are at large, see the definition **LARGE—AT LARGE**.

For matters of procedure regarding estrays, see the title **ESTRAY, IN THE ENCYCLOPEDIA OF PLEADING AND PRACTICE**.

“Any beasts may be estrays that are by nature tame or reclaimable, and in which there is a valuable property, as sheep, oxen, swine, and horses, which we in general call cattle. * * * Animals upon which the law sets no value, as a dog or cat, and animals *feræ naturæ*, as a bear or wolf, cannot be considered as estrays.” 1 Bl. Com. 298.

In Kinney v. Roe, 70 Iowa 509, the court, by Rothrock, J., said: “An estray is ‘any valuable animal, not wild, found wandering from its owner’ (Webster’s Dict.); ‘cattle whose owner is unknown’ (2 Kent’s Com. 259); ‘any beast, not wild, found within any lordship, and not owned by any man’ (1 Bl. Com. 297); ‘if the owners of distrained stock are not known, it shall be treated as an estray’ (Iowa Code, § 1456). An estray is a beast wandering or without an owner, one wandering at large, or lost, or whose owner is unknown.” Citing Walters v. Glats, 29 Iowa 439.

In Shepherd v. Hawley, 4 Oregon 207, the court, by Prim, C. J., said: “An estray is defined by Burrill’s Law Dict. to be ‘an animal that has escaped from its owner and wanders or strays about.’ This author says it is usually defined as a wandering animal whose owner is unknown (2 Kent’s Com. 359; 1 Bl. Com. 297, 298). According to this definition, an animal running on the range where it was raised, or where it was permitted to run by

its owner, could not be considered an estray, because in so doing it could not be considered as having escaped or wandered away from its owner.”

In People v. Kaatz, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 129, estrays are defined to be animals found wandering, and no man knoweth the owner of them.

The Phrase “Stray Beast in a Suffering Condition” as used in a statute (Connecticut Rev. Stat., tit. 59, § 5) which provides for proceedings in the case of the finding of any such animal, means any beast found estray and likely, unless taken care of, to suffer injury or be wholly lost to the owner. Sturges v. Raymond, 27 Conn. 473.

A Stolen Horse, left tied by a thief to a post in a public road, will not be considered an estray. Hall v. Gildersleeve, 36 N. J. L. 235.

Where the defendant testified that he did not know who the owner of the estray was, but he knew who had charge of it and where it was kept, and only seemed uncertain as to whether it was owned by the plaintiff or his agent, it was held, under such circumstances, that the horse could not be treated as an estray. Lyons v. Van Gorder, 77 Iowa 600.

Cattle Driven along a Road in Charge of a Herder, which, in passing, casually eat of the grass growing on the roadside, are not “estrays” or “running at large,” nor are they rendered so by the fact that the herder accidentally falls asleep while attending to them. Thompson v. Corpstein, 52 Cal. 653.

Stolen Animal at Large.—It seems that where a horse found running at large has escaped from or been turned loose by a thief, this will not prevent one who is a stranger and complies with the provisions of the statute concerning estrays, from acquiring a good title under the statute. Kinney v. Roe, 70 Iowa 509.

Animals Running at Large.—The words “at large” mean without restraint or confinement. Goener v. Woll, 26 Minn. 154.

Under a statute allowing the right of restraint where the owner of animals permits or suffers them to run at large, the animals are not within the operation of the statute as long as the owner uses all reasonable means to restrain them. Montgomery v. Breed, 34 Wis. 649.

So, where plaintiff’s horses escaped from an inclosure against his will, and he immediately went in search of them, it was held that such animals were not running at large in the legal sense of the term. Kinder v. Gillespie, 63 Ill. 88.

Animals, when they escape from their owner without his fault, are not generally considered as running at large. Com. v. Fourteen Hogs, 10 S. & R. (Pa.) 393.

2. Statutes Regarding.—The right to declare a forfeiture of estrays was recognized by the common law.¹ In the several states of the Union, estray laws have been enacted which generally provide for the taking charge of estrays, and after a reasonable time, and duly advertising the same, if the owner does not reclaim them, for the sale of the same to satisfy the charges against them.²

Constitutionality.—These statutes are, as a general rule, considered as constitutional, and as not divesting property rights without due process of law.³

Statutes must be Strictly Pursued.—It is incumbent on one who claims that he has acquired property under an estray law to show that the statutory forms of procedure have been strictly pursued,⁴ as the estray laws are strictly

A horse which while being driven becomes frightened, and escapes from the control of the driver without his fault, and runs away, is not running at large within the meaning of the city ordinance prohibiting animals from running at large. *Presnall v. Raley* (Tex. Civ. App. 1894), 27 S. W. Rep. 200.

Where defendant was accustomed to ride his horse some distance from the house to his work, and had trained it so that it would go back alone, and then be taken care of by his son, it was held that so long as the father or son was near it, so that, owing to its training, it would not wander about, and did, on several occasions, go directly back to its owner's home, it was held not to be running at large within *Vermont* Gen. Stat., c. 100, § 29. *Russell v. Cone*, 46 Vt. 600.

The term "running at large" as used in a statute (Laws *New York*, c. 459, 1862, § 1, as amended by Laws 1867, c. 814) implies permission or assent, or at least some fault or negligence, on the part of the owner of the animals; and where animals have escaped from their owners' premises, where due precaution has been taken to secure them, and there is no default nor negligence on the owners' part, and the owners make suitable efforts to secure and recover them, they are not running at large within the statute. *Coles v. Burns*, 21 Hun (N. Y.) 246.

A domestic animal is in possession of its owner when on its accustomed range. *Jones v. State*, 3 Tex. App. 498; *Stewart v. Hunter*, 16 Oregon 62, 8 Am. St. Rep. 267. See the definition **LARGE—AT LARGE**.

"At Large without a Keeper."—In *Jennings v. Wayne*, 63 Me. 468, the court, by Dickerson, J., said: "The phrase 'at large without a keeper,' must have a reasonable interpretation applicable to the subject-matter. A keeper * * * is one who has something in charge. * * * Such charge, or care, does not in all cases imply direct physical power to control the action of the animals. In some cases moral means would be sufficient for this purpose, such as the proximity of the owner to the animals, the human voice, gestures, and like means. Whether in a given case, physical or moral power over the animals is necessary, depends upon their nature, age, character, habits, and discipline, and business, and use at the time, and whatever other circumstances have a bearing upon the subject. What would constitute a person a keeper of one animal would not make him a keeper of an-

other under different circumstances. It is sufficient to constitute the owner of animals their keeper, in a given case, if it appears that he possessed the means upon which a person in exercise of ordinary care, judgment and intelligence upon these matters, would rely to control their actions. Whether or not animals are thus in charge, is a question of fact to be determined by the jury under proper instructions."

1. 1 Bl. Com. 297.

2. **Estray Laws.**—See *McCrossin v. Davis*, 100 Ala. 633; *Smith v. Ewers*, 21 Ala. 38; *Hyde v. Pryor*, 13 Ill. 64; *Newsom v. Hart*, 14 Mich. 233.

Interest of Distrainer in Animal Seized.—A person who takes up an estray and complies with the requirements of the estray laws is constituted a bailee of the animal during the time he is required to keep it, unless it is sooner claimed by the owner, and he is vested with a qualified property in the subject of the bailment, which becomes absolute on the failure of the owner to appear and prove his property therein within the time prescribed. Code *Alabama* 1876, §§ 1552, 1557; *Stephenson v. Brunson*, 83 Ala. 455; *Hudgins v. Glass*, 34 Ala. 110.

3. **Statutes Held Constitutional.**—*Campau v. Langley*, 39 Mich. 451, 33 Am. Rep. 414; *Burdett v. Allen*, 35 W. Va. 347; *Montgomery v. Breed*, 34 Wis. 649.

"The Right to Declare a Forfeiture of Property where animals forbidden by law to run at large are allowed or permitted by the owner to do so, is doubtless the exercise of a very high and delicate police power of the state. It is so high and delicate that a case ought to be brought clearly and plainly within the provision [of the law] before a court is called upon to enforce the forfeiture." *Cole, J.*, in *Montgomery v. Breed*, 34 Wis. 649.

4. **Statutes must be Strictly Complied with.**—*Cory v. Dennis*, 93 Ala. 440; *Haffner v. Barnard*, 123 Ind. 429; *Crook v. Peebly*, 8 Mo. 344; *Strauser v. Kosier*, 58 Pa. St. 496.

In *McCrossin v. Davis*, 100 Ala. 633, the court, by Coleman, J., said: "The taker-up of an estray, who proceeds according to the statute, is invested with a qualified property in the animal, and, upon his complying with the statute, he may become the absolute owner after the expiration of twelve months. *Hudgins v. Glass*, 34 Ala. 110; *Stephenson v. Brunson*, 83 Ala. 455. The title thus acquired does not rest upon the judgment of any court

construed as against the party claiming the benefit thereof.¹

IV. COMMUNICATING DISEASE.—The owner of animals which are infected with a contagious disease has a right to keep them on his own premises, and he will not be liable if the disease is communicated to other animals on adjoining lands if, while knowing of the diseased condition of his animals, he is not negligent in the manner of keeping them.²

condemning the animal to sale, or decree investing the taker-up with the ownership upon ascertaining that the requirements of the statute have been complied with. The title is made to pass upon complying with the statute. The requisitions of the statute are necessary muniments of title against the original owner, and it is incumbent upon one who relies upon such a title to see that the statute has been complied with, and to preserve the evidence to show such compliance. The decisions are numerous which hold that 'estray' proceedings are *stricti juris*, and the burden is on him who claims under title thus acquired to show affirmatively that the statute has been strictly complied with. *Dillard v. Webb*, 55 Ala. 468; *Cory v. Dennis*, 93 Ala. 440; *Stewart v. Hunter*, 16 Oregon 62, 8 Am. St. Rep. 267; *Fort Smith v. Dodson*, 51 Ark. 447, 14 Am. St. Rep. 62."

Distraitor as a Trespasser.—Under a statute (*Missouri* 2 Wag. Stat. 1301, § 30) it is held that a party who has taken up an estray and kept it in his possession for a year without complying with the estray laws is to be considered as a trespasser *ab initio*, and as having no such possession or right of possession as would enable him to recover against another who had received the estray from a third person. *Wright v. Richmond*, 21 Mo. App. 76; *Bayless v. Lafaire*, 37 Mo. 119.

In *Nelson v. Merriam*, 4 Pick. (Mass.) 249, it is held that where a person takes up an estray to keep it for the owner, and neglects to pursue the course prescribed by the statute, he is not liable to an action for conversion, unless he abused the estray or refused to deliver it up on demand. The mere delay of the party distraining to obtain an order of sale will not make him a wrong-doer *ab initio*. *Drew v. Spaulding*, 45 N. H. 472.

One who retains estrays without giving such notice as the law directs will be considered a tortfeasor. *Hyde v. Pryor*, 13 Ill. 65.

But c. 144 of *New Hampshire* Gen. Laws, relative to estrays, does not require the distraitor to give notice in the manner therein specified if the owner is known. *Hardy v. Nye*, 63 N. H. 612; *Jones v. Smyth*, 18 N. H. 119.

The general rule is, that where estray laws require notice to be given, no property rights can be acquired until such notice is given in accordance with the statute. *Hyde v. Pryor*, 13 Ill. 65; *McMillan v. Andrew*, 50 Ill. 282.

Distraitor Using Estray.—The finder of an estray must not make use of it unless necessary for its preservation, or for its owner's benefit. *Weber v. Hartman*, 7 Colo. 13, 49 Am. Rep. 339.

And one who finds an estray and takes possession of and uses it, so that it is injured, is bound to compensate the owner for damages.

Murgoo v. Cogswell, 1 E. D. Smith (N. Y.) 359. But where a taker-up of a horse, as an estray, rides it for the purpose of discovering the owner, he will not be liable for conversion. *Henry v. Richardson*, 7 Watts (Pa.) 557.

Replevin of Estray.—The taker-up of an estray cannot maintain replevin for it where he has not taken the steps required by statute making it necessary to appraise and advertise. *Duncan v. Starr*, 9 Lea (Tenn.) 238.

1. *Haffner v. Barnard*, 123 Ind. 429; *Walker v. Collier*, 61 Ga. 341.

2. **Disease Communicated to Other Animals.**—*Fisher v. Clark*, 41 Barb. (N. Y.) 329; *Mills v. New York, etc., R. Co.*, 2 Robt. (N. Y.) 326, affirmed in 41 N. Y. 619.

As to the liability of transportation companies for carrying diseased animals, see the title CARRIERS OF LIVE STOCK.

As to the liability of agisters for disease communicated by animals in their possession, see the title AGISTMENT.

As to the right to kill diseased animals, see the following titles: ABATEMENT OF NUISANCES, vol. I, p. 84; NUISANCES; POLICE POWER.

In *Illinois* this rule is changed as to sheep, by statute (Laws 1865, p. 126), so that the owner of sheep infected with a contagious disease has no right to let them run, even upon his land, if they can communicate the disease to sheep lawfully pastured in an adjoining field. *Herrick v. Gary*, 83 Ill. 85; *Herrick v. Gary*, 65 Ill. 101; *Mount v. Hunter*, 58 Ill. 246.

So, where the owner of sheep which were infected with a contagious disease, knowing of such an infection, suffered them to escape into the pasture of another, through a fence which he was bound to keep in repair, but had neglected, he was liable for damages resulting therefrom. *Herrick v. Gary*, 83 Ill. 85.

Duty and Rights of Owner.—In *Walker v. Herron*, 22 Tex. 55, the court, by Wheeler, C. J., said: "The proof is, that after the defendant bought his stock, and brought it upon his premises, the disease made its appearance. There is no pretense that he knew the stock was diseased when he brought it there. He then, undoubtedly, had the right to keep it there upon his own premises, warning his neighbors to keep their stock away, and using all the means reasonably within his power to prevent the communication of the disease. If, as soon as he discovered, or had reason to believe, his stock were infected with a contagious disease, he gave such warning, and used such means, to prevent injury to them, and they negligently suffered their stock to remain exposed to the contagion, and injury resulted to them, he clearly could not be held liable therefor."

Proof of Scierter—When Necessary.—In those jurisdictions where stock is allowed to run at large, and statutes have been enacted making the owners of diseased or distempered cattle liable for any communication of such disease, it

Right of Owner to Use Pasture.—In *Fisher v. Clark*, 41 Barb. (N. Y.) 329, the court, by Smith, J., said: "It could be no violation of the plaintiff's rights for the defendant to occupy his own land in his own way, unless he created a nuisance thereon. Pasturing sheep having an infectious disease was not a nuisance. It was and could be no injury to the plaintiff, unless he suffered his sheep to take the contagion by permitting them to come in contact with the defendant's sheep. Each party had a right to use his own field to pasture his sheep. If the defendant's sheep had infectious disease, infectious only to sheep, he had the same right to have the same in his own field as the plaintiff had to permit his sheep to run in the adjoining field exposed to take such disease."

The bare fact of placing one's own sheep having an infectious disease, in his own pasture adjoining the lot of another occupied by sheep, is not unlawful, nor is it such an act of wrong or negligence as will give to the owner of the adjoining lot a legal cause of action for damage sustained in consequence of the disease being communicated to his sheep. *Fisher v. Clark*, 41 Barb. (N. Y.) 329.

But where a person placed infected calves in a pasture, knowing that they would be likely to pass through an adjoining fence, and communicate the disease to cattle in the adjoining pasture, it was held that it was negligence to do so, and that the owner of the calves would be liable for damages resulting therefrom. *Clarendon Land Invest. Agency Co. v. McClelland*, 86 Tex. 179.

Horses with Glanders—Duty of Owner.—Where the shed in which diseased horses were kept was separated from the plaintiff's stables by a wooden partition, so that, except for the partition, the animals would have come in immediate contact, and it appeared that the defendants' horses had gnawed holes through the partition, it was held that it was the duty of the defendants to have immediately closed the holes, and to have been vigilant in using all necessary means to prevent the disorder from being conveyed by contact to the plaintiff's horses; and that, as the defendants knew the disorder [glanders] was contagious, they were bound to exercise all the care that prudence and a rightful regard for the interest of others required, or else to place their horses so remote from the wooden partition that contact would not have been possible. *Mills v. The New York, etc., R. Co.*, 2 Robt. (N. Y.) 326, affirmed in 41 N. Y. 619.

Where the owner of diseased horses, with knowledge of the fact that they were infected with glanders, placed them with horses belonging to the plaintiff, upon the simple acquiescence of the members of the plaintiff's family, it was held that the defendant was liable for damages resulting from the communication of the disease. *Hite v. Blandford*, 45 Ill. 9.

Placing Stock in Infected Pasture.—Where

the defendant occupied the land of the plaintiff as a mere licensee, and pastured thereon a flock of sheep which had an infectious disease, and after taking them away, said to the plaintiff that there was no danger of communicating the disease, and it appeared that the plaintiff was ignorant of the disease, and its manner of communication, it was held that the defendant was liable to the plaintiff for damages resulting from such false statement. *Eaton v. Winnie*, 20 Mich. 156, 4 Am. Rep. 377.

Seizure of Diseased Cattle.—Under *Kansas Laws 1881*, c. 161, if wild or undomesticated cattle, infected or diseased with Texas splenic, or Spanish fever, are in a condition to endanger the health of other cattle in the vicinity, by reason of probable contagion, where they are running at large, citizens interested may have them taken up and placed in the custody of the sheriff. But these proceedings, however, being *ex parte*, do not absolutely determine the owner's right. And if, upon a judicial hearing, it shall be ascertained that the complaint was made without cause, and that the cattle complained of are not within the terms of the statute, the owner is entitled to have them returned to him. *Verner v. Bosworth*, 28 Kan. 670. See also *Gilchrist v. Schmidling*, 12 Kan. 263; *Wilcox v. Johnson*, 34 Kan. 655.

Purchaser Assuming Liability.—In an action brought under Comp. Laws *Kansas 1885*, c. 105, § 80, for damages for illegally driving cattle infected with Texas fever, a purchaser of cattle who assumes liability for damages is a proper defendant, and judgment may be rendered against him and also against the vendor. *Woodrum v. Clay*, 33 Fed. Rep. 897.

Conditional Ownership.—Under a statute (*Illinois Laws 1867*, p. 169) making the owner of Texas or Cherokee cattle liable for disease communicated by them, a conditional ownership growing out of a lien will not make a person liable for such damages, unless he has the actual control and possession of the cattle. *Smith v. Race*, 76 Ill. 490.

Expert Evidence as to Existence of Disease.—In *Pearson v. Zehr*, 138 Ill. 49, the court, by Baker, J., said: "It would seem that farmers and other persons who for many years have had the personal care and management of horses, both sick and well, and have had an extensive practical experience with such animals, and with some particular disease to which they are subject, and ample opportunity to observe and know the characteristics and symptoms of such disease [glanders] are qualified to state whether in a particular case such characteristics and symptoms do or do not exist. And it would also seem that they, after detailing facts which show that they have a practical and personal knowledge and experience in respect thereto, may properly venture an opinion in regard to the existence or nonexistence of a disease with which observation has made them familiar. It would

is generally held that *scienter* on the part of the owner of the diseased cattle should be alleged and proved.¹

be difficult to say that such opinion would be of no probative force whatever, and it would be for the jury to say what weight should be given it."

Question for Jury.—The *Illinois* Act assumes that Texas cattle, although free from disease, do communicate disease to other cattle, and whilst it is the duty of courts to enforce the act, it is not a legal presumption that this theory is correct. That is a question of fact to be determined by the jury. *Davis v. Walker*, 60 Ill. 452.

Whether or not the disease among sheep known as "scab" is contagious, is a question for the jury. *Mount v. Hunter*, 58 Ill. 246.

Constitutionality of Statutes as to Importing Diseased Animals.—Statutes which restrict the importation of Texas and Mexican cattle are generally held to be unconstitutional and void. *Hannibal, etc., R. Co. v. Husen*, 95 U.S. 465; *Gilmore v. Hannibal, etc., R. Co.*, 67 Mo. 323; *Urton v. Sherlock*, 75 Mo. 247.

But a statute which provides that any person who has in his possession any Texas cattle which have not been wintered north, shall be liable for any damages that may accrue from allowing such cattle to run at large and thereby spread the disease known as Texas fever, is not in conflict with the right of Congress to regulate interstate commerce (*Iowa Code*, § 4059). *Kimmish v. Ball*, 129 U.S. 217. See the title CARRIERS OF LIVE STOCK.

1. *Patee v. Adams*, 37 Kan. 133; *Missouri Pac. R. Co. v. Finley*, 38 Kan. 550; *Coyle v. Conway*, 35 Mo. App. 490; *Bradford v. Floyd*, 80 Mo. 207.

In *Patee v. Adams*, 37 Kan. 133, the court, by Johnson, J., said: "The theory of the statute [*Kansas Laws* 1881, c. 161; 1884, c. 3] is, that the liability arises upon the negligence of the party who drives, or causes to be driven, the cattle that communicate the fever; and how can negligence be attributed to those who go into a market in the state and purchase such cattle, when they have no notice, and no facts exist by which they would be chargeable with notice that the cattle had the fever, or were liable to communicate it? The rule of the common law in such cases is, that knowledge is indispensably necessary to a recovery." Citing *Vrooman v. Lawyer*, 13 Johns. (N. Y.) 339; *Lyke v. Van Leuven*, 4 Den. (N. Y.) 127, affirmed in 1 N. Y. 515; *Dearth v. Baker*, 22 Wis. 73.

Independent of Statute.—Where a person knowingly brings into a state cattle infected with Texas fever, and allows them to run at large where it is permissible to allow stock to run at large, he will be liable for all injuries resulting therefrom, regardless of statute imposing such liability. *Kemmish v. Ball*, 30 Fed. Rep. 759.

In Case of Trespass by Diseased Cattle, in consequence of which the disease is communicated to others, the owner will, independent of statute, be liable even if he is unaware

of the diseased state of his cattle. *Barnum v. Vandusen*, 16 Conn. 200.

Thus, where defendant's sheep trespassed upon plaintiff's land, and communicated to plaintiff's sheep a disease known as hoof distemper, there being no sufficient justification for the trespass, it was held that, in order to recover damages, it was not necessary to show that the defendant had knowledge of the diseased state of his sheep, but that such evidence was competent to enhance the damages. It was also held that plaintiff was entitled to recover for the breach of his close, as well as for the loss of his sheep. *Barnum v. Vandusen*, 16 Conn. 200.

In *Anderson v. Buckton*, 1 Stra. 192, it was held that the entry of diseased cattle into plaintiff's close, by which plaintiff's cattle were infected, was a trespass, and that the injury to the plaintiff's cattle could be shown by way of aggravation of damages in trespass, or recovered in a distinct action as consequential damages. See also *Lee v. Burk*, 15 Ill. App. 651.

Judicial Notice of Existence of Disease.—A court will not take judicial notice of the supposed fact that at certain seasons of the year Texas cattle are known to have some infectious disease which can be communicated to other cattle. *Bradford v. Floyd*, 80 Mo. 207.

But the Act of Congress of 1884, May 29, recognizes the existence of the disease known as Texas fever. *Lynch v. Grayson* (N. Mex. 1891), 25 Pac. Rep. 992.

Sufficiency of Complaint.—Where a person applied to a livery-stable keeper who had a valuable horse, to board his horses, representing at the time that they had had the distemper, when in fact they were in the early stages of the disease, and representing that there was no danger of the disease spreading to the livery-keeper's animals, and the stable keeper knew nothing of the disease, it was held that a complaint which set forth these facts was not bad for not alleging that the injury occurred without fault or negligence on the part of the plaintiff. *Fultz v. Wycoff*, 25 Ind. 321.

Measure of Damages.—In the case of communication of disease by sheep, the court, by Savage, C. J., in *Jeffrey v. Bigelow*, 13 Wend. (N. Y.) 518, 28 Am. Dec. 476, said: "The plaintiff is entitled to such damages as necessarily and naturally flow from the act of the defendant. That damage is not the mere difference between a diseased sheep and a healthy one, but the damage sustained by communicating the disease to the plaintiff's flock. * * * 'If a person sells me a cow, which he knows to be infected with a contagious distemper, and conceals this disease from me, such concealment is a fraud on his part, which renders him responsible for the damage, and I suffer, not only in that particular cow which is the object of his original obligation, but also in my other cattle to which the distemper is communicated, for it is a fraud of the seller which occasions this damage.'"

Contributory Negligence as a Defense.—If a person receives animals, knowing that they are infected with a contagious disease, and permits his own stock to come in contact with them, whereby they become infected, he is guilty of such contributory negligence that he will not be entitled to recover for the damages sustained.¹

ANIMUS MANENDI. (See also the title DOMICIL.)—*Animus manendi* means an intention of always remaining.²

ANNEXATION.—As to the annexation of territory by political division, see the titles COUNTIES; MUNICIPAL CORPORATIONS; SCHOOLS; TOWNS AND TOWNSHIPS.

ANNEXED.—"Annexed" means attached to, added to, connected with. The term is frequently used in statutes requiring that one document shall be annexed to another. In the notes will be found examples of what has been held a sufficient compliance with such provisions.³

Where a cattle dealer sold a cow, and fraudulently represented it as free from infectious disease, knowing that it was not, and the purchaser afterwards placed the cow with five others, which caught the disease and died, it was held that the purchaser was entitled to recover the value of all the cows. *Mullett v. Mason*, L. R. 1 C. P. 559.

Proof of Value.—Where animals lost by disease were in an uninhabited country, with no market within two hundred miles, the plaintiffs, in the proof of the value of the cattle lost, will not be restricted to a single market, nor to the very time of the loss, but they may give in evidence the value of the animals in several markets nearest the place where the cattle were lost, and it is for the jury to determine the value at the time and place of the loss of the animals. *Sellar v. Clelland*, 2 Colo. 532.

Joint Owners—Apportionment of Damages.—Where it appeared that plaintiff's cattle had been exposed to a disease from two different lots of cattle, one of which belonged to the defendant and the other to a third person, it was held that it would be improper to instruct the jury that if they found that if both lots of cattle contributed to the disease, and they were unable to say which one, they should find for the defendant, and that such instructions should be given only on the assumption that the disease was communicated by the cattle of the one party solely, and not by the cattle of both. *Frazee v. Milk*, 56 Ill. 435, followed in *Newkirk v. Milk*, 62 Ill. 172. See also *Yeazel v. Alexander*, 58 Ill. 254.

1. Contributory Negligence.—*Patee v. Adams*, 37 Kan. 133; *Coyle v. Conway*, 35 Mo. App. 490.

Under a statute (Laws of *Illinois* 1869, p. 402) making persons liable for damages occasioned by communication of infectious disease through bringing Texas cattle into the state, it is held that where the plaintiff placed his cattle, among which were Texas cattle, in his own pasture, and afterwards, discovering that there were Texas cattle among them, still kept possession of them, keeping them with his other cattle, it was held that he was entitled to recover only such damage as resulted before he knew the character of the cattle, and that he was not entitled to recover for any damage caused afterward. *Harris v. Hatfield*, 71 Ill. 298.

Under a statute (Laws of *Illinois* 1867, Act Feb. 27) prohibiting the importation of Texas cattle, it is held that ordinary negligence on the part of the plaintiff contributing to the injury would not bar his right of recovery, and that nothing less than gross negligence would do so. *Somerville v. Marks*, 58 Ill. 371, followed in *Sangamon Distilling Co. v. Young*, 77 Ill. 197.

2. Berry v. Wilcox, 44 Neb. 82.

3. Papers Together in Envelope.—Where a statute required that a magistrate's certificate should be annexed to the deposition, it was held, where deponent referred in his answer to certain books, making them a part of his answer, and the books together with the deposition were inclosed in a wrapper, sealed up and directed to the clerk of the court, that this was a sufficient compliance with the statute. The court said: "The exception to the admission of the deposition of Rice, with the hotel registers therein referred to, is not well taken. The books with the deposition were together inclosed, sealed up and directed to the clerk of the court by the magistrate, the envelope in which they were placed was opened by the clerk, and the contents were taken therefrom and retained by him, until introduced as evidence. This leaves no room to question the identity of these books, or to doubt that they are in the same condition as when produced before the magistrate. If not the best, it is one method of annexation, within the meaning of the statute, which requires the magistrate's certificate to be annexed to the deposition (Gen. Stat., c. 131, § 26), and is not open to objection when the facts show that the security aimed at has been practically attained. In *Savage v. Birchead*, 20 Pick. (Mass.) 167, it was held that a deposition, taken under a commission, which was not annexed to the commission, or the interrogatories, was sufficiently connected by the envelope and official seal, and as much so as if attached by a ribbon. In either case there might be fraud or mistake; but in the absence of any suggestion of it, the objection cannot prevail." *Shaw v. McGregory*, 105 Mass. 96.

Placing the Papers Loosely Together.—Writing and signing a process on a separate paper from that on which the original petition is extended, and then placing the paper

ANNOUNCE.—To give public notice of; to proclaim; to declare; to publish; to pronounce; to declare by judicial sentence.¹

ANNOYANCE.—See note 2.

containing the process loosely within the folds of the petition, is not in compliance with the provision which requires that the process shall be *annexed* to the petition. The court said: "In this order, it is assumed that processes had been attached, and if so, that fact must have appeared from Campbell's evidence—there being no other to the point. Campbell swears positively to nothing. He gives his 'recollection' as to what he did. And what was that recollection? That he made out and signed processes for these cases, on separate papers, and laid them loosely in the folds of the declarations. This is not *annexing* process. The law expressly requires that process shall be *annexed* to the declaration; and further, that any 'process issued and returned in any other way shall be null and void.' It is the process that brings the party into court; hence the particularity of the law. We hold that process must be either written, or printed and written, on the same paper with the declaration, or, if written on different paper, *that* must be securely attached by wax, or by tape, or some other safe ligature, to the declaration. Nothing short of this is a compliance with the law. Campbell's testimony negatives such attachment, and there was, therefore, error in the passage of the order." *Ballard v. Bancroft*, 31 Ga. 503.

In *Saco v. Hopkinton*, 29 Me. 268, the court said: "The laying a loose paper within the folds of a writ does not make it any part of the writ, nor can it be said with any propriety of language to be *annexed* to the writ. The removal of such paper by the plaintiff would not be a mutilation of his writ, nor render him amenable to any one."

Written on the Back.—It was held that where an affidavit to foreclose a mortgage was written on the back thereof, it was *annexed* thereto within the meaning of the statute. *Lilly v. Willis*, 73 Ga. 139.

But where a statute requires that the certificate should be on the back of the instrument, it was held that it was not sufficient to write the certificate on a separate paper and *annex* it to the instrument. The court said: "This provision, enlarged so as to authorize the officer to administer the oath, is continued to the present time. In Rev. Stat., c. 76, § 2, it reads: 'and a certificate of the oath shall be made, stating the date of its administration, on the *back of the execution*, by the person who administered it.' The meaning of this language would seem to be unmistakable. That which is written upon a separate piece of paper is not upon the 'back of the execution,' even though the paper may be, at one corner, affixed to it. If it were affixed throughout, so that it could not be removed, it might become a part of the execution and a compliance with the law, but not otherwise. That this construction of the statute is in accordance with the intention of the legislature, is evident not only from the language used, but also from another provision of the statute relating

to the same general subject. By the revision of 1857, c. 76, § 3, the appraisers are to make their return 'on the back of the execution.' In 1863, c. 165, this was amended by adding the words, 'or *annexed* to the execution,' leaving the provision in relation to the certificate of the oath the same as before, thus showing clearly that the legislature understood that a return 'on the back' was not the same as one *annexed*, and although it might seem desirable to change the law in respect to the return of the appraiser, it was not so in respect to the certificate." *Hall v. Staples*, 74 Me. 178.

Tied to the Book.—Tying the collector's warrant to the tax book is a sufficient compliance with the statute requiring that a warrant be *annexed* to the collector's book. *Loehr v. People*, 132 Ill. 504.

Referring to Former Paper.—Where an agreement referred to a clause in a former agreement, and provided that it should extend to the new agreement as if it had been repeated therein, it was held that the clause referred to could not be considered as "*annexed* to" the new agreement so as to make an additional stamp necessary, on the ground of the agreement with the clause containing more than one thousand and eighty words. *Atwood v. Small*, 7 B. & C. 390, 14 E. C. L. 59.

Arbitration—Incorporated into the Submission. (See also the title ARBITRATION AND AWARD.)—Under the *Maine* statute (R. S.), c. 108, § 2, which requires that where a specific demand only is submitted to arbitration, it shall be *annexed* to the agreement and signed by the party making it, it was held that where the submission recited the demand, it was *annexed* within the terms of the statute, and that as the demand submitted was specified in the submission, and the submission was signed by the plaintiff, the demand was signed. *Deering v. Saco*, 68 Me. 322.

Fixtures—Annexed to the Freehold. (See also the titles FIXTURES; LANDLORD AND TENANT.) An expression used to define a fixture. "By the expression '*annexed* to the freehold,' is meant fastened to or connected with it; mere juxtaposition, or the laying of an object, however heavy, on the freehold, does not amount to annexation." *Merritt v. Judd*, 14 Cal. 59. See *Elwes v. Maw*, 3 East 38; 2 Smith's Leading Cases (8th Am. ed.) 169.

1. Findings Announced.—Where the court had directed the clerk to make an entry in a cause, setting forth the finding of the court, and subsequently allowed the plaintiff to dismiss his complaint, and erased the entry, it was held error, inasmuch as the finding of the court had been *announced*, and therefore the action of the court was in contravention of the statute which forbids that an action shall be dismissed except at any time before the finding of the court is *announced*. 2 Rev. Stat. 1876, p. 184, § 363. *Walker v. Heller*, 56 Ind. 298.

2. Real Covenants—Distinguished from Nuisances. (See also the titles NUISANCES; LAND-

ANNUAL—ANNUALLY. (See also the titles **ANNUITY**; **INTEREST**.)—"Annual," from the Latin *annus*, usually means yearly or every twelve months.¹ "Annually" means year by year.²

LORD AND TENANT; COVENANTS.—In *Tod-Heaty v. Benham*, 40 Ch. Div. 80, it was held that the establishment of a hospital for the treatment of outdoor patients was an *annoyance* within a covenant in a lease against doing any act "which shall or may be or grow to the *annoyance*, nuisance, grievance, or damage of the lessor." The court in that case distinguished *annoyance* from nuisance, and cited the similar case of *Bramwell v. Lacy*, 10 Ch. Div. 691, as supporting its view. To the same effect, see *Watson v. Leamington College*, 25 S. J. 30. Cotton, L. J., said: "In my opinion an act which is an interference with the pleasurable enjoyment of a house is an *annoyance* or grievance, and within the definition given by V.-C. Knight-Bruce in *Walter v. Selfe*, 4 De G. & S. 322. It is not sufficient, in order to bring the case within the words of the covenant, for the plaintiffs to show that a particular man objects to what is done, but we must be satisfied by argument and by evidence that reasonable people, having regard to the ordinary use of a house for pleasurable enjoyment, would be annoyed or aggrieved by what is being done. In my opinion it is not necessary, in order to show that there has been reasonable ground for *annoyance* or grievance, to prove absolute danger or risk of infection. In my opinion a reasonable apprehension of nuisance from acts done by the defendant is a matter which will produce such interference with the pleasurable and reasonable enjoyment of the adjoining houses as to come within the words '*annoyance* or grievance,' not that any particular person is annoyed or aggrieved, but that there is *annoyance* or grievance to persons who entertain reasonable views."

Synonymous with Nuisance.—For *annoyance* used as synonymous with "nuisance," see 3 Bl. Com., p. 215; Ohio, etc., *R. Co. v. Simon*, 40 Ind. 285.

1. *State v. McCullough*, 3 Nev. 224. The court in that case said: "Wherever used in contracts, it is construed to mean every twelve calendar months. *Annual* interest is interest payable every twelve months. *Annual* rent is construed in the same way."

2. *Juker v. Com.*, 20 Pa. St. 494.

The word *annually* means every year. *Union Iron Co. v. Pierce*, 4 Biss. (U. S.) 330.

"The ordinary and natural meaning of a direction by one person to pay to another a specified sum *annually*, or 'each year,' is that the specified sum is to be paid in an annual or yearly payment. The word or phrase, naturally interpreted, would be regarded as fixing both the measure and time of payment." *Kearney v. Cruikshank*, 117 N. Y. 99.

Annual Value.—As to the meaning of these words in the English income tax, see *Stevens v. Bishop*, 19 Q. B. Div. 442; *Dobb v. Grand Junction Waterworks Co.*, L. R. 9 App. Cas. 49; *West Middlesex Waterworks v. Coleman*, 14 Q. B. Div. 529; *Reg. v. Gainsborough Union*, L. R. 7 Q. B. 64; *R. v. Smith*, 50 J. P. 215; *Bristol Waterworks Co. v. Uren*, 15 Q. B. Div. 637. See also **VALUE**, and the title **INCOME TAX**.

Payments Annually—One Payment.—Where the charter of a church provided that members who paid a certain sum *annually* should be entitled to vote, it was held that the payment of the same just before election, where no payments had been made in former years, did not entitle the person making such payment to vote. *Juker v. Com.*, 20 Pa. St. 494.

Interest. (See also the title **INTEREST**.)—The meaning of the term *annually*, as applied to interest, is not an undertaking to pay interest at the end of one year only, but to pay interest at the end of each and every year during a period of time, either fixed or contingent. *Sparhawk v. Wills*, 6 Gray (Mass.) 164.

In *Westfield v. Westfield*, 19 S. Car. 89, it was said: "The law is well settled, that when the maker of a note promises to pay the sum mentioned in it, at twelve or within twelve months after its date, 'with interest from date *payable annually*,' it is necessary, in order to give the words italicized any force and effect, to construe the promise as a promise to pay the interest *annually* until the note is fully paid. Hence, on a note so drawn, the interest will continue to be payable *annually* after as well as before maturity. But where the promise is to pay more than twelve months after date, 'with interest from date payable *annually*,' no such necessity arises, and therefore the interest does not continue to be payable *annually* after maturity. This doctrine is so well settled in this state that it is not necessary to do more than refer to the cases. *Singleton v. Lewis*, 2 Hill (S. Car.) 408; *O'Neill v. Sims*, 1 Strobb. (S. Car.) 115; *O'Neill v. Bookman*, 9 Rich. (S. Car.) 80; *Wright v. Eaves*, 10 Rich. Eq. (S. Car.) 582; *Sharpe v. Lee*, 14 S. Car. 341."

In legal contemplation, a contract for *annual* interest is the same as if written: "for interest *annually*." *Catlin v. Lyman*, 16 Vt. 44.

Annual Income.—See **INCOME**.

Annual Elections.—See the title **ELECTIONS**.

Alteration of Instruments.—As to the effect of the addition of the word *annually* to the interest clause of a note, see the title **ALTERATION OF INSTRUMENTS**.

ANNUITIES.

BY CHARLES R. COVILLE.

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CROSS-REFERENCES.

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I. DEFINITION.—An annuity, in its technical meaning, is a yearly sum stipulated to be paid to another in fee, or for life or years, and chargeable only on the person of the grantor.¹

Term Used in a Broader Sense.—The term as used in its broader sense is a fixed sum, granted or bequeathed, payable periodically,² subject to such specific limitations as to its duration as the grantor or donor may impose,³ and may, when such intention is expressed, be a charge on real estate as well as on the person.⁴

1. The Term Defined.—Co. Litt. 144 *b*; 2 Bl. Com. 40; Bac. Abr., tit. "Annuity;" Turrentine v. Perkins, 46 Ala. 631; Bartlett v. Slater, 53 Conn. 102, 53 Am. Rep. 73; Owings' Case, 1 Bland (Md.) 290; Wagstaff v. Lowerre, 23 Barb. (N. Y.) 209; Kearney v. Cruikshank, 117 N. Y. 95, reversing 46 Hun (N. Y.) 219; Mosser v. Leshner, 154 Pa. St. 87, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 592, 593; Horton v. Cook, 10 Watts (Pa.) 125, 36 Am. Dec. 151.

In *Kearney v. Cruikshank*, 117 N. Y. 95, reversing 46 Hun (N. Y.) 219, the court, by Andrews, J., said: "In general terms, an annuity is a yearly payment of a certain sum of money granted to another in fee for life or for years." To same effect, see *Bartlett v. Slater*, 53 Conn. 102, 55 Am. Rep. 73.

In *Pearson v. Chace*, 10 R. I. 455, an annuity is defined "as a stated sum payable annually."

An annuity *ex vi termini* involves the notion of personal enjoyment. *In re Hemingway*, 45 Ch. Div. 453.

2. *Apple's Estate*, 66 Cal. 438.

Sum Payable Weekly may Be an Annuity.—*Wright v. Callender*, 2 DeG. M. & G. 652, 16 Jur. 647, 21 L. J. Ch. 787; *Rees v. Engelback*, L. R. 12 Eq. 225.

Sum Payable Quarterly may Be an Annuity.—*Hicks v. Ross*, L. R. 14 Eq. 141, 41 L. J. Ch. 677, 26 L. T. N. S. 470; *Atkinson v. Littlewood*, L. R. 18 Eq. 595; *Martin v. Drinkwater*, 2 Beav. 215; *Slanning v. Style*, 3 P. Wms. 334; *Radburn v. Jervis*, 3 Beav. 450; *Parsons v. Parsons*, L. R. 8 Eq. 260; *Bates v. Barry*, 125 Mass. 83, 28 Am. Rep. 207; *Cummings v. Cummings*, 146 Mass. 501; *Wiggin v. Swett*, 6 Met. (Mass.) 194, 39 Am. Dec. 716; *Cochrane v. Walker*, 4 Dem. (N. Y.) 164; *Blight v. Blight*, 51 Pa. St. 420; *Fisher v. Fisher*, 4 Am. L. J. 539, 5 Pa. L. J. 178.

Sum Payable Semi-annually may Be an Annuity.—*Warren v. Gregg*, 116 Mass. 304; *Stewart v. Chambers*, 2 Sandf. Ch. (N. Y.) 382; *Ex p. McComb*, 4 Bradf. (N. Y.) 151; *Griswold v. Griswold*, 4 Bradf. (N. Y.) 216; *In re Pierce's Estate*, 56 Wis. 560.

Contingent Annuity.—An annuity may be contingent. *Ives v. Dodgson*, L. R. 9 Eq. 401, 39 L. J. Ch. 693, 23 L. T. N. S. 215; *Bates v. Barry*, 125 Mass. 83, 28 Am. Rep. 207.

Cumulative Annuity.—An annuity may be cumulative. *Hartley v. Ostler*, 2 Jur. N. S. 1199; *Roch v. Callen*, 12 Jur. 112.

Where a will provided that a certain sum should be paid to the testator's son annually

after he should have attained the age of twenty-one years, and a larger sum when he should have attained the age of twenty-five, and a still larger sum when he should have attained the age of thirty, it was held that the annuities to be paid to the son were by way of substitution, and not cumulative. *Sears v. Hardy*, 120 Mass. 524.

Redeemable Annuity.—A redeemable annuity is merely a loan for money. *Floyer v. Sherard*, Ambl. 18. Sometimes called a constituted annuity. *La. C. C.*, § 2793-2800. See also *Mayor, etc., v. Duplessis*, 5 Martin (La.) 309.

Distinction between Life and Perpetual Annuities.—The only real distinction between a life annuity and an absolute or perpetual annuity is that in the latter case the annuitant is entitled to the corpus of the invested fund. *Bignold v. Giles*, 4 Drew. 343, 5 Jur. N. S. 84, 28 L. J. Ch. 358.

Continuing Annuities.—A continuing annuity is one that does not terminate with the life of the first taker. *Kearney v. Cruikshank*, 117 N. Y. 95, reversing 46 Hun (N. Y.) 219.

Annuity Not an Open Account.—A claim for an annuity of a certain sum, created by deed, and payable annually during the life of the annuitant, is not an open account within the three-years statute of limitations, under *Alabama Rev. Code*, § 2904. *Taylor v. Forsey*, 56 Ala. 426.

Annuities Not Insurance.—Annuities are not cases of insurance, and are not to be governed by the rule applicable to life insurance. *People v. Security L. Ins., etc., Co.*, 7 Abb. N. Cas. (N. Y. Supreme Ct.) 198, 233. See also *In re National Provincial Assurance Soc.*, L. R. 9 Eq. 314.

3. *Morgan v. Pope*, 7 Coldw. (Tenn.) 541; *Anderson v. Hammond*, 2 Lea (Tenn.) 281, 31 Am. Rep. 612.

Perpetual, Life or Years.—When not prohibited by statute, an annuity may be perpetual. *Kerr v. Middlesex Hospital*, 2 De G. M. & G. 576, 17 Jur. 49, 22 L. J. Ch. 355; *Rawlings v. Jennings*, 13 Ves. Jr. 39; for life, *Rawlings v. Jennings*, 13 Ves. Jr. 39; or for any period of years, *Blewitt v. Stauffers*, Cr. & Ph. 274, 10 L. J. N. S. Ch. 342, 5 Jur. 979, reversing 10 Sim. 491, 9 L. J. N. S. Ch. 209, 4 Jur. 501. See the title PERPETUITIES AND TRUSTS FOR ACCUMULATION.

4. *Cowie v. Muir* (1893), App. Cas. 674; *Ex p. McComb*, 4 Bradf. (N. Y.) 151.

An annuity may be charged on land in the form of rent. *Horton v. Cook*, 10 Watts (Pa.) 127, 36 Am. Dec. 151.

II. HOW CREATED.—1. In General.—An annuity may be created by contract, deed, marriage or *mortis causa* settlement, and by will.¹

2. Contract for Annuity.—A contract for an annuity, like contracts in general, requires a consideration to uphold it,² but mere inadequacy of

1. Contract.—*Cox v. Maxwell*, 151 Mass. 336. It may be created by contract of insurance. *Gresham L. Assur. Soc. v. Styles*, 25 Q. B. Div. 351.

By Deed.—*Sloan v. Frothingham*, 72 Ala. 589; *Palmer v. Newell*, 20 Beav. 32, 8 De G. M. & G. 74, 2 Jur. N. S. 268, 25 L. J. Ch. 461; *Atkinson v. Littlewood*, L. R. 18 Eq. 595, 31 L. T. N. S. 225.

Deed of Separation.—*Hatfield v. Minet*, 8 Ch. Div. 136.

Marriage Settlement.—*Ley v. Ley*, L. R. 6 Eq. 174; *Dawson v. Robinson*, 25 L. T. N. S. 486; *In re Gillman*, 10 Ir. R. Eq. 92.

Mortis Causa Settlement.—*Cowie v. Muirden* (1893), App. Cas. 674.

By Will.—*Radburn v. Jervis*, 3 Beav. 450; *Mitchell v. Mitchell*, 29 Md. 581; *Perrin v. Lepper*, 72 Mich. 454; *West v. Moore*, 37 Miss. 114; *Matter of Willets*, 112 N. Y. 289, *affirming* 5 Dem. (N. Y.) 342; *Roos' Estate*, 4 Misc. Rep. (N. Y. Surrogate Ct.) 232; *Adams v. Adams*, 10 Leigh (Va.) 552; *Catlett v. Marshall*, 10 Leigh (Va.) 83; *Bronson v. Phelps*, 58 Vt. 612; *Woodhill v. Thomas*, 18 Ont. Rep. 277.

2. Marriage Is a Good Consideration for an annuity. *Fowler v. Fowler*, 3 P. Wms. 353. See also *Atkinson v. Littlewood*, L. R. 18 Eq. 595.

Releasing Pecuniary Advantage.—Giving up a pecuniary advantage at the time an annuity is granted amounts to a valuable consideration, and is in effect the same as a sum of money paid down at the time. *Stiles v. Atty.-Gen.*, 2 Atk. 152.

Forbearance to Sue.—So where A granted to B an annuity issuing out of a bond and mortgage, and C undertook to pay the arrearages of the annuity in consideration that B should not sue the personal representatives of A, it was held that "a promise to pay an annuity in consideration of forbearance to sue the personal representatives of the grantor is binding, and may be enforced against the promisor." *Horton v. Cook*, 10 Watts (Pa.) 124, 36 Am. Dec. 151.

Release by Husband of Marital Rights.—In a deed executed upon a separation between husband and wife, the wife charged her separate property with the payment of an annuity to the husband, and the husband released his marital rights in respect of all future property acquired by the wife, and it was held that the release of the husband was a good consideration for the grant of the annuity by the wife. *Logan v. Birkett*, 1 Myl. & K. 220, 2 L. J. N. S. Ch. 52.

Covenant to Grant Annuity.—A covenant by a husband to secure to his wife an annuity, during her life, in case she should survive him, is a sufficient consideration to support a grant of an annuity from the wife's father. *Ex p. Draycott*, 2 Glyn & J. 283.

Covenant against Wife's Debts.—By articles

of separation, a husband covenanted with his wife's trustee to secure her an annuity of a certain sum, and the trustee covenanted with the husband, that on the annuity being secured, he would enter into a covenant to indemnify the husband against the wife's debts. And it was held, that the latter covenant, though conditional, was sufficient to support the contract for the annuity. *Wellesley v. Wellesley*, 10 Sim. 256, 4 Myl. & C. 561, 9 L. J. N. S. Ch. 21, 7 Jur. 2.

Breach of Promise of Marriage.—An annuity granted, the consideration of which appears to be the settlement of a breach of promise of marriage, is a contract for a valuable consideration, and will be enforced. *Keenan v. Handley*, 2 De G. J. & S. 283, 10 Jur. N. S. 906, 12 W. R. 1021, 10 L. T. N. S. 800.

Money Loaned.—Money loaned and paid for the education and advancement of the defendant is held good consideration for the grant of an annuity. *Kelfe v. Ambrose*, 7 T. R. 551.

Encouragement of Learning Not Sufficient.—An annuity granted in consideration that the public good is advanced by the encouragement of learning, is held not to be a sufficient consideration to sustain an annuity. *Stiles v. Atty.-Gen.*, 2 Atk. 152.

Past Seduction and Cohabitation is not a good consideration for an annuity. *Beaumont v. Reeve*, 8 Q. B. 483, 55 E. C. L. 483, 15 L. J. Q. B. 141, 10 Jur. 284.

Natural Love and Affection.—An annuity for which there is no consideration save natural love and affection, and which the testator was under no obligation to pay, creates no charge upon the estate, and the fact that it was paid by the testator for a long course of years, and that he gave written instructions to his agent for its punctual payment while in life, creates no legal or equitable obligations continuant after his death. *Kearney v. Kearney*, 17 N. J. Eq. 59, *affirmed* in 17 N. J. Eq. 504.

Joint Liability on Contract for Annuity.—Two persons entered into an agreement to pay an equal annuity to a third person, each giving a mortgage on real estate to secure the payment of his moiety, with a proviso that at the death of the annuitant any part of the annuity unpaid over and above the funeral expenses should be equally divided between each, and it was held that the annuitant could enforce the mortgage against either, and that it would be no defense thereto that the annuitant had failed to make the other party pay, the right to the surplus, if any, only accruing after the death of the annuitant. *Smith v. Smith*, 15 Lea (Tenn.) 93.

Payable to Husband and Wife during Life.—An agreement to pay an annuity to a husband and wife "during their natural lives" binds the party to pay the annuity during the joint lives of the husband and wife and during the life of the survivor. *Douglas v. Parsons*, 22

consideration, in the absence of fraud, will be no ground for setting it aside.¹

Specific Performance.—Specific performance of an agreement for the sale of an annuity, will be decreed by a court of equity.²

Purchase of Annuity Not Usurious.—A *bona fide* contract for, or the purchase of, an annuity will not be usurious. If, however, the transaction is a mere device for procuring an illegal rate of interest, it will be treated by the courts as usurious.³

III. CHARACTERISTICS—1. **Generally**—*a*. **DISTINGUISHED FROM INCOME.**—There is a distinction between an “income” and an “annuity.” The former embraces only the net profits after deducting all necessary expenses and charges, and may be uncertain in amount. The latter is a fixed amount directed to be paid absolutely and generally without contingency.⁴

Ohio St. 526; Hayden v. Snell, 9 Gray (Mass.) 365, 69 Am. Dec. 294.

Amount of Recovery.—A written contract binding the makers to pay three hundred dollars so as to secure an annuity for sixteen dollars and sixty-six cents, being an annuity payable by one of the makers thereto, with a provision that in case of any default in payment of the annuity, the whole sum of three hundred dollars shall be paid, is in the nature of a penal bond, and no more can be recovered upon it than the amount due upon the annuity. Cairnes v. Knight, 17 Ohio St. 69.

Contract—Evidence of.—Where the plaintiff proposed that the trustee should promise “to give me [the plaintiff] the sum of two thousand dollars during my life,” by way of compensation, and the trustee assented to the proposition, it was held to be a valid contract to pay the plaintiff an annuity during her life. Cox v. Maxwell, 151 Mass. 336.

1. Inadequacy of Consideration.—Vernor v. Winstanley, West 395; Speed v. Phillips, 3 Anstr. 732; Floyer v. Sherard, AmbL. 18; Low v. Barchard, 8 Ves. Jr. 133.

But in Gray v. Warner, L. R. 16 Eq. 577, 42 L. J. Ch. 556, 28 L. T. N. S. 835, 21 W. R. 808, the purchase by an executor of his coexecutor's legacy in consideration of a life annuity, the life being a bad one, was set aside on the ground of inadequacy of consideration. See the title CATCHING BARGAIN.

Misrepresentation as to Age.—A misrepresentation as to age, although unintentional, as to the life of one on whom an annuity is purchased, is ground for declaring the contract to be void *ab initio*. Atty.-Gen. v. Ray, L. R. 9 Ch. 397, 43 L. J. Ch. 478, 22 W. R. 498, 29 L. T. 373, affirming 43 L. J. Ch. 321, 22 W. R. 361.

Mistake in Calculating Amount Payable.—A mistake in calculating the amount payable as an annuity upon a given principle has been held a ground for setting aside an annuity. Carpmel v. Powis, 10 Beav. 36, 16 L. J. N. S. Ch. 31, 11 Jur. 158.

Burden of Proof.—As a general rule the burden of proof is on the person seeking to set aside a contract for an annuity. Blackie v. Clark, 15 Beav. 595, 22 L. J. Ch. 377.

2. Specific Performance of Agreement for Annuity.—Pritchard v. Ovey, 1 J. & W. 396;

Keenan v. Handley, 2 De G. J. & S. 283, 10 Jur. N. S. 906, 12 W. R. 1021, 10 L. T. N. S. 800; Swift v. Swift, 3 Ir. Eq. R. 267; Annandale v. Harris, 2 P. Wms. 432, affirmed in 1 Bro. P. C. 250. See the title SPECIFIC PERFORMANCE.

Annuitant Entitled to Security.—An agreement to purchase land for an annuity for the life of the vendor, to be a charge on the land, and to be paid quarterly, entitles the vendor not only to the security, but to the covenant of the purchaser for the payment of the annuity. Bower v. Cooper, 2 Hare 408, 11 L. J. N. S. Ch. 287, 6 Jur. 681.

3. Usury.—Lawley v. Hooper, 3 Atk. 278; Chesterfield v. Janssen, 1 Atk. 347, 1 Wils. 295; Scott v. Lloyd, 9 Pet. (U. S.) 449; Turrentine v. Perkins, 46 Ala. 631.

In Fuller's Case, 4 Leon 208, and Symonds v. Cockerill, Noy 151, a distinction is taken between the purchase of an annuity without any communication respecting a loan, and a purchase where the negotiation commences with an application to borrow money.

It seems that a mediated loan converted into the purchase of an annuity would be considered as a suspicious circumstance, where the question of the validity of the transaction is raised. Scott v. Lloyd, 9 Pet. (U. S.) 449.

In Chesterfield v. Janssen, 1 Atk. 340, it is held that if a bargain is really for an annuity, it is not usury, but if it stands on the same footing as borrowing and lending money, it is otherwise. See the title USURY.

4. Income and Annuity Distinguished.—Bartlett v. Slater, 53 Conn. 102, 55 Am. Rep. 73; Carr v. Bennett, 3 Dem. (N. Y.) 442; Booth v. Ammerman, 4 Bradf. (N. Y.) 135; *Ex p.* McComb, 4 Bradf. (N. Y.) 151; Pearson v. Chace, 10 R. I. 455.

The Pennsylvania courts controvert this view, and uniformly hold that there is no substantial difference in legal aspect between the gift of an annuity for life and of the interest or income of a fund for life, nor between the gift simply of interest and of interest payable annually. Flickwir's Estate, 136 Pa. St. 381; Ritter's Estate, 148 Pa. St. 577; Hoffman's Estate, 3 Pa. Dist. Rep. 663; Pennsylvania Co.'s App., 41 Leg. Int. 26, cited in 136 Pa. St. 381, said in Flickwir's Estate, 136 Pa. St. 381, to have been affirmed on appeal.

b. DISTINGUISHED FROM LEGACY.—The term “legacy” *prima facie* comprehends annuities,¹ and where an annuity springs alone from a will, and is given by it, it is a legacy,² unless the context of the will shows that such is not the intention of the testator.³

In *Hilyard's Estate*, 5 W. & S. (Pa.) 30, this view is qualified by the expression that the words “income” and “annuity” are sometimes treated synonymously, just as interest payable annually.

Income Defined.—Income includes all cases where interest of a certain sum is given, or where the profits or earnings of the property, although payable at fixed periods, may vary from time to time. *Pearson v. Chace*, 10 R. I. 455.

In some cases, perhaps, there may be a distinction between the gift of a certain sum per annum and the gift of an annuity, the term “annuity” having by usage acquired somewhat more relation to an interest limited by the duration of life than the term “a certain sum per annum” has acquired. *Hedges v. Harpur*, 3 De G. & J. 134.

Illustrations.—A bequest of “the sum of five hundred dollars, payable in sums of one hundred dollars yearly,” is not an annuity, and is to be paid out of the estate. *Stephens v. Milnor*, 24 N. J. Eq. 358.

But a bequest of “an annuity or yearly sum of three hundred dollars to be paid yearly and every year, for fifteen years from and after my decease,” is an annuity for years, and to be paid out of the income under the directions of the will. *Stephens v. Milnor*, 24 N. J. Eq. 358.

In *Craig v. Craig*, 3 Barb. Ch. (N. Y.) 76, there was a direction to invest a sum of money enough to produce by legal interest at least five hundred dollars per year, and this was treated as an annuity.

In *Pearson v. Chace*, 10 R. I. 455, the testator devised to his wife the dividends and income of certain shares of bank stock during her natural life, or so long as she remained a widow, and in lieu of dower, the reversionary right being in his three daughters, and it was held that the gift was one of income, and not an annuity, and that his wife was therefore liable to pay the taxes upon the stock so long as she received the income from it.

Necessity for Distinction.—It is very necessary in many cases to clearly distinguish between an income and an annuity, for the reason that in the former case the taxes upon the fund and expenses of the trust must be paid out of the income, and in the latter the clear sum of the annuity must be paid without any deduction, on account of taxes imposed upon the fund producing the annuity, which must be paid out of the estate. *Whitson v. Whitson*, 53 N. Y. 479; *Stubbs v. Stubbs*, 4 Redf. (N. Y.) 175; *Pearson v. Chace*, 10 R. I. 455.

Bequest of Interest.—A bequest of the interest of a stated amount cannot be treated as an annuity, but only as a gift of income. *Bartlett v. Slater*, 53 Conn. 102, 55 Am. Rep. 73; *Booth v. Ammerman*, 4 Bradf. (N. Y.) 134; *Stubbs v. Stubbs*, 4 Bradf. (N. Y.) 170; *Whitson v. Whitson*, 53 N. Y. 479.

A will contained a bequest to the testator's sister of “the interest upon fifteen hundred dollars, in case she should become a widow, during her widowhood, payable annually,” and that the executors should invest the estate in such sum and upon such terms as they might deem necessary for “the due execution of the will.” It was held that the legacy was not an annuity, but simply a gift of interest or income. *Booth v. Ammerman*, 4 Bradf. (N. Y.) 132.

But in *Brimblecom v. Haven*, 12 Cush. (Mass.) 511, a bequest of the interest of a certain sum, not setting apart any fund for its payment, was held to be the gift of an annuity equal to the interest of said sum, and not chargeable with any tax, expense of management, or other deduction by the executor.

Certain Sum to be Raised Annually.—Where there is a clear direction to raise a certain sum annually, that partakes of the essence of an annuity, notwithstanding the mode of raising it on investments be prescribed. *Craig v. Craig*, 3 Barb. Ch. (N. Y.) 76; *Booth v. Ammerman*, 4 Bradf. (N. Y.) 134.

1. Legacy and Annuity Distinguished.—*Gaskin v. Rogers*, L. R. 2 Eq. 284, 14 W. R. 707; *Heath v. Weston*, 3 De G. M. & G. 601; *Mullins v. Smith*, 1 D. & Sm. 204; *Ward v. Grey*, 26 Beav. 485; *Tichenor v. Tichenor*, 41 N. J. Eq. 39.

In *Trent v. Trent*, Gilmer (Va.) 174, 9 Am. Dec. 594, it is held that an annuity is a legacy charged on the whole estate. See the title LEGACIES AND DEVISES.

2. Annuity Given by Will.—*Heatherington v. Lewenberg*, 61 Miss. 372. See also *Swift v. Nash*, 2 Keen 20, 5 L. J. N. S. Ch. 363, 1 Jur. 557.

“While the two words under many circumstances may have different meanings, they have not here [when created by will]. A man may purchase an annuity which is not a legacy, yet where an annuity springs alone from a will, and is given by it, it is a legacy.” *Chalmers, J.*, in *Heatherington v. Lewenberg*, 61 Miss. 372.

3. Intention of Testator.—*Gaskin v. Rogers*, L. R. 2 Eq. 284, 14 W. R. 707; *Bromley v. Wright*, 7 Hare 334; *Sibley v. Perry*, 7 Ves. Jr. 522.

“Generally speaking, annuities are legacies, although in many cases, arising from the peculiar terms of a will, a distinction is made between them.” *Ward v. Grey*, 26 Beav. 485.

A provision in a will for the payment of five hundred dollars per year for ten years, in equal quarterly instalments, is an annuity contingent on the annuitant living so long, and not a legacy of five thousand dollars payable in instalments. *Bates v. Barry*, 125 Mass. 83, 28 Am. Rep. 207; *Weldon v. Bradshaw*, 7 Ir. R. Eq. 168.

c. **DISTINGUISHED FROM RENT-CHARGE.**—In those jurisdictions where the term “annuity” is used in its technical sense, it is distinguishable from a rent-charge, with which it is frequently confounded, in this: a rent-charge is a burden imposed upon, and issuing out of, lands; whereas an annuity is chargeable only upon the person of the grantor.¹

2. **Whether Realty or Personalty.**—An annuity charged upon real or personal property, if given with words of inheritance, will descend as real estate,² but for all other purposes than that of descent, it will be treated as personalty.³

Without Words of Limitation.—If the annuity is created without words of limitation appropriate to realty, it is personal estate, and will pass to the personal representatives of the annuitant.⁴

3. **When an Incumbrance.**—An annuity, when charged upon real estate, is an incumbrance, and follows the estate charged.⁵

But in *Shipperdson v. Tower*, 1 Y. & Coll. C. C. 441, 6 Jur. 658, and *Cornfield v. Wyndham*, 9 Jur. 651, 2 Colly. 184, 14 L. J. N. S. Ch. 375, on the construction of a charge of legacies in a will, annuities were held not to be included.

1. **Annuity and Rent-charge Distinguished.**—*Wagstaff v. Lowerre*, 23 Barb. (N. Y.) 209.

Where a will directs a trustee to make certain specific annual payments from the rents of certain real estate, an annuity is created, and not a rent-charge. *DeHaven v. Sherman*, 131 Ill. 115.

A bequest in the following words: “I give and bequeath to my daughter the sum of sixty dollars as an annuity to be paid to her out of the profits of my real estate annually,” was held to be an annuity and not a rent-charge. *Robinson v. Townshend*, 3 Gill & J. (Md.) 413, reversing *Townshend v. Duncan*, 2 Bland (Md.) 45.

Annuity—When a Rent-seck.—Where an annuity is given charged on land without any power of distress and entry, it is a rent-seck. *Sollory v. Leaver* L. R. 9 Eq. 22, 39 L. J. Ch. 72, 18 W. R. 59, 21 L. T. N. S. 453.

Rent-charge Descends to Heir.—It seems that a rent-charge descends to the heirs of an annuitant. *Wagstaff v. Lowerre*, 23 Barb. (N. Y.) 209.

2. **When there Are Words of Inheritance.**—*Taylor v. Martindale*, 12 Sim. 158, 10 L. J. N. S. Ch. 339, 5 Jur. 648; *Stafford v. Buckley*, 2 Ves. 170.

In *Turner v. Turner*, Ambl. 776, 1 Bro. C. C. 317, it is held that an annuity, when granted with words of inheritance, is descendible, but as to its security is personal only, and Lord Loughborough adds: “When charged upon land, it is either real or personal at the election of the holder, for he may proceed against either land or person. If proceeding out of coffers, it is personal only as to the remedy, but properly real as to its descent to heirs. An annuity when granted with words of inheritance is descendible, but as to its security is personal only, and may be granted in fee, of course as a qualified conditional fee, but is not entailable.”

3. **Personalty, except for Purposes of Descent.**—*Radburn v. Jervis*, 3 Beav. 450; *Turner v. Turner*, Ambl. 776, 1 Bro. C. C. 317; *Taylor*

v. Martindale, 12 Sim. 158, 10 L. J. N. S. Ch. 339, 5 Jur. 648; *Stafford v. Buckley*, 2 Ves. 170.

In *Radburn v. Jervis*, 3 Beav. 450, a perpetual annuity was granted payable out of coal duties, and it was held that though descendible to the heirs of the annuitant, it was personal and not real estate.

4. *Parsons v. Parsons*, L. R. 8 Eq. 260, 17 W. R. 1005; *Taylor v. Martindale*, 12 Sim. 158, 10 L. J. N. S. Ch. 339, 5 Jur. 648; *Joynt v. Richards*, L. R. 11 Ir. 278.

A testator gave real and personal estate to A, charged with the payment of annuities to the testator's six children “and their heirs respectively;” it was held that the annuities were perpetual and were personal estate, and that the statutory next of kin of one of the six children, who was dead at the date of the will, were entitled to one of the annuities, notwithstanding the use of the words “or their heirs respectively.” *Parsons v. Parsons*, L. R. 8 Eq. 260, 17 W. R. 1005.

A testator gave his real and personal estate to his wife, subject, among other bequests, to an annuity to A forever; it was held that on A dying intestate, the annuity passed, not to his heirs, but to his personal representatives. *Taylor v. Martindale*, 12 Sim. 158, 10 L. J. N. S. Ch. 339, 5 Jur. 648.

5. **Annuity as an Incumbrance.**—*Legard v. Hodges*, 1 Ves. Jr. 477; *Nash v. Taylor*, 83 Ind. 349; *Owings' Case*, 1 Bland (Md.) 290; *Ex p. McComb*, 4 Bradf. (N. Y.) 151; *Evans v. Sowles*, 51 Vt. 177; *Markwell v. Thorn*, 28 Wis. 548. See also *Clark v. Clark*, 147 N. Y. 639, affirming 84 Hun (N. Y.) 362.

Under a Residuary Devise “of all my estate, real, personal, or mixed, in fee simple, subject to the following annuities to be paid out of my estate,” the annuities are a lien upon the real estate prior to mortgages given by the devisee. *Wain v. Emley*, 26 N. J. Eq. 243.

In *Legard v. Hodges*, 1 Ves. Jr. 477, it is held that a covenant to set apart and pay annually profits of land is in equity a lien on the land against the convenantor and claimants under him with notice.

Mortgagee—Notice by Will.—A mortgagee of lands charged with the payment of an annuity cannot plead ignorance of such charge where

4. Liability for Taxes.—An annuitant can be assessed only for the sum actually due and unpaid on the annuity at the time of the assessment, and cannot be taxed for the principal sum producing the annuity.¹

the will by which the annuity is created constitutes one of the muniments of the mortgagor's title. *Nash v. Taylor*, 83 Ind. 349.

Partial Release by Annuitant.—A release of one, by the annuitant, from the payment of that part of the annuity which is chargeable on the latter's land, does not operate as a release of the charge upon the others' shares. *Nash v. Taylor*, 83 Ind. 349.

Partition of Lands Charged.—A judgment in partition which merely severs the lands charged with an annuity, and creates no new title, does not estop the annuitant from imposing payment of the annuity from such lands. *Nash v. Taylor*, 83 Ind. 349.

Purchaser of Lands Charged.—Certain lands were devised charged with the payment of a certain annuity, with the provision that in case the devisee should fail to pay the annuity, the land should become the property of the annuitant. The devisee sold the lands, and there were several mesne conveyances. In an action to enforce the lien of the annuitant, the defense was interposed that the owner was a *bona fide* holder, but it was held that, as his deed referred for a description to a prior deed which contained a notice of the charge, he was not a *bona fide* holder. *Evans v. Sowles*, 51 Vt. 177.

Merger.—In *Byam v. Sutton*, 19 Beav. 556, a life estate and a life annuity, charged on the same estate and devised to the same person, were held not to have merged, as the merger of the annuity in the life estate by operation of law would not be presumed. But see to the contrary *Glenn v. Spry*, 5 Md. 110.

Privity of Contract between Annuitant and Grantee.—Where the owner of land charged with an annuity conveyed the same, and covenanted with the grantee to protect the land from the charge of the annuity, and the grantee made subsequent conveyances, it was held that there was a privity of contract only between the owner and the grantee, and none between the annuitant and the grantee. *Clipping's Estate*, 162 Pa. St. 627.

Mortgagee of Property Charged.—Where lands devised are specifically charged with the payment of annuities, the mortgagee of the devisee can stand in no better position than the former. *Waln v. Emley*, 26 N. J. Eq. 243.

Mortgage Sale of Property Charged.—Real estate may be sold under a mortgage subject to the payment of annuities. *Waln v. Emley*, 26 N. J. Eq. 243.

Where annuities are charged on real estate prior to a mortgage, the annuitants are not necessary parties to the foreclosure of the mortgage, and the estate must be sold subject to the charge of the annuities. *Delabere v. Norwood*, 3 Swanst. 144.

But annuities may be cut off by a sale of property under prior claims, and the annuitants are properly parties to the suit. *Sullivan v. Sullivan*, 28 Beav. 102.

Enrolment of Memorial.—The enrolment of

a memorial in an annuity transaction is not necessary at common law. It is a matter collateral to the grantee's title, and only rendered requisite by statutory provisions. *Quære*, whether the English annuity acts are in force in *Canada*. *Emmons v. Crooks*, 1 Grant's Ch. (U. C.) 159.

By reason of the uniformity of the recording acts throughout the *United States*, records would doubtless show the existence of an annuity as affecting real estate. In *England*, "in a register county, they need only be searched for at the registrar's office. By 17 and 18 Vict., c. 90, repealing the usury laws, the act requiring grants of life annuities to be enrolled has been repealed, but by a later act (18 Vict., c. 18, § 12) they are still required to be registered as a safeguard to purchasers, inasmuch as the grantee of such an annuity rarely has possession of the title deeds. It seems that the register will not show upon what lands the annuities are charged, but a purchaser would, of course, require the seller to produce the grants." 2 Sugden on Vendors 156.

1. *State v. Cornell*, 31 N. J. L. 374; *State v. Hansom*, 36 N. J. L. 50; *State v. Shurts*, 41 N. J. L. 279; *State v. Pettit*, 39 N. J. L. 654.

As to the liability of annuities for succession or collateral inheritance tax, see the title SUCCESSION TAXES.

It seems that where an annuity is charged on real estate or on the general residue of personal estate, there can be no doubt that the real estate or the general residue should pay the annual taxes. *Ex p. McComb*, 4 Bradf. (N. Y.) 151.

Where a testator gave his wife an annuity of five hundred dollars per annum, to be paid semi-annually out of his estate, and directed his executors to retain it in their hands and keep invested a sum sufficient to pay the annuity, it was held that the annuity was a charge on the estate, and the executors were bound to invest a sum sufficient to pay the annuity clear of any taxes and commissions. *Ex p. McComb*, 4 Bradf. (N. Y.) 151.

Annuity Bond.—The holder of an annuity bond can be taxed only on the sum actually due and payable at the time of the assessment. *State v. Cornell*, 31 N. J. L. 374.

A Debtor Owning an Apportionable Annuity is entitled to a deduction of the same as a debt, from his taxable property, to the extent of what is due or owing thereon at the time of the assessment. *State v. Cornell*, 31 N. J. L. 374; *State v. Pettit*, 39 N. J. L. 654.

Not Subject to Estate Taxes.—It seems that an annuity is not subject to a tax or expense of the management. *Brimblecom v. Haven*, 12 Cush. (Mass.) 511.

In Case of a Bequest of an Income, taxes upon the fund and expenses of the trust must be paid out of it. But a clear annuity is free from tax or expense. *Whitson v. Whitson*, 53 N. Y. 479.

IV. DURATION — 1. For Life or Perpetual. — The duration of an annuity depends, as a general rule, upon the construction of the instrument by which it is created.¹

Simple Gift of Annuity. — Where there is nothing to be found beyond the simple gift of an annuity, and there is no explanatory language as to its duration, the annuitant takes for life only.²

When Perpetual. — But if the annuity is given in such a manner as to amount

1. Duration — Question of Construction. — *Hill v. Potts*, 8 Jur. N. S. 555, 31 L. J. Ch. 380, 10 W. R. 439, 5 L. T. N. S. 787

“**To Make an Annuity Created by Will Perpetual**, there must be express words in the will to that effect, or the testator must by some language in the will indicate an intention to that effect. The most common indication is a direction by the testator to segregate and appropriate a portion of his property, from the interest or profits of which the annuity is to be paid. When this is done, the annuity, when mentioned in the will, represents the *corpus* so appropriated; and, the *corpus* passing by the bequest of the annuity, the annuity may be said to be perpetual.” *Lett v. Randall*, 6 Jur. N. S. 1359, 9 W. R. 130, 3 L. T. N. S. 455, 30 L. J. Ch. 110, 3 Sm. & G. 83, 2 De G. F. & J. 388.

Annuity during Widowhood. — A husband devised to his wife an annuity “during her widowhood and life,” and it was held to cease on her second marriage by the testator’s intention; but it was further held that such intention being *in terrorem* and against the policy of the law as in restraint of marriage, it could not take effect, and that the widow was entitled to the annuity during her life, notwithstanding her second marriage, as the annuity was not expressly devised over except to a residuary legatee, an heir-at-law of the testator. *Parsons v. Winslow*, 6 Mass. 169, 4 Am. Dec. 107. See also *Mahar v. O’Hara*, 9 Ill. 424; *Long v. Dennis*, 4 Burr. 2055.

In *In re Boddington*, 25 Ch. Div. 687, a testator gave an annuity in the following language: “And in addition thereto to pay to my said wife, so long as she shall continue my widow and unmarried,” a certain annuity “by equal quarterly payments, commencing from the date of my decease.” Selborne, L. C., said: “These words appear to express, as plainly as language can, that the status of widowhood is a condition of the inception and a measure of the duration of the gift. For my own part, I have no difficulty in saying that these words make it clear that she cannot take the annuity at all unless she is the testator’s widow, and that if at any time she ceases to be his widow she ceases to be entitled to it.” After the date of the will the marriage was declared null at the suit of the wife, and it was held that she was not entitled to the annuity.

Annuity to Trustee during Office. — A gift of an annuity to a trustee, so long as he shall continue to execute the office of the trust, will cease on the payment of the whole of the trust property to a person absolutely entitled, although there is no devolution of the office on any other person. *Hull v. Christian*, L.

R. 17 Eq. 546, 43 L. J. Ch. 861, 22 W. R. 611, 18 L. T. N. S. 50.

Devise in Trust to Pay Annuity. — A devise of real estate in trust for the payment of annuities is valid so long as it does not render it inalienable for a longer period than the law allows. *Mason v. Mason*, 2 Sandf. Ch. (N. Y.) 432, affirmed in 2 Barb. (N. Y.) 229. See also *Leggett v. Perkins*, 2 N. Y. 327.

2. Mere Gift of Annuity, without More — Continues for Life Only. — *Hill v. Potts*, 8 Jur. N. S. 555, 31 L. J. Ch. 380, 10 W. R. 439, 5 L. T. N. S. 787; *In re Grove’s Trusts*, 5 Jur. N. S. 855, 1 Giff. 74, 28 L. J. Ch. 536, 7 W. R. 522; *M’Dermott v. Wallace*, 5 Beav. 142, 6 Jur. 547; *Yates v. Maddan*, 16 Sim. 613, 18 L. J. N. S. Ch. 310, 13 Jur. 331, reversed on another point, 3 MacN. & G. 532, 21 L. J. N. S. Ch. 24, 16 Jur. 45; *Blewitt v. Roberts*, 1 Cr. & Ph. 274, 10 L. J. N. S. Ch. 342.

The mere gift of an annuity to an annuitant, without anything further, where there is no provision for the payment of the annuity, or any specific fund appropriated, and no limit fixed for the enjoyment, will be held to be simply a gift to the annuitant for life only. *Bignold v. Giles*, 5 Jur. N. S. 84, 4 Drew. 343, 28 L. J. Ch. 358.

Pur Autre Vie. — A personal annuity, *pur autre vie*, does not determine by the death of the annuitant, *Savery v. Dyer*, Dick. 162; *In re Ord*, 12 Ch. Div. 22, 41 L. T. 13, as a gift of an annuity for a term or *pur autre vie* is a gift to the annuitant and his personal representatives during the term or the life of the *cestui que vie*. *In re Ord*, 12 Ch. Div. 22, 41 L. T. 13.

Charge on Rents or Income. — The mere fact that an annuity is charged upon a fund or given out of the income of a fund, or that a fund is placed in trust to pay the annuity, will not make it perpetual. *In re Morgan* (1893), 3 Ch. 222; *Wilson v. Maddison*, 2 Y. & Coll. C. C. 372. So if an annuity is a charge upon rents of freehold as distinguished from a gift of a portion of the estate, it will not be perpetual. *Blight v. Hartnoll*, 19 Ch. Div. 294; *Mansergh v. Campbell*, 3 DeG. & J. 232; *Sullivan v. Galbraith*, 4 Ir. R. Eq. 582; *Barden v. Meagher*, 1 Ir. R. Eq. 246; *Whitten v. Hanlon*, L. R. 16 Ir. 298.

Suspended during Marriage. — A man covenanted to pay a woman an annuity for her life, payable half-yearly, for her separate use; he afterwards married the annuitant and died leaving her surviving, and it was held that the widow was entitled to recover arrears accrued subsequently to the death of her husband. *Fitzgerald v. Fitzgerald*, L. R. 2 P. C. 83; 5 Moo. P. C. C., N. S. 180, 37 L. J. P. C. 44.

to a gift of so much capital or income as will produce the annuity without limit as to time, the annuity will be perpetual.¹

2. Maintenance and Education.—An annuity created for the purpose of the maintenance and education of the annuitant does not cease when the latter has attained his majority.²

1. When Annuity Perpetual.—*Stokes v. Heron*, 12 Cl. & F. 161, 9 Jur. 563, *reversing* 2 Dr. & War. 89, 4 Ir. Eq. R. 284; *Hill v. Potts*, 8 Jur. N. S. 555, 31 L. J. Ch. 380, 10 W. R. 439, 5 L. T. N. S. 787; *Pawson v. Pawson*, 19 Beav. 146; *Potter v. Baker*, 13 Beav. 273, 15 Beav. 489; *Rawlings v. Jennings*, 13 Ves. Jr. 39; *Kerr v. Middlesex Hospital*, 2 De G. M. & G. 576; *Hedges v. Harpur*, 3 De G. & J. 129, 4 Jur. N. S. 1209, 27 L. J. Ch. 742; *Engelhardt v. Engelhardt*, 26 W. R. 853; *Hicks v. Ross*, L. R. 14 Eq. 141.

In *Kerr v. Middlesex Hospital*, 2 De G. M. & G. 576, St. Leonards, Ch., said: "It is perfectly settled that if an annuity be given *simpliciter*, that is, to one generally, a life interest only passes. It is equally, I believe, undisputed, that if an annuity be directed to be provided out of the proceeds of property, or out of property generally, if an annuity is to be brought into existence by the application of property, and that annuity is given to a party generally, he will take the property appropriated to purchase the annuity, and therefore the annuity in perpetuity, if purchased."

In *Blight v. Hartnoll*, 19 Ch. Div. 294, 45 L. T. 524, 51 L. J. Ch. 162, 30 W. R. 513, Fry, J., said: "As a general rule, there can be no doubt that the gift of an annuity to A is the gift of the annuity during the life of A, and nothing more. It is equally free from doubt that where the testator indicates the existence of the annuity without limit after the death of the person named, and therefore implies that it is to exist beyond the life of the annuitant, there the annuity is presumed to be a perpetual annuity." *Compare* *Evans v. Walker*, 3 Ch. Div. 211.

This statement is approved by Lindley, L. J., in *In re Morgan* (1893), 3 Ch. 222.

Where there was a bequest of an annuity to A and B, and to the survivor for life, and if A should have any children, then to be equally divided between them; but if A should die without lawful issue, then to A and his heirs forever; it was held that the children of A took an absolute interest in a perpetual annuity. *Robinson v. Hunt*, 4 Beav. 450; *Stokes v. Heron*, 12 Cl. & F. 161, 9 Jur. 563, *reversing* *Heron v. Stokes*, 2 Dr. & War. 89, 4 Ir. Eq. R. 284. See also *Yates v. Madan*, 16 Sim. 613.

Devise in Fee Simple.—The devise of an estate in fee simple charged with an annuity is not of itself sufficient to indicate an intention that the duration of the annuity should correspond with the limits of the estate charged. *Mansergh v. Campbell*, 25 Beav. 544, 4 Jur. N. S. 1207, 3 De G. & J. 232. See also *Lett v. Randall*, 2 De G. F. & J. 388, 6 Jur. N. S. 1359, 9 W. R. 130, 3 L. T. N. S. 455, 30 L. J. Ch. 110, 3 Sm. & G. 83.

Failure of Issue—Limited Over.—An annuity limited over after an indefinite failure of

issue will be void as depending on too remote a contingency. *Turner v. Turner*, 1 Bro. C. C. 317, Ambl. 776; *Seale v. Seale*, 1 P. Wms. 290; *Boden v. Watson*, Ambl. 398, 478; *Robinson v. Fitzherbert*, 2 Bro. C. C. 127; *Kirkpatrick v. Kilpatrick*, 13 Ves. Jr. 484; *Bradhurst v. Bradhurst*, 1 Paige (N. Y.) 331.

But if the failure of issue is confined to the death of the annuitant, the limitation over is good, as being in the nature of an executory devise. *Sheppard v. Lessingham*, Ambl. 122; *Bradhurst v. Bradhurst*, 1 Paige (N. Y.) 331.

The Bequest of an Annuity Created de Novo requires words of limitation to be annexed to it, in order that more than a life interest should pass, unless the bequest contains a reference to a particular fund. *Arnold v. Kayess*, 51 L. J. Ch. 721, 46 L. T. 805, 30 W. R. 883; *Heron v. Stokes*, 1 Con. & L. 270, 2 Dr. & War. 89, 4 Ir. Eq. R. 284, *reversing* on this point 3 Ir. Eq. R. 163. But see *Tweedale v. Tweedale*, 10 Sim. 453, 9 L. J. N. S. Ch. 147, 4 Jur. 263, where it is held that an annuity given *de novo* out of personal estate, without words of limitation, was held to be a perpetual, and not a mere life, annuity.

Direction to Purchase.—It has been held that where there is a direction to an executor to purchase an annuity for a certain amount, such annuity will be perpetual. *Ross v. Borer*, 2 John. & H. 469, 31 L. J. Ch. 709, 10 W. R. 644, 6 L. T. N. S. 514.

This rule, however, does not accord with the weight of authority, for it has been held in several instances that a direction to invest a sum in government securities sufficient for a certain annuity, gives a life annuity only. *In re Taber*, 30 W. R. 883, 46 L. T. 805, 51 L. J. Ch. 721; *In re Grove*, 1 Giff. 74. See also *Banks v. Braithwaite*, 11 W. R. 298, 32 L. J. Ch. 198.

2. Annuities for Maintenance and Education.—*Wilkins v. Jodrell*, 13 Ch. Div. 564, 49 L. J. Ch. 26, 41 L. T. 649, 28 W. R. 224; *Soames v. Martin*, 10 Sim. 287; *In re Booth* (1894), 2 Ch. 282. See also *Nicholson v. Locke*, 18 Jur. 263; *Ellis v. Maxwell*, 3 Beav. 587. The contrary, however, is held in *Gardner v. Barber*, 18 Jur. 508.

In *Soames v. Martin*, 10 Sim. 287, the court said: "All persons who have attained twenty-one are not in a state in which they do not want education, and there is no period of life in which a person does not require maintenance." And it seems that there is no difference between a trust for "maintenance or education," and a trust for "maintenance and education." *Wilkins v. Jodrell*, 13 Ch. Div. 564, 49 L. J. Ch. 26, 41 L. T. 649, 28 W. R. 224.

In *Carr v. Living*, 33 Beav. 474, on the bequest of an annuity by a testator to his wife for the maintenance of herself and their children, it was held that the right of an

3. Joint Annuities.—Annuities may be created so that the annuitants will hold as tenants in common,¹ or as joint tenants with a right of survivorship,² according to the construction of the instrument by which they are created.

unmarried daughter to maintenance did not cease on her attaining twenty-one.

In *Bortoft v. Wadsworth*, 12 W. R. 523, there was a bequest of an annuity to a father for the maintenance of his children until they respectively attained twenty-one, and a further bequest of a principal sum to be divided among the children as they respectively attained twenty-one; and it was held that the amount of the annuity would not be reduced proportionately as the children respectively became of age.

Annuity for Support of Children.—Giving an annuity of a certain amount "to take charge of my children" will be construed, in the absence of any apparent intention to the contrary, to mean that the care and payment of the annuity are to cease when the children attain their majority. *Cox's Estate*, 15 Phila. (Pa.) 537, 39 Leg. Int. (Pa.) 129; *affirmed* on appeal, *Hewson's Appeal*, 102 Pa. St. 55, where it is held that the annuitant occupied the position in the nature of a testamentary guardian of the children.

For Maintenance Only.—An annuity given for a fixed period for maintenance is not determined by the attainment of majority, *Longmore v. Elcum*, 2 Y. & Coll. C. C. 363; *Badham v. Mee*, 1 R. & M. 631; nor by the death of the annuitant before the end of that period. And in case of death before the annuity is determined, the personal representatives will take for the remainder of the period. *Lewis v. Lewis*, 16 Sim. 266; *Attwood v. Alford*, L. R. 2 Eq. 479.

A testator bequeathed an annuity of five hundred dollars, to be paid out of the income of his whole estate, for the support of his daughter and her children, and it was held that it would charge the estate only, and not the *corpus* thereof, and that it was not a perpetual annuity, but an aggregate fund for the support of the daughter and her children during their lives. *Morgan v. Pope*, 7 Coldw. (Tenn.) 541.

1. Annuitants Holding as Tenants in Common.—*Jones v. Randall*, 1 J. & W. 100; *Bignold v. Giles*, 4 Drew 343, 5 Jur. N. S. 84, 28 L. J. Ch. 358; *Eales v. Cardigan*, 9 Sim. 384, 8 L. J. N. S. Ch. 11.

In *Bryan v. Twigg*, L. R. 3 Ch. 183, 37 L. J. Ch. 249, 16 W. R. 298, L. R. 3 Eq. 433, it was held that under a bequest of an annuity to the children of a person named, equally, share and share alike, for and during the term of their joint natural lives, or the life of the survivor of them, or longer liver of them, the children took as tenants in common, without benefit of survivorship, an annuity to last till the death of the survivor, and that the shares of those dying within that period went to the personal representative.

In *Lill v. Lill*, 23 Beav. 446, it was held that a gift of a certain sum to A and B each, yearly, so long as they shall live, was an annuity to each during their several lives.

Husband and Wife—Wife's Interest.—Where an annuity is created by deed, by which lands are charged, and the annuity is secured by a mortgage in favor of husband and wife during their joint lives, and to the survivor during his or her life, and is payable to the husband "for their mutual benefit," they each take by moieties, he holding her portion as trustee for her, and she has such an interest as entitles her to foreclose the mortgage to enforce payment. *Sloan v. Frothingham*, 72 Ala. 589.

2. Annuitants as Joint Tenants with Right of Survivorship.—*Ex p. Annandale*, 4 Deac. & Ch. 511; *M'Dermott v. Wallace*, 5 Beav. 142, 6 Jur. 547; *Brittain v. Fleming*, 2 Myl. & K. 147; *Hatton v. Finch*, 4 Beav. 186, 5 Jur. 548; *Orr v. Moses*, 52 Me. 287.

In *Wilson v. Maddison*, 2 Y. & Coll. C. C. 372, 12 L. J. N. S. Ch. 420, 7 Jur. 572, there was a bequest of an annuity to A, together with her three children, named, and for their joint maintenance, and it was held to be a bequest of the amount of the annuity to A and the three children as joint tenants for the life of the longest liver of them.

Husband and Wife.—In *Alder v. Lawless*, 32 Beav. 72, a bequest of an annuity was made to a husband and wife during their natural lives. The wife predeceased the testator, and it was held that the husband was entitled to the annuity for life. To same effect, see *Neighbour v. Thurlow*, 28 Beav. 33; *Moffatt v. Burnie*, 18 Beav. 211.

In *Townley v. Bolton*, 1 Myl. & K. 148, 2 L. J. N. S. Ch. 25, it was held that where an annuity was given to a husband and wife for their joint lives, and limited over, the husband, having survived his wife, was entitled to the annuity.

So an agreement to pay an annuity to a husband and wife "during their natural lives" binds the party to pay the annuity during the joint lives of the husband and wife, and during the life of the survivor. *Douglas v. Parsons*, 22 Ohio St. 526; *Hayden v. Snell*, 9 Gray (Mass.) 365, 69 Am. Dec. 294.

Test to be Applied—Intention.—When an annuity payable out of both real and personal estate is given to two persons, the test to be applied to ascertain whether they are joint tenants or tenants in common is, that that construction shall be applied which will best effectuate the intention of the donor or grantor of the annuity. *British North America Bank v. Matthews*, 8 Grant's Ch. (U. C.) 486.

Manner of Payment.—An annuity given to two persons as joint tenants must be paid half to one, and half to the other, as it becomes payable. *British North America Bank v. Matthews*, 8 Grant's Ch. (U. C.) 486.

Gift Over—Duration Inferred.—Where there is a gift of an annuity to several persons, to be divided equally between them, with a gift over on the death of the survivor, the latter will take the whole amount during life.

When Personal Representative will Take.—Where there is a gift of an annuity to several persons as tenants in common during their joint lives and the life of the survivor, the personal representatives of a deceased annuitant are entitled to the latter's proportional share during the life of the survivor.¹

V. ON WHAT PROPERTY CHARGEABLE—1. In General.—Whether or not annuities are given as part of a certain distinct property, or are simply charged upon the property either primarily or secondarily, as the case may be, so that in the event of the fund itself failing, they become charges upon the general personal estate, is a question not easily determined. The cases are very numerous upon this subject, and are hereinafter divided into three separate heads which are clear and distinct in themselves, although the application of the doctrine to the particular case in controversy is frequently one of much difficulty.²

A Question of Intention.—The question whether an annuity is a charge upon real estate is one of intention.³

M'Dermott v. Wallace, 5 Beav. 142; *Tuckerman v. Jefferies*, 11 Mod. 108; *Armstrong v. Eldridge*, 3 Bro. C. C. 215.

But a mere direction to purchase an annuity for their lives, to be equally divided between them, creates only an annuity during their joint lives. *In re Drakeley's Estate*, 19 Beav. 395; *Grant v. Winbolt*, 23 L. J. Ch. 282, 2. W. R. 151.

1. *Jones v. Randall*, 1 J. & W. 100; *Big-nold v. Giles*, 4 Drew 343; *Bryan v. Twigg*, L. R. 3 Eq. 433; L. R. 3 Ch. 183; *Eales v. Cardigan*, 9 Sim. 384; *Chatfield v. Berchtoldt*, 18 W. R. 387.

2. *Paget v. Hurst*, 9 Jur. N. S. 906, 8 L. T. N. S. 445.

See *infra*, this title, *Payment—Arrears*.

The very nature of an annuity suggests, when those charged with the payment of it have in their hands a fund producing income sufficient to pay it, that the payment should be made from the income, and not from the principal. *Cummings v. Cummings*, 146 Mass. 501.

In *Salvin v. Weston*, 12 Jur. N. S. 700, Wood, V. C., said: "With regard to the question whether the annuity is alleged on the *corpus*, the principle is clear. Among others, there is the rule that payments given indefinitely out of rents and profits would amount to a charge upon the *corpus*. There is also the other rule, as in *Baker v. Baker*, 6 H. L. C. 616, that a gift over of property apparently intended to pass in its entirety, is inconsistent with the charge. Besides those two rules, there is another intermediate rule, which I followed in the case of *Stelfox v. Sugden*, Johns. 234, that you are to collect from all the circumstances of the will, whether there is or is not a clear and manifest intent that the annuity should be paid out of the rents and profits, and not paid out of the *corpus*."

In *Mills v. Drewitt*, 20 Beav. 632, the court said: "I apprehend there is no magic in the word 'annuity,' and that it is not by reason of a person using the word 'annuity,' and charging it upon an estate, that the *corpus* of the estate is liable to make good that annuity, for it is clear that the testator may use other words exactly in the same manner as he would 'annuity.'"

Annuity upon an Annuity.—A granted an annuity to B, and covenanted to charge upon all such property as, in the event of C's dying before him, he might become possessed of at C's death, either by will or otherwise. A afterwards secured a certificate in bankruptcy; C then dying, having bequeathed an annuity in trust for A, it was held that B was entitled to a decree specifically charging his annuity upon the annuity bequeathed in trust for A. *Lyde v. Mynn*, 1 Myl. & K. 683, *Coop. temp. Brough*. 123.

Charge on Partnership Assets—Creditor.—Where by an agreement between partners then solvent, an annuity in favor of the wife of one of them was charged upon the assets of the partnership estate, it was held that the widow was entitled to the annuity free from the claims of creditors. *In re Flavell*, 25 Ch. Div. 89.

Lands Charged—Specific Devise.—A testator devised an annuity, charging its payment upon the whole of his real estate, which consisted of two tracts of land of equal value, one of which was specifically devised, and the other, under the provision of the will, became vested in an heir-at-law of the testator. In an action by the annuitant seeking to have one-half of the annuity paid out of the lands specifically devised, it was held that the land that had descended, being ample for the purpose, should be charged with the whole annuity to the exoneration of the lands specifically devised. *Mitchell v. Mitchell*, 21 Md. 244.

3. **Intention.**—*Addecott v. Addecott*, 29 Beav. 460; *Salvin v. Weston*, 12 Jur. N. S. 700; *Upton v. Vanner*, 8 Jur. N. S. 405; *Howarth v. Rothwell*, 30 Beav. 516; *Dickerman v. Eddinger*, 168 Pa. St. 240.

When there is a Clear Indication of Intention to charge the annuity upon the estate, it would be held payable out of the *corpus*. *Howarth v. Rothwell*, 30 Beav. 516.

The Leading Principle of the Cases is that when a testator bequeaths a life annuity in such a manner as to show a separate and independent intention that the money shall be paid to the annuitant at all events, that intention will not be permitted to be overruled merely by direction in the will that the money is to be raised in a particular way

The Primary Fund.—In the absence of specific direction or necessary implication to the contrary, the primary fund for the payment of annuities is the personal estate of the donor.¹

2. Personal Estate Primarily Liable.—The first class of cases is that in which a simple gift of an annuity is made, charged upon real estate, when the personal estate is not, even in the first instance, exonerated, but remains liable.²

3. Charge on Specific Real Estate.—In this class of cases the gift is in such a form that it is held a specific gift of so much of the real estate as would be sufficient to raise the amount charged, the personal estate is in no way liable, and the charge takes effect out of that specific property of which it forms a part, and, that property failing, the gift must fail like every other specific gift.³

or out of a particular fund. *Pierrepoint v. Edwards*, 25 N. Y. 128; *Delaney v. Van Aulen*, 84 N. Y. 16, *reversing* 21 Hun (N. Y.) 274, *modifying* the strict rule in *Allan v. Backhouse*, 2 Ves. & B. 65.

1. *In re Nathan's Estate*, 4 Pa. Dist. Rep. 149.

Real Estate Charged by Implication.—Where a testator specifically bequeaths all his personal property to his wife, it is a necessary implication that an annuity provided for in the will shall be paid, not out of the personal, but out of the real estate. *In re Nathan's Estate*, 4 Pa. Dist. Rep. 149.

Blending Realty and Personalty.—A testator charged certain annuities upon his estate, and by the terms of his will blended his real and personal estate together, and it was held that such act was conclusive as to his intention to charge the real estate with the annuities upon a deficiency of the personal estate. *Davis's Appeal*, 83 Pa. St. 348.

2. Personal Estate Primarily Liable.—*Paget v. Hurst*, 9 Jur. N. S. 906, 8 L. T. N. S. 445; *Dickin v. Edwards*, 4 Hare 273, *distinguishing* *Savile v. Blacket*, 1 P. Wms. 777.

An annuity in this instance is simply like a charge of debts or other payments on real estate, and the gift takes effect as a gift of an annuity; there is a charge upon the real estate, but the personal estate is primarily liable. *Paget v. Hurst*, 9 Jur. N. S. 906, 8 L. T. N. S. 445.

Where the whole annuity is charged on the estate, the *corpus* of that estate is liable to make good the annuity. *Byam v. Sutton*, 19 Beav. 556.

And there is no substantial difference between the gift of an annuity out of personal estate generally, and the gift of an annuity to be satisfied out of a particular fund, because an annuity which is given generally is to be provided for out of all the personal estate. *Tweedale v. Tweedale*, 10 Sim. 453, 9 L. J. N. S. Ch. 147.

In Justice v. Justice (N. J. 1890), 20 Atl. Rep. 208, the testator by his will gave to his wife an annuity of a certain sum so long as she should remain his widow. The residue of his estate was devised to his son, subject to the annuity above provided for, and it was held that the widow was entitled to the payment of the annuity, although the first payment would exhaust the whole of the estate. See *infra*, this title, *Payment—Arrears*.

Unlimited, Indefinite Charge.—An annuity

which is charged in an unlimited and indefinite manner upon the rents and profits is a charge upon the *corpus*, just as an unlimited and indefinite gift of rents and profits is a gift of the *corpus*. *Phillips v. Gutteridge*, 3 De G. J. & S. 332.

And see *Earle v. Bellingham*, 24 Beav. 445, where the testator showed clearly his intention that his trustees should, after the death of the annuitant, transfer to other parties the *corpus* of the fund undiminished and in its entirety.

Apportionment as to Capital.—Where an annuity was payable out of real estate, part of which comprised mines which were settled upon the eldest son, and part agricultural land which was settled upon the younger children, and the mining property, producing a larger income, but of a fluctuating nature and liable to great diminution, was valued at seven years' purchase, and the agricultural property at thirty years' purchase, it was held that the two properties must contribute to the annuity in proportion to the actual income year by year, and not in proportion to the capitalized value. *Ley v. Ley*, L. R. 6 Eq. 174.

Charge on Income Only.—A gift of an annuity to be paid out of the income of the whole estate is charged upon the income of the estate only, and not upon the *corpus* thereof. *Morgan v. Pope*, 7 Coldw. (Tenn.) 541.

3. Annuity Charged on Specific Real Estate.—*Paget v. Hurst*, 9 Jur. N. S. 906, 8 L. T. N. S. 445; *Mann v. Copland*, 2 Madd. 457; *Kendall v. Russell*, 3 Sim. 424; *Earle v. Bellingham*, 24 Beav. 445; *Lambert v. Turner*, 8 Jur. N. S. 1223, 11 W. R. 51, 7 L. T. N. S. 521; *Davies v. Wattier*, 1 Sim. & St. 463. See *infra*, this title, *Payment—Arrears*. The rule is, that unless it appears that it was intended by the testator to charge the payment of the annuities upon the *corpus* of the estate, they can only be enforced against the trustee, personally, so far as he has received the rents. The fee in the realty, if any, whether for life or for years, cannot be sold for their payment. *DeHaven v. Sherman*, 131 Ill. 115; *Nudd v. Powers*, 136 Mass. 276; *Baker v. Baker*, 6 H. L. Cas. 616.

A Direction to Pay an Annuity out of the Rents and Profits charges only the rents and profits, and not the *corpus* of the estate, unless a contrary intention appears, and can only be enforced against the devisees, personally, so far as they have received the rents; and the

4. Demonstrative Annuity.—The third and intermediate class of cases is where the annuity is in the nature of a demonstrative legacy, there being a clear indication of intention to give an annuity, and a specific fund pointed out from which it is to be paid. In this case the specific fund is the primary fund to answer the charge; but in the event of that fund failing, the gift itself does not fail, and the testator's general personal estate remains liable.¹

fee and life estate in the realty, if any, cannot be sold to provide the annuity. *Irwin v. Wollpert*, 128 Ill. 527; *Delaney v. Van Aulen*, 84 N. Y. 16.

In *Pearson v. Helliwell*, L. R. 18 Eq. 411, Malins, V. C., said: "I am clearly of opinion that whenever annuities are given by a will, and there are added words such as those which occur in this will, 'I charge the same annuities respectively upon all and singular my leasehold messuages, dwelling houses, or tenements, * * * by me given and bequeathed,' the annuitant is entitled to resort to the *corpus* as well as to the income of the property so charged; and that, in order to exonerate the *corpus*, there must be a distinct statement that the annuity is to be paid out of the income, and out of the income alone."

Agreement to Grant Annuity.—A agreed to purchase an estate from B, and, upon the estate being conveyed, to grant a life annuity to B, "to be secured by bond;" it was held that B had no lien on the estate for payment of the annuity, and was merely entitled to have it secured by the bond of the purchaser. *Dixon v. Gayfere*, 21 Beav. 118, 1 De G. & J. 655, 3 Jur. N. S. 1157, 27 L. J. Ch. 148, 25 L. J. Ch. 189.

Reversionary Interest.—An annuity was granted by deed in consideration of love and affection, and charged on certain hereditaments and upon the "moneys, securities for money and other effects" of the grantor. At the time of the deed the grantor was entitled to a reversionary interest in stock standing in the names of trustees. The annuity was regularly paid for more than twenty years by the grantor, but on his death his personal estate proved insufficient to pay his debts, and the real estate was not enough to provide for the annuity, and it was held that there was no specific charge on the reversionary interest, and that the annuitant had no priority over the creditors of the grantor. *In re Lucan*, 45 Ch. Div. 470.

1. Demonstrative Annuity.—*Paget v. Hurst*, 9 Jur. N. S. 906, 8 L. T. N. S. 445; *Picard v. Mitchell*, 14 Beav. 103; *Ingelman v. Worthington*, 1 Jur. N. S. 1062, 25 L. J. Ch. 46; *Mills v. Drewitt*, 20 Beav. 632, 1 Jur. N. S. 816; *Byam v. Sutton*, 19 Beav. 556, 18 Jur. 847; *Davies v. Wattier*, 1 Sim & St. 463; *Gratrix v. Chambers*, 7 Jur. N. S. 960; *Rowe v. Lansing*, 53 Hun (N. Y.) 210; *Denis's Estate*, 169 Pa. St. 493, *affirming* 4 Pa. Dist. Rep. 1. See *infra*, this title, *Payment—Arrears*.

In *Birch v. Sherratt*, L. R. 2 Ch. 644, Rolt, L. J., said: "If an annuity is given out of rents and profits, or dividends and interest, and the capital or *corpus* is given intact, from and after the annuitant's death, to another, the case is equivalent to the case of a

life interest with remainder over. But if the capital is given over, not 'from and after the annuitant's death,' but 'from and after satisfaction of the annuity, and subject to the annuity,' then I think the case is equivalent to the case of a legacy and a residuary bequest, especially if the gift of the annuity itself admits of a construction charging it on the capital of the estate, or of the trust fund."

In *Howarth v. Rothwell*, 30 Beav. 516, 8 Jur. N. S. 69, 31 L. J. Ch. 449, 10 W. R. 263, there was a bequest of an annuity to the wife of the testator, to be paid out of the rents, receipts, or disposal by valuation or auction sale of his property, and it was held to be a charge upon the *corpus* of the property.

A testator bequeathed an annuity of a certain sum to his daughter, and, to effectually secure the payment, provided for the investment of a sum which, at the legal rate of interest, would produce the annuity; and where the fund failed, it was held that she was entitled to sufficient out of the general estate to make up the amount of the annuity. *Boomer v. Babbitt* (Vt. 1895), 31 Atl. Rep. 838.

In *Pierrepont v. Edwards*, 25 N. Y. 128, the annuitant was a widow, and the annuity was expressly charged upon a certain income; and that failing, it was held that the payment of the annuity was properly payable out of the *corpus* of the estate.

In *Clason v. Lawrence*, 3 Edw. Ch. (N. Y.) 54, it is held that although a will giving an annuity out of land does not in terms charge it upon the rents and profits, yet it will be so, and it will fall first on the tenant for life, and next on the remainderman; and if, during the existence of the life estate, the rents and profits are insufficient to satisfy the amount, the deficiency is a charge upon the fee, to be raised by mortgage or otherwise out of the capital of the estate.

Security for Payment.—Where a testator in his will charged the residue of his personal estate with an annuity to be paid quarterly to his wife, the executor was ordered to bring before the master sufficient in bonds and securities to be set apart to secure the annuity. *Slanning v. Style*, 3 P. Wms. 334.

Power of Court.—In case the annuity is payable out of the clear residuary estate of the testator, the court has power to set apart a sufficient sum to answer the annuity, and to pay the remainder of the residue to the residuary legatees. And it seems that, notwithstanding the opposition of the annuitant, the court will exercise this power if the interests of the estate require it. The annuitant, nevertheless, will have the right to resort, if it becomes necessary, to the *corpus* of the fund so set apart. *Harbin v. Masterman* (1896), 1 Ch. 351.

5. Devise Subject to Annuity.—Where a devisee accepts property to him devised, charged with the payment of an annuity, he becomes liable for the payment of such annuity.¹

VI. RIGHT OF ANNUITANT TO CAPITAL SUM.—Where an absolute and unequalled annuity is given, with instructions to invest a sum sufficient to produce the annuity, the annuitant may elect to take the capital sum instead of having it invested for the purpose of producing the annuity.²

1. Devise Subject to Annuity.—*Rees v. Engelback*, L. R. 12 Eq. 225; *Mahar v. O'Hara*, 9 Ill. 424; *Glenn v. Spry*, 5 Md. 110; *Anderson v. Hammond*, 2 Lea (Tenn.) 281, 31 Am. Rep. 612; *In re Pierce's Estate*, 56 Wis. 560.

A Personal Liability.—In *Gridley v. Gridley*, 24 N. Y. 130, a will gave all the testator's real and personal property, and declared that the donor was to pay all the testator's debts and a certain annuity, and it was held that the acceptance of the gift created a personal liability, upon which an action might be maintained at law without any express promise. See also *Gifford v. Rising*, 51 Hun (N. Y.) 1.

Grantee of Property Charged is Bound.—Where an annuity is charged on real and personal property, conveyed by deed or gift, the acceptance of the deed binds the grantee to the payment of the annuity, so that neither he nor a purchaser from him with notice can claim a partial exoneration of the amount because of a subsequent loss of the personal property, as in the case of the emancipation of slaves by the late war. *Taylor v. Forsey*, 56 Ala. 426.

Annuitant Heir to Lands Charged.—Where an annuitant inherits real estate charged with an annuity payable to him, the charges become extinct by the title and lien in him. *Glenn v. Spry*, 5 Md. 110.

2. Wakeham v. Merrick, 37 L. J. Ch. 45, 16 W. R. 73, 17 L. T. N. S. 134; *Ford v. Batley*, 17 Beav. 303, 23 L. J. Ch. 225; *Smith v. Pybus*, 9 Ves. Jr. 567; *Palmer v. Craufurd*, 3 Swanst. 482, 2 Wils. 79; *Hicks v. Ross*, L. R. 14 Eq. 141, 41 L. J. Ch. 677, 26 L. T. N. S. 470; *Evans v. Walker*, 3 Ch. Div. 211, 25 W. R. 7; *Yates v. Yates*, 28 Beav. 637; *Woodmeston v. Walker*, 2 Russ. & M. 197, 9 L. J. Ch. 257; *Bent v. Cullen*, L. R. 6 Ch. 235, 40 L. J. Ch. 250, 19 W. R. 368; *Hill v. Rattey*, 2 Johns. & H. 634; *Power v. Hayne*, L. R. 8 Eq. 262, 17 W. R. 782, *overruling* *Day v. Day*, 1 Drew 569, 17 Jur. 586, 22 L. J. Ch. 878; *Bradhurst v. Bradhurst*, 1 Paige (N. Y.) 331.

Transfer of Investment.—In *re Browne's Will*, 27 Beav. 324, there was a bequest of consols in trust to purchase a life annuity for a woman, to be held for her separate use without power of anticipation, and in case of her illness or incapacity the testator gave the trustees a discretionary power as to the application of the annuity, for her maintenance, support, or otherwise for her personal benefit. The legatee was unmarried, and it was held that she was entitled to have a transfer to her of the consols.

Restraint on Anticipation.—Where a testator directs that an annuity be purchased,

and provides that the annuitant shall not be allowed to take the value of it instead such provision will be ineffectual. *Stokes v. Cheek*, 28 Beav. 620, 29 L. J. Ch. 922.

The same rule will apply where there is a direction that the annuity shall cease on alienation, *Hunt-Foulston v. Furber*, 3 Ch. Div. 285; or where there is a discretion vested in trustees as to the application of the annuity for the benefit of the annuitant in case of incapacity on the part of the latter, *In re Browne's Will*, 27 Beav. 324.

It seems that in the case of a married woman as an annuitant a restraint on anticipation will be effectual. *Woodmeston v. Walker*, 2 Russ. & M. 197.

When Perpetual.—Where the intention to give a perpetual annuity is apparent in a will, the intention will prevail, and the annuitant will be entitled to the fund. *Potter v. Baker*, 15 Beav. 489; *Kerr v. Middlesex Hospital*, 2 De G. M. & G. 576; *Clough v. Wynne*, 2 Madd. 439; *Philipps v. Chamberlaine*, 4 Ves. Jr. 51; *Parsons v. Parsons*, L. R. 8 Eq. 260; *Bradhurst v. Bradhurst*, 1 Paige (N. Y.) 331; *Huston v. Read*, 32 N. J. Eq. 596, *citing* *Stokes v. Heron*, 12 Cl. & F. 161.

Death of Annuitant—Rights of Representatives.—If an annuitant dies before an annuity to which he is entitled is purchased, provided the annuity is absolute and unqualified, the representatives have the same right to receive the capital fund that the annuitant would have if living. *Power v. Hayne*, L. R. 8 Eq. 262, 17 W. R. 782, *overruling* *Day v. Day*, 1 Drew 569, 17 Jur. 586, 22 L. J. Ch. 878; *Barnes v. Rowley*, 3 Ves. Jr. 305.

Inalienable Annuity.—Where an annuity is inalienable, the annuitant has no right to the capital sum. *Hatton v. May*, 3 Ch. Div. 148, 24 W. R. 754.

Gift Over of Annuity.—"Where there is a gift of an annuity to one for life, or to several for lives, and then a gift afterwards to another person, without any restriction, that means that the last taker is to have the capital from which the annuity was produced." *Per Malins v. C.*, *Evans v. Walker*, 3 Ch. Div. 211, 25 W. R. 7. This view, however, is *criticised* in *Blight v. Hartnoll*, 19 Ch. Div. 294, 45 L. T. 524, 51 L. J. Ch. 162, 30 W. R. 513.

Reason for the Rule.—"If an annuity is given to a man and his heirs in perpetuity, he has an absolute interest therein; and the only way of satisfying it is by setting aside such sum as will forever answer it; and the annuitant is entitled to the absolute disposition of the fund so set aside. If it is given to a man and the heirs of his body, it is in the nature of estate tail; but the annuity cannot be barred by a common recovery as a real estate can.

VII. APPORTIONMENT—1. Generally—Common-law Rule.—Subject to two exceptions, it was the uniform and unbending rule of the common law, recognized both by courts of law and of equity, that annuities, whether created *inter vivos* or by will, were not apportionable in respect of time.¹

Exceptions.—The two exceptions are well recognized; one in the case of an annuity for the support and maintenance of infants,² the other an annuity for the support of a wife living separate and apart from her husband.³

Therefore, to prevent a perpetuity, the common law gives to the annuitant an absolute interest; and the effect is precisely the same as that produced by our statute abolishing entails upon a devise of real property in tail." *Per* Walworth, Ch., in *Bradhurst v. Bradhurst*, 1 Paige (N. Y.) 331.

1. Apportionment of Annuities—England.—*Pearly v. Smith*, 3 Atk. 260; *Ex p. Smyth*, 1 Swanst. 349, note; *Franks v. Noble*, 12 Ves. Jr. 484; *Price v. Williams*, Cro. Eliz. 380; *Reg. v. Treasury Com'rs*, 16 Q. B. 357; *Leathley v. French*, 8 Ir. Ch. R. 401; *In re Thacker*, 28 L. T. N. S. 56; *Trimmer v. Danby*, 23 L. J. Ch. 979.

Apportionment is now allowed under Stat. 4 Wm. IV., c. 22, and 34 and 35 Vict., c. 35. *Carter v. Taggart*, 16 Sim. 447.

Connecticut.—*Tracy v. Strong*, 2 Conn. 659.

Indiana.—*Heizer v. Heizer*, 71 Ind. 526, 36 Am. Rep. 202; *Nading v. Elliott*, 137 Ind. 261.

Massachusetts.—*Wiggin v. Swett*, 6 Met. (Mass.) 194, 39 Am. Dec. 716.

Apportionment is now allowed under Gen. Stat., c. 97, § 24. *Bates v. Barry*, 125 Mass. 83, 28 Am. Rep. 207.

New Jersey.—*In re Lackawanna Iron, etc., Co.'s Petition*, 37 N. J. Eq. 26; *Manning v. Randolph*, 4 N. J. L. 162.

New York.—*Irving v. Rankine*, 13 Hun (N. Y.) 147, affirmed in 79 N. Y. 636; *Griswold v. Griswold*, 4 Bradf. (N. Y.) 216; *Kearney v. Cruikshank*, 117 N. Y. 95, reversing 46 Hun (N. Y.) 219; *Clapp v. Astor*, 2 Edw. Ch. (N. Y.) 383.

Common-law rule changed by N. Y. Laws 1875, c. 542, and apportionment allowed. *Kearney v. Cruikshank*, 117 N. Y. 95, reversing 46 Hun (N. Y.) 219.

Pennsylvania.—*McKeen's Appeal*, 42 Pa. St. 479; *Blight v. Blight*, 51 Pa. St. 420; *Wilson's Appeal*, 108 Pa. St. 344, 56 Am. Rep. 214; *Gheen v. Osborn*, 17 S. & R. (Pa.) 171; *Dubbs v. Watson*, 2 Pa. Dist. Rep. 115; *Stewart v. Swaim*, 13 Phila. (Pa.) 185; *Earp's Will*, 1 Pars. Eq. Cas. (Pa.) 453.

Vermont.—*In re Cushing's Will*, 58 Vt. 393.

"Where a certain sum is due on a future given day, no part is due till that day, and it is fully settled by all the authorities that there is no apportionment." *Per* Swift, C. J., in *Tracy v. Strong*, 2 Conn. 662.

The General Rule is, that where an annuity is payable at a fixed day during life, and the annuitant dies before the day, his representatives are not entitled to a proportionate share of the annuity for the time which has elapsed since the last day of payment. *In re*

Lackawanna Iron, etc., Co.'s Petition, 37 N. J. Eq. 26. But if the annuitant lives until morning of the day whereon the annuity is payable, his representatives are entitled thereto, although not demanded by him. *In re Lackawanna Iron, etc., Co.'s Petition*, 37 N. J. Eq. 26.

In *Manning v. Randolph*, 4 N. J. L. 162, it appeared that the annuitant, who was entitled to an annuity payable on the 12th day of April yearly, died only eight days before the annuity became due. The court said: "No principle is better settled than that, if a bond be for the payment of an annuity at a day certain, and the annuitant die before the day, the annuity for that year is lost."

In *Wiggin v. Swett*, 6 Met. (Mass.) 194, 39 Am. Dec. 716, a husband provided in his will for the payment of an annuity to his wife in quarterly instalments. The wife died three days before a quarterly instalment became due, and it was held that the annuity could not be apportioned, and that her representatives were not entitled to receive a *pro rata* payment. The common-law rule has since been changed in *Massachusetts* by statute. *Bates v. Barry*, 125 Mass. 83, 28 Am. Rep. 207.

2. Apportionment of Annuity for Support and Maintenance—England.—*Weigall v. Brome*, 6 Sim. 99; *Howell v. Hanforth*, 2 W. Bl. 1016; *Hay v. Palmer*, 2 P. Wms. 501; *Ex p. Smyth*, 1 Swanst. 349, note; *Reynish v. Martin*, 3 Atk. 330.

Massachusetts.—*Dexter v. Phillips*, 121 Mass. 180, 23 Am. Rep. 261; *Weston v. Weston*, 125 Mass. 268.

New Jersey.—*In re Lackawanna Iron, etc., Co.'s Petition*, 37 N. J. Eq. 26.

New York.—*Irving v. Rankine*, 13 Hun (N. Y.) 147, affirmed in 79 N. Y. 636; *Kearney v. Cruikshank*, 117 N. Y. 95, reversing 46 Hun (N. Y.) 219.

Pennsylvania.—*Stewart v. Swaim*, 13 Phila. (Pa.) 185, 36 Leg. Int. (Pa.) 302; *Blight v. Blight*, 51 Pa. St. 420; *Gheen v. Osborn*, 17 S. & R. (Pa.) 171; *Earp's Will*, 1 Pars. Eq. Cas. (Pa.) 453.

In *Gheen v. Osborn*, 17 S. & R. (Pa.) 171, the court, by *Huston, J.*, said: "It has been settled in this country that an annuity for the support of daughters is apportioned, and is to be paid up to the death of the daughter, or to the period when the annuity is to cease. So, also, an annuity to a wife for her separate maintenance has been apportioned, and decreed, that the fraction occurring between the last day of payment and her death, is to be paid."

3. Apportionment of Annuity for Support of Wife Living Apart from Husband.—*Howell v. Hanforth*, 2 W. Bl. 1016; *In re Lackawanna*

Reasons for the Exceptions.—These exceptions have been allowed from the necessity of the case, as otherwise the infants in the one case, or the wife living upon a separate maintenance in the other, could not procure credit for necessities from the time when one instalment became due to the next, unless the creditors should choose to take the risk of the annuitant's surviving until the next instalment became due.¹

2. Annuity in Lieu of Dower.—A third exception to the general rule has sometimes been allowed in the case of an annuity given in lieu of dower;² the reason being that as dower lasts during the life of the widow, that which is given in its place should last the same length of time.³

3. Statutory Changes.—In several jurisdictions the common-law rule is changed by statute, and annuities, like interest, are considered as accruing from day to day, and are apportioned accordingly.⁴

Iron, etc., Co.'s Petition, 37 N. J. Eq. 26; Kearney v. Cruikshank, 117 N. Y. 95, *reversing* 46 Hun (N. Y.) 219; Blight v. Blight, 51 Pa. St. 420; Stewart v. Swaim, 13 Phila. (Pa.) 185, 36 Leg. Int. (Pa.) 302; Fisher v. Fisher, 5 Pa. L. J. 178; Sweigart v. Frey, 8 S. & R. (Pa.) 299.

In *In re Lackawanna Iron, etc., Co.'s* Petition, 37 N. J. Eq. 26, A and his wife conveyed their farm to B, in consideration of B's agreement, secured by his bond and mortgage on the premises, to pay A an annuity of two hundred and fifty dollars on the first day of April, for his life, and if A's wife survived him, to pay her an annuity of two hundred dollars for her life, and A's wife outlived him, he dying some months before the payment of the annuity; it was held that her annuity, having been given for her support, was apportionable.

1. Tracy v. Strong, 2 Conn. 662; Irving v. Rankine, 13 Hun (N. Y.) 147, *affirmed* in 99 N. Y. 636; Kearney v. Cruikshank, 117 N. Y. 95, *affirming* 46 Hun (N. Y.) 219.

In Wilson's Appeal, 108 Pa. St. 344, 56 Am. Rep. 214, the court, by Paxson, J., stated the reasons for the exception as follows: "Courts of equity have extended the doctrine of apportionments to cases of settlements or annuities for maintenance, upon the ground of the presumed intention of the settler or donor to provide for the support of the beneficiary down to the determination of the gift by death, marriage, or arrival at majority, as the case may be."

2. Annuity in Lieu of Dower.—Blight v. Blight, 51 Pa. St. 420; Stewart v. Swaim, 13 Phila. (Pa.) 185, 36 Leg. Int. (Pa.) 302; Gheen v. Osborn, 17 S. & R. (Pa.) 171; Fisher v. Fisher, 4 Am. L. J. 539, 5 Pa. L. J. 178; *In re* Cushing's Will, 58 Vt. 393.

In Gheen v. Osborn, 17 S. & R. (Pa.) 171, a bequest was as follows: "I do further bequeath to my said wife the sum of one hundred dollars to be paid to her out of my estate yearly and every year during her natural life, * * * all which devises and bequests are given to my said wife in lieu of her dower." Testator died May 16, 1814; his wife died March 22, 1824, and her executor was allowed to recover the proportion of the annuity from May 16 to March 22 of the last year.

See Tracy v. Strong, 2 Conn. 659, where a sum of money was secured by a bond to a widow in consideration of her relinquishing her dower right, the annuity being payable on a certain day in each year during her life, and it was held that this was an annuity, not subject to apportionment, for the reason that the taking of the annuity was her own act, and had not been given to her in lieu of her dower.

Ground Rent to Widow.—An apportionment has been allowed where an annuity in the nature of a ground rent was devised to a widow, with remainder over. Smith v. Wistar, 5 Phila. (Pa.) 145. See also *In re* Lackawanna Iron, etc., Co.'s Petition, 37 N. J. Eq. 26.

3. Gheen v. Osborn, 17 S. & R. (Pa.) 171; Blight v. Blight, 51 Pa. St. 420.

4. Statutory Changes.—In *England* statutes have been enacted from time to time changing the harsh and rigorous rule of the common law. The first such statute, 4 Wm. IV., c. 22, made annuities apportionable in respect of time. In construing this statute, some courts held that the statute covered continuing annuities only; that is, annuities not terminating with the life of the first taker. Carter v. Taggart, 16 Sim. 447; Reg. v. Treasury Com'rs, 16 Q. B. 357; Lowndes v. Stamford, 18 Q. B. 425, 83 E. C. L. 425. This led to the enactment of the comprehensive statute, 34 and 35 Vict., c. 35, which made all annuities apportionable and declared that annuities should, like interest on money lent, be considered as accruing from day to day, and should be apportionable in respect of them accordingly.

Canada.—It seems that the English statutes relative to apportionment are not recognized in courts of law. Ausman v. Montgomery 5 U. C. C. P. 364.

But in the chancery courts they are recognized, and apportionment is allowed. Woodside v. Logan, 15 Grant's Ch. (U. C.) 145.

Massachusetts.—Under Gen. Stat., c. 97, § 24, an annuity may be apportioned. Bates v. Barry, 125 Mass. 83, 28 Am. Rep. 207.

New York.—Laws of 1875, c. 542, provide for the apportionment of rents, annuities, dividends, and other payments; but the statute does not apply to an annuity created by will where the testator died before its passage

VIII. PAYMENT—1. From What Time.—In the absence of statute or a disposition in the will to the contrary, annuities are payable at the end of one year from the death of the testator, and bear interest, where interest is payable thereon, from the time when the first payment is due and not made.¹ Where a sum of money is bequeathed in trust, with direction that the interest and income be applied to the use of a certain person, such person is entitled to interest from the death of the testator.²

Kearney v. Cruikshank, 117 N. Y. 95, *reversing* 46 Hun (N. Y.) 219; *Irving v. Rankine*, 13 Hun (N. Y.) 147, *affirmed* in 79 N. Y. 636.

1. When Annuity Payable—England.—*Rawson v. M'Causland*, 22 W. R. 145, 7 Ir. R. Eq. 277; *Hawthornthwaite v. Hawthornthwaite*, 27 Beav. 1; *Gibson v. Bott*, 7 Ves. Jr. 96; *Fearn v. Young*, 9 Ves. Jr. 553; *Stamper v. Pickering*, 9 Sim. 176.

Connecticut.—*Bartlett v. Slater*, 53 Conn. 102, 55 Am. Rep. 73.

Maine.—*Weld v. Putnam*, 70 Me. 209.

Massachusetts.—*Pollock v. Learned*, 102 Mass. 54; *Sargent v. Sargent*, 103 Mass. 297. *New Jersey.*—*Hayes v. Whittall*, 13 N. J. Eq. 241.

New York.—*Lawrence v. Embree*, 3 Bradf. (N. Y.) 364; *Cooke v. Meeker*, 36 N. Y. 15; *Matter of Lynch's Estate*, 52 How. Pr. (N. Y. Surrogate Ct.) 367; *Craig v. Craig*, 3 Barb. Ch. (N. Y.) 76; *Booth v. Ammerman*, 4 Bradf. (N. Y.) 132; *Carr v. Bennett*, 3 Dem. (N. Y.) 449; *Kerrigan v. Kerrigan*, 2 Redf. (N. Y.) 517; *Kearney v. Cruikshank*, 117 N. Y. 95, *reversing* 46 Hun (N. Y.) 219.

Pennsylvania.—*Flickwir's Estate*, 136 Pa. St. 374; *Eyre v. Golding*, 5 Binn. (Pa.) 472.

South Carolina.—*Hall v. Hall*, 2 McCord Eq. (S. Car.) 269.

Vermont.—*Boomhower v. Babbitt* (Vt. 1895), 31 Atl. Rep. 838.

In *Eyre v. Golding*, 5 Binn. (Pa.) 472, *Tilghman, C. J.*, said: "The first payment of the annuity must be made at the end of the first year, or the intention of the testator is not complied with; you must count the time immediately from his death, or the legatee will not receive the annuity annually during her life."

Payable Monthly or Quarterly.—If an annuity is directed to be paid monthly or quarterly, the instalments are payable at the end of the first month or quarter. *Houghton v. Franklin*, 1 Sim. & St. 390, 1 L. J. Ch. 231; *Wiggin v. Swett*, 6 Met. (Mass.) 194, 39 Am. Dec. 716.

And if a specific time is named, a proportional part thereof becomes payable on the first quarterly day. *Williams v. Wilson*, 5 N. R. 267.

Where the first payment of an annuity, payable quarterly, was directed to be paid at the end of eighteen months, a quarter's instalment only was held payable at that time. *Irvin v. Ironmonger*, 2 Russ. & M. 531.

Time of Payment Discretionary.—Where a testator left an annuity to his wife payable annually or in any way that she might wish, the annuity was ordered payable quarterly in advance. *Hall v. Hall*, 2 McCord Eq. (S. Car.) 269.

Presumption of Payment.—In *Smallman v. Hamilton*, 2 Atk. 71, it was held that arrears of an annuity were presumed to have been paid, after the lapse of twenty years from the death of the annuitant to the commencement of an action to recover. And in *Shadbolt v. Vanderplank*, 29 Beav. 405, interest and an annuity payable by a brother to a sister were presumed, after an interval of nine years, to have been satisfied, she having lived with, and been maintained and clothed by, him.

Deferred Annuity Made Present.—A personal annuity, not to commence in enjoyment for twenty years after the death of the testator, should, for the sake of the tenant for life, be converted into a present interest, in order to yield an immediate income, so that the interest of the tenant for life and the remainderman may be equal by the year. *Healey v. Toppan*, 45 N. H. 243, 86 Am. Dec. 159.

Right to an Accounting.—The charge of an annuity on the residuary fund of an estate entitles the annuitant to an accounting by the persons administering the estate, as the annuitant has the most important interest in the residuary, and is entitled to know its amount so as to determine the extent of the property out of which the annuity is payable. *Wollaston v. Wollaston*, 7 Ch. Div. 58.

2. *Cooke v. Meeker*, 36 N. Y. 15; *Matter of Lynch's Estate*, 52 How. Pr. (N. Y. Surrogate Ct.) 367; *Craig v. Craig*, 3 Barb. Ch. (N. Y.) 76; *In re Williams*, 12 N. Y. Leg. Obs. 179; *Pierce v. Chamberlain*, 41 How. Pr. (N. Y. Supreme Ct.) 501; *Lawrence v. Embree*, 3 Bradf. (N. Y.) 364; *Eyre v. Golding*, 5 Binn. (Pa.) 472; *Townsend's Appeal*, 106 Pa. St. 268, 51 Am. Rep. 523; *Hillyard's Estate*, 5 W. & S. (Pa.) 30; *Welsh v. Brown*, 43 N. J. L. 37. *Compare Carr v. Bennett*, 3 Dem. (N. Y.) 433.

As to interest on arrears of annuities, see *infra*, this title, *Arrears*.

As to allowance of interest on legacies, see the title LEGACIES AND DEVISES.

Statute of Limitations.—It seems that the statute of limitations does not apply to annuities where there is a trust relationship. *Lewis v. Duncombe*, 29 Beav. 175, 7 Jur. N. S. 695, 30 L. J. Ch. 732, 867, 9 W. R. 446, 3 L. T. N. S. 867; *Smallman v. Hamilton*, 2 Atk. 71; *Snow v. Booth*, 8 De G. M. & G. 69, 2 Jur. N. S. 245, 25 L. J. Ch. 417.

But where an annuity was charged on lands, and secured by the personal covenant of the grantor, it was held under a six-year limitation (3 and 4 Wm. IV., c. 27) that six years was the limitation of the arrears which could be recovered, and that this period was to be reckoned from the time when the claim was made in suit. *Hunter v. Nockolds*, 1 MacN. & G. 640, 1 H. & Tw. 644, 19 L. J. N. S.

2. When Entitled to Priority.—When there is a gift of an annuity, and a residuary gift, the payment of the former takes precedence over that of the latter.¹ But where both annuities and legacies are charged upon real estate, the annuities will not have priority over the legacies.²

Burden of Proof.—The burden of proof lies on the person seeking priority for his annuity, to make out that such priority was intended by the testator.³

3. How Enforced—*a.* IN GENERAL.—In former times the remedy for non-payment of an annuity was by means of the original writ of annuity, but this is long since obsolete.⁴ Where there is a personal liability or a covenant, an action of debt or covenant may be maintained, as the case may be.⁵

Ch. 177, 14 Jur. 256, *reversing* 18 L. J. N. S. Ch. 407.

1. *Croly v. Weld*, 3 De G. M. & G. 993; *In re Tootal's Estate*, 2 Ch. Div. 628, 24 W. R. 1031. See also *Earp's Will*, 1 Pars. Eq. Cas. (Pa.) 453.

As to abatement of annuities, see the title ABATEMENT OF LEGACIES, vol. 1, p. 54.

A Pecuniary Legatee or an Annuitant must be paid in preference to the residuary legatee, who can take nothing till the legatees and annuitants have been paid in full. *In re Tootal's Estate*, 2 Ch. Div. 628, 24 W. R. 1031.

Annuities on Equal Footing.—In all cases of annuities given by a testator, the annuitants are to be placed upon an equal footing, and none are entitled to priority unless there is something in the will to show such an intention. *Miller v. Huddleston*, 3 MacN. & G. 513; *Byam v. Sutton*, 18 Jur. 847.

Widow.—Whenever a testator, having land of which his wife is dowable, gives her an annuity in satisfaction of her dower, she has priority, although the annuity may greatly exceed the amount of any dower she would be entitled to. *Roper v. Roper*, 3 Ch. Div. 714, 24 W. R. 1013, 35 L. T. N. S. 155. See also *Earp's Will*, 1 Pars. Eq. Cas. (Pa.) 453.

Annuities Given for the Maintenance of a Wife and Children who were otherwise unprovided for are held not to abate in proportion with the general legacies. *Lewin v. Lewin*, 2 Ves. 415; *Stewart v. Chambers*, 2 Sandf. Ch. (N. Y.) 382.

A testator gave his wife an annuity of twelve hundred dollars for the support and maintenance of herself and children until his son should become of age, after which the widow was to receive only eight hundred dollars, and the son the balance. The son died at the age of sixteen years, and it was held that, as the will was silent as to any reduction of the annuity in the event of the death of the son, the full amount should be paid to the widow. *Dixon v. Manning*, 1 Dem. (N. Y.) 581.

Bequest to Executor—Deficiency.—The bequest of an annuity to an executor for his trouble in the conduct and management of the testator's estate has no priority over other legacies in case of a deficiency, and it must abate. *Duncan v. Watts*, 16 Beav. 204.

Deficient Estate—Apportionment.—When a testator's estate is insufficient to pay in full annuities given by his will, the fund must be apportioned among the annuitants in the proportion which the sums composed of the arrears of the annuity in each case, plus the present value of the future payments, bear to

each other, and the rule applies in a case in which the annuitants are all living at the time of distribution. *In re Wilkins*, 27 Ch. Div. 703; *Heath v. Nugent*, 29 Beav. 226.

Priority of Dower over Annuity.—Where an annuity, by reason of there being sufficient personal property at the death of the testator to furnish it, did not by force of the devise become a charge on land, the right of dower of the wife of a son of the testator in his share in the realty taken by him through the devise will have priority over the right of the annuitant, which right will not be affected by an arrangement between the annuitant and the devisees after the right of dower has attached, charging the annuity on the land. But where the son of the testator obtained a portion of the testator's realty by conveyances from the devisees and the annuitant, the land being charged with the payment of the annuity when title passed to him, the right of his wife to dower in such land will be subject to the lien of the annuity. *Clark v. Clark*, 147 N. Y. 639, *affirming* 84 Hun (N. Y.) 362.

2. And this although the annuitants have power of distress and entry. *Roper v. Roper*, 3 Ch. Div. 714, 24 W. R. 1013, 35 L. T. N. S. 155.

3. **Burden of Proof.**—*Coore v. Todd*, 7 De G. M. & G. 520, 23 Beav. 92, 2 Jur. N. S. 1079; *Miller v. Huddleston*, 3 MacN. & G. 513, 21 L. J. N. S. Ch. 1, 15 Jur. 1043, *reversing* 17 Sim. 71, 13 Jur. 719; *Brown v. Brown*, 1 Keen 275.

In *Miller v. Huddleston*, 3 MacN. & G. 513, 15 Jur. 1043, *reversing* 17 Sim. 71, 13 Jur. 719, Truro, L. J., said: "The proof of this [the intention] must be clear and conclusive. The reason is, that a testator, in the absence of clear and conclusive proof to the contrary, must be deemed to have considered that his estate would be sufficient, and consequently not to have thought it necessary to provide against a deficiency by giving a priority, in case of a deficiency, to some of the objects of his bounty."

4. 3 Kent's Com. 460; *Horton v. Cook*, 10 Watts (Pa.) 125, 36 Am. Dec. 151.

A writ of annuity being a remedy at law against the person of the grantor of the annuity, it follows that a devisee could not avail himself of it, as the deviser ceased to exist before the gift of the annuity took effect. *Clun's Case*, 10 Coke 128; *Brediman's Case*, 6 Coke 59; *Townshend v. Duncan*, 2 Bland (Md.) 45, *reversing* *Robinson v. Townshend*, 3 Gill. & J. (Md.) 413.

5. 3 Kent's Com. 460; *Wood v. Wood*, 3

b. SALE OR MORTGAGE OF PROPERTY CHARGED.—Where arrears of an annuity are charged on the *corpus* of land, a court of equity will, in its discretion, order a sale of the property charged, or compel the same to be mortgaged for the purpose of paying the arrearages.¹

4. Arrears—*a. IN GENERAL.*—Whether the arrears of an annuity are payable out of the *corpus*, or out of the income of a fund or estate set aside for its payment, is often a question of difficulty which can only be determined by looking to the nature of the charge by which the annuity is created.²

Wend. (N. Y.) 454; *Horton v. Cook*, 10 Watts (Pa.) 125, 36 Am. Dec. 151.

But at common law an action of debt would not lie for an annuity in fee while it continues as a freehold interest. *Webb v. Jiggs*, 4 M. & S. 113.

The decree of the court ought not only to cover the arrears of the annuity already fallen due, but also reserve the liberty of applying to the court to extend its decree to cover all annuities afterwards falling due. *Marshall v. Thompson*, 2 Munf. (Va.) 412.

When Legatee Bound.—Where a legatee or donee of a testator's estate accepts the estate subject to the payment of an annuity, he becomes personally bound, and his acceptance of the gift is an assumption of the obligation imposed with it, on which an action may be maintained. *Gridley v. Gridley*, 24 N. Y. 130, reversing 33 Barb. (N. Y.) 250.

Cannot Compel Annuitant to Elect.—Where an annuity is secured by bond and deed of trust, the annuitant cannot be compelled to enforce such lien before proceeding against the general estate of his deceased obligor. *Schmieding v. Doellner*, 13 Mo. App. 228.

1. *In re Tucker* (1893), 2 Ch. 323; *Graves v. Hicks*, 11 Sim. 551; *Hambro v. Hambro* (1894), 2 Ch. 564; *Cupit v. Jackson*, 13 Price 721; *White v. James*, 26 Beav. 191; *In re Owen*, 43 W. R. 55; *Picard v. Mitchell*, 14 Beav. 105.

Proceeds—Sale of Property Charged.—When the payment of an annuity charged upon real estate is enforced by a sale of the estate, the cost and expenses of sale, the amount of all annuities due and unpaid, with interest, and a sum sufficient to produce the annuity in the future, should be taken from the proceeds of the sale, and the residue, if any, paid to the owner of the fee. *Merritt v. Bucknam*, 78 Me. 504.

May Foreclose Mortgage.—An annuitant holding a mortgage as security for the payment of an annuity may foreclose the same. *Power v. Jenkins*, 13 Md. 443.

Rights of Personal Representatives.—In *Moore v. Dunn*, 92 N. Car. 63, a mortgage was given to secure an annuity, and it provided that in case the annuity was not promptly paid, the annuitant might sell the mortgaged land, and after paying the instalments due reinvest the money, or estimate the cash value of the annuity at the day of sale and retain the amount out of the proceeds. The annuity was in arrears, and the suit was brought by the second mortgagee to foreclose. The annuitant elected to take the cash value of her annuity, but died pending the action to foreclose, and it was held that her

administrator was only entitled to the arrears of the annuity and the interest thereon.

Whether a Condition Subsequent—Lien Charged by Decree.—In *Gallaher v. Herbert*, 117 Ill. 160, a father conveyed lands to his son, the consideration being natural love and affection, whereupon the son agreed to pay to the father two hundred dollars per year during the latter's life, and further agreed not to sell or convey the premises during the life of the father; and the son making a default in payment, it was held that there was no condition subsequent, and that the grantor was not entitled to have his deed set aside, but only entitled to the money therein provided for, with interest, and to have a lien declared in his favor for the payment of the two hundred dollars annually. It seems, however, that the words "upon condition," or their equivalent, or a re-entry clause, were not incorporated in the deed.

Annuity Charged on Lands Devised.—Where real estate is devised upon condition that the devisee shall pay an annuity, the annuity becomes a charge upon the estate devised, and will be enforced in equity by a sale of the estate. *Merritt v. Bucknam*, 78 Me. 504. See also *Whitehouse v. Cargill*, 86 Me. 60.

Rights Not Divested by Sale.—Where the annuity of a widow is, by decree of the court, made a fixed charge upon land during her life, pursuant to the terms of the will, a sheriff's sale under that decree cannot divest such charge. *Solliday v. Gruver*, 7 Pa. St. 452; *Hill v. Truby*, 117 Pa. St. 320.

Corpus Insufficient.—In *Todd v. Bielby*, 27 Beav. 353, followed in *Potts v. Smith*, L. R. 8 Eq. 683, 17 W. R. 1083, 39 L. J. Ch. 131, these propositions were announced:

Division of Proceeds.—When the *corpus* of an estate charged by will with annuities is insufficient to pay the arrears, it will be divided among the annuitants in proportion to the value of their respective annuities.

Annuitants All Living.—If all the annuitants are living at the period of the division, the values must be ascertained as at the death of the testator.

Annuitants Dead.—If they are all dead, the values must be taken to be the respective amounts of arrears.

Some Annuitants Dead and Others Living.—But if some are dead and others living, the value as to the former will be taken at the amount of their arrears, and as to the latter, at the amount of their arrears added to the calculated value of the future payments.

2. See *supra*, this title, *On What Property Chargeable*.

b. WHEN PAYABLE OUT OF CORPUS.—Where it clearly appears that the annuity is charged upon the *corpus*, the *corpus* as a matter of course will be liable for the payment of the arrears.¹

Residuary Fund Set Apart.—If a fund is set apart to secure the payment of an annuity, which after the death of the annuitant is to go to the residuary estate of the grantor or donor, the annuitant will nevertheless be entitled to have the arrears of his annuity payable out of the *corpus*.²

Question of Intention.—Where the income of an estate is insufficient to pay an annuity, it is a question of the testator's intention whether resort shall be had to the *corpus*. *Jones v. Jones*, 27 Grant's Ch. (U. C.) 317; *Almon v. Lewin*, 5 Can. Sup. Ct. Rep. 514.

1. When Annuity Payable out of Corpus.—*Lazonby v. Rawson*, 4 De G. M. & G. 556, 1 Jur. N. S. 289, 24 L. J. Ch. 482; *Haynes v. Haynes*, 3 De G. M. & G. 590; *Howarth v. Rothwell*, 30 Beav. 516; *Picard v. Mitchell*, 14 Beav. 103; *Stamper v. Pickering*, 9 Sim. 176; *In re Tucker* (1893), 2 Ch. 323; *Wroughton v. Colquhoun*, 1 De G. & S. 36; *Swallow v. Swallow*, 1 Beav. 432, note (a); *Torre v. Browne*, 5 H. L. Cas. 555; *Pearson v. Helliwell*, L. R. 18 Eq. 411; *Byam v. Sutton*, 19 Beav. 556.

Where a testator clearly indicated an intention to give an annuity of a certain sum to his son, and directed his executors to invest a sum sufficient to produce the annuity, and thereafter, by reason of the rate of interest being lower, the fund failed to produce the amount required, it was held that the annuitant could claim from the residuary estate sufficient to make up the amount of the annuity. *Merritt v. Merritt*, 43 N. J. Eq. 11.

Raising Arrears by Mortgage.—When an annuity charged upon the *corpus* of a settled real estate is in arrear, the court has power to order the arrears to be raised by sale or mortgage of the estate, though the making of such an order is a matter, not of course, but of discretion. *In re Tucker*, (1893) 2 Ch. 323; *Graves v. Hicks*, 11 Sim. 551.

To same effect, see *Cupit v. Jackson*, 13 Price 721; *Picard v. Mitchell*, 14 Beav. 105; *Todd v. Bielby*, 27 Beav. 353; *Hambro v. Hambro* (1894), 2 Ch. 564; *In re Owen*, 43 W. R. 55; *White v. James*, 26 Beav. 191 (No. 2).

But as Long as the Annuity is Properly Paid the annuitant cannot claim this right. *In re Parry*, 42 Ch. Div. 570; *Potter v. Potter*, 50 L. T. 8.

Direction to Pay out of General Estate.—A direction to pay out of the general estate will not warrant a holding that the annuities are charged on realty. *Almon v. Lewin*, 5 Can. Sup. Ct. Rep. 514.

Annuity in Lieu of Dower.—A testator bequeathed to his wife, among other things, an annuity payable yearly, which with the other bequests to her was in lieu of dower; the residue of the estate, on the death of the wife, was to pass to other parties named; and, as the personal property was insufficient to pay the annuity, it was held that in default of income sufficient to pay the annuity, the

principal should be applied in payment thereof. *Rowe v. Lansing*, 53 Hun (N. Y.) 210.

2. Direction to Set Aside Fund which is to Fall into the Residue.—*May v. Bennett*, 1 Russ. 370; *Davies v. Wattier*, 1 Sim. & S. 463; *Bright v. Larcher*, 3 De G. & J. 148; *Croly v. Weld*, 3 De G. M. & G. 993; *Wright v. Callender*, 2 De G. M. & G. 652; *Ingleman v. Worthington*, 1 Jur. N. S. 1062; *Anderson v. Anderson*, 33 Beav. 223; *Mills v. Drewitt*, 20 Beav. 632; *Magill v. Murphy*, L. R. 1 Ir. 196; *Illsley v. Randall*, 50 L. T. 717; *Perkins v. Cooke*, 2 John. & H. 393; *Carmichael v. Gee*, L. R. 5 App. Cas. 588; *Anderson v. Dougall*, 15 Grant's Ch. (U. C.) 405.

In *Davies v. Wattier*, 1 Sim. & S. 463, the testator gave his wife an annuity, to be paid by his executors out of his personal estate not specifically bequeathed. A decree was made that the executors transfer four thousand pounds of navy five per cent. annuities and certain other stocks to a trustee, and that the annuity be paid out of the dividends accruing therefrom. The fund thus appropriated having become insufficient, it was held that, as the annuity was a charge upon the whole of the residue, the annuitant was entitled to have the deficiency made good out of the other funds.

In *May v. Bennett*, 1 Russ. 370, the testator directed his executors to lay out in any government security they pleased as much money as would produce a certain annual interest for his wife. Here it was considered that it was the testator's intention to secure to his widow a certain yearly sum, and not merely to require the setting apart of as much money as would produce that sum at the moment of appropriation, and that the difference should be made up from the general estate.

A testator gave a clear annuity to his wife; a certain sum was set apart, the income of which was to pay the annuity, and the rest of the personalty was distributed to the residuary legatees, who were also the residuary devisees; the income proved inadequate to pay the annuity, and it was held that the widow was entitled to have the deficiency made up out of the rents of the residuary real estate. *Denis's Estate*, 169 Pa. St. 493, affirming 4 Pa. Dist. Rep. 1.

Prospective Order for Payment of Deficiency.—The court, in some cases, will grant a prospective order for raising a deficiency out of the *corpus* of the fund. *Hodge v. Lewin*, 1 Beav. 431; *Swallow v. Swallow*, 1 Beav. 432, note (a).

Residuary and Pecuniary Legatee.—In *Wright v. Callender*, 2 De G. M. & G. 652, *Cranworth, J.*, said: "I see no principle in saying that where the question is between the

Charged on Income of Estate.—If the income of the whole estate is charged with the payment of an annuity, and the capital fund is limited over “after payment,” or “subject to” the payment of the annuity, the *corpus* will be liable to the payment of arrears.¹

c. WHEN PAYABLE OUT OF INCOME.—Where a sum of money is set apart, the annuity to be paid out of the dividends therefrom, with a gift over of the capital sum, the *corpus* is not liable for arrears.²

Payable out of Surplus Income.—If it clearly appears that the annuity is to be paid only from a yearly gift of the income of an invested fund, the *corpus* will not be liable.³

annuitant and those entitled to the residuary estate, the annuitant is entitled to have the annuity valued, and to be paid the amount of the valuation in respect of his annuity. In all the cases which have been cited in support of that view, the question has arisen between the annuitant and pecuniary legatees, and not between the annuitant and the residuary legatee. But as between an annuitant and pecuniary legatees, the court holds that there must be an abatement *pari passu* in case of deficiency of assets, and knows of no other way of dealing with the subject, or of making the requisite abatement than by means of a valuation.”

1. Income of Estate Charged with Payment of Annuity.—*Playfair v. Cooper*, 17 Beav. 187; *Phillips v. Gutteridge*, 4 De G. & J. 531, 8 Jur. N. S. 1196, 11 W. R. 12, 32 L. J. Ch. 1; *Ex p. Wilkinson*, 3 De G. & S. 633; *Percy v. Percy*, 35 Beav. 295; *Stamper v. Pickering*, 9 Sim. 176; *In re Tyndall*, 7 Ir. Ch. 181; *In re Pepper's Trusts*, L. R. 13 Ir. 108; *In re Moore's Estate*, L. R. 19 Ir. 365; *In re Mason*, 8 Ch. Div. 411; *Bell v. Bell*, 6 Ir. R. Eq. 239; *Carter v. Salt*, 1 Ir. R. Eq. 97.

In *Playfair v. Cooper*, 17 Beav. 187, the *corpus* was given over “subject and without prejudice to the payment of the said annuity,” and it was held that the arrears were a charge on the *corpus*. So where there is an indefinite charge of an annuity with a gift over of what remains undisposed, the *corpus* will be liable for arrears. *Phillips v. Gutteridge*, 4 De G. & J. 531, 11 W. R. 12, 8 Jur. N. S. 1196, 32 L. J. Ch. 1. But see *Birch v. Sherratt*, L. R. 4 Eq. 58, where a testator directed his trustees to convert and invest the whole of his estate, and with and out of the annual proceeds to levy and raise a life annuity, “and from and after the payment” and “subject thereto,” to pay the income for life to certain persons, and thereafter to divide the principal amongst their children; and the income being insufficient for the payment of the annuity in full, it was held that the arrears were not payable out of the *corpus*, for the reason that the words “subject thereto” meant subject to the payment of the annuity out of the income. See also *Taylor v. Taylor*, L. R. 17 Eq. 324.

Annuity in Lieu of Dower.—A testator charged his estates with the payment of an annuity to his wife in lieu of dower. The real estate having been sold to pay the debts, and the income remaining being insufficient to pay the annuity, it was held that the widow was entitled to have her annuity paid out of

the capital as well as the income of the remaining fund, and, as the annuity was wholly in arrear, that the arrears were to be computed from the testator's death. *Stamper v. Pickering*, 9 Sim. 176. And in *Percy v. Percy*, 35 Beav. 295, a testator directed his trustees to convert the residue of his real and personal estate, and to invest so much thereof as would produce a certain annuity, and to pay it to his wife during her life, and he gave the residue not wanted for that purpose to other persons. There was a deficiency in the income of the widow's annuity, and it was held that the deficiency was payable out of the *corpus*.

But see *Graves v. Hicks*, 11 Sim. 551, where the annuity was not in lieu of dower, and the court refused to order an estate, charged with an annuity to the testator's widow, to be either mortgaged or sold for payment of the annuity, notwithstanding the rents were inadequate to pay it, and it became greatly in arrear, the estate being settled for life with the remainders over.

2. Fund Set Apart to Pay Annuity out of Dividends, with Gift Over.—*Baker v. Baker*, 6 H. L. Cas. 616; *Michell v. Wilton*, 23 W. R. 789; *Tarbottom v. Earle*, 11 W. R. 680; *Hindle v. Taylor*, 20 Beav. 109; *Miller v. Huddleston*, 17 Sim. 71, 3 MacN. & G. 513.

In *In re Mason*, 8 Ch. Div. 411, *Jessel, M. R.*, said: “This is a class of cases of which *Baker v. Baker*, 6 H. L. Cas. 616, is an instance, in which the testator has not given the annuity at all, but has directed a sum of money to be set apart which shall be sufficient to pay an annual sum, and then directs the income of the sum so set apart to be paid to a person for life. That is not a gift to an annuitant of a sum of money specifically mentioned, but it is a direction to set apart a capital sum, and what is given, and what the person to whom the income is to be paid takes, is the income of that capital sum which accrues due during his life, and nothing else.”

3. Sheppard v. Sheppard, 32 Beav. 194; *Darbon v. Rickards*, 14 Sim. 537; *Stelfox v. Sugden*, 1 Johns. 234; *Wormald v. Muzeen*, 17 Ch. Div. 167, 50 L. J. Ch. 776, 29 W. R. 795; *In re Matthews's Estate*, L. R. 7 Ir. 269.

In *Kendall v. Russell*, 3 Sim. 424, the testator gave certain yearly sums, to issue from the dividends of a quantity of stock in the navy five per cent. annuities sufficient to produce such sums, which stock was to be appropriated and invested, in the names of his executors, for this purpose. It was held that this was a gift of so much in the navy five per

Corpus to Remain Intact.—Where the intention is apparent that the *corpus* is to be intact on the death of the annuitant, it will not be liable for arrearages.¹

d. INTEREST—WHEN ALLOWED.—The cases are somewhat conflicting upon the question of the allowance of interest on arrears of annuities generally. The *English* courts seem to be inclined against it, and the courts of the *United States* in favor of it.²

cents. as would produce the annuity; that it was the intention of the testator that the appropriation of the stock designated should relieve the residue of his estate, and that the annuitants were not entitled to have the deficiency made up from the residue.

Payable from Accrued Income.—A testator devised the residue of his estate to executors in trust to pay "out of the income thereof" to his daughter during her life an annuity of sixteen hundred dollars in quarterly payments, and made further provision for the accumulation of "any surplus or excess of said income after paying said sixteen hundred dollars" and lawful expenses; and it was held upon an accounting had after the lapse of several years, it appearing that deficiencies of income for certain years had been paid by the trustees out of the surplus received in others, that the annuitant was entitled to have all arrearages satisfied out of the income of after years that were full. *Cochrane v. Walker*, 4 Dem. (N. Y.) 164, following *Stewart v. Chambers*, 2 Sandf. Ch. (N. Y.) 382.

Charge beyond Life of Annuitant.—In *In re Mason*, 8 Ch. Div. 411, Jessel, M. R., said: "There is a class of cases of which *Booth v. Coulton*, L. R. 5 Ch. 684, is one, in which there is not a gift of an annuity *simpliciter*, but a fund is directed to be invested, or there is an existing investment, or an existing estate producing income, and the testator directs that out of the income of the sum to be invested, or of the existing investment, or out of the rents of the existing estate, a life annuity is to be paid, and subject thereto the fund or estate is to go elsewhere. That class of cases has been held to mean this: that there being no direction that the annuity is to be paid out of the income to accrue during the life of the annuitant, the annuity is a charge upon the income even beyond the life of the annuitant, so that no one can take the income till the arrears of the annuity are satisfied." This doctrine is often applied so that an annuity will be a continuing charge on annual rents, even after the death of the annuitant or until the arrearages are paid. *Philipps v. Philipps*, 8 Beav. 193; *Taylor v. Taylor*, L. R. 17 Eq. 324; *Forbes v. Richardson*, 11 Hare 354; *Salvin v. Weston*, 14 W. R. 757.

1. Corpus to Remain Intact.—*Taylor v. Taylor*, L. R. 17 Eq. 324; *Foster v. Roberts*, 29 Beav. 467; *Forbes v. Richardson*, 11 Hare 354; *Addcott v. Addcott*, 29 Beav. 460; *Darbon v. Rickards*, 14 Sim. 537; *Earle v. Bellingham*, 24 Beav. 445; *In re Kelly*, 9 Ir. Ch. 103; *Sheppard v. Sheppard*, 32 Beav. 194.

This class of cases is best illustrated in the ordinary instance of a "testator devising his estate in strict settlement—to one person for life with remainders over—and saying that

those persons are to take the estate, subject to the payment of certain annual sums, and to the annuitants he gives powers of distress and entry for the recovery of those sums, as if the same had been secured by a lease for years," there being nothing in the terms of the gift by which the annuities can be charged upon the *corpus*. *Taylor v. Taylor*, L. R. 17 Eq. 324.

Gift in Tail of Corpus.—When the gift over is in the nature of a gift in tail of the whole *corpus*, the *corpus* must remain intact. *Sheppard v. Sheppard*, 32 Beav. 194.

2. Interest on Arrears of Annuities.—*Booth v. Coulton*, 30 L. J. Ch. 378; *Mansfield v. Ogle*, 5 Jur. N. S. 419; *Martyn v. Blake*, 3 Dr. & War. 125; *Booth v. Leycester*, 3 Myl. & C. 459, 1 Keen 247; *Robinson v. Cumming*, 2 Atk. 409; *Wheatley v. Davies*, 24 W. R. 818, 35 L. T. N. S. 306; *Jenkins v. Briant*, 16 Sim. 272; *Lainson v. Lainson*, 17 Jur. 1044; *Bedford v. Coke*, Dick. 178, 2 Ves. 116; *Bignal v. Brereton*, 1 Dick. 278; *In re Powell*, 10 Hare 134; *Torre v. Browne*, 5 H. L. Cas. 555; *Beamish v. Farmer*, 1 Ir. R. Eq. 466; *Anderson v. Dwyer*, 1 Sch. & Lef. 301; *Goldsmith v. Goldsmith*, 17 Grant's Ch. (U. C.) 213; *Snarr v. Badenach*, 10 Ont. Rep. 131.

In *Pennsylvania* an unpaid instalment of an annuity bears interest from the time when due. *Hoffman's Estate*, 3 Pa. Dist. Rep. 663; *Addams v. Hefferman*, 9 Watts (Pa.) 529; *Brotzman's Estate*, 133 Pa. St. 478; *Stewart v. Martin*, 2 Watts (Pa.) 200. See also *Hilyard's Estate*, 5 W. & S. (Pa.) 30; *Flickwir's Estate*, 136 Pa. St. 381.

In *South Carolina* it is held that it is the general rule to allow interest, although the earlier case of *Irby v. M'Crae*, 4 Desaus. (S. Car.) 432, held that the allowance of interest is "in the legal discretion of the court." *Stephenson v. Axson*, Bailey Eq. (S. Car.) 274.

Compare Adams v. Adams, 10 Leigh (Va.) 552.

See *Waples v. Waples*, 1 Harr. (Del.) 392, where it is said that the English decisions on the subject of allowing interest on arrears of an annuity are variant and conflicting, and probably interest would be allowed in no case except where the annuity was for the maintenance of the annuitant.

As to the allowance of interest on an annuity from the death of the donor or grantor to the time of the first payment, see *supra*, this title, *Payment*.—*From what Time*.

Interest Discretionary.—Some courts hold the allowance of interest to be discretionary. 1 Hov. Supp. 126, 127; *Irby v. M'Crae*, 4 Desaus. Eq. (S. Car.) 432.

In *Beeson v. Elliott*, 1 Del. Ch. 368, it is held that the question of allowing interest upon arrears of an annuity in a court of equity

Annuity for Maintenance.—In the case of an annuity given for support and maintenance, interest on arrears is very frequently allowed.¹

5. Value—How Computed.—In the absence of statute or court rule to the contrary, it is generally proper to compute the value of an annuity by means of the Northampton Tables.²

is discretionary, depending upon equitable considerations arising out of the circumstances of the particular case. To same effect, see *Laura Jane v. Hagen*, 10 *Humph. (Tenn.)* 332.

Covenant to Indemnify.—If there is a covenant to indemnify an annuitant against the effects of incumbrances, and the perception of the annuity has been prevented by the claims of incumbrancers, and especially if this has occurred in consequence of the acts of the covenantor, it seems that it will be a proper case to give interest upon the arrears. *Mansfield v. Ogle*, 5 *Jur. N. S.* 419; *Martyn v. Blake*, 3 *Dr. & War.* 125.

Action on Annuity Bond.—It seems that where an annuity is secured by a bond, the court will allow interest on arrearages, but not exceeding, however, in the whole, the penalty of the bond. *Crosse v. Bedingfield*, 12 *Sim.* 35.

Gross Misconduct.—Interest will be given upon the arrears of an annuity where the person bound to pay it has been a party to the deed by which it was created, and where his acts disclose a system of misconduct and opposition for the purpose of evading payment. *Mansfield v. Ogle*, 5 *Jur. N. S.* 419; *Martyn v. Blake*, 3 *Dr. & War.* 125; *Stapleton v. Conway*, 1 *Ves.* 427.

Pending Action.—In *Jenkins v. Briant*, 16 *Sim.* 272, the court refused to allow interest on arrears where, after the death of a person who had covenanted to pay an annuity, a suit was instituted for the administration of assets, pending which the annuity became in arrear.

Judgment for Arrearages.—An annuitant cannot recover interest by way of damages upon a judgment for arrearages. *Booth v. Leicester*, 3 *Myl. & C.* 459; *Ogilvie v. Foley*, 2 *W. Bl.* 1111.

But see *Hyde v. Price*, 8 *Sim.* 578, where the arrears of an annuity were treated as a debt due, the annuity being secured by a bond, and interest allowed.

Neglect to Demand.—Where a person entitled to an annuity removed to parts unknown, and made no demand of the administrator for many years till suit was instituted therefor, the court refused to allow interest except from the date of the bill; the allowance of interest in such cases not being matter of positive law, but dependent on the circumstances. *Laura Jane v. Hagen*, 10 *Humph. (Tenn.)* 332.

Payable in Agricultural Products.—Interest will not be allowed on the arrears of an annuity which is to be paid at a particular place in agricultural products, the value of which is to be ascertained by testimony, there being an absence of any proof of a demand at the place of payment, or of an agreement to dispense with such demand. *Philips v. Williams*, 5 *Gratt. (Va.)* 259.

1. Annuity for Maintenance and Support—

Interest.—*Newman v. Auling*, 3 *Atk.* 579; *Beavers v. Smith*, 11 *Ala.* 32; *Turrentine v. Perkins*, 46 *Ala.* 631.

For a General Discussion of the American and English authorities relative to allowing interest on arrearages, see *Waples v. Waples*, 1 *Harr. (Del.)* 399.

Maintenance of Wife.—In *Newman v. Auling*, 3 *Atk.* 579, interest was allowed upon arrearages where the annuity was for the maintenance of a wife. But see *Tew v. Winterton*, 1 *Ves. Jr.* 451, and *Creuze v. Hunter*, 2 *Ves. Jr.* 157, where, under similar circumstances, interest was refused.

Annuity in Lieu of Dower.—An annuity bequeathed to a widow in lieu of dower, for her maintenance, and charged upon real estate, payable quarterly, the prompt payment of which is necessary to her support, is a proper case for the allowance of interest. *Litton v. Litton*, 1 *P. Wms.* 541; *Beeson v. Elliott*, 1 *Del. Ch.* 368; *Irby v. M'Crae*, 4 *Desaus. Eq. (S. Car.)* 432.

But in *Tew v. Winterton*, 1 *Ves. Jr.* 451, interest was refused; and in *Isenhardt v. Brown*, 2 *Edw. Ch. (N. Y.)* 347, it is held that the weight of authority is against allowing a widow interest upon arrears.

2. Method of Computation of Present Value of Annuity.—*Schmieding v. Doellner*, 13 *Mo. App.* 228; *People v. Security L. Ins., etc., Co.*, 7 *Abb. N. Cas. (N. Y. Supreme Ct.)* 198; *Peterson v. Oleson*, 47 *Wis.* 122.

In several jurisdictions, however, other methods are used.

In *England*, where an annuitant entitled to a perpetual annuity adequately secured is willing to receive a present payment of cash in lieu of his annuity, the amount of such cash payment ought to be such a sum as, at the price of the day, will purchase two and one-half per cent. government stock sufficient to produce the annuity, excluding any charge for brokerage. Before the National Debt Act of 1888, the rate would have been three per cent. *Hicks v. Ross* (1891), 3 *Ch.* 499.

In *Kentucky* the courts have adopted the American Life Annuity Tables to determine the present value of annuities given for life. *Alexander v. Bradley*, 3 *Bush (Ky.)* 667.

Massachusetts Stat. 1891, c. 425, § 13, provides that "in case of an annuity or life estate, the value thereof shall be determined by the so-called actuaries' combined experience tables and four per cent. compound interest." *Minot v. Winthrop*, 162 *Mass.* 113.

Present Value—Brokerage.—Where an annuitant is to receive a present cash value or a perpetual annuity, no charge for brokerage should be made. *Hicks v. Ross* (1891), 3 *Ch.* 499.

Calculation of Annuity in Lieu of Dower.—Where it is agreed between the widow and the tenant that he shall allow her a yearly sum

IX. RIGHTS OF CREDITORS.—A devise of an absolute annuity, which is not a trust, is liable to the claims of the creditors of the annuitant, notwithstanding a statement contained in the instrument creating the annuity, that it is for the support of the annuitant.¹

X. DUTIES OF EXECUTORS AND TRUSTEES.—Where a testator provides in his will that a sum shall be set aside to pay a certain annuity, it is the duty of the executors or trustees to set apart a sum sufficient to pay the amount of the annuity.²

instead of having dower assigned to her according to law, the interest of one-third of the value of the premises at the time of the alienation is the proper measure of the annuity; subject, however, to a reasonable deduction as a compensation to the tenant on account of necessary repairs and the risk of loss by fire, where a house and buildings constitute the principal part of the property. *Hale v. James*, 6 John. Ch. (N. Y.) 259, 10 Am. Dec. 328.

Damages—Evidence of Health of Annuitant—Charge to Jury.—At the trial of an action under 9 and 10 Vict., c. 93, brought for the benefit of the mother, widow, and children of R, to recover damages for causing the death of R by negligence, it was proved that the deceased was under a covenant to pay his mother an annuity of a certain sum during their joint lives. A witness was called in behalf of plaintiff, who stated that he was an "accountant," and that he had personal experience as to the mode in which insurance business was conducted. He gave evidence, after referring to certain tables used by insurance offices called the "Carlisle Tables," as to the average duration of life of two persons of the ages of the mother and son respectively, and as to the price for which an annuity for the mother's life could be bought. The admissibility of this evidence was objected to by the defendants, but was ruled admissible.

The court charged the jury that they might, if they thought proper, calculate the mother's damages by ascertaining what sum would produce the given annuity for a person of her age according to the average duration of human life; and that, in calculating the widow's and children's damages, they might, if they thought proper, take as a guide the period of the probable duration of life of a person of the age of the deceased. To all of which the defendant excepted. And on appeal it was held:

First, That the witness was competent to give evidence as to the probable duration of life, and the price of the annuity, although not an actuary; and (Brett, J., *dissenting*) that the evidence was relevant and properly admitted.

Secondly, That the direction to the jury as to the calculation of the mother's damage was wrong, as the direction was erroneous in not noticing the circumstance that the annuity of the mother was on the joint lives of herself and son, and that it was only secured by his personal covenant.

By Honyman, J.: The direction was also erroneous in authorizing the jury to find the term for which an annuity is to be purchased, solely by reference to the average duration of

life, without taking into account the state of health of the particular annuitant.

Thirdly, That the direction as to the mode of calculating the damages recoverable by the widow and children might be construed as meaning that the probable duration of life of a person of the same age and in the same circumstances as the deceased, was an element to be taken into the calculation of the jury with the rest of the evidence, and, being so construed, was correct (Brett, J., *dissenting*). *Rowley v. London, etc., R. Co.*, L. R. 8 Exch. 221.

1. *Gifford v. Rising*, 51 Hun (N. Y.) 1.

This case, however, was decided without reference to the earlier case of *Sillick v. Mason*, 2 Barb. Ch. (N. Y.) 79, *modifying* 4 Sandf. Ch. (N. Y.) 351, where it is held that if a person is entitled under a will to an annuity for life, payable semi-annually, out of real and personal estate in the hands of trustees, his interest in such annuity, beyond what is necessary for the support of himself and his family, may, under the provisions of the revised statutes (see 1 R. S. 729, § 57; 773, § 2), be reached by a creditor's bill, and applied to the payment of his debts. To same effect, see *Frazier v. Barnum*, 19 N. J. Eq. 316, 97 Am. Dec. 666.

In *Degraw v. Clason*, 11 Paige (N. Y.) 136, an annuity was bequeathed by the testator to his widow, and was charged upon his real and personal estate. It was held liable for the debts of the widow.

In *Younghusband v. Gisborne*, 1 De G. & S. 209, it is held that an annuity given by will through the medium of trustees, charged on real estate, is liable to the judgments of the annuitant. See also 2 Sugd. on Vendors, 162. See also the title TRUSTS AND TRUSTEES in this work, and the title CREDITORS' BILLS in the ENCYCLOPÆDIA OF PLEADING AND PRACTICE.

2. Duties of Executors and Trustees.—*Cummings v. Cummings*, 146 Mass. 508; *Rhodes's Estate*, 11 Phila. (Pa.) 133, 33 Leg. Int. (Pa.) 168.

Where a person leaves the disposition of his property after his decease to trustees, and requires them to purchase an annuity as he has directed, and they decline or neglect to act, and the aid of the court is required, the court will not, as a matter of course, exercise the discretion with which the trustees were invested, but will follow its own established and known rule, unless the intention of the testator plainly appears to exclude such a mode of procedure. But the court will no doubt look to the will of the testator, and so deal with the property as to effectuate the purpose that he appears to have had in

Entitled to Best Security Obtainable.—An annuitant is entitled to the best security as an investment for the capital sum producing the annuity.¹

ANNUL.—To annul is to make void, and to dissolve is to annul.²

ANOTHER.—The word “another” means a different person.³

view. *Prendergast v. Prendergast*, 3 H. L. Cas. 195, 14 Jur. 989, *affirming* *Prendergast v. Lushington*, 5 Hare 171, 16 L. J. N. S. Ch. 125, 11 Jur. 865.

A testator having given certain annuities to be paid by his executor, it was held that it was the executor's duty to pay the annuities, and that he ought to retain at his disposal sufficient funds to meet the charges, instead of leaving the annuitants to resort annually to the persons who might hold the different parcels of the real estate which were liable for the payments. *Nash v. Cutler*, 19 Pick. (Mass.) 67.

Fund to be Used at Discretion.—Where an annuity was given to a trustee in trust to apply the same at his discretion for the benefit of the annuitant during life, and for his advancement, maintenance, support, or otherwise for his benefit, without being answerable for any of the money so laid out, or for the exercise of the discretion so vested in the trustee as to the mode and extent of expending and laying out the same, it was held that the trustee could not apply any portion of the annuity for his own benefit, but was bound to account for all sums not shown to be applied for the advancement, maintenance, support, or benefit of the annuitant. *Wainford v. Heyl*, L. R. 20 Eq. 321.

Discretion of Executors.—A testator devised a certain annuity to his sister during her life, with the further direction that, if it were necessary for her care and comfort, his executors should pay to her, or expend for and on her behalf, such further sums as they in their discretion should deem proper; and it was held that after the distribution of the estate the executors had discretion to increase the annuity out of the interest of the residuary legatee. *Elmer v. Gray*, 73 Cal. 283.

Where a testator directed his executors, “as soon as, in their judgment, the best interests of my estate shall warrant,” to set aside sufficient money to secure an annuity, and they, in the exercise of their discretion, without improper motives, did not set aside the money, it was held that the court properly refused to compel them to do so, or to pay other legacies which were made payable after the setting aside of the annuity fund. *Young's Estate*, 4 Pa. Dist. Rep. 293. See also *Brotzman's Estate*, 133 Pa. St. 478, 119 Pa. St. 645.

Unauthorized Purchase of Annuity by Trustee.—Certain property was conveyed in trust for the grantor during life, and after her death to hold, keep properly invested, collect rents and profits, and to apply the net income, in the trustee's discretion, to the comfortable support of C, with power, if the income was inadequate, to use the principal, first obtaining the consent of the court. After C's death, provision was made for the distribution of any remaining part of the *corpus* of the trust. It was held that the trustee could not purchase with the *corpus* an annuity for C, although the income

was insufficient for his support, and the annuity would perhaps suffice, and the purchase was assented to by some of the donees over. *Eldredge v. Greene*, 17 R. I. 17.

Mingling Trust Fund.—Where an executor and trustee held property in trust for the purpose of paying an annuity, and so mingled it with his other funds that it could not be traced, he having made an assignment for the benefit of creditors, it was held that the annuitant should come in with the rest of the creditors. *Little v. Chadwick*, 151 Mass. 109.

Liable for Breach of Duty.—Where an annuity is devised, and the executor is authorized to sell lands sufficient to raise a fund for the payment of the annuity, and he fails to do so, it is held to be an unfaithful administration, and a breach of the condition of his official bond given for the faithful performance of his duties as executor. *Prescott v. Pitts*, 9 Mass. 376; *Hall v. Cushing*, 9 Pick. (Mass.) 395.

Residuary Bequest “Subject to” Annuity.—Where a residuary bequest is made to one “subject to” the payment of a certain annuity to another for life, it is equivalent to charging that annuity upon the property bequeathed for the life of the annuitant; and before the property should be delivered to the legatee, enough of the property should be set aside and invested by the executor, so that its income will be sufficient to pay the annuity, or the legatee should give the executor other sufficient security for the payment of the annuity. *Healey v. Toppan*, 45 N. H. 243, 86 Am. Dec. 159.

1. *Paterson v. McMaster*, 11 Grant's Ch. (U. C.) 337; *Ford v. Batley*, 17 Beav. 303, 23 L. J. Ch. 225; *Hill v. Rattey*, 2 John. & H. 634; *Harbin v. Masterman* (1896), 1 Ch. 351; *In re Parry*, 42 Ch. Div. 570.

The annuitant is entitled to have such a security set apart, to answer the annuity, as will make it practically certain that the annuity will be paid. *Harbin v. Masterman* (1896), 1 Ch. 351.

See the various state statutes, as well as local court rules, relative to the investment of trust funds.

See also the titles TRUSTS AND TRUSTEES; EXECUTORS AND ADMINISTRATORS.

2. *Wait v. Wait*, 4 Barb. (N. Y.) 208.

Cancel and Annul. (See also CANCEL.)—One meaning of cancel is to *annul*. *Golden v. Fowler*, 26 Ga. 464.

Annul.—Where the authorities were empowered to *annul* a sale, it was held that the use of the word “forfeited” would not invalidate the proceeding. “*Annul* is not a technical word. There is nothing which prevents the idea conveyed by it from being expressed in equivalent words. The *annulling* of a lease is nothing more in effect than causing a forfeiture of it.” *Woodson v. Skinner*, 22 Mo. 24.

3. *Moore v. Com.*, 92 Ky. 633. See also *Greenwood v. McGilvray*, 120 Mass. 521.

ANOTHER SUIT PENDING.—See vol. I, ENCYC. OF PLEADING AND PRACTICE, p. 750.

Whether the Term Includes a State or the United States.—In *Moore v. Com.*, 92 Ky. 630, it was held that the forgery of a witness certificate against the state is embraced by the statute which provides for the punishment of any person who shall forge any writing "whereby fraudulently * * * to deprive *another* of any money or property, or cause him to be injured in his estate." The word *another* embraces the state, and its meaning is not limited to individuals by the subsequent use of the personal pronoun in the statute.

In *U. S. v. Maxon*, 5 Blatchf. (U. S.) 360, it was held that the phrase "personal goods of *another*," in a statute against larceny, embraced the personal goods of the United States.

Another State.—Where a *Missouri* statute, on the consolidation of railroads, authorized "a corporation of this state to lease its road to a corporation of *another* state," it was held that a corporation chartered by Congress was a corporation of "*another* state" within the meaning of the act, the act being designed to embrace any corporation outside of Missouri, whether chartered by Congress or by *another* state. *Smith v. Pacific R. Co.*, 61 Mo. 17.

Statute of Frauds. (See also FRAUDS, STATUTE OF.)—In a provision that no action shall be brought to charge any person, upon any special promise, to answer for the debt of *another*, etc., "the word *another* must be understood as referring to a third person, and not to a debt due from either of the contracting parties." *Preble v. Baldwin*, 6 Cush. (Mass.) 553.

Same—Whether the Term Includes a Corporation.—In *Hunnewell v. Duxbury*, 157 Mass. 1, it was held that a corporation was within the statute requiring representations as to the credit or ability "of *another* person" to be in writing in order to be actionable. See also PERSON; and the title FRAUDS, STATUTE OF.

More than One.—A statute provided a penalty for any person who should assault *another* with intent to do great bodily harm, less than the crime of murder. It was held that an information under this statute was not defective because it alleged the crime to have been committed against more than one person, although counsel contended that *another* meant one and no more. *People v. Ellsworth*, 90 Mich. 445.

Another Kind.—Under the 32 and 33 Vict., c. 112, which by section 2 defines the term "to dye seeds" as giving to seeds, by any process of coloring, dyeing, sulphur-smoking, or other artificial means, the appearance of seeds of *another* kind, and by section 3 imposes a penalty upon any person who, with intent to defraud, "dyes any seeds or sells any dyed seeds," no offense is committed by subjecting seeds to a process by sulphur-smoking, so as to improve them in appearance, and to make old and inferior seeds appear to be new seeds, so long as they are not made to appear of a different species or description from that to which they actually belong. The court said: "The words '*another* kind' do not apply to a mere im-

provement in appearance, and nothing could have been easier than for the legislature to have included this case in the enactment." *Francis v. Maas*, 3 Q. B. Div. 341.

Until Another Officer is Elected or Appointed—Suretyship. (See also the titles BONDS; PUBLIC OFFICERS; SURETYSHIP.)—A bond stipulating for the good conduct of an officer holding office for a fixed term, and until *another* officer is appointed, will not remain in force after the reappointment of such original officer, the term *another* in this case not meaning *another* person. The court said: "If the office, when it runs into a new term, may be said to be '*another*, and not the same,' it does not seem a strained or far-fetched exposition to deduce from the facts of the present case that, within the meaning of the statutory clause above quoted, '*another* treasurer' was chosen at each successive annual election, whether the old incumbent was re-chosen or *another* person was put in his place. * * * The natural and reasonable supposition is, that when a man goes surety for the good conduct of a person elected to an office for a definite term, he intends to stand bound for that term alone, and words conspicuously plain should be required to carry over such obligation to an indeterminate period, possibly extending over the entire lifetime of the official. I know of no case in which such an amplitude of responsibility has been thrown upon a surety, except when the terms of the obligation would admit of no other result. In the present instance, I do not find in the language above cited any such imperative force." *Citizens' Loan Assoc. v. Nugent*, 40 N. J. L. 215, 29 Am. Rep. 230. See also *Welch v. Seymour*, 28 Conn. 387.

But in *Amherst Bank v. Root*, 2 Met. (Mass.) 522, it was held that this did not apply to the cashier of a bank, where a statute provided that the cashier should retain his place until removed therefrom, or *another* should be appointed, and the same cashier was re-appointed. The court, by Shaw, C. J., said: "Where a bond is given for the faithful performance of the duties of an office that is, by the law or usage by which it is created, limited to the term of one year, such bond is available only as security against violations of duty happening within that year. This results from the subject matter. Such office, *ex vi termini*, means a retainer or engagement for one year, and must then expire. If there be a re-election, it is in fact to *another* and not the same office; such as the offices of treasurers of the state, counties, towns, and the like, where the office is created by law, and by the same law made annual. Is such the case with the cashier of the bank, for whose faithful performance of his duties, as such, this bond was given? * * * Then the question recurs, and it is the only remaining question, whether an election by the directors, made in October, 1832, or at any subsequent period, of the *same* person, Luther Root, as cashier for the ensuing year, or for an unlimited time, was the election of

ANSWER. (See ENCYC. OF PLEADING AND PRACTICE, pp. 777, 863, for an exhaustive treatment of this subject.)—The answer is the regular mode of reply to a bill or petition setting up an equitable cause of action. It is the defense made in writing, by the defendant, to the charges contained in the bill or information filed by the complainant against him in a court of equity.¹

In Code Pleading, the answer is the reply of the defendant to the complaint of the plaintiff.²

another person in the stead of Luther, which was the limitation of the term of the first office, as constituted by the vote of the directors and the law under which he was elected. It was certainly not so within the letter or any reasonable construction of the law, and we cannot perceive that it is 'within the spirit or intent of the contract of the parties.'

Property of Another—Embezzlement.—In *Com. v. Stearns*, 2 Met. (Mass.) 343, it was held that by "the money or property of *another*," the embezzlement of which by any agent, clerk, or servant, without the consent of his employer, is made larceny by a *Massachusetts* statute, is meant the money or property of any person except such agent, clerk, or servant who embezzled it, and that the word *another* includes the master or principal.

Wife—Arson.—An indictment charged the defendant with arson of a dwelling house, "the property of *another* person, to wit A." It appeared from the evidence that A. was the wife of the defendant. It was held that the conviction was properly sustained. *Garrett v. State*, 109 Ind. 527. See the title ARSON, ENCYC. PLEADING AND PRACTICE, vol. 2, p. 823.

Another Religious Denomination.—The Constitution of *New Hampshire* provides that "no person of any particular religious sect or denomination shall ever be compelled to pay towards the support of the teacher or teachers of *another* persuasion, sect, or denomination." Where a tax had been assessed on a Presbyterian for the salary of a Congregational minister, elected by the First Parish of Amherst as a public teacher of piety, religion, and morality therein, it was held that, under the Constitution and laws of New Hampshire, Presbyterians and Congregationalists are different sects in religion. Hence a Presbyterian could not be taxed for the support of a Congregational minister. *Muzzy v. Wilkins*, Smith (N. H.) 1. See also the title TAXATION.

1. Bouv. Law Dict.; Langnell's Code Pleading, § 92.

2. See ANSWERS IN CODE PLEADINGS, vol. 1, ENCYC. OF PLEADING AND PRACTICE, p. 777.

General Sense.—In *Howell v. Howell*, 15 Wis. 55, it was said: "This provision came with the code, in which the word *answer* is frequently used in a general sense, so as to signify any pleading by which an issue, whether of law or of fact, is made or tendered on the part of the defendant."

Mixed Character.—In *Forsyth v. Clark*, 3 Wend. (N. Y.) 643, the court said: "An *answer* is often of a mixed character. The definition once given of it by a very eminent counselor in this court is, in my judgment, exceedingly correct. In some respects, he says, it is mere pleading; in others, it is pleading coupled with evidence; and when it is neither,

it is merely evidence (*Woodcock v. Bennet*, 1 Cow. (N. Y.) 745, note). As pleading, the *answers* must certainly stand, and the appellant is put to the proof of the facts in issue; as evidence, they ought to be, like every other species of evidence, liable to be impeached and overthrown."

Appear or Answer.—A *Maine* statute exempted from the operation of a judgment for partition of land, any person who did not appear and answer. In *Larrabee v. Larrabee*, 33 Me. 100, it was held that the name of an attorney placed for a special purpose under the name of a respondent in the docket entry of such a petition, did not constitute either an *answer* or an appearance. The court said: "The word 'appearance' has the signification in Webster's Dictionary of 'being present in court,' and in the same dictionary the term *answer* has given to it the definition: 'In law, a counter statement of facts, in a course of pleading; a confutation of what the other party has alleged,' and when an *answer* is spoken of in legal proceedings, in civil cases, it generally implies something which is written. And we cannot suppose that the legislature would make use in the statute of the words 'appeared and answered,' if it were the intention merely to repeat the idea conveyed by one."

Plea to the Jurisdiction.—In *Fairbanks v. Blum*, 2 Tex. Civ. App. 479, a plea to the jurisdiction filed by a nonresident was held an *answer* within a statute providing that the filing of an answer should constitute an appearance for the defendant, since all defensive pleadings are styled the *answer* by the *Texas* statute. See also *York v. State*, 73 Tex. 651; *Richardson v. Wells*, 3 Tex. 227; *Hopkins v. Wright*, 17 Tex. 36.

Demurrer—Stipulation.—In *Steele v. Moss*, 69 Wis. 498, it was held that a stipulation between parties to an action extending the defendant's time "to serve and file his *answer*" gave him the right within that time to demur, a demurrer being an *answer* within the meaning of the statute. The court said: "But the learned counsel for the plaintiff contends that the stipulation giving the defendant ten days additional time 'to serve and file an *answer*' did not give the right to demur, and that it was in violation of the stipulation to do so. We cannot concur in that view of the matter. More than twenty-five years ago it was held by this court that, within the meaning of the statute, a demurrer was an answer (*Howell v. Howell*, 15 Wis. 55), and this, too, under a provision which enacted that the objection that an action was not commenced within the time limited, could 'only be taken by *answer*.' That decision, defining or construing the word *answer*, has been followed since in several cases. See

ANTENUPTIAL CONTRACTS.—See the titles HUSBAND AND WIFE; MARRIED WOMEN.

ANTENUPTIAL SETTLEMENTS.—See the title MARRIAGE SETTLEMENTS.

ANTICHRESIS. (See the titles PLEDGE; COLLATERAL SECURITY; MORTGAGES.)—Antichresis is a kind of pledge known to the Roman law, by which the pledgee took the fruits of the thing pledged, in lieu of interest on his loan.¹

Orton v. Noonan, 25 Wis. 675; Tarbox v. Adams County, 34 Wis. 560; Hyde v. Kenosha County, 43 Wis. 138; George v. Chicago, etc., R. Co., 51 Wis. 605. Presumably counsel were familiar with these decisions, and made the stipulation with a view to the meaning which had been given to the word *answer* in them. We cannot, therefore, construe the stipulation as allowing the defendant to *answer* only and not demur.

Same—Notice.—A notice was in the following words: "And unless you appear thereto, and *answer* on or before noon," etc. The court said: "The appellant construes the word *answer*, used in this notice, in its technical sense of filing an answer, as distinguished from a demurrer or a motion. We think, however, that as used in this connection the word means to respond in any manner, either by motion, demurrer, or *answer*. The defendants were advised, both by the law and by the rules of the court, that no default could be entered against them if they appeared within the time prescribed, and filed a motion or a demurrer. They could not have been misled by the notice, and they should have appeared within the time limited, and responded in some manner." Lyman v. Bechtel, 55 Iowa 437.

Same—Order.—In Brodhead v. Brodhead, 4 How. Pr. (N. Y. Supreme Ct.) 308, it was held that an order made by the judge at chambers, enlarging the time to *answer*, extended to a demurrer. See also Bedell v. Bedell, 2 Barb. Ch. (N. Y.) 99; Burrall v. Raineteaux, 2 Paige (N. Y.) 331.

Same—Not Including Demurrer.—But in Kelly v. Downing, 42 N. Y. 71, a demurrer was held not to be an *answer* within § 275 of the Code of Procedure, which provides that "the relief granted to the plaintiff, if there be no *answer*, cannot exceed that which he shall have demanded in his complaint."

So in Henry v. Blackburn, 32 Ark. 449, it was held that an attorney might enter a demurrer to the complaint, and, as a demurrer is not an *answer*, it would not be an appearance for an absent defendant.

In the Sense of True Answer.—In Reg. v. Hulme, L. R. 5 Q. B. 377, Lush, J., said: "Wherever the legislature speaks of answering questions, it means that which is intended by the words 'true *answer*,' *answer*, in the sense in which the word is ordinarily and popularly used."

1. Story on Bailments (9th ed.), § 344; 4 Kent Comm. (13th ed.) 138, note.

What Constitutes the Contract.—A counter-letter stipulating that the property sold could not be disposed of by the purchaser without the consent of the vendor, and that so soon as the debt, in security whereof the sale was made, should be paid, the property should revert to

the former owner, showed that such a contract was an *antichresis*, and, no agreement having been made to the contrary, the fruits of the property belonged to the vendor, and should be applied to the payment of the debt. Calderwood v. Calderwood, 23 La. Ann. 658.

A contract by which a party sells real estate to another, accompanied with a transfer of possession, but with the stipulation that if the vendor pays the vendee a certain sum of money within a given time the premises are to be reconveyed to him, or that, in default of such payment, the premises shall be sold and the stipulated sum paid to the original vendee out of the proceeds of the sale, the remainder going to the original owner, must be classed as an *antichresis* under the laws of Louisiana, and not as a *vente à réméré*. Livingston v. Story, 11 Pet. (U. S.) 351.

Same—Succession Rights cannot be pledged, because they cannot be delivered. Forbes v. Burke, 24 La. Ann. 85.

Same—Actual Possession, as in all contracts of pledge, is of the essence of an *antichresis*. Garcia v. Garcia, 7 La. Ann. 526.

Suffering Debtor to Retain Possession.—Where the pledgees, suffering the debtor to keep possession as owner, make a contract with him as to supplies they are to furnish, they will stand in no better position than himself towards an overseer and furnisher of supplies whose debts will be privileged on the crops. Garcia v. Garcia, 7 La. Ann. 526.

Though the debtor in such case manages the plantation as the agent of the pledgees, the registry of the *antichresis* will not relieve them from liability to parties furnishing necessary supplies, though the agent exceed the amount limited by the contract. Preston, J., in Garcia v. Garcia, 7 La. Ann. 526.

Same—Growing Crops.—A letter pledging growing crops is not an *antichresis*, where the creditor has no right to enter and reap the fruits. Hagan v. Sompeyrac, 3 La. 157. See the title CROPS.

Distinguished from Pawn.—In Louisiana, under the Civil Code, there are two kinds of pledges—the pawn, where the security is movable, and the *antichresis*, where the security consists in immovables or real estate. Under the latter, the creditor acquires the right to take the rents and profits of the land, and to credit the same annually upon the interest and the surplus upon the principal of the debt, and is bound to keep the estate in repair and to pay the taxes. Upon default, the creditor may obtain a decree for selling the thing pledged. 4 Kent Comm. (12th ed.) 137, note c; Livingston v. Story, 11 Pet. (U. S.) 351; La. Rev. Civ. Code (1870), arts. 3133–3135, 3176–3181.

Welsh Mortgage.—The Welsh mortgage was a contract precisely similar to the old Roman

Formerly, the Creditor Retained the Fruits of the thing pledged, in lieu of interest, and therefore he was not held to account for the profits so received.¹

In Modern Times, the law relating to antichresis has been so modified that in all cases the creditor must account for the fruits or profits received above interest and expenses.²

The Property does Not Vest in the Creditor upon the debtor's default.³

ANTICIPATE.—See note 4.

ANTIQUARIAN.—The word "antiquarian," as applied to a book store, can have no other meaning or effect than to indicate to the public that the proprietor deals in a class of books, to wit ancient books, or books pertaining to antiquity.⁵

ANTIQUITY.—See note 6.

ANTI-TRUST LAW.—See the title TRADE COMBINATIONS AND CORPORATE TRUSTS.

ANY.—The word "any" is frequently used in the sense of "all" or "every," and when thus used it has a very comprehensive meaning.⁷ But,

antichresis. The creditor took the profits of the land in lieu of interest, and was not bound to render any account of them. But in cases of Welsh mortgages, courts of equity would, if the value of the rents and profits were excessive, decree an account, any agreement to the contrary notwithstanding. 4 Kent Comm. (13th ed.) 137.

Slavery—Writing.—An agreement to hire a slave until the lessor's debt to the lessee be paid from the wages stipulated, amounts to an *antichresis*, and must be in writing. Smith v. Tabor, 7 La. Ann. 582. Compare Rev. Civ. Code, § 3135, which provides that the *antichresis* shall consist in immovables.

Where a slave is *antichretically* pledged, the owner cannot sue for his wages until the principal debt has been paid. Smith v. Taylor, 14 La. Ann. 673; Rev. Civ. Code, § 3178.

Mortgage and Antichresis.—A mortgage may coexist with an *antichresis*; the former affects the land, the latter its fruits. As the fruits gathered before the mortgage is enforced belong, not to the mortgagee, but to the debtor, who may dispose of them as he pleases, so, if gathered by the pledgee, he may apply them to his debt, or, with the debtor's consent, to any other purpose, *e. g.*, the embellishment of the estate. The inactive mortgagee may not complain. Pickersgill v. Brown, 7 La. Ann. 296.

Execution.—Other creditors may cut off an *antichresis* by a *fi. fa.* (Louisiana Civil Code 3148). Pickersgill v. Brown, 7 La. Ann. 296.

Repairs and Improvements.—The pledgee, while bound to make useful and necessary repairs (Louisiana Civ. Code 3144) cannot make new, expensive, and unusual improvements, or such as materially change the mode of cultivating or using the estate. If he does he cannot recover his absolute outlay, but only the increased value resulting therefrom. When, however, the debtor consents, there is as between him and the grantee no reason for complaint. Pickersgill v. Brown, 7 La. Ann. 296.

1. Mackeldy Rom. Law, § 346, note 4; Muhlenbruch Doctrina Pandectarum, § 321; Story Bailm., § 344.

2. Story Bailm., § 344; Pothier, Nantissement, note 20; 1 Domat, B. 3, tit. I, § 1, art. 28; Civ. Code of Louisiana, arts. 3102, 3143; 4 Kent's Comm. 138, note.

3. Rev. Civ. Code La., art. 3179.

In the contract of *antichresis*, the creditor does not become proprietor of the pledged immovables by failure of payment at the stated time; any clause to the contrary is null; nor can the parties, by a subsequent agreement, stipulate that the pledge shall vest in the creditor by the mere failure of the debtor to pay. Livingston v. Story, 11 Pet. (U. S.) 351.

4. Where a testator provided that if the beneficiary sought to *anticipate* the income of the trust there should be another disposition of the fund, it was held that *anticipate* could not be read as meaning "attempting to *anticipate*." *In re Wormald*, 43 Ch. Div. 630.

Patent Law.—As to the objection that the article or process sought to be patented has been *anticipated*, see the title PATENT LAW.

Married Women.—As to the *anticipation* by married women of their separate estates, see the title SEPARATE PROPERTY OF MARRIED WOMEN.

Restraints on Alienation.—A restraint on *anticipation* is equivalent to a restraint on alienation. *In re Currey*, 32 Ch. Div. 361; Stroud's Judicial Dict. See generally the titles TRUSTS; RESTRAINTS ON ALIENATION.

5. Choynski v. Cohen, 39 Cal. 503, 2 Am. Rep. 476. In that case, it was held that the name "*Antiquarian Book Store*" was not a proper trade-mark. See the title TRADE-MARKS.

6. **Collection of Antiquities.**—These words in a revenue statute were held to import a collection of articles where both the *antiqueness* of the individual articles and the circumstance that they are assembled together into a collection unite to make them attractive, or useful, or valuable, or otherwise desirable. Baumgarten v. Magone, 41 Fed. Rep. 770.

7. **Comprehensive Sense.**—*England.*—Reg. v. Ashton, 1 El. & Bl. 286, 72 E. C. L. 286; Darling v. Sherwood, 2 L. J. N. S. 130; The Blessing, 3 Prob. Div. 35; Manchester Tp. v. St. Pancras, 4 Q. B. Div. 409; Foot v. Baker, 5 M. & G. 335, 44 E. C. L. 181; Liverpool v. Tomlinson, 7 D. & R. 556, 16 E. C. L. 295; Reg. v. Rowlands, 8 Q. B. Div. 530; *Ex p.* Norris, 17 Q. B. Div. 728; Shaw v. Smith, 18 Q. B. Div. 193; Dyson v. Mason, 22 Q. B. Div. 351; Danford v. Taylor, 33 J. P. 277; Luff v. Leaper, 36 J. P. 54; Beckett v. Sutton, 51 L. J. Ch. 432; *In re Tait*, 52 L. J. Ch. 117.

United States.—*McMurray v. Brown*, 3 Cent. L. J. 158; *New England Marine Ins. Co. v. Dunham*, 11 Wall. (U. S.) 1; *Marvin v. Maysville St. R., etc., Co.*, 49 Fed. Rep. 436; *Montclair v. Ramsdell*, 107 U. S. 147.

California.—*Davidson v. Dallas*, 8 Cal. 239.

Georgia.—*DuBignon v. Tufts*, 66 Ga. 61.

Maryland.—*McComas v. Amas*, 29 Md. 141.

Massachusetts.—*Livermore v. Swasey*, 7 Mass. 227.

Minnesota.—*Merrill First Nat. Bank v. Harper* (Minn. 1895), 63 N. W. Rep. 1083.

Missouri.—*State v. Williams*, 35 Mo. App. 541; *Logan v. Small*, 43 Mo. 256.

Nebraska.—*Alexander v. Overton*, 22 Neb. 227.

Nevada.—*Virginia, etc., R. Co. v. Ormsby County*, 5 Nev. 348.

New Jersey.—*State v. Crowley*, 39 N. J. L. 269; *Montclair Tp. v. New York, etc., R. Co.*, 45 N. J. Eq. 442.

New York.—*People v. Clark*, 7 N. Y. 385; *Heaton v. Wright*, 10 How. Pr. (N. Y. Supreme Ct.) 83.

West Virginia.—*Raines v. Watson*, 2 W. Va. 390.

Wisconsin.—*Hanson v. Eichstaedt*, 69 Wis. 545.

Same—Any Part.—A power to dispose of *any* part of the estate, it is said, will authorize the disposition of the whole estate. See Stroud's Judicial Dict.; *Rendlesham v. Meux*, 14 Sim. 249; *Cooke v. Farrand*, 7 Taunt. 122, 2 E. C. L. 122; 1 Jarman on Wills 361, 362; *Arthur v. Mackinnon*, W. N. (79) 93. Compare *In re Yates*, 38 Ch. Div. 112.

Same—Any Other Mines.—By a lease of mines, the lessees were authorized to make ways to carry away the produce of the mines thereby demised or *any* other mines. It was held that the lessees were not limited to using the ways constructed by them for carriage from the mines demised alone. *Bidder v. North Staffordshire R. Co.*, 4 Q. B. Div. 412.

Same—Any Bank has been held to include a national bank. *Elmira Sav. Bank v. Davis*, 73 Hun (N. Y.) 357, *affirmed* in 142 N. Y. 590.

Same—Any and All Lands—Eminent Domain.—The power to condemn "*any* and all lands" for park purposes was held to extend to the condemnation of a seminary. Matter of Board of Street Opening, 62 Hun (N. Y.) 499, *affirmed* in 133 N. Y. 329. See the title EMINENT DOMAIN.

Same—Any of the Waters of the State.—Where a statute prohibited the taking of fish by certain methods from *any* of the waters of the state, it was held that by the words "*any* of the waters of the state," were meant all waters lying within the state. *State v. Haugh* (Iowa 1895), 64 N. W. Rep. 400.

Same—Any Election Law.—It was held that where the constitution provided for the violation of *any* election law, the words "*any* election law" meant not merely such election laws as were in force when it was adopted, but applied also to all that might be lawfully passed in the future. *Leonard v. Com.*, 112 Pa. St. 607, 16 Am. & Eng. Corp. Cas. 136. And in that case it was also held that the words "*any* election" included primary as well as regular elections.

Same—Any Corporation.—A constitution re-

quired the assent of two-thirds of the members of the legislature to the passage of every bill creating, altering, or renewing *any* body politic or corporate. It was held that the provision extended to all corporations, whether public or private. The court said: "These words are so plain, and their meaning so clear, that, had there been no attempt to explain them away, I should consider it a work of supererogation to enlarge on this point. If the words 'altering or renewing *any* body politic or corporate' may be construed to mean one kind of corporations only, viz. private corporations, why may we not make another distinction, and say that the words do not apply to sole corporations? or another, that they do not relate to lay, but only to spiritual corporations? and then, refining still more in our love of spiritualization, explain '*any* body' to mean *no body*? The construction contended for is the reverse of what the constitution plainly imports: 'every bill continuing, altering, etc., *any* body politic,' etc. Johnson says the word 'every' means '*each one of all*,' and gives this example: 'All the congregation are holy, every one of them (Numbers).' The same lexicographer defines *any* to mean *every*, and says, 'It is, in all its senses, applied indifferently to persons or things.' Now, the construction contended for by the defendants in error would make the words 'every bill altering or renewing *any* body politic or corporate,' mean *some* bills and *some* corporations, instead of *all* bills and *all* corporations. But to my mind the words are so plain, that, in the language of Story and Rutherford, there is no necessity of resorting 'to other means of interpretation.'" *Purdy v. People*, 4 Hill (N. Y.) 384.

Same—Any Contract.—A statute gave a lien on crops, to agricultural laborers, for wages due them "under *any* contract" for labor and services. It was held that the words "*any* contract" applied as well to implied as to express contracts. The court said: "The statute, the general policy of which is the securement to the laborer of the just reward of his labor, is founded on the principle of honesty and good conscience, that no person shall be permitted to take and enjoy the fruits of another's toil without making just compensation. Its beneficial provisions should not be so narrowly and strictly construed as to defeat its just and humane purposes. The statute does not require that the contract shall be express. Its words, '*any* contract,' are comprehensive enough to include implied as well as express contracts. Giving to the words of statute their fair and plain import and scope, *any* contract is sufficient to originate the lien, which, if the labor is rendered, is sufficient to create a debt or liability." *Wilson v. Taylor*, 89 Ala. 368.

Same—Any Unpaid Stock—Any Debts Due from a Corporation.—A statute provided that "*any* unpaid stock" should be a fund for the payment of "*any* debts due from the corporation." It was held that *any* was used in the sense of "all." The court said: "What is made a fund for the payment of debts? '*Any* unpaid stock.' What debts are contemplated? '*Any* debts due from the cor-

like all other general words, its meaning is frequently restrained and limited

poration.' 'Any unpaid stock' means all unpaid stock, and 'any debts due from the corporation' means all debts due from the corporation; that is to say, all unpaid stock shall be a fund for the payment of all debts of the corporation. No subscriber for unpaid stock can escape liability; and no corporate debt shall go unpaid, so far as the capital stock is concerned." *Jones v. Whitworth*, 94 Tenn. 602.

Same—Any in the Sense of All of Them—Cross-remainders.—A testator devised one moiety of certain freehold property unto and between William, Thomas, and David P., in equal shares, and the heirs of their bodies respectively, lawfully begotten, and, in default of such issue of any of them, unto M. P., her heirs and assigns, forever. It was held that cross-remainders were created by implication between William, Thomas, and David P., and that the words "of any of them" must be construed to mean "of all of them." *Powell v. Howell*, L. R. 3 Q. B. 654. See also *Holmes v. Meynel*, T. Raym. 452.

Same—Any Soldier. (See also the title NUNCUPATIVE WILLS.)—Where a statute provided that any soldier in active service, etc., might make a nuncupative will, it was held that minors were included within the words "any soldier," and might make a valid will. *In re Farquhar*, 4 Notes of Ecc. Cas. 651.

Same—Any Road.—A statute provided for the submission of the question to the people whether the county should construct or aid in constructing any road requiring extraordinary expenditures. It was held that any would be extended to a railroad. The court said: "An effort is made to restrict the meaning of the words 'any road' to common roads, streets, and lanes. We can see no good reason for such limitation upon the ordinary use of words. The word any extends to an indefinite number of roads. It applies to all, and to all kinds, which may require an extraordinary expenditure. An ordinary highway or road requires no such expenditure. Such roads and highways are abundantly provided for by the general road tax upon persons and property." *Dubuque County v. Dubuque, etc., R. Co.*, 4 Greene (Iowa) 2.

Same—Any Person Injured.—In *Brewer v. Crosby*, 11 Gray (Mass.) 29, it was held that the remedy given by statute "to any person injured" by a dog, applies to injuries to property. The court said: "The Statute of 1798, c. 54, § 3 (of which the statute counted upon is a reenactment), expressly made liable the owner or keeper of any dog for 'any damage' done by the dog 'either to the person or the property of any person.' In the Rev. Stat., c. 58, § 13, the term 'any person' is used in its broadest sense, as 'anybody,' 'any human being,' and not in contrast to property, as in the words 'person or property' in the former statute." See the title ANIMALS.

Same—Some, or an Indefinite Number.—Any is defined to mean some, or an indefinite num-

ber. *West Chicago Park Com'rs v. McMullen*, 134 Ill. 179.

A statute provided that suits might be brought against "any or all shareholders." The court said: "The term any is not here used in its limited sense, but in its enlarged and plural sense, and is to be construed as meaning some, or an indefinite number." *Witherhead v. Allen*, 28 Barb. (N. Y.) 666, reversed in 3 Keyes (N. Y.) 562.

Same—Any in the Sense of All.—A statute which defines the rights of "any person"—using the singular expression—will be construed as applying equally to any number of persons who together come within the descriptive terms employed. *Spurgeon v. Hennessey*, 32 Mo. App. 83.

Same—Mechanic's Lien.—A statute giving a lien for labor performed in the erection of any bridge, was held to apply to railroad bridges. The court said: "By familiar rules of statutory construction, such general unqualified language must have a general application, and must be held to include all bridges, unless some are excluded on grounds of public policy." *Purtell v. Chicago Forge, etc., Co.*, 74 Wis. 134.

Same—Any Court.—A United States statute excluded as evidence from "any court" unstamped paper. It was contended that this must be limited to federal courts. The court held, however, that the words "any court," as used in their broadest form and fullest sense, without qualification or exception, applied to state as well as to federal courts. *Chartiers, etc., Turnpike Co. v. McNamara*, 72 Pa. St. 281, 13 Am. Rep. 673.

Same—Any Park.—A statute empowered park boards to connect any park with any part of any incorporated city. It was contended that the words "with any part of any incorporated city," meant some one part or point of such city. The court refused to give the statute such construction, holding that "any incorporated city" was intended to apply to all cities having a park or parks, and that the word any, as used in the phrase "with any part of any incorporated city," was intended to confer power to connect parks with such parts of the city as the public convenience might demand. *West Chicago Park Com'rs v. McMullen*, 134 Ill. 179.

Same—Statute of Frauds.—The words "any contract for the sale of real estate," as used in the statute, include every agreement by which one promises to alienate an existing interest in the land upon a consideration, either good or valuable. It has been accordingly held in a number of cases that a contract to convey land in consideration of labor or services to be rendered, is within the statute. *Sprague v. Haines*, 68 Tex. 216; *Dowling v. McKenney*, 124 Mass. 478; *Baxter v. Kitch*, 37 Ind. 554; *Burlingame v. Burlingame*, 7 Cow. (N. Y.) 92; *Helm v. Logan*, 4 Bibb (Ky.) 78; *Jack v. McKee*, 9 Pa. St. 235. See also the title FRAUDS, STATUTE OF.

Same—Any Damages.—A requirement to pay any damages, has been held to cover all

by the context or subject-matter.¹

damages. The court said: "The words here require the payment of damages, 'if *any*,' by reason of the erection of the bridge. This last expression, in the connection in which it stands, is the same thing as 'on account of,' or 'because of,' the erection of the bridge. In this sense, the paragraph means any damage on account of its erection. The subjunctive or contingent form 'if' does not lessen the import of the word *any*, which means indefinite results or amounts, and consequently means all damages." *Buckwalter v. Black Rock Bridge Co.*, 38 Pa. St. 281. See also *Monongahela Nav. Co. v. Coon*, 6 Pa. St. 379, 47 Am. Dec. 474.

Same—Any Kind.—Where a statute, after enumerating certain games, provided further that it should be unlawful to play these "or games of *any kind* on Sunday," the court refused to limit the words "games of *any kind*" to games *ejusdem generis* with those enumerated, drawing a distinction between "*any kind*" and the words usually used, "or *any other*." *State v. Williams*, 35 Mo. App. 548. See also *OTHER*.

Same—Any Special Matter.—"Any special matter," comprehends every special matter. *Tillou v. Britton*, 9 N. J. L. 128.

Any Other County—"Any" Distinguished from "Some."—A statute creating a new county provided that it should have "all the jurisdiction, powers, rights, etc., which *any* other county in the state doth or may enjoy." It was held that this included those general powers which belong to other counties as a class, and did not extend to exclusive and exceptional powers. The court said: "It shall have and enjoy all the jurisdiction, powers, rights, privileges, liberties, and immunities, which *any* other county in this state doth or may enjoy," etc. The obvious purpose of this declaration is that this county shall be politically equal with the other counties of the state. The word *any* has several meanings according to the subject which it qualifies. In synonyms, it is distinguished from 'some.' Thus it is said 'some' applies to one particular part in distinction from the rest; *any*, to every individual part without distinction. The former is altogether restrictive in its sense, the latter is altogether universal and indefinite. (Crabb's English Synonyms.) This is more noticeable when it is joined with another word, as 'anything,' 'anywise.' Webster says, 'Although the word *any* is formed from 'one,' it often refers to many.' The true interpretation, where there is a general clause of reference to other statutory powers, will be found in *Rex v. Justices*, 2 T. R. 504, 'that all the general powers and provisions given and made in acts *in pari materia* shall be virtually incorporated in this, but that such provisions as are always considered special provisions shall not. *Potter's Dwar. Stat.* 278." *Stiles v. Chosen Freeholders*, 50 N. J. L. 9.

Affidavit of Attachment.—"Any" Not Read as "Some."—Affiant stated that he believed that the attachment defendant had assigned or concealed, or was about to assign or conceal, *any* of his property. This affidavit was held insuf-

ficient. The court said: "After carefully considering the very ingenious argument of the learned counsel for the defendants in support of the position that the word *any*, as used in the affidavit, is synonymous with 'some,' we are impelled to the conclusion that in a prosecution for perjury, the court would not be justified in adopting the construction contended for, but would be compelled to hold that a charge of perjury, based upon the portion of the affidavit under consideration, could not be sustained." *Miller v. Munson*, 34 Wis. 579, 17 Am. Rep. 461.

1. Limited Sense—England.—*Harrod v. Worship*, 1 B. & S. 381, 101 E. C. L. 381; *Tobacco Pipe Makers v. Woodroffe*, 7 B. & C. 838, 14 E. C. L. 139; *Metropolitan Board of Works v. London, etc., R. Co.*, 14 Ch. Div. 521; *Irwell v. Eden*, 18 Q. B. Div. 588; *Ex p. Bagster*, 24 Ch. Div. 477; *In re Monckton*, 27 Ch. Div. 555; *In re Yates*, 38 Ch. Div. 112. *United States.*—*U. S. v. Palmer*, 3 Wheat. (U. S.) 631.

Connecticut.—*Hatch v. Stamper*, 42 Conn. 28. *Massachusetts.*—*Peirce v. Richardson*, 9 Met. (Mass.) 69; *Shute v. Boston*, 99 Mass. 236. *Mississippi.*—*McLaurin v. Parker*, 24 Miss. 509.

New Jersey.—*Den v. Goldtrap*, 1 N. J. L. 319.

Wisconsin.—*Edson v. Hayden*, 20 Wis. 682.

Same—Any Other Person.—A statute giving a right of action for money lost at gaming to the loser "or *any other person*," was held not to include the loser's wife. *Moore v. Settle*, 82 Ky. 187, 56 Am. Rep. 889.

Same—Any and All Materials.—Where a guaranty was for the payment of *any* and all materials furnished to one W., it was confined by extrinsic evidence to materials required by W. to enable him to fulfil his contracts in regard to certain houses. The court said: "The words '*any* and all materials' and '*any balance*' are equally as comprehensive and significant when applied to materials required for a particular purpose and the indebtedness accruing therefrom, as when applied to materials required generally or for indefinite purposes and the indebtedness remaining after the application of payments made from time to time. It cannot, for that reason, be said that the guaranty is either unequivocally limited to the materials required by Wiegiers for a particular purpose, or that it unequivocally includes materials required by Wiegiers for indefinite purposes." *McShane v. Padian*, 1 Misc. Rep. (N. Y. C. Pl.) 332.

Same—Any Evidence.—By "*any evidence*" is not meant a mere scintilla, but such as taken alone would justify the jury in inferring the fact. *Citizens' Pass. R. Co. v. Foxley*, 107 Pa. St. 539.

Same—Any Other Means—Limited Sense.—An act providing for the incorporation of companies for the manufacture of gas, or the supply of light or heat to the public by *any other means*, does not apply to electric light. *Scranton Electric Light Co.'s Appeal*, 122 Pa. St. 154, 9 Am. St. Rep. 79.

Same—Any Person—Fellow-servants. (See also the title FELLOW-SERVANTS.—A statute which gave a right of action against a railroad company whenever “any person” should die from any injury resulting from the negligence of any officer, agent, or employee, was held not to give the right of action for death happening through the negligence of fellow-servants, where the master had not been negligent in employing unskilful or improper servants. The court declared that the legislature did not intend to include under the term “any person,” a fellow-servant injured by the negligence of a coemployee without any fault of the master. *Proctor v. Hannibal*, etc., R. Co., 64 Mo. 112, *overruling* *Schultz v. Pacific R. Co.*, 36 Mo. 13. See also *Connor v. Chicago*, etc., R. Co., 59 Mo. 285; *Rohback v. Pacific R. Co.*, 43 Mo. 187.

A similar decision was rendered by the Supreme Judicial Court of Maine in *Carle v. Bangor*, etc., Canal, etc., Co., 43 Me. 269. To the same effect, see *Sullivan v. Mississippi*, etc., R. Co., 11 Iowa 421.

One clause of a *Missouri* statute provides that “whenever any person shall die from any injury resulting from, or occasioned by, the negligence * * * of any servant or employee, whilst running, conducting, or managing any locomotive, car, or train of cars,” etc.; and a subsequent clause provides that “when any passenger shall die from any injury resulting from or occasioned by any defect or insufficiency in any railroad or * * * machinery thereof,” etc.; it was held that the provision of the first clause conferred a right of action upon employees injured by the negligence of those in charge of the train, so long as such persons were not fellow-servants. *Sullivan v. Missouri Pac. R. Co.*, 97 Mo. 113. Black, J., said: “The further point is made, that, this being an action by the representative of an employee, the court erred in fixing the damages at five thousand dollars. In other words, the contention is that the case is not within the second section of the damage act. The case of *Proctor v. Hannibal*, etc., R. Co., 64 Mo. 112, decides, and decides only, that the words ‘any person’ do not include the case of a servant whose death is occasioned by the negligence of a fellow-servant. Considering the second, third, and fourth sections together, it was held that it was not the object, purpose, or intent of the legislature to destroy or interfere with the rule that prohibits a servant from sustaining an action against the master for the negligence of a fellow-servant, the master himself not being in fault. Says the court, ‘the face of the section is at war with any other idea than that the right to sue was intended to be a transmitted right, and not an original right.’ That case has been followed to the present time, and we still adhere to the ruling there made. But if we are right in the conclusion that *Sullivan* was not a fellow-servant with the servants of the defendant, running the train which ran over and killed him, then the *Proctor* case is without any application here. The statute reads: ‘Whenever any person shall die from any injury resulting from or occasioned by the negligence * * *

of any servant or employee, while running, conducting, or managing any locomotive, car, or train of cars,’ etc.; and a subsequent clause goes on to say: ‘And when any passenger shall die from any injury, resulting from or occasioned by any defect or insufficiency in any railroad or * * * machinery thereof,’ etc. It will be seen that in case of death resulting from defective road or machinery, this section extends to passengers only, and not to servants, though they may have a cause of action under the third section, but not even under that section if the death be the result of the negligence of a fellow-servant. But the first clause of the second section is not limited to passengers. Under that clause, if the person die from the negligence of the servant, whilst running any locomotive, car, or train of cars, then his representatives will be entitled to recover five thousand dollars damages; provided the person would have had a cause of action had death not followed. *Sullivan*, therefore, not being a fellow-servant with the train men, the plaintiff’s cause of action comes within the said second section of the damage act.”

Compare the case of *Le May v. Canadian Pac. R. Co.*, 18 Ont. Rep. 314, 41 Am. & Eng. R. Cas. 331, where it was held that a statute giving the right of recovery to any person injured through failure to comply with its provisions, extended to the servants of the company.

Same—Release.—Where the release was of any other matter or thing from the beginning of the world, it was held that these words would be restricted to the subject-matter. *Halsey v. Fairbanks*, 4 Mason (U. S.) 227.

Same—At Any Time.—In *Park v. Whitney*, 148 Mass. 280, an offer to buy at any time after a certain date, was held not to import perpetuity, but to entitle the party to a reasonable time only.

Same—Any Town.—Where a statute forbade the digging up of a human body without the authority of “the selectmen of any town in this commonwealth,” it was held sufficient to aver that the defendant was not authorized by the selectmen of the town where the body had been buried. *Com. v. Loring*, 8 Pick. (Mass.) 370.

Same—Any One Creditor.—Where an act limited the jurisdiction of a justice to cases where the amount claimed by “any one creditor” did not exceed one hundred dollars; and a creditor obtained three several judgments on three separate claims of one hundred dollars each, accompanied by affidavit and bond to each claim respectively, it was held that “any one creditor” meant any one claiming under the same bond and affidavit, and that the justice had jurisdiction. *State v. King*, 5 Ind. 439.

So the words “any creditor” have been limited in a composition-deed to those creditors only who were to receive a composition under the deed. *Wells v. Greenhill*, 5 B. & Ald. 869, 7 E. C. L. 283.

Same—Any Part of a Dramatic Piece.—Where a statute provided a penalty for the unauthorized production of “any part of a dramatic piece,” it was held that such penalty was not incurred where the matter taken from

"Any" means one of several; one or more.¹

For some miscellaneous phrases in which the word has received construction, see the note below.²

the first work was not material or substantial, the court saying that the words in the statute, "production of *any* part thereof," must receive a reasonable construction and are to be treated as implying some part that is substantial and material. *Chatterton v. Cave*, L. R. 3 App. Cas. 483. See also *Planché v. Braham*, 7 L. J. C. P. 25, 4 Bing. N. Cas. 17, 33 E. C. L. 269.

1. **One Out of Several or Many.**—The word *any*, used as an adjective, means one out of several or many. *New Haven Young Men's Inst. v. New Haven*, 60 Conn. 38.

One or More.—*South Carolina v. Antonio*, 3 Wheel. Crim. Cas. (N. Y.) 508.

"**Any**" Includes "One"—**Singular Included in Plural.**—Thus if a statute prohibits the larceny of *any* bonds, the larceny of one bond would come within the prohibition. *Com. v. Messinger*, 1 Binn. (Pa.) 275, 2 Am. Dec. 441.

So where a statute forbade the purchase of *any* pretended rights or titles, the prohibition was held to extend to the purchase of one pretended right. *Partridge v. Strange*, 6 Plowd. 86.

And where a statute took away the benefit of clergy from persons who wilfully burned *any* dwelling house, Lord Hale took it for granted that the burning of one dwelling house was within the purview of the statute. 2 H. H. P. C. 265.

The word *any* may, with equal propriety, be applied to a substantive in either the singular or plural number. Where it is joined to a substantive in the plural, it certainly has, in strict construction, a plural signification. *Tilman, C. J.*, in *Com. v. Messinger*, 1 Binn. (Pa.) 276, 2 Am. Dec. 441.

By statute 2 Geo. 2, c. 25, § 3, it is enacted that "if *any* person shall steal or take by robbery *any* bank notes, bonds, bills, promissory notes for the payment of any money," etc., "notwithstanding any of the said particulars is termed in law a chose in action, he shall be deemed guilty of felony in the same nature, and in the same degree, etc., in the same manner as it would have been if the offender had stolen or taken by robbery *any* other goods of like value," etc. It was determined that the stealing of a single bank note is within the statute. *Hassell's Case*, 2 East Cr. Law 598, 1 Leach 1.

The word *any* is synonymous with "either," so an act saying, "*Any* person who shall counterfeit, or utter, or attempt to pass, knowing them to be counterfeit, *any* of the aforesaid gold or silver coins," etc., means *any* one of them, that is to say one or more, and an indictment under this act will be sustained by proof of the passing a single dollar, knowing it to be counterfeit. *State v. Antonio*, (Constitutional Ct. S. Car.) 3 Wheel. Crim. Cas. 508.

Same—Any Husband.—So the term, "*any* former deceased husband," has been held as used in the statute not to be confined in its application to cases where the widow has had

two or more husbands who are deceased. *Anderson v. Gilchrist*, 44 Ohio St. 440.

2. **Removal of Causes—Any Defendant.**—Where a right of removal is given to *any* defendant being a citizen of another state, the cause may be removed, although some of the defendants have not the requisite citizenship. The court said: "It is sufficient if there is a 'controversy' involved in the suit between two such persons, the one being a citizen of the state in which it is brought, whatever may be the citizenship of the other plaintiffs or defendants. Nor can the right of removal thus given to *any* defendant having the prescribed citizenship, with any respect for the ordinary significance of language, be construed to include 'all' the defendants, and so be denied to *any*, unless 'all' have such citizenship." *Fisk v. Henarie*, 32 Fed. Rep. 417. See also ENCYC. OF PLEADING AND PRACTICE, title REMOVAL OF CAUSES.

Mechanic's Lien.—A *West Virginia* statute gave a lien to every workman who does any work by virtue of *any* contract written, verbal, express, or implied, for *any* incorporated company, for the value of the work so done. It was held that the words "*any* contract" did not include a subcontractor's contract, and, therefore, laborers for the subcontractor were not entitled to the benefit of the lien. The court said: "'*Any* contract' does not mean anybody's contract with the company, but refers to the kind of contract, whether written or verbal, express or implied; in support of which meaning see *Mornan v. Carroll*, 35 Iowa 22." *Richardson v. Norfolk*, etc., R. Co., 37 W. Va. 641.

Any of Them—"Any" in Sense of "Each."—In a deed of bargain and sale, where the premises conveyed an estate "to the grantees or *any* of them, their or any of their heirs or assigns," and the *habendum* "to them, their heirs, or assigns forever," *any* was construed to mean "each," so as to create a grant of tenancy in common, and not a joint tenancy. *Galbraith v. Galbraith*, 3 S. & R. (Pa.) 392.

At Any Time.—As to the construction of these words in real covenants, see the title COVENANTS. And see *Prout v. Roby*, 15 Wall. (U. S.) 476; *Maughlin v. Perry*, 35 Md. 357; *Schroeder v. Gemeinder*, 10 Nev. 361.

Any Goods.—As to the construction of these words in a guaranty, see the title GUARANTY. See also *Tischler v. Hofheimer*, 83 Va. 38; *Bastow v. Bennett*, 3 Campb. 220; *Mason v. Pritchard*, 12 East 227.

Any Other.—As to the *ejusdem generis* principle of construction, see OTHER; and the title STATUTES.

Any Person.—As to whether these words include corporations, states, etc., see PERSON.

Any Change of Title.—As to the construction of this term in fire and marine insurance policies, see the titles FIRE INSURANCE; MARINE INSURANCE.

Any Cause Whatever—Vendor and Purchaser.—As to a provision in a contract for sale, that

APART.—Separately, in regard to space or company; in a state of separation as to place; aside.¹

APARTMENT. (See also the title **LODGINGS AND APARTMENTS.**)—A part of a house; one or more rooms in a house occupied by a person, while the rest of the house is occupied by another or others.²

if for *any* cause the sale is not completed on the day fixed, the purchaser shall pay interest, see the title **VENDOR AND PURCHASER.**

In *In re Riley* to Streetfield, 34 Ch. Div. 386, it was held that it was not sufficient that the vendee set aside the unpaid purchase money and gave the vendor notice of such appropriation. The court in this case refused to follow the case of *In re Gold's and Norton's Contract*, 33 W. R. 333.

In *Kershaw v. Kershaw*, L. R. 9 Eq. 56, it was held that the purchaser was not liable for interest where, upon receiving notice of rescission from the vendor, he placed the unpaid purchase money in a bank for the benefit of the vendor. See also *In re Monckton*, 27 Ch. Div. 555.

Any Railroad.—"Any railroad" may be taken distributively, including all railroads taken severally, as in the expression "*any* county may subscribe to the stock of *any* railroad of this state." *Chicot County v. Lewis*, 103 U. S. 167.

1. Living Apart. (See also **LIVING**; and the titles **ALIMONY**; **HUSBAND AND WIFE**; **MARRIED WOMEN**.)—A husband is not "living apart" from his wife, within the meaning of a statute dispensing with his joining in a conveyance, when he is only temporarily absent in pursuit of his ordinary calling, as in the case of a seaman. *Ex p. Gilmore*, 3 C. B. 967, 54 E. C. L. 967.

Nor when the circumstances of his going away are not such as to warrant a belief that he has no intention of coming back. *In re Squires*, 17 C. B. 176, 84 E. C. L. 176.

Acknowledgment—Apart from Her Husband.—In an act providing that the acknowledgment of a married woman should be taken "on a private examination *apart* from her husband," it was held that the above clause did not exclude the presence of other persons than the husband, as the latter words qualified and explained the former ones, the omission of which from an acknowledgment did not invalidate it. *Den v. Geiger*, 9 N. J. L. 233. See also the title **ACKNOWLEDGMENTS**, vol. 1, p. 521.

Same—"Separate" Synonymous with "Apart."—In *Belo v. Mayes*, 79 Mo. 67, the court said: "The objection that it does not recite that the examination of the wife was 'separate' as well as *apart* from her husband, has no force. Redundancy and repetition occur in statutes as well as elsewhere. The words mean substantially the same thing. I do not perceive how an examination could be *apart* from her husband without being 'separate' from him. The deed was properly admitted. I may add here that the 13th section of the statute, which directs what must be done by the party making the acknowledgment and by the officer taking it, employs the word *apart*, and omits the word 'separate.'"

2. Burrill's Dict.; Bouvier's Dict.

Separate Apartments.—In *Tracy v. Talbot*, 6 Mod. 214, it was held, where a house originally entire was divided into several *apartments* with an outer door to each *apartment* and no communication with each other, that the several *apartments* should be rated as distinct houses; but if the owner lived therein, all the untenanted *apartments* would be considered as parts of his house.

Lease.—In *McMillan v. Solomon*, 42 Ala. 356, 94 Am. Dec. 652, it was held that by the lease of *apartments* in a building for the purpose of trade, the lessee took such subjacent land as was dependent upon the enjoyment of the *apartments* rented and necessary thereto, and that if the *apartments* were destroyed by fire, his interest ceased. The court said: "We must distinguish between the lease of *apartments* in a house, as in this case, and the lease of a house. The authorities are very strong to the point, that a lease of a house will pass at least the subjacent land. * * * Without involving ourselves with any question of controversy in English law, we may admit that 'house, *ex vi termini*,' at least embraces the land upon which the building is erected. This does not, however, affect the precise question in hand. A house, and *apartments* within it, are not the same. 'House' may include the subjacent land, but *apartments* within it may not. It often occurs that each *apartment* of a house of several stories is leased to a different person. Upon reason and justice, each lessee has an interest in the land in so far as it supports the building, and, therefore, conveyances or leases of the *apartments* may be within the statute of frauds. *Inman v. Stamp*, 1 Stark. 12, 2 E. C. L. 15; *Stockwell v. Hunter*, 11 Met. (Mass.) 448, 45 Am. Dec. 220; *Taylor on Landlord and Tenant*, § 30. No such interest as would protect the lease of the several tenants could exist if, with the lease of the *apartments*, or any one or more of the other *apartments*, a right to the soil independently of, and separately from, the enjoyment of the *apartments*, vested. The lease of the rooms of a house, by the force and meaning of the words, does not carry any distinguishable interest in the land, and there is no principle, and certainly not a preponderance of decisions, giving to it that effect."

Burglary.—On an indictment for burglary in entering the house, room, *apartment*, and tenement of A., A. being a lodger and renting his room from one who was tenant and lessee of the whole house, it was held that there was no variance between the allegation and the proof. *People v. St. Clair*, 38 Cal. 137. See also the title **BURGLARY**.

Right of Suffrage. (See also the title **ELECTIONS**.)—Where one occupied a part of a house, having a key to the outer door, the landlord not residing in, or occupying any portion of,

APERTURE.—See note 1.

APEX.—The summit or highest point of anything; the top.²

the premises, it was held that the occupier was entitled to vote, and that the premises so occupied were properly described as *apartments*. *Score v. Huggett*, 7 M. & G. 95, 49 E. C. L. 95.

Detached Building.—In *Com. v. Estabrook*, 10 Pick. (Mass.) 293, it was held that a small building on the same lot with a dwelling house, at a distance of forty-five rods from it, with a passageway between them, was not an *apartment* or dependence of the dwelling house, though the same person occupied the whole lot, including the house and building.

Same—"Apartment" of a Prison.—An inclosed prison yard containing the only necessary house for the accommodation of prisoners, is not an *apartment* of the prison, unless it has been assigned as such. *M'Lellan v. Dalton*, 10 Mass. 190. But see *Partridge v. Emerson*, 9 Mass. 122.

1. Intoxicating Liquors.—An ordinance declared it unlawful to keep open on Sunday any place for the sale of liquors, or to keep open "any door or *aperture* thereof, which could or might be used as a means of ingress or egress." It was held that this was not void on account of vagueness. The court said: "There is no fatal vagueness or uncertainty in the quoted language of the ordinance; the use of the word 'door' is a sufficient exponent that the meaning of the ordinance is that the *aperture* or other manner of keeping open must be one serving the same purposes of ingress and egress as a door naturally does when kept in a condition that it can be opened by, or ready to be opened for, the public. A reasonable view of the language used relieves the ordinance of all uncertainty." *Ex p. Peacock*, 25 Fla. 478.

2. Duggan v. Davey, 4 Dakota 110.

Mines. (See also the title **MINES AND MINING CLAIMS**.)—The top or *apex* is the end or edge or terminal point of the lode nearest the surface of the earth. *Stevens v. Williams*, 1 McCrary (U. S.) 480; *Iron Mine v. Loella Mine*, 2 McCrary (U. S.) 121; *Iron Silver Min. Co. v. Murphy*, 3 Fed. Rep. 368.

It is not required that it shall be on or near or within any given distance of the surface. If found at any depth, and the locator can define on the surface the area which will inclose it, the lode may be held by such location. *Iron Silver Min. Co. v. Murphy*, 3 Fed. Rep. 368; *Iron Mine v. Loella Mine*, 2 McCrary (U. S.) 121.

Though the definition given, viz.: "point of the lode nearest the surface of the earth," is the usual one, see criticism of this definition in *Duggan v. Davey*, 4 Dakota 110, quoted below.

A Line.—In *Larkin v. Upton*, 144 U. S. 23, it was held that the *apex* is not necessarily a point, but often a line of great length.

Mines—Distinguished from Outcrop.—In *Duggan v. Davey*, 4 Dakota 110, the court said: "The definition of the top or *apex* of a vein usually given is 'the end or edge of a vein nearest the surface,' and to this definition the

defendants insist we must adhere with absolute, literal, and exclusive strictness, so that wherever, under any circumstances, an edge of a vein can be found at any surface, regardless of all other circumstances, that is to be considered as the top or apex of the vein. The extent to which this view was carried by the defendants, and, I must confess, its logical results, were exhibited by Prof. Dickerman, their engineer, who, replying to an inquiry as to what would be the *apex* of a vein cropping out at an angle of 1 deg. from the vertical, on a perpendicular hillside, and cropping out also at a right angle with that along the level summit of the hill, stated that in his opinion the whole line of that outcrop, from the bottom clear over the hill as far as it extended, would be the *apex* of the vein. Some other witnesses had a similar opinion. The definition given is no doubt correct under most circumstances, but, like many other definitions, is found to lack fullness and accuracy in special cases; and I do not think important questions of law are to be determined by a slavish adherence to this letter of an arbitrary definition. It is indeed difficult to see how any serious question could have arisen as to the practical meaning of the terms 'top' or *apex*, but it seems in fact to have become somewhat clouded. I apprehend, if any intelligent person were asked to point out the top or apex of a house, a spire, a tree, or hill, he would have no difficulty in doing so, and I do not see why the same common sense should not be applied to a vein or lode. Statutory words are to receive their ordinary interpretation, except where shown to have a special meaning; and, as I think the testimony shows that these terms were unknown to miners in their application to veins before the statute, the ordinary rule would seem to apply to them.

"Justice Goddard, a jurist of experience in mining law, in his charge to the jury in the case of *Iron Silver v. Louisville*, defines 'top' or *apex* as the highest or terminal point of a vein 'where it approaches nearest the surface of the earth, and where it is broken on its edge, so as to appear to be the beginning or end of the vein.' Chief Justice Beatty, of Nevada, who is mentioned in the report of the public lands commission of 1879-80 as 'one of the ablest jurists who has administered the mining law,' in his letter to that commission says, after defining dip and course of strike: 'The top or *apex* of any part of a vein is found by following the line of its dip up to the highest point at which vein matter exists in the fissure. According to this definition the top or apex of a vein is the highest part of a vein along its entire course. If the vein is supposed to be divided into sections by vertical planes, at right angles to the strike, the top or apex of each section is the highest part of the vein between the planes that bound that section; but if the dividing planes are not vertical, or not at right angles to a vein which departs at all from a perpendicular

APOTHECARY. (See also the title DRUGGISTS.)—An “apothecary,” in the most usual and familiar sense, is understood to be one who vends drugs or medicines as his trade or business.¹

APPARATUS.—Though Latin in form and origin, this word is in common use, and as much a part of our vocabulary as any other word in the English language. It is defined by lexicographers as an equipment of things provided and adapted as a means to some end; any complex instrument or appliance for a specific action or operation, of which mechanical or chemical instruments are given as examples.²

in its downward course, then the highest part of the vein between such planes will not be the top or apex of the section which they include.” (Report Pub. Lands Com. 389.)

“I am aware that in several adjudged cases ‘top’ or *apex* and ‘outcrop’ have been treated as synonymous, but never, so far as I am aware, with reference to a case presenting the same features as the present. The word *apex* ordinarily designates a point, and so considered the apex of a vein is the summit; the highest point in a vein is the ascent along the line of its dip or downward course, and beyond which the vein extends no further, so that it is the end, or, reversely, the beginning, of the vein. The word ‘top,’ while including *apex*, may also include a succession of points—that is, a line—so that by the ‘top’ of a vein would be meant the line connecting a succession of such highest points or *apices*, thus forming an edge. * * * I have been led into some digression from the strict line of my argument. Bearing in mind the descriptions heretofore given of the two lines of outcrop on Custer hill, if we might suppose that the outcrop along the northerly face were nearly vertical, I do not see how it could be seriously contended that such outcrop, under the circumstances, constituted the top or *apex* of this stratum of quartzite. Such a conclusion could only be reached, it seems to me, by shutting one’s eyes to every feature of the case, except the one fact that there was an edge at or near the surface, which was therefore the top or *apex* of the vein. This I cannot do without such a violation of the ordinary use of words, and, with all the respect and deference which I feel for the opinions of the learned counsel for the defense, I must say, without such a transgression of the dictates of a sound common-sense view of the situation, as, in my judgment, the statute does not contemplate. Nor can I see that there would be any difference whatever in the principle, were this outcrop to be found at an angle of 45 deg., or, as it is, at an angle of about 8 deg. from the horizontal. I am compelled, therefore, to hold that this outcrop found in the Sitting Bull location is not the top or *apex* of this vein, lode, or ledge, and that such top or *apex* is not within that location. I must regard that outcrop as merely an exposure of the edge of the vein on the line of its dip.”

1. *Westmoreland v. Bragg*, 2 Hill (S. Car.) 414. And in that case it was held that one engaged in selling medicines under the “Thompsonian system” was an *apothecary*

within the meaning of an act requiring that *apothecaries* should take out a license.

Merchant and Apothecary.—In *Anderson v. Com.*, 9 Bush (Ky.) 569, it was held that a statute prohibiting merchants from selling spirituous liquors did not apply to *apothecaries*. The court said: “The word ‘merchant,’ in its most general and comprehensive sense, will certainly embrace all who may be engaged in the purchase and sale of goods; and as an *apothecary*, regarded in the strictest sense of that word, is ‘one who prepares and sells drugs for medicinal purposes,’ and must necessarily be a trafficker in drugs, it would seem that he is in a certain sense a merchant, and more obviously so is an ordinary druggist, ‘whose occupation is merely to buy and sell drugs.’ But looking to what must have been the intention of the legislature in enacting the statute under consideration, whether it was to make the common retail traffic in liquors a source of revenue only, or for reasons of public policy to limit and restrain it, we cannot think that the legislature intended either to repress or lay a burden upon the harmless and necessary sale of liquors for medicinal purposes by persons engaged in the occupation of *apothecaries*, whether that business be, as it usually is in this country, combined with a retail trade in drugs and fancy articles or not. But we are of the opinion that the intention of the legislature was to prevent the retail sale of intoxicating liquors by common merchants or dealers in merchandise, to be drunk or used simply as a beverage, unless such merchants should first obtain a license for that purpose; a traffic which is often productive of crime and a detriment to society being thus restricted as well as rendered a source of revenue.”

Physician Putting Up His Own Drugs—Trader.—Within an *English* statute, it was held that a surgeon and *apothecary*, who put up drugs for his own patients only, was a trader. *Ex p. Crabb*, 8 De G. M. & G. 277.

2. *Board of Education v. Andrews*, 51 Ohio St. 199. This case was upon the construction of a statute limiting the expenditures of school boards for *apparatus* to be used in the schools.

A mathematical chart was held an *apparatus* in *School Dist. v. Swain*, 29 Kan. 152.

Gaming Apparatus. (See also the title GAMING.)—A statute providing for the destruction of *apparatus* and implements used in unlawful gaming, does not authorize the killing of fighting cocks. *Coolidge v. Choate*, 11 Met. (Mass.) 79. In that case, implements were defined as “things necessary in any trade or mystery, without which the work cannot be

APPAREL. (See also WEARING APPAREL; and the title EXEMPTIONS.)—This term is not a technical one, and, as used in statutes generally, receives its ordinary meaning.¹

APPARENT.—What seems to exist, or is indicated by appearances;² also manifest, evident, proved; what is regularly before the court.³

performed; also the furniture of a house, as all household goods, implements, etc. And implements of household are tables, presses, bedsteads, and the like.' * * * It does not appear that it has ever been used to denote animals, or beings having life. * * * The words 'implements' and *apparatus* have the same meaning, and are so defined. No one, we apprehend, ever did or ever would call a living animal an *apparatus*."

Billiard tables were held not to be "gaming *apparatus*" within the meaning of one penal statute, as they were expressly named in another similar statute. *State v. Hope*, 15 Ind. 474.

Necessary Apparatus.—In a lease of a paper mill in which the lessors covenanted to furnish "all necessary *apparatus*," it was held that those words meant, not such articles of necessary *apparatus* as were at the mill at the date of the lease, but "all *apparatus* which might become necessary for manufacturing paper according to the ordinary process usually adopted by conductors of such establishments, and that all such *apparatus*, whether at the mill or not at the date of the contract, was included in the lease." *Patterson v. Garret*, 7 J. J. Marsh. (Ky.) 112.

1. *Maillard v. Lawrence*, 16 How. (U. S.) 261; *Greenleaf v. Goodrich*, 101 U. S. 285.

Exemption—Trunk.—A traveling trunk, mahogany cabinet box, and breastpin are not within the exemption. *Towns v. Pratt*, 33 N. H. 345, 66 Am. Dec. 726. This exemption, however, extended only to necessary wearing apparel; and the court said that while, in its ordinary signification, the word *apparel* may have a more extensive meaning, including not merely vesture—habilitments for covering the person—but all ornaments and decorations worn with the vesture, still, in combination with the word "ordinary," it would not cover the articles named.

Exemption—A Watch.—In *In re Steele*, 2 Flipp. (U. S.) 325, a watch was held exempt. The court said: "It would not be doing any great violence to the meaning of the term 'wearing *apparel*,' as used in the bankrupt act, to include in it a gold watch of moderate value. The definition of the word *apparel*, as given by lexicographers, is not confined to clothing; the idea of ornamentation seems to be a rather prominent element in the word, and it is not improper to say that a man 'wears' a watch or 'wears' a cane. The exemption law of Arkansas says that 'wearing *apparel*' shall be exempt, 'except watches.' Ark. Dig. 503, 504; *James on Bankruptcy* 58; *Avery & Hobbs Bankr.* 68." See also *Bumpus v. Maynard*, 38 Barb. (N. Y.) 626.

In *Stewart v. McClung*, 12 Oregon 431, 53 Am. Rep. 374, a watch of moderate value was held exempt.

A watch was held wearing *apparel* in *Mack*

v. Parks, 8 Gray (Mass.) 517, 69 Am. Dec. 267.

But in *Smith v. Rogers*, 16 Ga. 480, an insolvent moved to exempt from sale a watch that he claimed to be part of his wearing *apparel*. His wife had claimed and been allowed a gold watch. The court doubted whether a watch came under the head of *apparel*, but decided that if it did, no more than one watch could be allowed.

And in *Rothschild v. Boalter*, 18 Minn. 362, a silver watch and chain, worth forty or fifty dollars, worn by the debtor, was held not exempt. See also *Sawyer v. Sawyer*, 28 Vt. 252.

Will—A Watch.—In *Gooch v. Gooch*, 33 Me. 535, a watch was held not to pass under a bequest of wearing *apparel*.

Exemption.—Bags and bedding are not wearing *apparel*. *Shaw v. Davis*, 55 Barb. (N. Y.) 389.

Unworn Wearing Apparel—United States Revenue Law.—In *Astor v. Merritt*, 111 U. S. 202, it was held that the exemption of wearing *apparel* from United States customs duties extended to *apparel* ready for wear, though unworn.

Shoes were held to be wearing *apparel* in *Swayne v. Hager*, 37 Fed. Rep. 782.

Shawls were held wearing *apparel*, and subject to duty as such, in *Maillard v. Lawrence*, 16 How. (U. S.) 261.

Apparel—Rings and Jewelry are Not Included.—*Frazier v. Barnum*, 19 N. J. Eq. 316, 97 Am. Dec. 666.

Exemption—Cloth Sent to a Tailor.—In *Ordway v. Wilbur*, 16 Me. 263, 33 Am. Dec. 663, cloth sent to a tailor to be made into clothes was in that form held to be exempt as *apparel*. To the same effect, see *Richardson v. Buswell*, 10 Met. (Mass.) 506, 43 Am. Dec. 450.

Apparel of Deceased Husband—Watch—Ornaments.—A *Vermont* statute gave to the widow the wearing *apparel* of her deceased husband. It was held that this did not include ornaments, such as a watch, seals, finger-rings, etc., nor the sword and sword-belt of a United States officer, though it did include epaulettes. *Sawyer v. Sawyer*, 28 Vt. 252.

2. *Johnson v. State*, 5 Tex. App. 433.

3. *Burr. Law Dict.*

Apparent Ownership was defined to be equivalent to "*prima facie* ownership" in *State v. Hastings*, 15 Wis. 84.

Apparent Possession. (See the titles BILLS OF SALE; FRAUDULENT SALES.)—The Bill of Sales Act, 17 & 18 Vict., c. 36, § 1, provides that personal chattels shall be deemed to be in the "*apparent* possession" of the person making or giving the bill of sale, "so long as they shall remain or be in any house * * * or other premises occupied by him, or as they shall be used and enjoyed by him in any place whatsoever, notwithstanding that formal

APPARENT EASEMENTS. (See the title EASEMENTS.)—**Apparent or Continuous Easements** are those depending upon some artificial structure upon, or natural formation of, the servient tenement, obvious and permanent, which constitutes the easement, or is the means of enjoying it; as the bed of a running stream, an overhanging roof, a pipe for conveying water, a drain, or a sewer.

Nonapparent or Noncontinuous Easements are those that have no means specially constructed or appropriated to their enjoyment, and that are enjoyed at intervals, leaving between these intervals no visible sign of their existence; such as a right of way, or right of drawing a seine upon the shore.¹

APPEAL. (For a full treatment of the subject of appeals, see ENCYC. OF PLEADING AND PRACTICE, vol. 2, pp. 1-587.)—Appeal (*appellatio* in civil law) is defined *ab inferioris judicis sententia ad superiorem provocare*; the removal of

possession thereof may have been taken by or given to any other person." The grantor of a bill of sale being tenant of rooms in which the goods were placed, but residing elsewhere, having made a default in paying the sum secured, gave the keys to the grantee, who opened the doors and put his name on some of the goods, though without removing them. It was held that the goods had ceased to be in the "apparent possession" of the grantor, and that the bill of sale was valid as against his execution creditor. *Robinson v. Briggs*, L. R. 6 Exch. 1. See also *Gough v. Everard*, 2 H. & C. 1.

Where goods in the house of a trader, but not belonging to him, were levied upon by the sheriff under a *f. fa.* against the trader, it was held that this did not disturb the "apparent possession" of the trader, subsequently declared a bankrupt, so that they might be sold by his assignees as against the true owner. *Barrow v. Bell*, 5 El. & Bl. 540.

Apparent Good Order. (See generally the title BILLS OF LADING.)—Where the word *apparent* in a bill of lading was placed before the usual words "good order," it was held that this did not affect the legal sense of the bill of lading, and that the carrier might show a latent defect where loss occurred. *The Oriflamme*, 1 Sawy. (U. S.) 178.

Self-defense—Apparent Danger. (See also the titles ASSAULT AND BATTERY; HOMICIDE; SELF-DEFENSE.)—As used with reference to the doctrine of self-defense, *apparent* danger means such overt actual demonstration, by conduct and acts, of a design to take life or do some great personal injury, as would make the killing *apparently* necessary to self-preservation. *Evans v. State*, 44 Miss. 762.

Same—Apparent Intention.—It was provided by statute that "though a homicide may take place under circumstances showing no deliberation, yet if a person guilty thereof provoked a contest with the *apparent* intention of killing or doing serious bodily injury to deceased, the offense does not come within the definition of manslaughter." It was held that "*apparent* danger" meant what was "manifest, beyond doubt, obvious," as distinguished from the popular meaning signifying "that which seems to exist or is indicated by appearances, rather than that which is real

or actual." *Johnson v. State*, 5 Tex. App. 423.

Agents—Apparent Authority. (See also the title AGENCY, vol. 1, pp. 1136, 1146.)—"By the words '*apparent* authority' is meant the authority which the agent appears to have [as distinguished] from that which he actually does have, and not from that which he may pretend to have, or from his actions on occasions which were unknown to, and unratified by, his principals." *Oberne v. Burke*, 30 Neb. 592.

Alteration of Wills.—An English statute provided that no alteration of a will should be valid or have any effect if made after the execution of the will, unless after such alteration the original words or effect of the will should not be *apparent*. *In re Horsford*, L. R. 3 P. & D. 216. *Hannen, J.*, said: "I think that the word *apparent*, in the 21st section, means *apparent* on the face of the instrument, in the condition in which it was left by the testator." See also *Townley v. Watson*, 3 Curt. 761.

"Apparent Violation" of a Rule of Court.—In a rule of court, declaring that "where more than one count," etc., "shall have been used in *apparent* violation of the preceding rule," which prohibited their use when founded on one subject-matter, it was held that the words "*apparent* violation" meant that "two things appear to be the same, whether they are so or not; * * * that if the two counts be such that any person conversant with pleading, looking at them, would say that they are founded on the same subject-matter of complaint, the fifth rule is violated." *Ramsden v. Gray*, 7 C. B. 967, 62 E. C. L. 967. See *Temple v. Keily*, 1 M. & G. 904, 39 E. C. L. 703.

1. *Fetters v. Humphreys*, 18 N. J. Eq. 262.

Where the defendant was not aware, at the time his house was conveyed to him, of the existence of a drain running under it, and urged that there could be no implied agreement unless the easement were "*apparent* and continuous," it was held that he must have known, or ought to have known, that some drainage then existed, and if he had inquired he would have known of this drain; and that by "*apparent* signs" must be understood not only those which must necessarily be seen, but those which may be seen or known on a careful inspection by a person ordinarily conversant with the subject. *Pyer v. Carter*, 1 H. & N. 916.

a cause from the sentence of an inferior to a superior judge, or, as Blackstone expresses it, a complaint to a superior court of an injustice done by an inferior court.¹

The term "appeal" was unknown to the common law, and belonged wholly to the civil law and courts of chancery, and meant, in its technical and appropriate sense, the removal of a suit and its final determination from an inferior court, after final judgment in that court, to a superior court, and placing the case in the latter court to be again tried *de novo* upon its merits, just as though it had never been tried in the inferior court.²

But while this is the technical definition, in modern times and especially in the *United States*, the distinction is not always observed, and the term "appeal" is often used in a general sense, as embracing all kinds of proceedings for the review of cases, whether they be decrees in equity or judgments at law.³

1. *U. S. v. Wonson*, 1 Gall. (U. S.) 13. An *appeal* is the granting of a new trial on the same issue in a higher court. *Rawson v. Adams*, 17 Johns. (N. Y.) 131.

An *appeal* in law is the removal of a matter or cause from an inferior to a superior court for the purpose of reviewing, correcting, or reversing the judgment or sentence of the inferior tribunal. *Leach v. Blakely*, 34 Vt. 134.

To *appeal* is to remove a cause to a higher court for review and retrial. In general terms, an *appeal* is a resort to an upper court to review the action of a lower court. *State v. Case*, 14 Mont. 525.

An *appeal* is correctly defined to be a removal of a cause from one tribunal to a higher. *Clark v. Haines*, 4 N. J. Eq. 137.

The term *appeal* is used to designate the act of lodging the action in the appellate court, and it is also used to designate the action itself when in the appellate court. *Williamson v. Middlesex*, C. P. 42 N. J. L. 391.

2. *U. S. v. Wonson*, 1 Gall. (U. S.) 11; *Styles v. Tyler*, 64 Conn. 472; *Fouse v. Vandervort*, 30 W. Va. 331; *Barlow v. Daniels*, 25 W. Va. 521.

Writ of Error.—A writ of error was held to be an *appeal* within a statute declaring that appeals shall be allowed in certain cases. *Clark v. Ross*, 1 Ill. 334. Compare *Bowers v. Green*, 2 Ill. 43, where this case is criticised.

An *appeal* is a process of civil-law origin, and removes causes, entirely subjecting the facts as well as the law to review and retrial; but a writ of error is a process of common-law origin, and it removes nothing for reexamination but the law. *Wiscart v. Dauchy*, 3 Dall. (U. S.) 327, quoted with approval in *Ex p. Henderson*, 6 Fla. 289; *U. S. v. Goodwin*, 7 Cranch (U. S.) 110. See also *Dawkins v. State*, 42 Miss. 633.

In *Babbitt v. Clark*, 103 U. S. 611, it was said: "Congress evidently intended that orders of this kind made in suits at law should be brought here by writ of error, and that where the suit was in equity an *appeal* should be taken. That is the fair import of the phrase, 'writ of error or *appeal* as the case may be.' This was a suit at law, and consequently should have been brought up by writ of error."

Appeal Distinguished from Common-law Method of Review.—In *Noé v. U. S.*, Hoffm. Land

Cas. 242, it was held that the word *appeal* in the statute of 1851 was used in its technical sense, and denoted the civil-law mode of transferring a cause to a superior tribunal for a reexamination on the matters of fact as well as of law, as distinguished from a writ of error, by which errors in matters of law were alone submitted for revision.

Technical Sense.—In *Polk v. Covell*, 43 Neb. 884, a distinction between proceedings by petition in error and by *appeal* is recognized. See also *McHugh v. Smiley*, 17 Neb. 626.

Same—Judiciary Act of 1789.—It has been decided by the Supreme Court that the term *appeal* in the Judiciary Act of 1789 must be understood in its technical sense as expressive of the civil-law mode of removing a cause to a higher tribunal, and not in its popular sense as descriptive of appellate jurisdiction without regard to the manner in which the cause was transmitted to that jurisdiction. *U. S. v. Goodwin*, 7 Cranch (U. S.) 110; *U. S. v. Tenbroek*, 2 Wheat. (U. S.) 248.

Certiorari Distinguished from Appeal.—*Rawson v. Adams*, 17 Johns. (N. Y.) 130.

3. *Fouse v. Vandervort*, 30 W. Va. 332.

In *Lyles v. Barnes*, 40 Miss. 609, it was held that the statute providing for *appeals* from the county to the circuit court did not use the term *appeals* in its technical sense, and, therefore, that trial in the Circuit Court is not *de novo*. See also *Dawkins v. State*, 42 Miss. 633.

"The legal signification of proceedings on *appeal* does not import the review merely of questions of law; *appeal* signifies simply the removal of a cause from an inferior to a superior jurisdiction, and any question of fact or law, or both, may be the subject of *appeal*, or the whole facts or the whole case: as, for instance, *appeals* in summary proceedings to remove tenants; from the decisions of justices of the peace, to the court of common pleas or county courts. It is, indeed, now the substitute for a writ of error. But it is more; it is the method by which all the mistakes in the judgments of an inferior jurisdiction are rectified, except when otherwise specially provided." *People v. Justices*, 11 How. Pr. (N. Y. Supreme Ct.) 401.

Popular Sense.—The term *appeal* is, in the several states, used in very different senses, and has to a great extent, in statutes and

APPEAL BOND.—An appeal bond is a voluntary obligation entered into by the appellant and his sureties, as obligors, and the appellees as obligees,

decisions, lost its distinctive meaning, having become the generic term for all forms of rehearing; or else nearly or quite synonymous with error or new trial. *Swenson v. Girard, F. & M. Ins. Co., 4 Colo. 478.*

In *Crane v. Giles, 3 Kan. 48*, it was said: "An *appeal*, as defined by Webster, is 'the removal of a cause from an inferior to a superior tribunal, as from a common pleas to a superior or supreme court.' Worcester defines it to signify in law 'a removal of a cause from an inferior to a superior court, or jurisdiction, for the purpose of reëxamination.' To the same effect, Jacobs, in his *Law Dictionary*, remarks that 'it signifies the removal of a cause from an inferior court or judge to a superior.' These authorities are sufficient to show that the term *appeal*, as used in the constitution, is a general term denoting not only what are technically denominated *appeals*, as contradistinguished from a certiorari, writ of error, or petition in error, but any proceeding by which a cause is sought to be removed from probate and justice courts to superior tribunals, for the purpose of reëxamination, and thereby precludes the jurisdiction of this court in the case at bar; the manifest object of the provision being to enable parties to obtain justice in their own county, without being subjected to the trouble and expense of a suit in the Supreme Court, except in case of necessity."

Construed to Mean Appeal Bonds.—A statute provided that "all *appeals* from the judgment of any justice court which have been heretofore signed by the attorney or agent of any party appellant for said appellant are hereby validated." It was held that the word *appeals* must be construed to mean *appeal bonds*. *Andrews v. Beane, 15 R. I. 451.*

Distinguished from Action.—It is clear that an *appeal* is a mere incident to an action, and not at all the same thing. The judgment is the result or consequence of the action, and the *appeal* is the mode of seeking to have the judgment of the inferior court corrected by the appellate tribunal. *Beaird v. Russ, 34 La. Ann. 318.* In that case, it was contended that the word *appeal* and the word "action," as defined in the *Louisiana Code of Practice*, had the same meaning.

An *appeal* is the commencement of a new proceeding in an action after its determination by the rendition of a final judgment, and is distinct from that which resulted in its recovery. *Wood v. Blodgett, 15 Civ. Pro. Rep. (N. Y. Supreme Ct.) 114.*

An *appeal* is the right of entering a superior court and invoking its aid and interposition to redress the error of the court below. It seems absurd to denominate this paramount right a part of the practice of the inferior tribunal. *Atty.-Gen. v. Sillem, 10 H. L. Cas. 704.*

But in *Teaff v. Hewitt, 1 Ohio St. 520, 59 Am. Dec. 634*, it is said that an *appeal* from a decree is nothing else than a proceeding in the original cause, which continues the case

by vacating or suspending the decree till the final hearing in the appellate court.

Petition to the Appellate Court.—As to whether an *appeal* includes a petition to the appellate court, see *Clark v. Haines, 4 N. J. Eq. 139.*

Rehearing before the Same Court.—In *Pool v. Barnett, Dudley (Ga.) 10*, it was held that the word *appeal* might apply to a rehearing before the same court. The court said: "Judge Law seems to be somewhat embarrassed with the idea which he has attached to the word *appeal*. It is generally true (as he says) that the idea of an appeal is the rehearing of a cause before another and higher tribunal. This is the idea attached to appeals in the legislation of England, and it was the idea attached to it in the legislation of this state anterior to the Act of 1792. But it will be readily admitted that the legislature was competent to call its own acts by such terms as to it seemed proper, and that it had a right to apply the term *appeal* as it has been applied in the Acts of 1792 and 1797, and that the constitution had a right to adopt this new application as it has done. The term *appeal*, as applied in these acts, signifies only a right of rehearing before the same court with a different special jury." See also *Leach v. Blakely, 34 Vt. 134.*

Authority to Retry.—Where a court was given jurisdiction to entertain *appeals* from the decisions of state boards of equalization, it was held that the word was not used in its technical sense, but to signify an authority to retry the questions arising before the board upon a contest. *Hayes v. Merchants' Bank, 10 Wash. 573.*

Appeal—Criminal Causes.—In *Louisville, etc., R. Co. v. Clarke, 152 U. S. 239*, it is said: "An *appeal*, when spoken of as a criminal prosecution, denoted, according to Blackstone, an accusation by a private subject against another for some heinous crime—a 'private process for the punishment of public crimes,' having its origin in a custom, derived from the ancient Germans, of allowing a pecuniary satisfaction, called a *weregild*, to the party injured or his relations, 'to expiate enormous offenses.' 4 Bl. Com. 312, 313. Bacon defines it to be a 'vindictive' action, 'the party's private action, seeking revenge for the injury done him, and, at the same time, prosecuting for the Crown in respect of the offense against the public.' Bacon Abridg., tit. Appeal. These appeals could be brought 'previous to an indictment, and if the appellee be acquitted thereon, he could not be afterwards indicted for the same offense.' 4 Bl. Com. 315; Comyns's Dig., tit. Appeal, G. 11, 16. While, during the continuance of the custom referred to, a process was given for recovering the *weregild* by the party to whom it was due, 'it seems that when these offenses by degrees grew no longer redeemable, the private process was still continued, in order to insure the infliction of punishment on the offender, though

conditioned that the obligors shall prosecute the appeal with effect or answer to the liability created by the bond.¹

APPEAR.—"Appear" means to come into court as a party to the suit.²

APPEARANCE. (See, for a full treatment of the subject, vol. 2, ENCYC. OF PLEADING AND PRACTICE, p. 588. As to conditions in bail bonds and recognizances that defendant shall appear, etc., see the titles BAIL; BONDS.)—Appearance is the process by which a person, against whom a suit has been brought, submits himself to the jurisdiction of the court.³

the party was allowed no pecuniary compensation for the offense.' Bk. 4, 314. By statute of 59 Geo. 3, c. 46, appeals of murder, treason, felony, and other offenses were abolished."

Appeal shall be Brought.—A statute requiring an *appeal* to be brought within a certain time is not complied with by giving notice of the *appeal* and entering into a recognizance within the time. *Hunter v. Griffiths*, 7 Ont. Pr. Rep. 86.

Appeal from Arbitrators.—Included in a promissory note were the following words: "If not paid at maturity waiving inquisition, *appeals*," etc. It was held that the maker was thereby precluded from an *appeal* from an award of arbitrators and a compulsory rule of reference. *Watson v. Wetter*, 91 Pa. St. 385. See the title ARBITRATION AND AWARD.

Affidavits.—In an affidavit that defendant has a just and legal defense to make upon the merits of the *appeal*, the word *appeal* means the action in the court above. *Snover v. Tinsman*, 38 N. J. L. 210.

1. ENCYC. OF PLEADING AND PRACTICE, p. 964, which see for an exhaustive treatment of the subject.

In *Kountze v. Omaha Hotel Co.*, 107 U. S. 378, it is said: "As an *appeal bond*, or bond in error, is a formal instrument required by the law, and governed by the law, and has, by nearly a century's use, become a formula in legal proceedings, with a fixed and definite meaning, and as the important right of *appeal* is greatly affected by it, we think that it is not allowable in practice, by a change in its phraseology, to give to it an effect contrary to what the statute intended. It would be against the policy of the law to allow such deviations and irregularities to creep in. We think the rule followed in some of the states is a sound one, that if the condition of an appeal bond, or bond in error, substantially conforms to the requisitions of the statute, it is sufficient to sustain it, though it contain variations of language, and that if further conditions be superadded, the bond is not therefore invalid so far as it is supported by the statute, but only as to the superadded conditions."

Process.—An *appeal bond* was held to be a process requiring stamps under the *United States Stamp Law*. *Tipton v. Cordova*, 1 N. Mex. 383.

2. *Schroeder v. Lahrman*, 26 Minn. 87.

"Appear to Them" in the Sense of "Obvious—Known."—A statute empowered county courts to remove jailers whenever it should *appear* to them that they had been guilty of neglect of duty. Upon the construction of the word *appear*, the court said: "It is also sug-

gested, that the terms in which this power is given to the county courts indicate that something more than mere judicial power was intended to be conferred. They shall have 'full power * * * whenever it shall appear to them,' etc. But whatever force is given to the word 'full,' the power is subject to the condition afterwards expressed, that it shall *appear* to them that the jailer has been guilty of neglect of duty. And although the word *appear* has reference in one sense to that which is seen by the eye, we have no doubt that it was intended to be used in its broader sense, as signifying that which is obvious or known, or clear, or made clear by evidence or reasoning, and that it comprehends all the cases in which it shall be satisfactorily known or shown to the court that the jailer has been guilty, etc. The word *appear* or *appearing* is one of frequent use in judicial proceedings (and is sometimes used in statutes referring to them), as meaning 'clear to the comprehension,' when applied to matters of opinion or reasoning, and 'satisfactorily or legally known or made known,' when used in reference to facts or evidence. And as it cannot be understood in this place as restricting the power of removal to cases in which the courts might actually see the neglect of duty, but as extending it to all cases of neglect of duty, without discriminating between those which might occur in view of the court, and those which might be otherwise made known, we do not perceive that it is entitled to any peculiar force, or that it indicates in any degree that the court may act otherwise than judicially in removing the jailer." *Gorham v. Luckett*, 6 B. Mon. (Ky.) 146.

Right to Appear Implies Right to be Heard.—A statute gave a party interested the right to *appear* before a board of equalization. It was held that the right to *appear* before a tribunal engaged in the transaction of a particular business, implied the right to be heard thereby, so far, at least, as the party was interested. *Dundee Mortg. Trust Invest. Co. v. Charlton*, 32 Fed. Rep. 192.

Appear by Affidavit.—Where a statute requires that a fact shall *appear* by affidavit, it has been held that the words "*appear* by affidavit," mean that such legal evidence going to establish the fact must be given as would be received in the ordinary course of judicial proceedings, and not conclusions, opinions, or hearsays. *Mackubin v. Smith*, 5 Minn. 367; *Curtis v. Moore*, 3 Minn. 29.

3. 1 Daniell's Ch. Pl. & Pr., p. 536.

An *appearance* is a submission to the jurisdiction of the court in obedience or in answer

APPELLATE.—Pertaining to, or having cognizance of, appeals and other proceedings for the judicial review of adjudications.¹

APPELLATE COURT. (See also ENCYC. OF PLEADING AND PRACTICE, titles APPEALS; COURTS.)—An appellate court is a court of appeals.²

APPELLATE JURISDICTION. (See ENCYC. OF PLEADING AND PRACTICE, title APPEAL, vol. 2, p. 1; and see this work, title JURISDICTION.)—Appellate jurisdiction, in its most limited and technical sense, means jurisdiction to retry and determine something that has already been tried in some other tribunal.³

to the process. *Grigg v. Gilmer*, 54 Ala. 430.

Appearance in the law has several significations, and the word must always be understood in reference to the particular business or subject-matter to which it relates. In some cases it means to *appear* in person, in others by attorney. Sometimes an obligation to *appear* can only be satisfied by actually coming into court, while in others it will be sufficient to put in special bail, or enter an *appearance* in the common rule book. In one case it may be necessary for the party to *appear* on the specified day, while in another it will be sufficient if done within ten or twenty days thereafter. The purpose or end to be answered by the *appearance* is also important. In most, if not all, cases where a party is bound to a personal *appearance* in court to answer any charge or action brought against him, he must not only *appear*, but must remain in court until discharged by due course of law; and how long he must attend, depends on the nature of the proceeding and the course and practice of the court." Seeley v. Evans, 19 Wend. (N. Y.) 459.

Actual Appearance.—A statute required a justice of the peace to wait one hour after the time specified in the process for the *appearance* of the parties. It was held that by *appearance* was meant, not a formal *appearance* of the action to be entered on the docket, but the personal *appearance* of the parties. *Brandies v. Robinson*, 45 Wis. 464.

Appearance Term.—The *appearance* term contemplated by § 2742 of the Iowa Code is the term at which it first becomes apparent that there is for trial and determination any issue of fact. *Vinsant v. Vinsant*, 47 Iowa 594.

Voluntary Submission to Jurisdiction.—The word *appearance*, as used in the *New York* Civ. Proc., § 2458, providing that in order to entitle a judgment creditor to maintain supplementary proceedings, "the judgment must have been rendered upon the judgment debtor's *appearance* or by a personal service of the summons upon him," means voluntary submission to the jurisdiction, and after entry of judgment on a forfeited recognizance such proceedings may be instituted, though defendant was not served with summons, the signing of the recognizance being equivalent to a voluntary *appearance*. *People v. Cowan*, 146 N. Y. 348, reversing 11 Misc. Rep. (N. Y.) 302.

1. Rap. & Law. L. Dict.

"Appellate" and "Supervisory" Power.—Where by Act of Congress the "supervision" of public business relating to public lands

was conferred upon the Secretary of the Interior, and the Commissioner of the General Land Office was vested with authority to perform executive duties connected with the public lands, "under the direction of the Secretary of the Interior," it was held that the latter's power of revising the acts of his subordinates was "supervisory rather than *appellate* power, in the sense in which the term *appellate* is employed in defining the powers of courts of justice," and that in the exercise thereof he might approve, modify, or annul their acts. *Hestres v. Brennan*, 50 Cal. 211.

2. *Allen v. State*, 1 Tex. App. 514. In that case, it was held that it was not a valid objection to a recognizance, that it bound the defendant to appear before the lower court to abide the judgment of the *appellate* court instead of the court of appeals.

A court having jurisdiction of removed causes, without regard to the manner of their removal, by appeal, certiorari, or writ of error. *Clark v. Ross*, 1 Ill. 334. Compare *Bowers v. Green*, 2 Ill. 43, where this case is criticised.

Appeal Bond.—The term *appellate court* in an appeal bond was held, where the cause was appealable to either of two courts, to embrace both courts. *Prewitt v. Day*, 86 Tex. 166.

3. *Cavanaugh v. Wright*, 2 Nev. 166.

Broader Sense.—The Constitution of *Nevada* gave final *appellate jurisdiction* to the district courts in cases arising in justices' courts. In construing this phrase, the court said: "*Appellate jurisdiction*, in its most limited and technical sense, means jurisdiction to retry and determine something that has already been tried in some other tribunal. If we were to give the phrase its most technical and limited meaning, we might rather hold that the framers of the constitution intended thereby to require that all appeals from justices should be tried *de novo*, than that none should be so tried. But we are not disposed to give it so narrow and technical a construction. We think, as used in the constitution, the phrase *appellate jurisdiction* was intended to be used in a broad and comprehensive sense. It was intended to confer jurisdiction upon the district courts to hear cases on appeal, either in the strictest sense, which would require a trial *de novo*, or to review them as law cases are reviewed at common law. We think the language quoted from the eighth section clearly confers on the legislature the power to regulate the manner of appeals to the district courts. It might require in one class of cases that upon appeal the trial should be *de novo*, and in other cases a simple review of the

APPENDAGE.—Something added as an accessory to, or the subordinate part of, another thing;¹ something added to a principal or greater thing, though not necessary to it.²

proceedings of the court below." *Cavanaugh v. Wright*, 2 Nev. 166.

Trial De Novo.—In *Ex p. Henderson*, 6 Fla. 280, the trial *de novo* of an appeal in the circuit court from a justice of the peace was held rather to be the exercise of original than *appellate jurisdiction*. The court said: "We do not concur in the opinion that the case of an appeal from a justice of the peace is a case of *appellate jurisdiction* in the sense in which this term is used in the constitution conferring it on this court. The fact is, it is of a mixed character, having but one ingredient of appellate power, in that it has its origin in the inferior court, whilst in all other respects it is and from the commencement, as well by the legislature as the courts, has been treated and regarded as if originally instituted in the circuit court, with the single exception that written pleadings are not required. The case is directed to be tried anew in the circuit court, and is to be continued after judgment until final execution. This undoubtedly is the exercise of original jurisdiction. Here is no revision and correction of error of law merely, no remitting of the case below for further trial."

Exercise of Appellate Jurisdiction.—*Appellate jurisdiction*, strictly speaking, is exercised by revising the action of the inferior court and remanding the cause for the rendition and execution of the proper judgment. *Dodds v. Duncan*, 12 Lea (Tenn.) 734.

Capacity of Appellate Court and Original Court to Participate in the Exercise of the Same Judicial Power.—"Appellate jurisdiction is not only a continuation of the exercise of the same judicial power which has been executed in the court of original jurisdiction, but it necessarily implies that the original and appellate courts are capable of participating in the exercise of the same judicial power. After the exercise of the *appellate* power in the adjudication of a cause, important judicial acts often remain to be done in the court of original jurisdiction." *Piqua Bank v. Knoup*, 6 Ohio St. 342.

Implies Revision—Implies that there has been Previous Litigation.—In *Auditor v. Atchison*, etc., R. Co., 6 Kan. 505, 7 Am. Rep. 575, the court quotes with approval the following definition of *appellate jurisdiction* from Story's Constitutional Law, § 1761: "The essential criterion of *appellate jurisdiction* is that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. In reference to judicial tribunals, an *appellate jurisdiction*, therefore, necessarily implies that the subject-matter has been already instituted and acted upon by some other court, whose judgment or proceedings are to be revised. The *appellate jurisdiction* may be exercised in a variety of forms, and, indeed, in any form which the legislature may choose to prescribe; but still the substance must exist before the form can be applied to it. To operate

at all, then, under the Constitution of the United States, it is not sufficient that there has been a decision by some officer or department of the United States; it must be by one clothed with judicial authority, and acting in a judicial capacity."

It is an essential criterion of *appellate jurisdiction*, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. *Marbury v. Madison*, 1 Cranch (U. S.) 175; *Tierney v. Dodge*, 9 Minn. 166. Compare *Virginia v. Rives*, 100 U. S. 327.

Exclusion of Original Jurisdiction.—When *appellate jurisdiction* in a certain class of cases is given, the inference is that original jurisdiction in that class is excluded. *Marbury v. Madison*, 1 Cranch (U. S.) 175.

The term "original" is a general term of limitation, contradistinguished from the term "appeal." *Reed v. McCormick*, 4 Cal. 342.

Agreed Case.—In *Crull v. Keener*, 17 Ill. 246, it was held that the Supreme Court would not take jurisdiction of a case certified or an agreed case, unless there had been a final judgment entered in the court below. The court said: "This court has only *appellate jurisdiction*, except in certain specified cases, of which this is not one. § 5, art. 5, Const. In this case, no decision was ever made in the Circuit Court; but the counsel have stipulated or certified that certain questions of law arise in the case which are still pending and undetermined in that court; and on that stipulation the questions are brought here, and we are asked to decide them in the first instance and for the Circuit Court. This is neither contemplated by the statute nor allowed by the constitution. The word *appellate* in the constitution is used in contradistinction to 'original.' It was intended to invest this court with supervisory power only, except where original jurisdiction is expressly given."

Correction of Errors in the First Place.—In *Smith v. Carr*, Hard. (Ky.) 313, it was held that the court would not entertain jurisdiction for the correction of errors or irregularities in an execution in the first instance. The court said: "The question then is, would this be the exercise of *appellate jurisdiction*? *Appellate jurisdiction, ex vi termini*, implies a resort from an inferior tribunal of justice to a superior for the purpose of revising the judgments of the inferior tribunal. This, it is believed, is the sense in which the expressions have at all times been used by legal writers."

1. *State Treasurer v. Somerville*, etc., R. Co., 28 N. J. L. 26.

2. *State v. Fertig*, 70 Iowa 272. *In re Boze-man's Petition*, 42 Kan. 456.

"Necessary Appendages" to a Schoolhouse.—Under an act directing that "the district board shall provide the necessary *appendages* for the schoolhouse," it was held that a stereoscope and stereoscopic views did not come within this description, and it was said that

APPENDANT. (See also APPENDAGE; APPURTENANCE; and the title EASEMENTS.)—An appendant is a thing used with, and related to, or dependent upon, another thing more worthy, to which it has belonged for time beyond memory, and agreeing in its nature and quality to the thing whereunto it is appendant.¹

But one kind of corporeal real property cannot be appendant to another description of the like real property, as land to land, or a house.²

appendages for the schoolhouse "would seem to refer to things connected with the building or designed to render it suitable for use as a schoolhouse." *School Dist. No. 29 v. Perkins*, 21 Kan. 536, 30 Am. Rep. 447.

Same—Well, Fence, Privy.—This language was construed broadly so as to authorize the district board to construct a well, a fence, or a privy on the schoolhouse grounds, and it was expressly decided that a well was a "necessary *appendage*." *Hemme v. School Dist. No. 4*, 30 Kan. 377.

Same—Fence.—A line fence around a schoolhouse was held to be a necessary *appendage* to the building. The court said: "Is a fence a necessary *appendage* for the schoolhouse under this statute? We think the fence, at least in this case, was a necessary *appendage* to this schoolhouse. It was a line fence, and, therefore, presumably necessary to be built. It comes within the same category as a well, woodhouse, or a privy, and has been held a necessary *appendage* in *Hemme v. School Dist. No. 4*, 30 Kan. 377. While it is not an annexation to the schoolhouse, it can certainly be considered an accessory to it. The word *appendage*, as used in our school statutes, does not mean simply the school apparatus to be used inside the building; nor do I think it can be limited to such articles as brooms, pails, cups, etc., but must be construed in a broader sense, as it has in other courts, to include fuel, fences, and necessary outhouses." *Creager v. School Dist. No. 9*, 62 Mich. 101.

Same—Chart.—National Business Multiplication Charts, being charts or cards containing the multiplication table, practical forms of business contracts, and also brief mention of prominent historical events, and designed for use in schoolrooms, are held not to be necessary *appendages* for the schoolhouse within the meaning of the statute (Comp. L. 1871, § 3618) such as the director is required to provide. *Gibson v. School Dist. No. 5*, 36 Mich. 404.

A mathematical chart was held an *appendage* in *School Dist. No. 17 v. Swayze*, 29 Kan. 211.

Same—Lightning Rod.—*In re Bozeman's Petition*, 42 Kan. 451, it is said that a lightning rod might properly be considered as a necessary *appendage* to a schoolhouse. *Monticello Bank v. Coffin's Grove Dist. Tp.*, 51 Iowa 350.

Equivalent to Outhouse—Appurtenant. (See also APPURTENANT.)—A statute forbade the keeping of a billiard table in connection with a house where spirituous liquors are retailed, as an *appendage* thereto. The court construed *appendage* as follows: "The phrase 'as an

appendage thereto,' we understand to refer back to billiard table, and the billiard table is to be an *appendage* to the house where spirituous liquors are retailed. This phrase, 'as an *appendage* thereto,' is to be understood in the same sense as the word *appurtenance*, or 'outhouse,' when applied to the main building on any given premises, meaning part and parcel of the same whole. We do not here undertake to say how far the billiard table must be separated from the barroom in order to render them separate establishments, but we do not hesitate to say that the proof in this case, according to our construction of the statute, made out the offense." *Van Dyke v. State*, 22 Ala. 57.

"Appendage" to a Saloon.—Where whiskey was found in a room back of a saloon, but separated from it by a third room, it was held that the back room could be properly denominated an *appendage* to the saloon, so that there would be a presumption that the whiskey found there was kept for unlawful sale. *State v. Fertig*, 70 Iowa 272.

Road with Its Appendages.—This phrase in a railroad charter was held not to include the equipment, rolling stock, furniture, or other personal property of the company, but to be invariably applied to real estate—to the accessories of the road itself; and, as examples, were enumerated depots, car houses, water-tanks, shops for repairing engines, etc.; houses for switch and bridge tenders, coal or wood yards for fuel for the use of locomotives, bridges, viaducts, wharves, piers, and other similar erections. "Invariably, the term is used to denote an accessory of the road, something connected with it, and either essential to its completion or to its advantageous and convenient operation." *State Treasurer v. Somerville, etc., R. Co.*, 28 N. J. L. 27.

1. *Leonard v. White*, 7 Mass. 8, 5 Am. Dec. 19, *citing Co. Litt. 121b, 122a*; *Lucas v. Bishop*, 15 Lea (Tenn.) 167, 54 Am. Rep. 410.

"*Appendant* is an inheritance belonging to another that is superior or more worthy." *Meek v. Breckenridge*, 29 Ohio St. 648.

Appendant Distinguished from Appurtenant.—See APPURTENANT.

2. *Leonard v. White*, 7 Mass. 8, 5 Am. Dec. 19; *Lucas v. Bishop*, 15 Lea (Tenn.) 167, 54 Am. Rep. 410; *Hill v. Grange, Plowd.* 170. See APPURTENANT and the title EASEMENTS.

Appendant in deeds includes nothing which is substantial, corporeal property capable of passing by feoffment or livery of seisin. *Co. Litt. 121*; 4 Coke 86; *Buszard v. Capel*, 8 B. & C. 141, 15 E. C. L. 169; *Capel v. Buszard*, 6 Bing. 150, 19 E. C. L. 36.

It seems that an easement as distinct from an interest cannot in strictness be called "appendant."¹

APPERTAINING. (See also APPURTENANT.)—Belonging to; also usually occupied, used, or lying with, as land with a messuage.²

APPLIANCES.—See note 3.

APPLICABLE.—See note 4.

1. Godley v. Frith, Yelv. 159.

2. Hill v. Grange, Plowd. 170.

Property Appertaining to Said Railroad.—A mortgage by a railroad company of its real estate, engines, machinery, etc., and "all other personal property whatsoever in any way belonging or *appertaining* to the said railroad of the said company," was held not to include canal boats used and run in connection with the road, but beyond its terminus. The court said: "They were in a general sense accessory to the business of the road; but I very much doubt whether they belonged or *appertained* to it according to any interpretation which we can place upon those terms." Parish v. Wheeler, 22 N. Y. 494.

Expenses That may Appertain to the Goods Themselves.—Where one was bound by contract to pay over to another one-tenth of the net profits of a business relating to the sale and purchase of cargoes, collecting freight moneys, collecting and forwarding information, etc., after deducting "the actual expenses that may *appertain* to the goods themselves," it was held that the expenses of clerk hire, advertising, and taxes were properly deducted from the gross amount. Foster v. Goddard, 1 Cliff. (U. S.) 158.

With the Lands Appertaining.—It was held that by a devise of a house "with the lands *appertaining*," land employed for producing hay and corn, etc., passed, while, had the devise been "with the appurtenances," only the garden and orchard would have passed. Blackburn v. Edgley, 1 P. Wms. 603.

"Appertaining" Distinguished from "Adjoining."—The words *appertaining* and "adjoining" are not synonymous. As descriptive words in a deed, "adjoining" usually imports contiguity; *appertaining*, use, occupancy. One thing may *appertain* to another without adjoining or touching it. Miller v. Mann, 55 Vt. 478.

"Appertaining" in the Sense of "Peculiar."—The Constitution of South Carolina granted jurisdiction to the probate court, "in business *appertaining* to minors." It was held that business *appertaining* to minors meant business peculiar to minors, and, therefore, did not include partition. Herndon v. Moore, 18 S. Car. 339.

3. **Master and Servant.**—See also the title MASTER AND SERVANT.

Within the rule that it is the duty of a master to furnish his servants with safe implements and *appliances* for doing his work, the term *appliances* has been thus defined: "The term *appliances* of the business embraces not only machinery, premises, and all the implements of every kind used in and about the business, but also the persons employed to operate them; and the master must furnish a sufficient number of persons competent to per-

form the labor safely; and when the failure to employ a sufficient number of hands to perform the particular service is the proximate cause of the injury, the master is liable unless the servant may fairly be said to have assumed the risk incident thereto." 3 Wood's Railway Law, p. 1487, § 381, quoted *approvingly* in Johnson v. Ashland Water Co., 71 Wis. 557, 5 Am. St. Rep. 243.

In Griffiths v. New Jersey, etc., R. Co., 5 Misc. Rep. (N. Y. Super. Ct.) 320, 8 Misc. Rep. (N. Y.) 3, the plaintiff was in the defendant's employ as a carpenter; while framing the roof of a building, he stepped on a tie-beam which gave way, and he fell and was injured. It was held that the defendant was not liable. The court said: "The joist containing the knot which caused the injury was neither machinery, tools, nor *appliances*."

Chattel Mortgage.—A chattel mortgage on the "fixtures, furniture, and *appliances* used in and about the carrying on of" a certain store, was held not to cover wagons and teams used by the mortgagor for the delivery of goods from the store to his customers. The court said: "Did the mortgage create a lien upon the horses, harnesses, and wagons in question? In addition to the words used in the lease the mortgage employs the words 'fixtures, furniture, and *appliances* used in and about the carrying on of a first-class retail grocery store.' The only term which could be claimed to include the horses, harnesses, and wagons, is the word *appliances*. It is possible that it would not be altogether inadmissible to speak of the horses, harnesses, and wagons as *appliances* for conveying goods sold to customers. But here, again, the circumstances and situation of the parties must be considered. Robert W. Pool had purchased a retail grocery store from his brother. He was executing a mortgage upon the store to secure the purchase money. It may be presumed that both parties were aware of the general custom of retail grocers in the city of Davenport to keep teams to deliver goods to customers. Now, it is not reasonable to suppose that if one party intended to execute, and the other to obtain, a mortgage upon the horses and wagons which might be thus employed, they would use a term so indefinite as the word *appliances*." Van Patten v. Leonard, 55 Iowa 527.

4. **Exception to the Constitutional Provision that No Special Law shall be Passed, save when a General Law would Not Be Applicable.** (See the title STATUTES.)—A general law should always be construed as *applicable* in the constitutional sense, where the entire people of the state have an interest in the subject; but where only a portion of the people are affected, it will depend upon the facts of each particular case. The court said: "The

APPLICATION.—A request, usually in writing, to a superior.¹

general law might be *applicable* to the general subject, but not *applicable* to the particular case. In other words, * * * a general law could not always be so moulded as to meet the exigencies of every case." *Evans v. Job*, 8 Nev. 334.

Adoption of the Common Law Applicable to the People of the Different States. (See also the title *COMMON LAW*.)—It is generally stated that the common law has been adopted in the several states only so far as it is *applicable* to their people. It has been the subject of some controversy, whether by *applicable* is meant *applicable* to their political interests or to their domestic habits.

In *Seeley v. Peters*, 10 Ill. 150, and *Boyer v. Sweet*, 4 Ill. 121, it was held that the latter was the true doctrine. See also, to the same effect, *Wagner v. Bissell*, 3 Iowa 402.

In *Seeley v. Peters*, 10 Ill. 150, Caton, J., *dissenting*, argued to the contrary.

1. Application for Continuance. (See 4 *ENCYC. PL. & PR.* 822.) Where a statute required an affidavit on a second *application* for continuance, it was held that an *application* refused was not an *application* within the statute. *State v. Maguire*, 69 Mo. 204.

Application for Insurance Policy. (See the various insurance titles, such as *ACCIDENT*, *FIRE*, *LIFE*, etc.)—A paper contained a series of questions intended to be addressed to the person whose life was proposed to be insured. It was held that the paper headed "Questions to be answered by the medical examiner for the company," was not the *application* or a

part of the *application*. *Higbee v. New York Guardian Mut. L. Ins. Co.*, 66 Barb. (N. Y.) 462. See *Scheffer v. National L. Ins. Co.*, 25 Minn. 534.

On Application—Writing.—These words used in the statute giving release to insolvent debtors do not mean necessarily a written *application*. *State v. Stiles*, 12 N. J. L. 298.

Refusal of an Application.—This phrase is wide enough to include the dismissal of a bill on an appeal. *International Financial Soc. v. Moscow Gas Co.*, 7 Ch. Div. 246.

Summary Application.—A motion for a re-taxation of costs is not a special proceeding nor a summary *application* in the action after judgment. *Ernst v. The Steamer Brooklyn*, 24 Wis. 616.

Application for Appointment of Appraisers.—By a *Wisconsin* statute, the supervisors had no power to appoint appraisers, except upon *application* by the owner or occupant of lands entered upon. It was held that a claim for damages filed by such owner or occupant could not be construed as an *application* for the appointment of appraisers. *State v. Leon*, 68 Wis. 502. See also the titles *EMINENT DOMAIN*; *HIGHWAYS*.

Pennsylvania Land Law. (See also the title *STATE LANDS*.)—*Applications* for vacant lands were the inceptions of right, but of themselves merely conferred no title to any defined tract. They have been called the "expression of wishes to hold lands at or near a certain spot." *Biddle v. Dougal*, 5 Binn. (Pa.) 151. See also *Duncan v. Curry*, 3 Binn. (Pa.) 20.

APPLICATION OF PAYMENTS.

BY GEORGE E. BEERS AND F. J. KEARFUL.

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For other matters of *SUBSTANTIVE LAW and EVIDENCE related to this subject*, see the titles: *ACCOUNTS*, vol. 1, p. 433; *AGENCY*, vol. 1, p. 930; *BANKRUPTCY*; *BUILDING AND LOAN ASSOCIATIONS*; *DEBTOR AND CREDITOR*; *EXECUTION*; *INSOLVENCY*; *INTEREST*; *MORTGAGES*; *PARTNERSHIP*; *PAYMENT*; *PLEDGE*; *SET-OFF, RECOUPMENT AND COUNTER-CLAIM*; *SUBROGATION*; *SURETYSHIP*; *USURY*.

I. DEFINITION AND GENERAL PRINCIPLES.—Application of payments is defined to be the appropriation of a payment to some particular debt, or the determination to which of several demands a general payment made by a debtor to his creditor shall be applied.¹

How the Question Arises.—The question of the application or appropriation of payments arises where a creditor receives a payment which is insufficient to discharge entirely the obligation of his debtor, and especially where the indebtedness consists of two or more distinct claims.² It is immaterial

1. Black's L. Dict.

The term "appropriation of payment" is synonymous with "application of payment." The two are used interchangeably. Barbour's Law of Payment, p. 345; Munger's Application of Payments, p. 1.

"The Act of Allotting among Several Debts a payment inadequate to satisfy all." The Century Dictionary, "Application," 7.

"The Determining to Which of Several Debts a sum of money paid shall be applied." The Century Dictionary, "Appropriation" 4 (b).

"Ascription" and "Imputation" have sometimes been used to express the same meaning. 2 Greenleaf on Ev. (15th ed.), § 529; 1 Story Eq. Jurisp. (13th ed.), § 459b, where it is said: "This is called in our law the appropriation of payments. It is called in the foreign law the imputation of payments, a phrase apparently borrowed from the Roman law, where the doctrine of the appropriation of payments is carefully examined, and the leading distinctions applicable to it amply discussed." See *infra*, this title, *Civil-law Rule*.

2. 1 Story Eq. Jurisp. (12th ed.), § 459b; 2 Greenleaf on Ev. (15th ed.), § 529; Horne v. Planters' Bank, 32 Ga. 12.

The question cannot arise until the money has passed from the debtor. Phillips v. Mayer, 7 Cal. 81.

If Only One Demand is Proved to Exist, an undirected payment is *pro tanto* a discharge of that demand. McDonnell v. Branch Bank, 20 Ala. 313; Blinn v. Chester, 5 Day (Conn.) 359; Weil v. Flowers, 109 N. Car. 212; Donally v. Wilson, 5 Leigh (Va.) 329.

A Running Account has been Held to be One Debt, although composed of secured and unsecured items. Dunnington v. Kirk, 57 Ark. 595; Kehl v. Smith, 87 Wis. 212.

Several Articles Bought at One Time.—And so, where several articles were all bought at one time, under a single contract, and the promise to pay for them was one and indivisible, there was held to be but one debt. Hill v. McLaughlin, 158 Mass. 307.

Notes in the Hands of One Creditor, growing out of the same transaction, constitute but

whether payment is made in money or in property,¹ or whether the question arises in an action at law or in equity.²

II. BY THE DEBTOR—1. General Rule.—Where a payment is made by the debtor, he has the right to prescribe the manner in which it shall be applied towards the discharge of his indebtedness.³ He may apply it most beneficially to himself by preferring principal to interest,⁴ secured to unsecured debts,⁵ or legal to equitable debts.⁶ He may also direct application to illegal demands, in which case the amount paid cannot be recovered.⁷

one debt, and payments in such case are imputed to the entirety. *Eyle v. Roman Catholic Church*, 36 La. Ann. 310.

1. Payment in Cotton.—An obligation was for cotton as the consideration price of lands. A vendor's lien existed for the purchase price, but none on any cotton. It was held that the rules applicable to the delivery of cotton in such case are the same as to general payments, where two or more debts are owing by the debtor to the same person. *Smith v. Vaughan*, 78 Ala. 201.

Payment in Horses and Cattle.—Where a deputy sheriff held several notes for collection, and on one of them accepted horses and cattle in payment and delivered up the note, payments in money by him to the creditors were applied on that note, because the security was most precarious, although it was not proven that the deputy had sold the live stock and realized the money. *State v. Thomas*, 11 Ired. (N. Car.) 251.

Payment in Land.—Where payment was to have been made in land, it became a cash liability upon failure to deliver the deed. *McGillin v. Bennett*, 132 U. S. 445.

Payment in Merchandise.—The same has been held where payment was to have been made in merchandise. *Anderson v. Mason*, 6 Dana (Ky.) 217.

Payment by Set-off.—The question does not arise in cases of set-off; so an open and unstated account cannot be applied in payment of notes held by one against another. *Stanwood v. Smith*, 3 Ill. App. 647. But see *Planters' Bank v. Stockman*, Freem. Ch. (Miss.) 502, which held that by analogy to the rule a set-off would be applied to the unsecured debt.

2. Bacon v. Brown, 1 Bibb (Ky.) 334, 4 Am. Dec. 640.

3. Debtor's Right of Application.—The cases affirming this rule, subject to the qualifications stated *infra* this title, are too numerous for citation. It is laid down in every reported case in which the question has arisen, is a rule of the civil and common law alike (see *infra*, this title, *Civil-law Rule*), and is recognized and asserted with more or less emphasis according to the issue in almost every case cited under this title. It is based upon the elementary principle that the ownership of property implies the right to dispose of it at will.

Reason of Rule.—According to Redfield, J., in *Boutwell v. Mason*, 12 Vt. 608, this absolute right of application in the debtor "results from one of the most obvious principles of human action, that a free agent may annex such conditions to an offer as he sees fit, and he who accepts the offer takes it subject to those conditions."

4. Preferring Principal to Interest.—*Davis v. Fargo, Clarke Ch.* (N. Y.) 470.

But in *Johnson v. Robbins*, 20 La. Ann. 569, it was held that the debtor cannot, without the consent of the creditor, impute to the reduction of the principal any payment he may make when there is interest due. It would seem, however, that the creditor's consent may be implied from his acceptance upon that condition. And in *Pindall v. Marietta Bank*, 10 Leigh (Va.) 502, it was held that although the law, in the absence of application by either party, would direct payment upon the interest rather than the principal of a debt, the debtor may apply it to the principal in exclusion of the interest. *Cited with approval* in *Miller v. Trevilian*, 2 Rob. (Va.) 1.

5. Preferring Secured to Unsecured Debts.—So he may prefer a debt secured by mortgage where there are others unsecured. *Plain v. Roth*, 107 Ill. 588; *Stewart v. Hopkins*, 30 Ohio St. 502.

6. Preferring Legal to Equitable Demands.—*Bacon v. Brown*, 1 Bibb (Ky.) 334, 4 Am. Dec. 640.

7. Illegal Demands—Connecticut.—*Tomlinson Carriage Co. v. Kinsella*, 31 Conn. 268.

Iowa.—*Smith v. Coopers*, 9 Iowa 376.

Maine.—*Phillips v. Moses*, 65 Me. 70; *Brown v. Burns*, 67 Me. 535; *Treadwell v. Moore*, 34 Me. 112.

Massachusetts.—*Hubbell v. Flint*, 15 Gray (Mass.) 550; *Rohan v. Hanson*, 11 Cush. (Mass.) 44; *Richardson v. Woodbury*, 12 Cush. (Mass.) 279.

New Hampshire.—*Caldwell v. Wentworth*, 14 N. H. 431.

New Jersey.—*Feldman v. Gamble*, 26 N. J. Eq. 494.

Payments on Usurious Contracts.—To the same effect, in regard to payments on usurious contracts, are *Rackley v. Pearce*, 1 Ga. 241; *Johnson v. Phillips*, 24 La. Ann. 156; *Reid v. Duncan*, 1 La. Ann. 265; *Seymour v. Marvin*, 11 Barb. (N. Y.) 80.

The same principle applies whether the application is made by the debtor himself at the time of payment, or by the creditor under a previous agreement with the debtor that it should be so applied. *Dickey v. Permanent Land Co.*, 63 Md. 170.

In *Peterborough Sav. Bank v. Hodgdon*, 62 N. H. 300, it was held that payments of usurious interest, being regarded as made under moral duress, are excepted from the ordinary rule, and such payments may be recovered back.

In *Reid v. Duncan*, 1 La. Ann. 265, it was held that the holder of a usurious note must impute payments *pro rata* to principal and

2. Qualifications.—In order that the debtor may exercise the right of application, the payment must have been voluntary,¹ and it must also have been made from the funds or property of the debtor.²

III. BY THE CREDITOR—1. Civil-law Rule.—The civil law, looking only to the interest of the debtor, requires that in case he makes no application of a payment, the creditor shall so apply it as to operate most advantageously to the debtor,³ as to that obligation which the debtor had the most interest in discharging or which was the most burdensome,⁴ or in which his safety or honor was concerned,⁵ rather than to one not attended with such consequences.

interest, and that he may retain the amount imputed to the interest if that part of the contract be afterwards annulled as usurious.

It has been held that money so paid may be recovered back in an action for money had and received, or by way of counter claim. *Cobb v. Morgan*, 83 N. Car. 211; *Rackley v. Pearce*, 1 Ga. 241; *Bond v. Jones*, 8 Smed. & M. (Miss.) 368.

In Louisiana the balance of a payment after discharging the principal, excluding unlawful interest, may be reclaimed by the debtor if demanded within a year. *Duncan v. Helm*, 22 La. Ann. 418.

Payments on Ultra Vires Contracts.—The rule obtains where a corporation has directed the application of a payment made by it to a contract which is *ultra vires*. *Williamson v. New Jersey Southern R. Co.*, 28 N. J. Eq. 277.

Payments upon Stock.—And where a stockholder made payments generally upon stock subscribed under two separate issues, one lawful and the other unlawful, he cannot, in order to relieve himself from personal liability, require the payment upon the void stock to be applied upon the valid. *Kampmann v. Tarver* (Tex. Civ. App. 1895), 29 S. W. Rep. 1144.

1. See *infra*, this title, *Involuntary Payments*.

2. See *infra*, this title, *Particular Fund*; also *Joint Debtors*.

3. Civil Law Looks to Debtor's Interest.—1 *Domat's Civil Law*, by Strahan (Cushing's ed.) 905; *Munger on the Application of Payments*, pp. 5, 82.

This rule is substantially followed in the law of modern continental Europe, and all those countries that derive their jurisprudence primarily from the Roman law. *Stone v. Seymour*, 15 Wend. (N. Y.) 23; *Pothier's Obligations*, pt. 3, § 530; 1 *White's New Recopil.* b. 2, p. 164; *Van der Linden's Laws of Holland* (Henry's ed.) 207; *Grotius' Introduction to Dutch Jurisp.* b. 3, § 15; *French Civil Code*, art. 1253-1256; *Civil Code of Louisiana*, art. 2159-2161.

By the Roman law it is considered that when the debtor omits to make the appropriation, he thereby constitutes the creditor his agent for that purpose; and hence the latter is bound to have a regard not only to his own interest, convenience, or security, but to that of the debtor. "Appropriation of Payments," by H. Campbell Black, 21 Cent. L. J. 475.

4. A Security Debt Bearing Interest was therefore discharged in preference to a simple contract debt. *Heyward v. Lomax*, 1 Vern. 24.

And a Debt Secured by Mortgage in preference to one not so secured. *New Orleans Ins. Co. v. Tio*, 15 La. Ann. 174; *Hamer v. Kirkwood*, 25 Miss. 95; *Neal v. Allison*, 50 Miss. 175; *Windsor v. Kennedy*, 52 Miss. 164.

Interest-bearing Debt Preferred.—One that bore interest is preferred to one that did not. *Gass v. Stinson*, 3 Sumn. (U. S.) 98; *Scott v. Fisher*, 4 T. B. Mon. (Ky.) 387; *Blanton v. Rice*, 5 T. B. Mon. (Ky.) 253; *Bussey v. Gant*, 10 Humph. (Tenn.) 238.

Legally Enforceable Debts.—A debt legally enforceable rather than one that the debtor was under no obligation to pay. *Keane v. Branden*, 12 La. Ann. 20.

Compound Interest.—Where a creditor held one note calling for interest to be compounded semi-annually, and other claims bearing only simple interest, he was required to apply payments upon the former obligation because most onerous, provided none of the obligations would thereby be impaired. *Murdock v. Clarke*, 88 Cal. 384.

Equally Due.—Such debts, however, must be equally due, otherwise application will be made to that which has fallen due, though less burdensome than those not yet due and payable; and where they are of a like nature, neither more burdensome than the other, and all due, the application will be made proportionately. *Spiller v. Creditors*, 16 La. Ann. 292; *Miller v. Steamer S. F. J. Trabue*, 16 La. Ann. 375.

But the same court has held that if the creditor holds several notes of the same debtor, he may apply a payment to a part only of the notes, and is not bound to apply it to all *pro rata*. *Blackman v. Leonard*, 15 La. Ann. 59.

Where a planter was indebted for acceptances and also on a promissory note, it was held that undirected payments made before the maturity of the note must be imputed to its payment because it was most to the debtor's interest to discharge that debt. *Byrne v. Grayson*, 15 La. Ann. 457.

5. *Note to Pattison v. Hull*, 9 Cow. (N. Y.) 747; 2 *Greenleaf on Ev.* (15th ed.), § 529, note 2.

Thus a payment is applied to the discharge of a debt for which a surety is bound, rather than to acquit what the debtor is singly bound for without giving any security. *Marryatts v. White*, 2 Starkie N. P. 101, 3 E. C. L. 334. *Contra*, *Plomer v. Long*, 1 Stark. 153, 2 E. C. L. 66.

2. Common-law Rule—Failure of Debtor to Direct Creditor's Right of Application.—The general rule of the common law is that if the debtor fails to direct in what manner a payment shall be applied, the right then passes to the creditor to make whatever application he pleases.¹

Creditor may Consult His Own Interests Largely in Making the Application.—Thus, the creditor may in general apply such payment so as best to serve his own interests by preferring precarious or unsecured obligations to secured obligations.²

1. Exercise of Discretion.—A creditor can exercise no discretion unless the debtor has wholly failed to direct the application. *Walmesley v. Morse*, 34 La. Ann. 262.

The Rule which Allows the Creditor a Discretion in applying payments to different claims has no application where the creditor claims that the different accounts were made by separate parties. *Dick Bros. Quincy Brewing Co. v. Finnell*, 39 Mo. App. 276.

A Factor who receives a consignment with directions to sell, and apply the proceeds to the payment of a bill drawn by the owner in favor of the shipper, cannot apply the proceeds to the payment of any debt due to himself from the owner, but is bound to obey the directions. *Farmers', etc., Bank v. Franklin*, 1 La. Ann. 393; *Brander v. Phillips*, 16 Pet. (U. S.) 121.

2. Mortgage Securities.—Where the creditor holds two debts, one secured by mortgage and the other not, he may apply undirected payments to the latter. *Driver v. Fortner*, 5 Port. (Ala.) 9; *Bell v. Radcliff*, 32 Ark. 645; *Lewis v. Hartford Silk Mfg. Co.*, 56 Conn. 25; *Van Sickle v. Ayres*, 6 N. J. Eq. 29; *Bird v. Davis*, 14 N. J. Eq. 467; *Wadlinger v. Washington German Bldg., etc., Assoc.*, 153 Pa. St. 622; *Baum v. Tranthan*, 42 S. Car. 104.

Where a creditor holds several unsecured claims and one secured by mortgage, undirected credits or payments may be applied by him so as "to leave the balance at the foot of the account to constitute the mortgage debt." *Greig v. Smith*, 29 S. Car. 426.

Where a part of different debts secured by one mortgage is better secured than the others, and the fund realized is insufficient to satisfy all, the creditor may apply to those least secured. *Hanson v. Manley*, 72 Iowa 48.

Advances.—It is competent for one who holds a mortgage on realty, personalty, and a crop to secure advances, to apply a payment made from the crop to discharge advances made in excess of the mortgage. *Mercer v. Tift*, 79 Ga. 174.

To the same effect is *Ross v. Perrault*, 13 Grant's Ch. (U. C.) 206.

Proceeds of Mortgage.—A mortgagee in possession under two mortgages may, as against the purchaser of the second debtor's equity of redemption at an execution sale under attachment, apply the rent on the second mortgage, provided the purchaser knew of such mortgage previous to the attachment; otherwise not. *Proctor v. Green*, 59 N. H. 350.

Book Account.—The rule of the text is not altered by reason of the fact that one of the creditor's claims is a book account assigned to him by another. *Miller v. Craig*, 23 Ill. App. 128.

Open Account—Lien Security.—A creditor may, in the absence of specific application of money due to him from the debtor, apply such money to the payment of an open account in preference to another debt which constitutes a lien upon the property of the debtor. *L'Hommiedieu v. The H. L. Dayton*, 38 Fed. Rep. 926; *McCartney v. Buck* (Del. 1887), 12 Atl. Rep. 717; *Soluble Pac. Guano Co. v. Harris*, 78 Ga. 20; *Waterman v. Younger*, 49 Mo. 413; *Bean v. Brown*, 54 N. H. 395; *Lester v. Houston*, 101 N. Car. 605; *Lary v. Young* (Tex. Civ. App. 1894), 27 S. W. Rep. 908; *North v. La Flesh*, 73 Wis. 520.

The plaintiffs in an action on a mechanic's lien were held to be entitled to apply rent due from them to the defendant to discharge an unsecured account instead of to the debt secured by lien, the defendant having failed to make application. *McQuaide v. Stewart*, 48 Pa. St. 198.

In *Pecan Lake Mill Co. v. American Cooperage Co.* (Miss. 1894), 15 So. Rep. 580, it was held that the seller of personalty, who reserved title in himself until full payment, was not thereby prevented from applying payments made on the purchase price of the property to the settlement of an open account between them in order to enforce a vendor's lien.

Lien for Work.—The foreman of a mine, who also boarded men for the mine owner, and at different times received money from the owner less than the amount due for board, was held to have the right to apply the money to the board account at the time of filing his lien for work, where neither party had made application at the time of payment. *Capron v. Strout*, 11 Nev. 304.

Liens Generally.—Where one conveys both realty and personalty to a joint-stock company, and agrees to receive a part of the purchase price in stock, and, as the balance of the consideration, the company to assume outstanding incumbrances on the realty, he may, in the absence of direction by the company, apply part of the stock received in payment of the personalty, and, upon a breach of the agreement to discharge said incumbrances, enforce his vendor's lien upon the realty. *Koch v. Roth*, 150 Ill. 212.

But the purchase of goods with the mere promise to pay for them out of the proceeds of the sale of those and other goods constituting one stock, where it is mutually understood that the parties' relation is that of debtor and creditor, creates no lien in favor of the seller so as to deprive the purchaser of his right to apply such proceeds to one of several other debts. *Stewart v. Hopkins*, 30 Ohio St. 502.

So also may he give preference to equitable over legal debts;¹ again, he may prefer nonenforceable to enforceable claims;² and finally he may apply to the

Judgment and Simple Contract.—Where the party making the payment is indebted both on a judgment and a simple contract debt, the creditor may apply the payment in liquidation of either, *Chitty v. Naish*, 2 D. P. C. 511; *Brazier v. Bryant*, 2 D. P. C. 477; although the judgment was earlier in date, *Armour v. Carruthers*, 4 L. J. (Ont.) 210.

Where one died indebted to a bank upon judgment and simple contract, with a balance to his credit on a general cash account, the bank was entitled, independently of the statute of set-off, to apply the balance to the simple contract debt. *State Bank v. Armstrong*, 4 Dev. (N. Car.) 519; *State Bank v. Locke*, 4 Dev. (N. Car.) 529.

To the same effect, see *Anonymous*, 8 Mod. 236; *Manning v. Westerne*, 2 Vern. 606; *Peters v. Anderson*, 5 Taunt. 596; *Hall v. Wood*, 14 East 243, note *a*.

Notes and Running Accounts.—As between notes and running accounts a creditor may apply to the latter. *Whittaker v. Groover*, 54 Ga. 174. See also *Wittkowski v. Reid*, 84 N. Car. 21.

A Running Account Is So Far One Debt, that, although composed of items which are both secured and unsecured, the creditor has no election as to which item he will credit with an undirected payment, but must apply it to extinguish the items in the order they accrued. *Dunnington v. Kirk*, 57 Ark. 595. So held where a creditor holding a mortgage and book account carried the mortgage debt into the account. *In re Browne*, 2 Grant's Ch. (U. C.) 111, 590; *Buchanan v. Kerby*, 5 Grant's Ch. (U. C.) 332. But where accounts were rendered excluding the mortgage debt, it was held to be otherwise. *Russell v. Davey*, 7 Grant's Ch. (U. C.) 13.

Equal Securities.—Where all of the different debts are equally secured, the creditor should apply first to that which is most onerous in the matter of interest. *Murdock v. Clarke*, 88 Cal. 384.

Where both debts are secured, it has been held that the creditor may apply payment to either. *Brown v. Davenport*, 76 Ga. 799.

1. Equitable and Legal Demands.—Where there are two debts, one good at law and the other enforceable only in equity, the creditor may apply an undirected payment to the latter and sue at law for the former. *Bosanquet v. Wray*, 6 Taunt. 597. See also *Birch v. Tebutt*, 2 Stark. 74, 3 E. C. L. 323.

But not to an equitable debt which arose subsequently to the payment. *Goddard v. Hodges*, 1 Crompt. & M. 33.

Where Creditor has no Right to Subject Matter of One Demand.—Where one received permission from the owner of a tract of land to cut and drive pine standing thereon, and also on another tract not owned by him, and payments were made on the whole account, the creditor was not allowed to apply to the account of logs cut on the latter tract. *Scheffer v. Tozier*, 25 Minn. 478.

Where there Is Demand Not Legally Charge-

able to Debtor.—An application cannot be made to a debt with which the debtor is not legally chargeable, as one chargeable against his father, when there is another legally due. *Burland v. Nash*, 2 F. & F. 687.

2. Bankruptcy.—Payments upon an account made before and after the debtor's discharge in bankruptcy may be applied by the creditor, in the absence of notice to him of the bankruptcy proceedings, to the items first due. *Hill v. Robbins*, 22 Mich. 475.

Barred by Limitation.—Where one claim is barred by the statute of limitations and another is not, the creditor may apply an undirected payment to the one so barred and sue upon the other. *Wait's Actions and Defenses*, p. 416; *Mills v. Fowkes*, 5 Bing. N. Cas. 455, 35 E. C. L. 175, 7 Scott 444, 3 Jur. 406; *Nash v. Hodgson*, Kay 650, 6 De G. M. & G. 474, 25 L. J. Ch. 186; *Williams v. Griffith*, 5 M. & W. 300; *Ashby v. James*, 11 M. & W. 542; *Armistead v. Brooke*, 18 Ark. 521; *Ramsay v. Warner*, 97 Mass. 8; *Crisler v. McCoy*, 33 Miss. 445; *Moore v. Kiff*, 78 Pa. St. 96.

Revival of a Barred Debt.—It has been held that such an application is not effectual to revive the remedy as to a residue of the outlawed debt remaining unpaid. *Mills v. Fowkes*, 5 Bing. N. Cas. 455, 35 E. C. L. 175, 7 Scott 444, 3 Jur. 406; *Armistead v. Brooke*, 18 Ark. 521; *Pond v. Williams*, 1 Gray (Mass.) 630; *Livermore v. Rand*, 26 N. H. 85.

Many authorities hold the contrary. *Jackson v. Burke*, 1 Dill. (U. S.) 311; *Taylor v. Foster*, 132 Mass. 30; *Blair v. Carpenter*, 75 Mich. 167; *Beck v. Haas*, 31 Mo. App. 180; *Ayer v. Hawkins*, 19 Vt. 26; *Corliss v. Grow*, 58 Vt. 702.

But see *Ramsay v. Warner*, 97 Mass. 8, where the court, by Hoar, J., said: "The debtor is not presumed to have intended to renew a promise which is no longer legally binding upon him, although he has put it in his creditor's power to satisfy *pro tanto* a claim upon which he had lost his legal remedy."

In *Ayer v. Hawkins*, 19 Vt. 26, it was held that where money was paid without direction upon several notes, all of which were barred, the creditor had no right to apply a portion upon each of the notes in order to revive all, the court saying: "If [the debtor] silently waives [his right to direct his application] in favor of the creditor, it should be intended that he does so relying upon a mode of application to which he could not justly or reasonably object." Cited with approval in *Wheeler v. House*, 27 Vt. 735; *Pierce v. Knight*, 31 Vt. 705.

New Starting Point Created.—Where the debt has not yet become barred, such application of a partial payment by the creditor will fix a new starting point from which the statute will run. *Nash v. Hodgson*, Kay 650, 6 De G. M. & G. 474, 25 L. J. Ch. 186; *Ramsay v. Warner*, 97 Mass. 8; *Taylor v. Foster*, 132 Mass. 30; *Beck v. Haas*, 111 Mo. 264.

less valuable rather than to the more valuable obligations.¹

But Creditor may Not Make Application Injurious or Unjust to Debtor.—This right on the part of the creditor is not, however, without limits. While he is not obliged, under this rule, to consult the interests of his debtor in any way, when the debtor has had an opportunity to act,² nor the interests of any third person

In *Jackson v. Burke*, 1 Dill. (U. S.) 311, the creditor was allowed to apply a payment upon eleven notes which had not yet become barred, so as to prevent the bar on all.

Within the Statute of Frauds.—By the same rule the creditor may apply to those claims which, though just, are not enforceable by reason of the statute of frauds. *Murphy v. Webber*, 61 Me. 478; *Haynes v. Nice*, 100 Mass. 327, 1 Am. Rep. 109.

Or Because of the Stamp Act.—*Biggs v. Dwight*, 1 M. & R. 308, 17 E. C. L. 255.

Or the Tipping Act.—*Phillpott v. Jones*, 2 Ad. & El. 41, 29 E. C. L. 24; *Crookshank v. Rose*, 5 C. & P. 19, 24 E. C. L. 194.

Payment to Attorney on General Account.—Where money had been paid on general account by a municipal corporation to its attorney, he was held to have the right to apply it upon two bills for business done for which he had not received a sufficient retainer, in preference to a bill for costs incurred by him as town clerk, although upon the first two bills he could not have recovered. *Arnold v. Poole*, 4 M. & G. 860, 43 E. C. L. 444, 2 Dowl. N. S. 574, 5 Scott N. R. 741, 7 Jur. 653.

1. Simple Contract and Specialty.—The creditor has the right to discharge a simple contract debt rather than a specialty debt. *Peters v. Anderson*, 5 Taunt. 596; *Chitty v. Naish*, 2 D. P. C. 511; *Chase v. Box*, 2 Freem. 261; *Brazier v. Bryant*, 2 D. P. C. 477; *Alexandria v. Patten*, 4 Cranch (U. S.) 317; *Harding v. Tift*, 75 N. Y. 461; *Pierce v. Knight*, 31 Vt. 701.

To a Debt Not Bearing Interest rather than to one which does. *Chase v. Box*, 2 Freem. 261; *Manning v. Westerne*, 2 Vern. 606. *Contra*, *Heyward v. Lomax*, 1 Vern. 24.

An Open Account in preference to a debt evidenced by a promissory note. *Giles v. Vandiver*, 91 Ga. 192; *Bell v. Bell*, 20 S. Car. 34.

Interest before Principal.—To the interest due upon a debt, before applying any part to the principal. *Smith v. Screven*, 1 McCord (S. Car.) 368.

And where the creditor holds several debts, he may apply payments to the interest upon all before applying to the principal of either. *Steele v. Taylor*, 4 Dana (Ky.) 445. See also *infra*, this title, *Legal Interest*.

2. The Debtor must have Had an Opportunity for Making the Application.—2 Greenleaf on Ev. (15th ed.), § 531a; *Brett v. Marsh*, 1 Vern. 468; *Young v. English*, 7 Beav. 10; *Jones v. Perkins*, 29 Miss. 139, 64 Am. Dec. 136; *Dennis v. M'Laurin*, 31 Miss. 606.

Where one in charge of another's business drew out money which he charged to himself on the books, it was held that the other had no opportunity to make the application, and was therefore not bound. *Jones v. Williams*, 39 Wis. 300.

So where the tenants of mortgaged prem-

ises paid their rent to the mortgagee under a general arrangement without application, it was held that the rule that permits the creditor to make the application, in the absence of the exercise of that right by the debtor at the time of payment, was inapplicable. *Sanford v. Van Arsdall*, 53 Hun (N. Y.) 70.

Exceptions.—It has been held that where a payment was made and credited upon a mortgage, and both parties were under the erroneous impression that the whole amount was required to extinguish the mortgage, there being in fact a surplus, the debtor, not having applied the surplus at the time, could not do so afterwards. *Baum v. Trantham*, 42 S. Car. 104. To the same effect is *Cole v. Trull*, 9 Pick. (Mass.) 325.

Where the revenues of Spain were pledged for the payment of a loan, duties payable to the king of Spain, coming legally into the hands of the person who negotiated the loan, were held to be properly applied by him to the liquidation of the loan. *King of Spain v. Oliver, Pet.* (C. C.) 276.

Where a debtor has placed claims due him in the hands of his creditor, for collection, payments received thereon are deemed applied to the claims of the latter *eo instante*. *Grandy v. Abbott*, 92 N. Car. 33.

Bank Deposits.—A banker holding a note has a right to apply a deposit received from the maker to the payment of the note when it falls due, and the debtor cannot object on the ground that he did not direct or request such an application. *Knapp v. Cowell*, 77 Iowa 528.

And so where a bank discounted a note for one as town treasurer, indorsed by another, and the day before its maturity a personal note of the maker to the bank fell due, it was held that upon direction from the president the cashier had a right to apply a balance standing in the name of such person to the note due the bank, and that in an action upon the official note the bank might recover from either the maker or indorser. *National Mahaiwe Bank v. Peck*, 127 Mass. 298, 34 Am. Rep. 368. To the same effect is *Ex p. Whitworth*, 2 Mont. D. & De G. 164.

But a banker has not that right in the case of a deposit made by one of two joint indorsers. *Long Island Bank v. Townsend, Hill & D. Supp.* (N. Y.) 204. And he is not bound to make such an application in order to release an acceptor on a draft. *Citizens' Bank v. Carson*, 32 Mo. 191.

Individual and Partnership Accounts.—Where one indebted individually and also on partnership account, makes payments which exceed his individual liability, without protesting against further liability, such excess will be applied to discharge the partnership debt, although the creditor at the time,

as for instance, a surety, guarantor, or joint debtor,¹ yet he cannot make an

without knowledge of the standing of the accounts, credited the payments on the individual debt. *Robie v. Briggs*, 59 Vt. 443, 59 Am. Rep. 737.

1. To Hold a Surety.—It may be said generally that the creditor may apply payments on unsecured debts in order to hold sureties on others.

England.—*Plomer v. Long*, 1 Stark. 155, 2 E. C. L. 66; *Hutchinson v. Bell*, 1 Taunt. 558; *Campbell v. Hodgson*, Gow 74, 5 E. C. L. 468; *Kirby v. Marlborough*, 2 M. & S. 18; *Williams v. Rawlinson*, 11 Moore 362, 3 Bing. 71, R. & M. 233; *Stracy v. Saunders*, 7 Mod. 123.

United States.—*Sanborn v. Stark*, 31 Fed. Rep. 18.

Arkansas.—*Marshall v. Sloan*, 26 Ark. 513.

Georgia.—*Holmes v. Pratt*, 34 Ga. 558.

Illinois.—*Plain v. Roth*, 107 Ill. 588.

Iowa.—*Hanson v. Manley*, 72 Iowa 48.

Kentucky.—*Blanton v. Rice*, 5 T. B. Mon. (Ky.) 253; *Burks v. Albert*, 4 J. J. Marsh. (Ky.) 97, 20 Am. Dec. 209.

Massachusetts.—*Brewer v. Knapp*, 1 Pick. (Mass.) 332; *Dedham Bank v. Chickering*, 4 Pick. (Mass.) 314.

Michigan.—*Wood v. Callaghan*, 61 Mich. 402, 1 Am. St. Rep. 597.

Missouri.—*Poulson v. Collier*, 18 Mo. App. 583; *Goetz v. Piel*, 26 Mo. App. 634.

New York.—*Clark v. Burdett*, 2 Hall (N. Y.) 197; *California Bank v. Webb*, 48 N. Y. Super. Ct. 175; *Harding v. Tift*, 75 N. Y. 461.

Oregon.—*Wilson v. Allen*, 11 Oregon 154.

Pennsylvania.—*Woods v. Sherman*, 71 Pa. St. 100.

South Carolina.—*Pelzer v. Steadman*, 22 S. Car. 279.

Vermont.—*Fair Haven First Nat. Bank v. Johnson*, 65 Vt. 382.

Where one firm, upon purchasing the assets of another firm, assumed existing liabilities of the latter, and afterwards itself became indebted to the same creditor, the creditor was allowed to apply general payments on account, not arising out of the assets of the old firm, to the debt of the new firm, in order to hold a surety for the debt of the old firm. *Hall v. Johnston*, 6 Tex. Civ. App. 110.

Payments made generally to a creditor on account of a person for whom a guaranty is given, may be applied by the creditor in liquidation of a balance existing against him before the execution of the guaranty, and the guarantor cannot insist upon their being applied in exoneration of his liability, though at the time he executed the guaranty he had no notice of the balance. *Kirby v. Marlborough*, 2 M. & S. 18.

He may apply the proceeds of a sale under a deed of trust given to secure separate notes to the last note maturing, and then obtain a judgment against a surety upon the note first maturing, that being the only note indorsed. *Pope v. Transparent Ice Co.* (Va. 1895), 20 S. E. Rep. 940.

Where a bank closed an account and opened a fresh one with a customer upon the death of

the guarantor of an account, it was held that there was nothing to oblige the bank to bring subsequent payments into the old account for the benefit of the surety. *In re Sherry*, 25 Ch. Div. 692, 53 L. J. Ch. 404.

Exceptions to the Rule.—Where one held a judgment as assignee with security, and a later one against the same creditor without security, it was held that money raised by the sheriff on the debtor's property could not be applied to discharge the later judgment without being a discharge of the surety on the other *pro tanto*. *Simmons v. Cates*, 56 Ga. 609.

Where a mortgagor from time to time sold portions of the mortgaged property and made payments to the mortgagee, the latter was not allowed to apply them to loans made since the mortgage, there being a third person liable on the original mortgage debt. *Pritchard v. Comer*, 71 Ga. 18.

The proceeds of a sale of mortgaged property given to secure notes, on some of which the mortgagor is principal alone with surety, and on another joint principal with a third person, cannot be applied by the mortgagee to discharge the latter note first, in order to hold the surety for a balance. *Merrimack County Bank v. Brown*, 12 N. H. 320.

To Charge a Joint Debtor.—In the case of individual and joint debts, payment by one of the joint debtors may be directed by the creditor so as to hold the other joint debtor. *Fargo v. Buell*, 21 Iowa 292; *Brady v. Hill*, 1 Mo. 315, 13 Am. Dec. 503.

The proceeds of a mortgage given by a partner to secure his own and the firm's indebtedness may be applied by the creditor to the individual debt. *Senter v. Williams* (Ark. 1891), 17 S. W. Rep. 1029; *King v. Sutton*, 42 Kan. 600.

But where grain, raised upon a farm for which joint lessees were indebted for rent, was delivered to the lessor, he was not allowed to apply it to the individual debt of one lessee, leaving the rent unpaid, without the consent of both; and the fact that one was, in reality, merely surety for the other, was held immaterial, inasmuch as they were cotenants under a written lease. *Kahler v. Hanson*, 53 Iowa 698.

And where one received joint funds, with knowledge that they were such, he was compelled to apply them to the joint debt. *Vanderwick v. Summerl*, 2 Wash. (U. S.) 41. See also *infra*, this title, *Joint Debtors*.

Accommodation Maker.—Where one deposited with his bankers as security for a loan the accommodation note of another, and afterwards paid money into the bank, and later obtained a further loan, it was held that an undirected payment should be applied to the discharge of the debt secured by the note, and that the maker could not be held for a larger sum than the balance due at the time the payment was made. *Hammersley v. Knowllys*, 2 Esp. 666.

Money Furnished by Third Party.—In case the money is furnished by a third person, the creditor is bound to apply it to the debt upon

application that would be positively injurious to the debtor,¹ or even unreasonable or unjust.²

Matured and Unmatured Claims.—So he cannot apply a payment to a debt which is not matured, in preference to a matured debt.³

Debt Arising after the Payment.—Nor to one which arose subsequently to the payment, rather than to one existing at the time.⁴

Contested and Uncontested Claims.—Nor to a contested claim when there exists one not contested.⁵

Definite and Indefinite Claims.—Nor to indefinite and unliquidated claims, to the exclusion of others that are definite or acknowledged.⁶

which such third person, or his property, would otherwise be liable. *Crane Bros. Mfg. Co. v. Keck*, 35 Neb. 683.

Limited Guaranty.—Where credit is extended after a limited guaranty has expired, thereafter undirected payments must be applied by the creditor to the secured indebtedness. *Phipps v. Willis* (Tex. Civ. App. 1895), 32 S. W. Rep. 801.

Joint Creditor.—A creditor cannot apply to his own share money paid on a debt due to himself and another jointly. *Cole v. Trull*, 9 Pick. (Mass.) 325.

See also *infra*, this title, *Receipt in Different Capacities*.

1. Application Injurious to Debtor.—*Meggott v. Mills*, Ld. Raym. 287; *Dawe v. Holdsworth*, Peake 64; *Peters v. Anderson*, 5 Taunt. 596.

2. Unreasonable or Unjust Application.—*Murdock v. Clarke*, 88 Cal. 384; *Arnold v. Johnson*, 2 Ill. 196; *Bonnell v. Wilder*, 67 Ill. 327; *Koch v. Roth*, 150 Ill. 212; *Frazier v. Lanahan*, 71 Md. 131, 17 Am. St. Rep. 516; *Ayer v. Hawkins*, 19 Vt. 26; *Taylor v. Coleman*, 20 Tex. 772.

3. Preferring Unmatured to Matured Debt.—*Alabama*.—*Bobe v. Stickney*, 36 Ala. 482; *Heard v. Pulaski*, 80 Ala. 502; *McCurdy v. Middleton*, 82 Ala. 131.

Arkansas.—*Gates v. Burkett*, 44 Ark. 90.
California.—*Byrnes v. Claffey*, 69 Cal. 120.
Connecticut.—*Stamford Bank v. Benedict*, 15 Conn. 437.

Illinois.—*Heintz v. Cahn*, 29 Ill. 308.
Kentucky.—*Bacon v. Brown*, 1 Bibb (Ky.) 334, 4 Am. Dec. 640.

Maine.—*Wetherell v. Joy*, 40 Me. 325.
Michigan.—*Richardson v. Coddington*, 49 Mich. 1.

Mississippi.—*Effinger v. Henderson*, 33 Miss. 449.

Missouri.—*Cloney v. Richardson*, 34 Mo. 370.

New York.—*Hunter v. Osterhoudt*, 11 Barb. (N. Y.) 33; *Thomas v. Kelsey*, 30 Barb. (N. Y.) 268.

Pennsylvania.—*Seymour v. Sexton*, 10 Watts (Pa.) 255.

Where there Are Several Mortgage Notes, part of which are past due, application must be made so as to discharge the notes, including principal and interest, in the order of their maturity. *Trimble v. McCormick*, 12 Ky. L. Rep. 857 (Ky. 1891), 15 S. W. Rep. 358.

Where a Payment was to have been Made Partly in Land and partly in notes payable at a future date, neither of which was done, it was

held that a credit should be applied first to that part which was to have been paid in land, which became a cash payment upon failure to deliver the deed, and not on the deferred payments to have been evidenced by notes. *McGillin v. Bennett*, 132 U. S. 445.

Where a Creditor Held Four Bonds Payable at Successive Periods, and it appeared after the death of the debtor that the payments amounted to more than the first bond, it was held that the excess should be applied to the second bond upon which a surety was bound, and not to those due at a later time. *Ross v. M'Lauchlan*, 7 Gratt. (Va.) 86.

Payments Generally on a Bond should be applied to instalments then due. *Seymour v. Sexton*, 10 Watts (Pa.) 255.

So a Payment upon Account must be applied first to that part which is due at the time of payment. *Effinger v. Henderson*, 33 Miss. 449.

In the Absence of Authority from the Mortgagor, a mortgagee cannot apply money received from the mortgagor to the payment of the mortgage debt before maturity. *Richardson v. Coddington*, 49 Mich. 1.

Insolvent Debtor—Exception.—An exception is made where a depositor in a bank has made an assignment for the benefit of creditors, when it has been held that the bank may apply his deposit to the payment of unmatured notes held by it. *Greene v. National Security Bank*, 13 Phila. (Pa.) 146.

4. Preferring Debts Arising after Payment to Those Existing at Such Time.—*Hammersley v. Knowlys*, 2 Esp. 666; *Dawe v. Holdsworth*, Peake 64; *Goddard v. Hodges*, 1 Cromp. & M. 33; *Law v. Sutherland*, 5 Gratt. (Va.) 357; *Hersey v. Bennett*, 28 Minn. 86, 41 Am. Rep. 271; *Niagara Bank v. Rosevelt*, 9 Cow. (N. Y.) 409; *Donally v. Wilson*, 5 Leigh (Va.) 329.

5. Preferring Disputed to Undisputed Claims.—*Stone v. Talbot*, 4 Wis. 442, where the court, by *Whiton, C. J.*, said: "To allow a creditor to apply payments thus made to a debt which he claimed to have against the debtor, but the existence of which the latter denied, would be to compel him to pay, perhaps, a fraudulent claim which the creditor had set up against him without the possibility of defending against it."

But if a claim is *bona fide* and legal, application to that claim will not be prevented merely because the debtor disputes its correctness. *McLendon v. Frost*, 57 Ga. 448; *Mann v. Major*, 6 Rob. (La.) 475; *Lee v. Early*, 44 Md. 80.

6. A Creditor Holding an Unliquidated Account and a judgment bearing interest against his

Contingent and Ascertained Indebtedness.—Nor to contingent liabilities instead of an ascertained indebtedness.¹

Illegal Demands.—Nor can he in any way make application to an illegal demand without the assent of the debtor.²

3. American Decisions.—Most of the states of the Union have adopted the rule of the common law,³ but inasmuch as it is apparent that the common law on this subject was in part borrowed from the Roman law,⁴ it has been a source of much contention as to how far at common law the rules of the civil law on this subject ought to be followed.⁵ Three of the states have

debtor, must apply an undirected payment to the judgment. *Scott v. Fisher*, 4 T. B. Mon. (Ky.) 387.

The claim upon which payment is applied must be ascertained in amount, *Goddard v. Hodges*, 1 Crompt. & M. 33; and be existing at the time the payment is made, *Hammersley v. Knowlys*, 2 Esp. 666.

1. Preferring Contingent Liabilities to Ascertained Indebtedness.—A contractor who received payment on account of different contracts, some of which were unfinished, was not allowed to apply upon those not completed. *McDowell v. Blackstone Canal Co.*, 5 Mason (U. S.) 11.

2. Illegal Demands.—*Ex p.* Randleson, 2 Dea. & C. 534; *Wright v. Laing*, 3 B. & C. 165, 10 E. C. L. 44; *Lamprell v. Billericay Union*, 3 Exch. 283; *Phillips v. Moses*, 65 Me. 70; *Rohan v. Hanson*, 11 Cush. (Mass.) 44; *McCausland v. Ralston*, 12 Nev. 195, 28 Am. Rep. 781; *Kidder v. Norris*, 18 N. H. 532; *Bancroft v. Dumas*, 21 Vt. 456; *Backman v. Wright*, 27 Vt. 187, 65 Am. Dec. 187; *Greene v. Tyler*, 39 Pa. St. 368, where the court, by Woodward, J., said: "That doctrine [of application by the creditor] can never apply except where the creditor has two or more honest claims against the debtor, to either of which the partial payment may be lawfully applied. * * * It could not be made to a spurious or pretended claim; nor to an immoral one, like a gambling contract; nor to usury, for that is forbidden by statute."

If an Account is Made Up Partly of Legal and Partly of Illegal Sales, undirected payments are to be applied to the charges for the legal sales. *Solomon v. Dreschler*, 4 Minn. 278; *Hall v. Clement*, 41 N. H. 166; *Dunbar v. Garrity*, 58 N. H. 575; *Huffstater v. Hayes*, 64 Barb. (N. Y.) 573; *Storer v. Haskell*, 50 Vt. 341.

But if at any time the aggregate payments exceed the amount of the legal sales, the excess may be applied for the charges for illegal sales. It will not be presumed that payments were made in advance on future legal sales. *Hall v. Clement*, 41 N. H. 166.

Where a Void Note was Given in the settlement of an account, which was then kept open and payments credited thereon, it was held that those payments might be applied to the legal items covered by the note. *Quigley v. Duffey*, 52 Iowa 610.

Illegal Sale of Liquors.—An agreement to apply credits to an account for liquors illegally sold was held binding in *Tomlinson Carriage Co. v. Kinsella*, 31 Conn. 268.

It was held that where the debtor is in-

debted on two accounts, one illegal because for spirituous liquors sold in quantities not amounting to twenty shillings, and the other legal, being for board and lodging, the creditor might apply general payments to the account for liquors. *Cruikshanks v. Rose*, 1 M. & Rob. 100. See also *Caldwell v. Wentworth*, 14 N. H. 431.

Usurious Contracts.—In the absence of an agreement at the time of payment authorizing a creditor to apply payments to a usurious contract, he will not be allowed to so apply them, but they must be applied to other legal obligations or to the principal. *Smith v. Coopers*, 9 Iowa 376; *Parchman v. McKinney*, 12 Smed. & M. (Miss.) 631; *North Bend First Nat. Bank v. Miltonberger*, 33 Neb. 847; *Adams v. Mahnken*, 41 N. J. Eq. 332; *Moore v. Holland*, 16 S. Car. 15; *Stanley v. Westrop*, 16 Tex. 200; *Gill v. Rice*, 13 Wis. 549; *Fay v. Lovejoy*, 20 Wis. 403.

On this point the court of appeals of Virginia says, in *Turner v. Turner*, 80 Va. 379: "There is this well-recognized exception to the rule that the creditor may apply where the debtor does not, 'that the creditor has no right to apply the money paid to him to the satisfaction of what does not, nor ever did, constitute any legal or equitable demand against the party making the payment.'"

Application cannot be Made by a National Bank to interest which has been forfeited by taking an unlawful discount. *Danforth v. National State Bank*, 48 Fed. Rep. 271.

Where a Statute Merely Prohibits the Recovery of Interest in Excess of Ten Per Cent., unless it is under contract in writing, but does not otherwise make the rate of interest unlawful, the creditor may apply payments to such interest under a contract not in writing. *Marye v. Strouse*, 5 Fed. Rep. 483.

3. See *supra*, this title, *Common-law Rule*.

4. Munger on the Application of Payments, p. 3, 1 Am. Law Mag. (April, 1843) 31; *Devaynes v. Noble* (Clayton's Case), 1 Meriv. 606; *Lane v. Cotton*, 12 Mod. 482; *Simson v. Ingham*, 2 B. & C. 65, 9 E. C. L. 25; *U. S. v. Bradbury*, Davies (U. S.) 146; *Gass v. Stinson*, 3 Sumn. (U. S.) 110; *Milliken v. Tufts*, 31 Me. 500; *Pattison v. Hull*, 9 Cow. (N. Y.) 747; *Moss v. Adams*, 4 Ired. Eq. (N. Car.) 49; *Heilbron v. Bissell*, Bailey Eq. (S. Car.) 430; *Bussey v. Gant*, 10 Humph. (Tenn.) 242.

5. Rule of Civil Law Followed.—In *Pattison v. Hull*, 9 Cow. (N. Y.) 747, where all the leading cases are elaborately examined and criticised, Cowen, J., after reviewing the leading English cases, said: "I think the weight of authority is in favor of the civil-law rule, although it

unqualifiedly adopted the civil-law rule,¹ while in others the law appears to be still somewhat unsettled.²

must be admitted that it is impossible to reconcile the cases." And again on page 770: "It is worthy of remark, that not only is the rule itself, as to the relative power of debtor and creditor in the application of payments, clearly brought over from the civil law, but the whole list of cases just cited exhibit the most distinct features of, and, as far as they go, travel *pari passu* with the corollaries of, that law in respect to the applying of indefinite payments."

In a learned note to the same case the following appears: "On the head of the appropriation, or, as continental writers would say, the imputation of payments, it is matter of curiosity as well as instruction to see how nearly English judges have followed the Roman lawyers without acknowledging it. * * * A little more liberality on this head, a simple reference to the ground on which the early decisions were founded, would doubtless have prevented that singular discrepancy which their cases exhibit. * * * A moment's recurrence to the civil law will convince the learned reader how much we have borrowed from it almost without credit."

The whole text of the law relating to the subject is contained *passim* in the Digest (lib. 46, tit. 3), and as rendered into English by Strahan from the French of Domat's Civil Law, contains seven articles. For full text see note to *Pattison v. Hull*, 9 Cow. (N. Y.) 773; 1 Am. Law Mag. 36; Munger's Application of Payments, p. 5; 2 Greenleaf on Ev. (15th ed.), § 529.

In *Gass v. Stinson*, 3 Sumn. (U. S.) 110, Judge Story, said: "There is no doubt that the doctrine of the common law as to the appropriation of indefinite payments, has generally been borrowed from the Roman law; and it is deeply to be regretted that there has been any departure in any of the authorities from its true results. The Roman law is equally simple, convenient, and reasonable upon this subject, and for most cases will furnish an easy and satisfactory solution." And again, on page 111, he continues: "If the creditor has a right in any case to elect to what debt to appropriate an indefinite payment, it seems to me that can be only when it is utterly indifferent to the debtor to which it is applied, and then, perhaps, his consent that the creditor may apply it as he pleases, may fairly be presumed." After citing *Pattison v. Hull*, 9 Cow. (N. Y.) 747, as being manifestly in favor of adopting the doctrines of the Roman law throughout, he says: "I confess myself strongly inclined the same way, and shall yield only to authorities which I am bound to follow."

The same theory is substantially asserted in *Milliken v. Tufts*, 31 Me. 500; *Bussey v. Gant*, 10 Humph. (Tenn.) 242; *The Ship Antarctic*, Sprague (U. S.) 206. See also *Calvert v. Carter*, 18 Md. 73; *Scott v. Fisher*, 4 T. B. Mon. (Ky.) 387; *Blanton v. Rice*, 5 T. B. Mon. (Ky.) 253.

In *Sanford v. Van Arsdall*, 53 Hun (N. Y.)

78, the court, after directing application to the earlier of two mortgages, thereby affording the greatest possible relief to the debtor, said, by Macomber, J., "The rule should require him [the creditor] to make the application which circumstances show would be most favorable to the debtor. The defendant had a right to assume that the plaintiff would apply the several sums so paid to him in the extinguishment of the indebtedness in its order."

Contrary View.—This doctrine is, however, ably controverted by many authorities of great weight which deny that the provisions of the civil law on this subject have been adopted as a part of the common law. *H. Campbell Black*, "Appropriation of Payments," 21 Cent. L. J. 473, 479; *Hollister v. Davis*, 54 Pa. St. 508; *Seymour v. Van Slyck*, 8 Wend. (N. Y.) 403; *Heilbron v. Bissell*, Bailey Eq. (S. Car.) 430.

Stone v. Seymour, 15 Wend. (N. Y.) 29, where the chancellor said: "The Roman law proceeded upon the erroneous principle that where there was an indefinite payment the creditor was bound to act upon the golden rule of doing as he would be done by if he was himself the debtor; and must, therefore, apply it in that way which would be most beneficial for the debtor. In adopting this principle the Roman lawgivers overlooked the fact that where there were conflicting interests the golden rule applied to the debtor as well as the creditor; and that, upon the same principle, it would be the duty of the debtor to allow his creditor to apply the payment in the way that he might consider the most beneficial to himself." Cited with approval in *Logan v. Mason*, 6 W. & S. (Pa.) 9, where the leading cases are cited and the whole doctrine is ably considered by Gibson, C. J. Commenting upon the decision of Story, J., in *Gass v. Stinson*, 3 Sumn. (U. S.) 110, he says: "It seems to me his partiality for his favorite code has carried him too far. In the American courts the question is not an open one, and it would require some intolerable mischief, certainly more than an equality in point of simplicity, convenience, and reasonableness, to justify us in overturning the decisions of more than two centuries."

1. Jurisdictions Adopting Civil-Law Rule Unqualifiedly.—*Louisiana.*—New Orleans Ins. Co. v. Tio, 15 La. Ann. 174; *Slaughter v. Milling*, 15 La. Ann. 526; *Spiller v. Creditors*, 16 La. Ann. 292; *Johnson v. Robbins*, 20 La. Ann. 569.

Maryland.—*McTavish v. Carroll*, 1 Md. Ch. 160; *Gwinn v. Whitaker*, 1 Har. & J. (Md.) 754; *Dorsey v. Gassaway*, 2 Har. & J. (Md.) 402; 3 Am. Dec. 557; *Calvert v. Carter*, 18 Md. 73. *Mississippi.*—*Poindexter v. La Roche*, 7 Smed. & M. (Miss.) 699; *Hamer v. Kirkwood*, 25 Miss. 95; *McLaughlin v. Green*, 48 Miss. 175; *Neal v. Allison*, 50 Miss. 175; *Windsor v. Kennedy*, 52 Miss. 164.

2. In *White v. Trumbull*, 15 N. J. L. 318, 29 Am. Dec. 687, the court, by Ryerson, J., said: "The application of payments seems

IV. TIME OF APPLICATION—1. When Made by Debtor—*a.* **AT THE TIME OF PAYMENT.**—As to when the debtor must exercise the right to make application, the rule distinctly asserted by nearly all of the courts that hold the common-law doctrine is, that he must do so at or before the time of payment; and if it is not so exercised, the presumption arises that he intended to waive his right of application in favor of the creditor, to whom it therefore passes.¹

b. **BEFORE CREDITOR APPLIES.**—The foregoing is undoubtedly a correct statement of the rule where the creditor exercises his right immediately upon failure of the debtor.² But it is also true that, although a right of application is thus given to the creditor, the debtor's right is not necessarily thereby wholly forfeited, unless the creditor makes immediate application; and it may be stated, as a limitation to the general rule, that the right of application may be exercised by the debtor at any time before the payment has been applied by the creditor.³ And it has been held that the right of the debtor

to be a subject about which it is difficult to find general principles in the books to guide our practice. The party paying may direct to what the application is to be made. If he waives his right, the party receiving may select the object of its appropriation. If both are silent, the law must decide. But what is the decision of the law or of enlightened reason, seems not to be well settled. Sometimes the court seems to have gone on the principle of preferring the supposed wishes or interest of the party paying. And sometimes a similar preference has been given to the party receiving. At other times the interest of a third party has governed the decision. And the cases seem to rest more on their own particular facts than upon any general principles." See *supra*, p. 441, note 5.

1. Direction Not Made by Debtor at Time of Payment—Presumption—*England.*—*Manning v. Western*, 2 Vern. 606; *Wilkinson v. Sterne*, 9 Mod. 427; *Bowes v. Lucas*, Andr. 55; *Hall v. Wood*, 14 East 243, note *a*; *Hooper v. Keay*, 1 Q. B. Div. 178; *Peters v. Anderson*, 5 Taunt. 596.

United States.—*L'Hommedieu v. The H. L. Dayton*, 38 Fed. Rep. 926.

Alabama.—*Aderholt v. Embry*, 78 Ala. 185; *McCurdy v. Middleton*, 82 Ala. 131.

Georgia.—*Green v. Ford*, 79 Ga. 130.

New York.—*California Bank v. Webb*, 94 N. Y. 467.

North Carolina.—*Wittkowsky v. Reid*, 82 N. Car. 116; *Long v. Miller*, 93 N. Car. 233.

North Dakota.—*Fargo First Nat. Bank v. Roberts*, 2 N. Dak. 195.

Tennessee.—*Reynolds v. M'Farlane*, 1 Overt. (Tenn.) 488.

Washington.—*Frazer v. Miller*, 7 Wash. 521.

Where cotton is shipped by a debtor to a creditor holding two demands, the direction as to the application must be made at the time of shipment and not at the time of sale. *Frost v. Weathersbee*, 23 S. Car. 354.

Where one owed a debt secured by mortgage on lots, and another by chattel mortgage on mules, and another upon a book account unsecured, and sold the mules to the mortgagee for an amount which he supposed was less than the mortgage on them and which was indorsed on the mortgage, but which was

really more, it was held that the creditor might apply the surplus to the unsecured account, and the debtor, having failed to apply to the other mortgage at the time of the payment, could not do so afterwards; and that the fact that both parties were under the erroneous impression that it would require the whole of the sum to extinguish the mortgage on the mules could not affect the question. *Baum v. Trantham*, 42 S. Car. 104.

2. Exercise of Right by Creditor Immediately.

—It may be assumed that the privilege of application is not forfeited by the debtor until such time as application is actually made by the creditor. *H. Campbell Black*, "Appropriation of Payments," in 21 Central L. J. 474.

In *Tayloe v. Sandiford*, 7 Wheat. (U. S.) 13, the court, by Marshall, C. J., said: "Although prudence might suggest an express direction of the application of payments at the time of their being made, yet there may be cases in which this power would be completely exercised without any express direction given at the time."

In *Moss v. Adams*, 4 Ired. Eq. (N. Car.) 48, the court, by Ruffin, C. J., said: "We do not find it anywhere said that the debtor, if he fail to make the application at the time of the payment, can do so afterwards, although the creditor may not then have appropriated it. We suppose he cannot; for, by not exercising the power when he parted from the money, he allows it to devolve on the creditor, and submits to his exercise of it, if the latter will do it at all."

3. Where the creditor omitted to apply to either debt, it was held that the debtor might, when sued on one of the debts, apply the payment so as to discharge the debt sued on, though the creditor had delayed action on both debts, it not appearing that they were extended by reason of the payment. *Dent v. State Bank*, 12 Ala. 275.

In *Briggs v. Williams*, 2 Vt. 287, *Hutchinson, J.*, in a *dissenting* opinion, held that where a payment was received by the plaintiff and not applied at all, and the notes sued, and the defendant was obliged to come to court and make defense for the sole purpose of compelling application somewhere the plaintiff's right of election was restored.

exists until he has received notice of an application by the creditor.¹ This limitation, however, has not been universally recognized.²

2. When Made by Creditor—*a. RULE OF CIVIL LAW.*—Under the Roman law, upon failure of the debtor, the right of application passes to the creditor only on the condition that he exercise it at the time of payment.³

b. ENGLISH DECISIONS.—This doctrine has not been followed to a great extent in *England*, where the courts generally have allowed the creditor the greatest latitude in the matter of time.⁴

c. AMERICAN DECISIONS—*Civil Law Followed in Some Jurisdictions.*—In the *United States* many courts, following the civil-law rule to some extent, have held that the creditor must exercise his right within a reasonable time.⁵

1. See *infra*, this title, *Communication*.

2. See *supra*, p. 444, note 1.

3. *Civil Law.*—The civil law exacts of the creditor, as well as of the debtor, an application at the time of payment, differing in this particular from the law of England. 1 *American Law Mag.* 39; *Devaynes v. Noble* (Clayton's Case), 1 *Meriv.* 571, 3 *Eng. Rul. Cas.* 329; *U. S. v. Bradbury, Davies* (U. S.) 146.

4. *Doctrine of the English Cases.*—*Bosanquet v. Wray*, 6 *Taunt.* 597; *Bodenham v. Purchas*, 2 *B. & Ald.* 39; *Wilkinson v. Sterne*, 9 *Mod.* 427; *Devaynes v. Noble* (Clayton's Case), 1 *Meriv.* 606; *Peters v. Anderson*, 5 *Taunt.* 596; *In re Bulmer*, 3 *De G. M. & G.* 236.

The creditor may make the application "not only at the instant of payment, but up to the very last moment." *City Discount Co. v. McLean*, L. R. 9 *C. P.* 692.

In *Phillpott v. Jones*, 2 *Ad. & El.* 43, 29 *E. C. L.* 25, *Denman, C. J.*, said: "The defendant made no appropriation of that payment; the plaintiff, therefore, might elect at any time to appropriate it to this part of his demand."

And in the same case, *Taunton, J.*, said: "The rule is that if a debtor pays money on account, and does not at the time state how it is to be applied, the creditor may make the appropriation. Here the seventeen pounds was paid without any application to particular items of the account. The plaintiff, then, might apply that payment to the items in question, and he was not bound to tell the defendant at the time that he made such application; he might make it any time before the case came under the consideration of a jury."

It has been held that the right continues until communicated to the debtor. *Grigg v. Cocks*, 4 *Sim.* 438.

In *Simson v. Ingham*, 2 *B. & C.* 65, 9 *E. C. L.* 29, a case often quoted in England as a leading authority, *Bayley, J.*, said: "Entries made by a man in books which he keeps for his own private purposes, are not conclusive on him until he has made a communication on the subject of those entries to the opposite party. Until that time he continues to have the option of applying the several payments as he thinks fit."

Also *Holroyd, J.*, said: "Now, those entries not having been communicated to the opposite party, it seems to me that the election was not complete. The effect of making the entries in their own private books shows only that the idea of so applying the payments had passed in their own minds. It is much the

same thing as if they had expressed to a stranger their intention of making such application of the payments, and had afterwards refused to carry such intention into effect."

Best, J., said: "I think that [the creditor] has a reasonable time to decide to which account he will place a sum that has been paid him without any application of it by his debtor, and more than a reasonable time has not been taken by the plaintiffs. When once the creditor has made his election, he is bound by it."

The Inconsistency of the English Courts on this subject is illustrated in the following cases: In *Smith v. Wigley*, 3 *M. & S.* 175, 30 *E. C. L.* 286, *Tindal, C. J.*, said: "Then supposing the conduct of *Tunnicliffe* not to amount to an indication of intention so to appropriate the payments, has the plaintiff who, in the next place has the right, signified his intention to set the sums received by him against the latter part of the account exclusively? In the absence of appropriation by the debtor, the creditor must make the appropriation at the time the money comes to his hands."

In *Mills v. Fowkes*, 5 *Bing. N. Cas.* 455, 35 *E. C. L.* 178, the same judge said: "These cases show clearly that the receiver has a right to appropriate if the payer omit to do so; and in *Simson v. Ingham*, 2 *B. & C.* 65, 9 *E. C. L.* 25, that he may make the appropriation at any time before action. *Best, J.*, was the only judge who said that the appropriation must be made within a reasonable time. * * * If a debtor wishes to do what is just, there are many cases in which he will not set up the statute of limitations as a defense."

In the same case, *Bosanquet, J.*, said: "As the debtor made no appropriation, the creditor might appropriate the payment at any time before the action commenced."

Coltman, J., said: "The more correct view, however, seems to be that the creditor is not limited in point of time."

5. Civil Law Followed—Creditor Allowed Reasonable Time.—*Alexandria v. Patten*, 4 *Cranch* (U. S.) 320; *The Ship Antarctic*, *Sprague* (U. S.) 206; *Starrett v. Barber*, 20 *Me.* 461; *Allen v. Culver*, 3 *Den.* (N. Y.) 284; *Pattison v. Hull*, 9 *Cow.* (N. Y.) 749; *Bridenbecker v. Lowell*, 32 *Barb.* (N. Y.) 9; *Heilbron v. Bissell*, *Bailey Eq.* (S. Car.) 430; *Briggs v. Williams*, 2 *Vt.* 283; *Donally v. Wilson*, 5 *Leigh* (Va.) 335; *Hill v. Southerland*, 1 *Wash.* (Va.) 133.

According to Some Authorities, Right Extends to Time of Controversy or Suit.—But a large number have recognized a right in the creditor to make application at any time before a controversy has arisen between the parties with reference to the debt to which application is sought to be made by the creditor,¹ or before suit has been commenced.²

Some Cases Follow English Rule.—While others, following the English rule, hold that it exists and may be exercised at any time, so that it be before application is made under direction of the court,³ if the rights of third

In *Harker v. Conrad*, 12 S. & R. (Pa.) 305, 14 Am. Dec. 691, the court, by Gibson, J., said: "Although as between the immediate parties the creditor has a right to appropriate where the debtor has failed to do so, yet this right must be exercised within, at the furthest, a reasonable time after the payment, and by the performance of some act which indicates an intention to appropriate. It is too late to attempt it at the trial." See also *Logan v. Mason*, 6 W. & S. (Pa.) 14.

To the same effect is *Levy v. Chicago Nat. Bank*, 158 Ill. 88, which held that money collected by a creditor upon collaterals pledged to him as security will be applied to reduce his claim at the time such collections are made.

If Payments on a Note are Not Applied as They Accrue, the same rate of interest will be allowed thereon as the note bears. *Hilliard v. Johnson* (Tex. Civ. App. 1895), 32 S. W. Rep. 914.

1. Application Any Time before Controversy Arisen.—*Backhouse v. Patton*, 5 Pet. (U. S.) 160; *U. S. v. Kirkpatrick*, 9 Wheat. (U. S.) 720; *Johnson v. Thomas*, 77 Ala. 367; *Lazarus v. Freidheim*, 51 Ark. 371; *Fairchild v. Holly*, 10 Conn. 184; *Applegate v. Koons*, 74 Ind. 247; *Milliken v. Tufts*, 31 Me. 497; *Burt v. Butterworth* (R. I. 1895), 32 Atl. Rep. 167; *Robinson v. Doolittle*, 12 Vt. 249; *Norris v. Beaty*, 6 W. Va. 477.

In *U. S. v. Kirkpatrick*, 9 Wheat. (U. S.) 724, the court, by Story, J. (Marshall, C. J., presiding), said: "It is certainly too late for either party to claim a right to make an appropriation, after the controversy has arisen, and *a fortiori* at the time of the trial."

2. Application Any Time before Suit Commenced.—*Simson v. Ingham*, 2 B. & C. 65, 9 E. C. L. 25; *Miller v. Miller*, 1 U. C. C. P. 240; *Whetmore v. Murdock*, 3 Woodb. & M. (U. S.) 390; *L'Hommedieu v. The H. L. Dayton*, 38 Fed. Rep. 926; *Callahan v. Boazman*, 21 Ala. 246; *Haynes v. Waite*, 14 Cal. 446; *Green v. Ford*, 79 Ga. 130; *Poulson v. Collier*, 18 Mo. App. 583; *Shortridge v. Pardee*, 2 Mo. App. 363; *Richards v. Columbia*, 55 N. H. 96; *Jenkins v. Beal*, 70 N. Car. 440.

In *Moss v. Adams*, 4 Ired. Eq. (N. Car.) 52, the court, by Ruffin, C. J., after citing *Mills v. Fowkes*, 5 Bing. N. Cas. 455, 35 E. C. L. 175, and commenting thereon, said: "The old argument was revived again, that where the creditor failed to make the appropriation at once he could not do it, but the law did it afterwards. But Chief Justice Tindal replied that the decisions were clearly the other way, and that the receiver had a clear right to apply a payment, 'at any time before action.'" After

citing with approval the opinions of Marshall, C. J., in *Alexandria v. Patten*, 4 Cranch (U. S.) 317, and *U. S. v. Kirkpatrick*, 9 Wheat. (U. S.) 720, he continued: "The only limitation must be that laid down in the English cases; namely, suit brought. * * * It is important that the law should be settled on these points; and it is perhaps of more consequence that some certain rule should be established than that it should be any one in particular, so that debtors may fully know the consequences of not availing themselves of the power of applying a payment when it is made and allowing it to devolve on the creditor. Perhaps it had been well to adhere to the original rule of the civil law, as more simple in itself, easily understood, and, in its uniform operation, doing as much justice upon the whole as any others, however modified."

In *Donally v. Wilson*, 5 Leigh (Va.) 335, President Tucker, referring to those decisions which give to the creditor a sharp and peremptory right of application, said: "Those cases, then, * * * do not sustain the instruction here. For my own part, I think they have strained the doctrine of the creditor's right to apply the payments, far beyond what is reasonable."

An Exception has been allowed in favor of a debtor who requested that an earlier application be made. *California Bank v. Webb*, 94 N. Y. 467; *Frazer v. Miller*, 7 Wash. 521.

3. Application Any Time before Made by Court.—*City Discount Co. v. McLean*, L. R. 9 C. P. 692, 43 L. J. C. P. 344; *Pearce v. Walker*, 103 Ala. 250; *Plummer v. Erskine*, 58 Me. 59; *California Bank v. Webb*, 94 N. Y. 467; *Stewart v. Cochran*, Bailey Eq. (S. Car.) 380; *Heilbron v. Bissell*, Bailey Eq. (S. Car.) 430; *Howard v. McCall*, 21 Gratt. (Va.) 205.

The Right was Asserted and Given at the Time of Trial in *Larrabee v. Lumbert*, 32 Me. 97; *Capron v. Strout*, 11 Nev. 304.

In *Ontario* it is held that appropriation for the first time apparently on the very day on which an account is brought into the master's office, is too late. *Fraser v. Locie*, 10 Grant's Ch. (U. C.) 207.

The Right was Allowed to be Exercised at Any Time before Judgment or Verdict in *Brice v. Hamilton*, 12 S. Car. 32; *Baum v. Trantham*, 42 S. Car. 104.

After Recovery of Judgment.—In *Marsh v. Oneida Cent. Bank*, 34 Barb. (N. Y.) 298, it was held to be unnecessary to apply a deposit towards payment of a note immediately on its maturity, and that the right was not waived by omission even after the recovery of a judgment thereon.

parties have not intervened.¹

V. BY THE COURT.—1. **In General.**—It is held generally to be the rule that the court will direct the application of a payment upon failure of both the debtor and creditor so to do;² but it will not act so as to interfere with an application properly made by either party,³ not even to defeat an illegal contract in order that the payment may be applied to a just debt.⁴

2. **Intention of the Parties**—*a.* **IN GENERAL.**—In directing an application the court will look first to the intention of the parties in making and receiving the payment, and it will not generally exercise its power to direct an application according to its own notion of justice and equity, so long as any intention of the parties to apply the payment can be ascertained with reasonable certainty.⁵

When Indifferent to Debtor.—In *Pattison v. Hull*, 9 Cow. (N. Y.) 767, Cowen, J., said: "I am inclined to think that where one owes two debts to another, upon the face of which it must be altogether indifferent to the debtor how the money shall be applied, there a general payment may be applied by the creditor, at any time, to which debt he pleases. *Bosanquet v. Wray*, 6 Taunt. 597."

1. **Where the Rights of Third Parties have Intervened**, the right of the creditor to appropriate the payment as his own interests may dictate is gone as against such third persons. *Harrison v. Johnston*, 27 Ala. 445; *Crompton v. Pratt*, 105 Mass. 257; *Pattison v. Hull*, 9 Cow. (N. Y.) 747; *Berghaus v. Alter*, 9 Watts (Pa.) 386; *Harker v. Conrad*, 12 S. & R. (Pa.) 301, 14 Am. Dec. 691; *Willis v. McIntyre*, 70 Tex. 34, 8 Am. St. Rep. 574.

Even though the party whose right is affected holds under a conveyance fraudulent as to creditors. *Miller v. Miller*, 23 Me. 24, 39 Am. Dec. 597.

2. **General Rule when Court Makes Application.**—The duty of making an application, where neither debtor nor creditor applies, will be performed by the court in accordance with its own notions of justice and in such a manner as to do the greatest equity.

United States.—*Postmaster-Gen. v. Norvell*, Gilp. (U. S.) 106; *Cremer v. Higginson*, 1 Mason (U. S.) 323; *Gordon v. Hobart*, 2 Story (U. S.) 243; *Gass v. Stinson*, 3 Sumn. (U. S.) 98; *U. S. v. Kirkpatrick*, 9 Wheat. (U. S.) 724.

Alabama.—*Dent v. State Bank*, 12 Ala. 275; *Callahan v. Boazman*, 21 Ala. 246.

Connecticut.—*Fairchild v. Holly*, 10 Conn. 179; *Stamford Bank v. Benedict*, 15 Conn. 438; *Chester v. Wheelwright*, 15 Conn. 567.

Delaware.—*Pickering v. Day*, 2 Del. Ch. 333.

Florida.—*Randall v. Parramore*, 1 Fla. 458.

Georgia.—*Green v. Ford*, 79 Ga. 130.

Illinois.—*Bayley v. Wynkoop*, 10 Ill. 449; *Dehner v. Helmbacher Forge, etc.*, Mills, 7 Ill. App. 47.

Maryland.—*Gwinn v. Whitaker*, 1 Har. & J. (Md.) 754.

Michigan.—*Youmans v. Heartt*, 34 Mich. 397.

Mississippi.—*Baine v. Williams*, 10 Smed. & M. (Miss.) 113.

Missouri.—*Benny v. Rhodes*, 18 Mo. 147, 59 Am. Dec. 293.

New Hampshire.—*Merrimack County Bank v. Brown*, 12 N. H. 320; *Young v. Woodward*, 44 N. H. 250.

New York.—*Allen v. Culyer*, 3 Den. (N. Y.) 284; *Baker v. Stackpoole*, 9 Cow. (N. Y.) 420, 18 Am. Dec. 508; *Stone v. Seymour*, 15 Wend. (N. Y.) 29; *Truscott v. King*, 6 N. Y. 147.

Oregon.—*Trullinger v. Kofoed*, 7 Oregon 228, 33 Am. Rep. 708.

Pennsylvania.—*Harker v. Conrad*, 12 S. & R. (Pa.) 301, 14 Am. Dec. 691.

Texas.—*Proctor v. Marshall*, 18 Tex. 63; *Taylor v. Coleman*, 20 Tex. 772.

Vermont.—*Briggs v. Williams*, 2 Vt. 283; *Pierce v. Knight*, 31 Vt. 701.

Virginia.—*Smith v. Loyd*, 11 Leigh (Va.) 535, 37 Am. Dec. 621; *Magarity v. Shipman*, 82 Va. 784; *Pope v. Transparent Ice Co.* (Va. 1895), 20 S. E. Rep. 940.

West Virginia.—*Norris v. Beaty*, 6 W. Va. 477.

Or the Jury will Make the Application under the evidence and the direction of the court. *Oliver v. Phelps*, 20 N. J. L. 180.

3. **Court will Not Interfere with Application by the Parties.**—*Mercer v. Tift*, 79 Ga. 174; *Terhune v. Colton*, 12 N. J. Eq. 320; *Muskingum Bank v. Carpenter*, 7 Ohio 21, 28 Am. Dec. 616; *Selfridge v. Northampton Bank*, 8 W. & S. (Pa.) 320; *Watt v. Hoch*, 25 Pa. St. 411.

4. This would be in effect to make a new contract for the parties against their wishes and intentions, and different from that which the law raises from the circumstance that the money may be recovered back. *Tomlinson Carriage Co. v. Kinsella*, 31 Conn. 272. In *Feldman v. Gamble*, 26 N. J. Eq. 494, the vice-chancellor said: "I know of no rule of law which will permit the court to open a fraudulent contract, voluntarily executed, to give its aid to either party."

Where Payments have been Applied by Joint Consent of the Parties, there is no question of application by the court. *Mercer v. Tift*, 79 Ga. 174.

5. **General Rule—Intention of Parties Controlling.**—*Chitty v. Naish*, 2 D. P. C. 511; *Taylor v. Kymer*, 3 B. & Ad. 320, 23 E. C. L. 81; *Thompson v. Brown*, 1 M. & M. 40, 22 E. C. L. 242; *The Martha*, 29 Fed. Rep. 708; *The Mary K. Campbell*, 40 Fed. Rep. 906; *Bangor Boom Corp. v. Whiting*, 29 Me. 123; *Peterborough Sav. Bank v. Hodgdon*, 62 N. H. 300; *Emery v. Tichout*, 13 Vt. 15.

b. EXPRESS INTENTION—(1) *Communication*.—An expressed intention, in order to affect an application, must be communicated to the party whom it is sought to bind thereby. This is generally true whether it be the debtor¹ who seeks to apply the payment, or the creditor;² though it has been held that application by the creditor need not be communicated in order to be effectual.³

Form of Communication.—The communication need not be expressed in writing,⁴ nor in any technical or formal words,⁵ nor delivered in any particular manner.⁶ It will be sufficient that the intention is manifest, and that it comes to the knowledge of the other party.⁷

(2) *Acceptance*—*Accepting Payment with Directions as to Application*.—When the creditor accepts a payment with directions from the debtor as to its application, he is bound to follow those directions, notwithstanding he expressly refused at the time of payment to concur in the debtor's application.⁸

1. Necessity of Communication of Intention—Debtor Making the Application.—*Frazer v. Bunn*, 8 C. & P. 704, 34 E. C. L. 592; *Long v. Miller*, 93 N. Car. 233; *Heilbron v. Bissell*, *Bailey Eq. (S. Car.)* 430; *Hill v. Southerland*, 1 Wash. (Va.) 128.

So where a Memorandum Made at the Time of Payment was found among the debtor's papers, after his decease, showing an intent and purpose to make a certain application, it was excluded by the court as being a mere uncommunicated declaration. *Brice v. Hamilton*, 12 S. Car. 32.

Private Entries.—Entry by the debtor in his private books, without other communication, is not sufficient to show a particular application. *Terhune v. Colton*, 12 N. J. Eq. 232.

But if the debtor at the time of payment makes an entry in his books, showing a specific application, and at the same time shows the entry to the creditor, this is such an application as will bind the latter. *Frazer v. Bunn*, 8 C. & P. 704, 34 E. C. L. 592.

But where a third party, acting for the debtor, made such an entry upon payment without communicating it to the creditor, the latter was not bound. *Pearce v. Walker*, 103 Ala. 250.

Application by Collector of Customs.—Where a collector of customs received a check in payment of duties, and there was more than one consignment upon which duties were payable by the same parties, it was held that in the absence of notice to apply upon a particular consignment he might apply upon any of them. *Hendricks v. Schmidt*, 68 Fed. Rep. 425.

2. Necessity of Communication of Intention—Creditor Making the Application.—*Simson v. Ingham*, 2 B. & C. 65, 9 E. C. L. 25; *Dulles v. De Forest*, 19 Conn. 190; *Dorsey v. Wayman*, 6 Gill (Md.) 59; *Capen v. Alden*, 5 Met. (Mass.) 268; *Allen v. Culver*, 3 Den. (N. Y.) 284; *Van Rensselaer v. Roberts*, 5 Den. (N. Y.) 470; *Seymour v. Marvin*, 11 Barb. (N. Y.) 80; *Sawyer v. Tappan*, 14 N. H. 356; *Heilbron v. Bissell*, *Bailey Eq. (S. Car.)* 433.

3. *Addison on Contracts* (8th ed.) 820; *Pollock, J.*, in *Simson v. Ingham*, 2 B. & C. 65, 9 E. C. L. 25; *Johnson v. Thomas*, 77 Ala. 369; *Truscott v. King*, 6 N. Y. 147.

4. Communication need Not be Expressed in Writing.—*Ilsley v. Jewett*, 2 Met. (Mass.) 168.

It may be Shown by Verbal Declarations or by account rendered, showing the application. *Poulson v. Collier*, 18 Mo. App. 583.

5. The Expression of a Wish by the Debtor is Sufficient.—*Hansen v. Rounsavell*, 74 Ill. 238.

Or the Declarations of the Bearer of the Money at the time of delivering it to the creditor. *Gay v. Gay*, 5 Allen (Mass.) 157.

6. A Direction to a Tenant to Pay Rent to a Mortgagee "so long as he occupies the same, or until the mortgage is paid off if he occupies as long," was held to be a sufficient application of such payments to the mortgage debt. *Plain v. Roth*, 107 Ill. 594.

Material Men—Mortgaged Property.—Where mortgaged property was being improved by the mortgagor, and material men were paid with orders on money in the hands of the mortgagee, each of which, for the protection of the mortgagee, was required to and did specify for what material and upon what account it was given, it was held that the material men, having accepted the orders, could not apply the payments to prior accounts different from those named therein. *Western Sash, etc., Co. v. Young*, 48 Mo. App. 505.

7. Adams Express Co. v. Black, 62 Ind. 128. Here it was held that an instruction to the jury that in the absence of express direction from the debtor as to the application of the payment made, the creditor had the right to elect for himself, was clearly erroneous; but that the question was, what was the debtor's intention in making such payment, as shown by the attending facts and circumstances.

In *Guthrie's Appeal*, 92 Pa. St. 269, it was held that a mere avowal of an intention to apply a payment in a particular manner does not amount to an appropriation.

8. Creditor Bound by Directions when Payment Accepted—England.—Anonymous, Cro. Eliz. 68; *Colt v. Netterville*, 2 P. Wms. 304.

Canada.—*Canada Powder Co. v. Burly*, 9 U. C. C. P. 290; *McDonald v. Peck*, 17 U. C. Q. B. 270.

United States.—*Bank of North America v. Meredith*, 2 Wash. (U. S.) 47.

Alabama.—*Levystein v. Whitman*, 59 Ala. 345.

Florida.—*Randall v. Parramore*, 1 Fla. 458.

Illinois.—*Jackson v. Bailey*, 12 Ill. 159.

Kansas.—*Irwin v. Paulett*, 1 Kan. 418.

Acceptance with Directions to Apply to Unmatured Obligation.—For instance, he is not bound to accept a payment with directions to apply upon an obligation not yet matured; yet, having accepted, he is bound to comply with the condition.¹

Acceptance with Directions to Apply to Principal Instead of Interest.—It is the same where the application is to discharge a part of the principal to the exclusion of the interest.²

Acceptance with Directions to Apply to Most Onerous Debt.—As it is also, in the case of several obligations, to discharge that which is most onerous or burdensome to the debtor, although a loss to the creditor is thereby occasioned.³

(3) **Ratification.**—An application by the creditor contrary to express direction, or one which he could not have made without the consent

Kentucky.—*Bosley v. Porter*, 4 J. J. Marsh. (Ky.) 621.

Maine.—*Wetherell v. Joy*, 40 Me. 325.

Massachusetts.—*Hall v. Marston*, 17 Mass. 575.

New York.—*Godfrey v. Warner*, Hill & D. Supp. (N. Y.) 32; *Grinnan v. Platt*, 31 Barb. (N. Y.) 328.

North Carolina.—*Runyon v. Latham*, 5 Ired. (N. Car.) 551.

Ohio.—*Stewart v. Hopkins*, 30 Ohio St. 502.

Pennsylvania.—*Smuller v. Union Canal Co.*, 37 Pa. St. 68; *Martin v. Draher*, 5 Watts (Pa.) 544.

South Carolina.—*M'Donald v. Pickett*, 2 Bailey (S. Car.) 617.

Texas.—*Eylar v. Read*, 60 Tex. 387.

Vermont.—*Boutwell v. Mason*, 12 Vt. 608.

Where the creditor received money sent by the debtor through a surety, together with a notice of its application, he was considered bound by such notice, although he positively refused to admit payment of the account as directed in the notice, but accepted for the purpose of discharging another debt of the principal. *Reed v. Boardman*, 20 Pick. (Mass.) 441; *Patty v. Milne*, 16 Wend. (N. Y.) 557, *affirmed* in 22 Wend. (N. Y.) 558.

Direction to Pay Part of Money to Third Party.—And where the creditor is directed by the debtor to pay over to a third person a part of money sent, he is bound to comply if he accepts the money, even though the whole amount received is insufficient to discharge the debt. *Hall v. Marston*, 17 Mass. 575.

Where One, being Indebted Both on Mortgage and on an Open Account, sent to his creditor money with instructions to apply it on the mortgage note, which the latter failed to do, the creditor was held to be liable to the debtor's assignee in bankruptcy for the amount, and, in a suit by the assignee for the amount, not to be able to plead the account as a set-off. *Libby v. Hopkins*, 104 U. S. 303.

Where the Debtor Sent a Check to His Creditor, together with a statement that it was in full for all rents due upon a lease, and afterwards expressly demanded its acceptance for that purpose, or its return, which was refused, it was held to be a payment in full, as stated by the debtor. *Washington Natural Gas Co. v. Johnson*, 123 Pa. St. 576, 10 Am. St. Rep. 553.

Where a Draft is Accepted with Directions as

to Application, the creditor is bound the same as if the payment had been in money. *Moorehead v. West Branch Bank*, 3 W. & S. (Pa.) 550.

Where a Partial Payment is Made, accompanied by an expressed intent that upon full payment of a certain note and mortgage, securities shall be transferred to other obligations, such application to the note and mortgage is not affected by the fact that the contingency never happens, no further payment being made. *Lazarus v. Henrietta Nat. Bank*, 72 Tex. 354.

When the expressed intention of the debtor who delivers money into the hands of his creditor, wholly negatives the idea of payment at all, the creditor's control of the money, if he accepts, is limited to the purpose expressed. *Detroit, etc., R. Co. v. Smith*, 50 Mich. 112; *Hall v. Marston*, 17 Mass. 575.

1. *Wetherell v. Joy*, 40 Me. 325.

2. *Pindall v. Marietta Bank*, 10 Leigh (Va.) 502.

3. **As, where One Debt is About to Become Barred** by the statute of limitations, and the debtor directs application to another more recent, the creditor may be compelled to make the application as directed, although he thereby loses the whole of the former debt. *Eylar v. Read*, 60 Tex. 387.

So in the Case of a Debt Due Which was Not Secured, and another not due which was guaranteed, money paid jointly by the guarantor and debtor, on account, was held to be an application to the debt covered by the guaranty, and the creditor was bound to apply it to that debt, though not due. *Wetherell v. Joy*, 40 Me. 325.

Where One Debt was Secured by Mortgage, and Another was a Simple Contract, and money was paid with direction to apply upon the mortgage debt, and the creditor accepted, but refused to so apply the money, and shortly thereafter the debtor was declared a bankrupt, it was held that, as against the assignees in bankruptcy, the payment could not be applied on the account, but must go to satisfy the mortgage debt. *Stewart v. Hopkins*, 30 Ohio St. 502.

Partnership and Individual Liabilities.—Where a creditor acknowledges receipt of a payment as discharging a debt due from a firm, he cannot afterwards apply it to an indebtedness of the individual member making it. *Brown v. Brabham*, 3 Ohio 275.

of the debtor, may become binding on the debtor by a subsequent ratification.¹

(4) *Acquiescence*.—Continued acquiescence of the debtor, after knowledge of a contrary application by the creditor, may amount to a ratification, and acquiescence may be inferred from the debtor's conduct.²

c. IMPLIED INTENTION—(1) *From Circumstances*.—The intention to make a certain application of a payment may be implied from the circumstances attending the transaction.³

1. Debtor's Ratification of Creditor's Application.—*McLear v. Hunsicker*, 30 La. Ann. 1225; *Dorsey v. Wayman*, 6 Gill (Md.) 59; *Flarsheim v. Brestrup*, 43 Minn. 298.

Where a creditor holding two notes, one secured by mortgage and the other not, applied a payment on the mortgage debt with the knowledge of the debtor, to which he made no objection, and a judgment creditor purchased the mortgaged property at a sheriff's sale, under a judgment recovered by him against the debtor, it was held that neither had any ground for objection to the application. *Paterson Sav. Inst. v. Brush*, 29 N. J. Eq. 119.

To the same effect is *Larkin v. Watt* (Tex. Civ. App. 1895), 32 S. W. Rep. 552.

There must Be an Express Assent by the Debtor, or it must be shown that he did not object to the positive statement of the creditor that he should make application to a debt barred by statute. *Sitterly v. Gregg*, 22 Hun (N. Y.) 258. See also *infra*, this title, *Acquiescence*.

2. Acquiescence of Debtor — How Inferred.—Where a debtor receives without objection an account current from his creditor, which imputes payments made by him to the less onerous parts of his debt, he is held by his silence to have acquiesced in the application of the creditor. *Flower v. O'Bannon*, 43 La. Ann. 1042. See also *Maitland v. Secord*, *Drap. (U. C.)* 456; *McGillivray v. Keefer*, 4 U. C. Q. B. 342.

But it has been held that credits may not be thus imputed to the payment of charges that the debtor was not legally bound to pay. *Keane v. Branden*, 12 La. Ann. 20.

Where a debtor might have defended against an item contained in an account current on the ground of mistake of fact in making the purchase, he was held to be estopped by receiving a bill containing that item, without objection. *Mackey v. Fullerton*, 7 Colo. 556.

Where a creditor of a firm and of its successor in business rendered statements to the latter showing that payments had been applied in their order upon a bill against the old firm, and no objection was made, it was held to be a ratification of such application. *Armitage v. Saunders*, 94 Mich. 482. To the same effect is *Middleton v. Frame*, 21 Mo. 412.

Where a debtor upon several promissory notes directed that a payment should be applied upon one in particular, but afterwards accepted other notes with knowledge of a different application, this was held to be a ratification of the creditor's application. *Cardinell v. O'Dowd*, 43 Cal. 586.

Knowledge of Debtor Necessary.—It is other-

wise where he had no knowledge that the notes received by him did not contain the note upon which he had directed payment, and he was not thereby estopped to assert payment of it. *Fargo First Nat. Bank v. Roberts*, 2 N. Dak. 195.

Opportunity for Knowledge.—In *Baker v. Smith*, 44 La. Ann. 925, it was held that opportunity to know of an application by the creditor, and long-continued acquiescence thereafter, constituted a sufficient ratification.

But where the creditor purposely withheld circumstances from a guarantor, upon inquiry, knowledge of which was necessary to charge him with acquiescence, he was not bound, and the creditor was required to apply a payment made by the debtor according to his implied intention. *Lyman v. Miller*, 12 U. C. Q. B. 215.

Receipt Showing Different Application.—It has been held that the debtor is not estopped to insist on the application designated by him, though he accepted a receipt showing a different application by the creditor. *Eylar v. Read*, 60 Tex. 387; *Starkweather v. Kittle*, 17 Wend. (N. Y.) 20, *per* Bronson, J.

3. Intention Implied from Circumstances.—2 Greenleaf on Ev. (15th ed.), § 530; *Harrison v. Johnston*, 27 Ala. 445; *Howland v. Rench*, 7 Blackf. (Ind.) 236; *Bayley v. Wynkoop*, 10 Ill. 449; *Fowke v. Bowie*, 4 Har. & J. (Md.) 566; *Sawyer v. Tappan*, 14 N. H. 352; *Lauten v. Rowan*, 59 N. H. 215; *Terhune v. Colton*, 12 N. J. Eq. 237; *West Branch Bank v. Moorehead*, 5 W. & S. (Pa.) 542; *Foster v. McGraw*, 64 Pa. St. 464; *Black v. Shooler*, 2 McCord (S. Car.) 293; *Roakes v. Bailey*, 55 Vt. 542; *Tayloe v. Sandiford*, 7 Wheat. (U. S.) 20, where the court, by Marshall, C. J., said: "A direction may be evidenced by circumstances as well as by words. A payment may be attended by circumstances which demonstrate its application as completely as words could demonstrate it. A positive refusal to pay one debt, and an acknowledgment of another, with a delivery of the sum due upon it, would, we think, be such a circumstance."

Where a Tenant, Indebted to His Landlord for Supplies and Rent, contracted to pay the rent out of the first cotton baled, and delivered only enough cotton to pay the rent, it was applied to the rent. *Cross v. Johnson*, 30 Ark. 396.

Where a Debtor, on Account of Rent, made a partial payment without knowledge that his creditor had obtained and held another debt against him, it was held to be a fair inference that the intention was to apply the payment to the rent account. *Phillips v. McGuire*, 73

(2) *From Conduct*.—The intention to make the application may be implied from the conduct of the parties, either at the time of making and receiving payment, or thereafter.¹

(3) *From Course of Dealing*.—Application of a payment may be implied from the course of dealing between the parties, or facts and circumstances which imply a course of dealing.²

Ga. 517. To the same effect are *Holley v. Hardeman*, 76 Ga. 328; *Marx v. Schwartz*, 14 Oregon 177.

Where Services were Rendered in Payment of a Claim, the consent of both parties at the time was implied that the services should be applied to that claim. *McIntyre v. Corss*, 18 Vt. 451.

Individual and Partnership Debts.—Where a creditor held notes made by a firm, and others by an individual member of the firm, payments made by the individual without any direction were presumed to have been intended to be applied upon the individual notes. *Camp v. Smith*, 49 Hun (N. Y.) 100, affirmed in 117 N. Y. 354.

So, where such a debtor delivered to the creditor the check of the firm, it was presumed to have been intended as a payment on the firm debt, in the absence of any direction by the individual or of the consent of the firm to the member's use of it, although the firm debt was not due at the time and the other was. *Rogers v. Betterton*, 93 Tenn. 630.

Where the Payment is Precisely the Amount of One Debt, and not of another, it may properly be inferred that the debtor intended it should be applied to the former. *The Appropriation of Payments*, 3 Am. L. Reg. 707; *Marryatts v. White*, 2 Stark. 101, 3 E. C. L. 334; *Adams Express Co. v. Black*, 62 Ind. 128; *Robert v. Garnie*, 3 Cal. (N. Y.) 14; *Seymour v. Van Slyck*, 8 Wend. (N. Y.) 403; *Stone v. Seymour*, 15 Wend. (N. Y.) 19.

The Form of Receipt Taken by the Debtor may Show the Intention.—*Bowes v. Lucas*, Andr. 55; *Sawyer v. Tappan*, 14 N. H. 352; *Stewart v. Keith*, 12 Pa. St. 238; *Otto v. Klauber*, 23 Wis. 471.

An Entry by the Creditor in his book of an application different from that shown by a receipt which he has given, will not control. *Fraser v. Birch*, 3 Knapp 380.

Where a Receipt was Given in these words, "Received from B his ninety day note for three hundred dollars," on the question whether the note was applied on an account held by the creditor jointly with others or to an individual debt, an instruction that the receipt was silent and had no legitimate bearing one way or the other, was held not erroneous. *Appleton, C. J., and Dickerson, J., dissenting*, in *Hunt v. Brewer*, 68 Me. 262.

Where a Receipt was Given by a Guardian to an administrator, which expressed that a payment made by the latter was on account of the ward's share of the real and personal estate, it was held that the payment should be appropriated *pro rata*. *Ordinary v. McCollum*, 3 Strobh. (S. Car.) 494.

Receipt in Name of Firm.—In *Otto v. Klauber*, 23 Wis. 471, it was held that where one made a payment to his creditor, who was a member of a firm to whom the former

was also indebted, a receipt given by the latter in the name of the firm was evidence of an application.

1. Intention Implied from Conduct.—*Newmarch v. Clay*, 14 East 239; *Reynolds v. Paten*, 10 Misc. Rep. (N. Y. C. Pl.) 155; *Stewart v. Hopkins*, 30 Ohio St. 540; *Moorehead v. West Branch Bank*, 3 W. & S. (Pa.) 550, 5 W. & S. (Pa.) 542; *Wittkowsky v. Reid*, 82 N. Car. 116.

Illustrations.—A landlord who had business transactions with his tenant charged the latter on his ledger rent as it fell due monthly, and also cash advances made him from time to time. The landlord received from time to time the proceeds of the sale of iron belonging to the tenant, and credited such proceeds generally on the account. The landlord distrained for rent, and it was held that such action constituted an election to appropriate the moneys received to the items of the account, excluding the rent. *Garrett's Appeal*, 100 Pa. St. 597.

In an action by an executor against the father of the decedent to recover certain insurance money paid the father upon the death of the decedent's brother, on a policy on the brother's life for the decedent's benefit, where there was evidence that she had stated that she intended the money to go to pay an indebtedness of her brother to her father, and, her attention being called to a transfer of the credit from her account to that of her brother, she had said it was correct, and thereupon had settled the account, paying a balance and taking a receipt, it was held that there was an application by her of the insurance money to the debt. *Hodge v. Hoppock*, 75 N. Y. 491.

Where a creditor brought suit upon one of two notes, it was held to be an application of a prior payment to the other note. *Starrett v. Barber*, 20 Me. 457; *Allen v. Kimball*, 23 Pick. (Mass.) 473.

Instructions previously given to a consignee to appropriate the proceeds of goods shipped to the payment of a mortgage, were held to be revoked by the consignor drawing a draft on the proceeds, and, upon acceptance, application should be made to the draft. *Kennedy v. Davis*, 82 Ga. 210.

Application was shown by subsequent declarations of the debtor in *Waters v. Tompkins*, 2 C. M. & R. 723, 1 Tyr. & G. 137.

But a Direction to the Creditor after an Application already made will have no effect. *Wyland v. Griffith* (Iowa 1895), 64 N. W. Rep. 673.

2. Implication from Course of Dealing.—*Brown v. Anderson*, 2 Moo. P. C. 249; *Taylor v. Kymer*, 3 B. & Ad. 320, 23 E. C. L. 81; *Lysaght v. Walker*, 5 Bligh N. S. 1; *Gwin v. McLean*, 62 Miss. 121; *McLear v. Hunsicker*, 30 La. Ann. 1225.

d. QUESTION OF FACT.—What were the intentions of the parties, whether of the debtor or the creditor, is a question of fact to be determined by the jury from all the circumstances of the case.¹

e. BURDEN OF PROOF.—The burden of proving an application, or an intention to apply, when the intention controls, is on the party who seeks to establish the application.²

Parol Evidence for Such Purposes, or that notice was given to the opposite party, is admissible.³

3. When No Intention Appears—*a. GENERAL RULE*—Court will Direct Equitable Application.—When neither the debtor nor the creditor has manifested an intention to make application of a payment, and no such intention can properly be deduced from all the circumstances of the case, the court will direct the application equitably to all parties concerned.⁴

In an action of book account the court may infer the understanding of the parties as to the application of payments from facts reported by an auditor. *Emery v. Tichout*, 13 Vt. 15.

Where a firm account is continued in the name of a surviving partner with the debtor's consent, subsequent payments may be applied to discharge the original balance. *Boyd v. Webster*, 59 N. H. 89.

In *Louisiana*, where an undirected payment must be applied by the creditor to that debt which is most onerous, it was held that where, according to a course of dealing, the proceeds of cotton shipped by debtor to creditor were applied to an open account instead of to promissory notes, it was a proper application. *Chaffe v. Mackenzie*, 43 La Ann. 1062.

In *Mississippi*, which also holds the civil-law doctrine, the most favorable to the debtor, it has been held that where there existed a course of dealing from which an agreement would be implied that the appropriation shall be made in a manner most beneficial to the creditor, the court will make the application accordingly. *Gwin v. McLean*, 62 Miss. 121.

1. Question of Fact—*England*.—*Walker v. Butler*, 6 El. & Bl. 506; *Lysaght v. Walker*, 5 Bligh N. S. 1.

Canada.—*Carrall v. Montreal Bank*, 21 U. C. Q. B. 18.

United States.—*Alexandria v. Patten*, 4 Cranch (U. S.) 317.

Connecticut.—*Dulles v. De Forest*, 19 Conn. 190.

Georgia.—*Greer v. Burnam*, 71 Ga. 31; *Phillips v. McGuire*, 73 Ga. 517; *Cox v. Wall*, 84 Ga. 456.

Maryland.—*Fowke v. Bowie*, 4 Har. & J. (Md.) 566.

Pennsylvania.—*Dickinson College v. Church*, 1 W. & S. (Pa.) 462; *Moorehead v. West Branch Bank*, 3 W. & S. (Pa.) 550, 5 W. & S. (Pa.) 542; *Logan v. Mason*, 6 W. & S. (Pa.) 15.

In *Killorin v. Bacon*, 57 Ga. 497, a charge to the jury that if they were unable to reconcile conflicting statements of the plaintiff and defendant as to what application had been made, the law will direct payment to the oldest debt, and that they must find accordingly, was held to be erroneous, as relieving

them from the performance of a duty which the law devolved upon them; the court, by *Warner, C. J.*, saying: "The law devolved the duty on the jury to have reconciled the conflicting evidence of the two witnesses, if possible, without imputing perjury or bad motives to either of them; but if their testimony was irreconcilable, then they must determine, from all the circumstances connected with the transaction about which they testified, who was entitled to the most credit, and have found their verdict accordingly, and so the court should have charged the jury."

2. The Burden Is on the Debtor to show that he directed the application which he contends should be made. *Kent v. Marks*, 101 Ala. 350; *Blinn v. Chester*, 5 Day (Conn.) 359; *Perry v. Bozeman*, 67 Ga. 643; *Cox v. Wall*, 84 Ga. 456; *Harrison v. Dayries*, 23 La. Ann. 216; *Thatcher v. Massey*, 26 S. Car. 155.

In *Gass v. Stinson*, 3 Sumn. (U. S.) 114, where the creditor sought to apply an undirected payment to a certain demand where another valid debt was shown to exist, the court held that in order to bring the case within the reach of the principles as to the appropriation of payments, the *onus probandi* is on the creditor to establish a subsisting debt, due *in presenti* and not *in futuro*, and much more, one not contingent.

Where the Creditor Seeks to Establish Application to a debt whereon the debtor disputes his liability, the burden is on the creditor to prove the existence and validity of such demand. *Mann v. Major*, 6 Rob. (La.) 475; *Trundle v. Williams*, 4 Gill (Md.) 313.

3. Parol Evidence.—*Ilseley v. Jewett*, 2 Met. (Mass.) 168; *Wittkowsky v. Reid*, 82 N. Car. 116; *Bray v. Crain*, 59 Tex. 649.

4. Application by Court in Exercise of Sound Discretion—*England*.—*Perris v. Roberts*, 1 Vern. 34.

United States.—*Cremer v. Higginson*, 1 Mason (U. S.) 323; *Postmaster-Gen. v. Norvell*, Gilp. (U. S.) 106; *Gordon v. Hobart*, 2 Story (U. S.) 243; *Gass v. Stinson*, 3 Sumn. (U. S.) 98; *Field v. Holland*, 6 Cranch (U. S.) 8; *U. S. v. Kirkpatrick*, 9 Wheat. (U. S.) 737.

Alabama.—*Bobe v. Stickney*, 36 Ala. 482; *Robinson v. Allison*, 36 Ala. 525.

Connecticut.—*Chester v. Wheelwright*, 15 Conn. 562.

This Rule Is Necessarily a Universal One, and while all of the courts profess to recognize it to some extent, yet the question of what rules, if any, should be generally followed in order to arrive at an equitable application is attended with much contrariety of judicial opinion.¹

b. QUESTION OF LAW.—How the application shall be made when no intention of the parties appears, is a question of law which should not be left to the determination of the jury.²

c. PRESUMED INTENTION.—(1) *In General.*—A large number of the authorities hold that the court should direct application, where no intention appears, according to the presumed intention of the parties.³

Georgia.—*Green v. Ford*, 79 Ga. 130.

Illinois.—*Dehner v. Helmbacher Forge*, etc., Mills, 7 Ill. App. 47.

Iowa.—*Stewart First Nat. Bank v. Hollinsworth*, 78 Iowa 575.

Kentucky.—*Hammer v. Rochester*, 2 J. J. Marsh. (Ky.) 144.

Maryland.—*Gwinn v. Whitaker*, 1 Har. & J. (Md.) 754; *Calvert v. Carter*, 18 Md. 73.

Michigan.—*Youmans v. Heartt*, 34 Mich. 397.

Minnesota.—*Solomon v. Dreschler*, 4 Minn. 278.

Mississippi.—*Baine v. Williams*, 10 Smed. & M. (Miss.) 113.

New Hampshire.—*Caldwell v. Wentworth*, 14 N. H. 431; *Young v. Woodward*, 44 N. H. 250.

New York.—*Campbell v. Vedder*, 1 Abb. App. Dec. (N. Y.) 295; *Allen v. Culver*, 3 Den. (N. Y.) 284; *Stone v. Seymour*, 15 Wend. (N. Y.) 19.

Pennsylvania.—*Harker v. Conrad*, 12 S. & R. (Pa.) 301, 14 Am. Dec. 691; *Johnson's Appeal*, 37 Pa. St. 268.

Texas.—*Matossy v. Frosh*, 9 Tex. 610.

Vermont.—*Robinson v. Doolittle*, 12 Vt. 246; *Pierce v. Knight*, 31 Vt. 701.

Virginia.—*Magarity v. Shipman*, 82 Va. 784; *Pope v. Transparent Ice Co.* (Va. 1895), 20 S. E. Rep. 940; *Smith v. Loyd*, 11 Leigh (Va.) 535, 37 Am. Dec. 621.

West Virginia.—*Norris v. Beaty*, 6 W. Va. 477; *Buster v. Holland*, 27 W. Va. 510; *Hempfield R. Co. v. Thornburg*, 1 W. Va. 261.

1. The conclusion is irresistible that those judges who hold the extreme view of either side of the controversy are farthest from the principle of the general rule, although they generally profess to have hit upon the simplest method of effectuating it. See *Field v. Holland*, 6 Cranch (U. S.) 27, where the court, by Marshall, C. J., in answer to the contention that payments ought to be applied in a manner most advantageous to the debtor because it must be presumed that such was his intention, said: "The correctness of this conclusion cannot be conceded. When a debtor fails to avail himself of the power which he possesses, in consequence of which that power devolves on the creditor, it does not appear unreasonable to suppose that he is content with the manner in which the creditor will exercise it. If neither party avails himself of his power, in consequence of which it devolves on the court, it would seem

reasonable that an equitable application should be made."

And in *Smith v. Loyd*, 11 Leigh (Va.) 535, 37 Am. Dec. 621, the court of appeals, by Allen, J., states what must necessarily be the true position. Referring to *Field v. Holland*, 6 Cranch (U. S.) 27, he said: "The point has not been decided, so far as I can discover, in Virginia. In the absence of any express authority, I incline to the opinion that the position taken by the Supreme Court is, upon the whole, the best. No general rule applicable to every case could be adopted and adhered to without producing great hardship. Men keep their accounts loosely. Scarcely any case occurs which does not vary in some material circumstances from every other case. Justice to creditor or debtor would frequently require exceptions to any specific rule that might be adopted, and these exceptions would multiply with the ever-varying dealings and transactions of individuals, until at length the rule itself, and the particular cases in which it could apply, would become exceptions. If the parties, having the power, fail to use it, they cannot complain that the law, not conforming itself to the presumed intentions of either, makes the application according to the justice of the particular case in view of all the circumstances attending it."

2. *Nuttall v. Brannin*, 5 Bush (Ky.) 19. Here the court, by Peters, J., said: "If he [the appellant] had not placed the credit on either debt, and there was no evidence that he had exercised that right, and there was none in this case, it was erroneous to tell the jury they had a right, in the absence of any evidence of the fact, to apply it as they pleased; that was making them judges of the law."

3. *Presumed Intention of the Parties.*—1 Story's Equity Jurisprudence (12th ed.), § 459c.

"As the principle now stands, the courts in the absence of a distinct appropriation of either party will impute the payment with a regard to the probable disposition that would have been made by the parties at the time." Senator Tracy in *Stone v. Seymour*, 15 Wend. (N. Y.) 41.

Where One Held a Note and Mortgage against another, and also an outstanding note of the latter procured without the debtor's knowledge, and cotton was sent by the debtor without direction as to the proceeds, it was presumed that he intended it to apply on the mortgage, and the court made application

(2) *Presumed Intention of the Debtor*—(a) **In General—Civil-law Rule.**—Those authorities that follow the rules of the civil law on this subject hold that, in directing the application of payments, the court is bound to carry out the presumed intention of the debtor.¹

(b) **Most Burdensome Debt.**—Looking to the presumed intention of the debtor, it is held that the court will direct payments to be applied in such manner as to afford the debtor the greatest relief from the pressure of his obligations.²

accordingly. *Holley v. Hardeman*, 76 Ga. 328, citing *Phillips v. McGuire*, 73 Ga. 517.

Balance after Payment of all Legal Demands—Illegal Demands.—Where the debtor makes a general payment sufficient to discharge all legal claims, and a balance remains, it will be presumed that such balance was intended to be applied to illegal demands where such exist, and not to future legal advances, in the absence of explanatory circumstances. *Hall v. Clement*, 41 N. H. 166.

So, where Only One Demand is Proved to Exist, it is presumed that payment was intended to be applied to that demand. *McDonnell v. Montgomery Branch Bank*, 20 Ala. 313.

Payments of Revenue made by an officer during a specified year are presumed, in the absence of all proof to the contrary, to have been intended to extinguish the liabilities of that year, where he is charged with the revenues of such year. *Draffen v. Boonville*, 8 Mo. 395.

Personal and Fiduciary Debts.—A payment will be presumed to have been intended to apply to a personal debt rather than to another in the capacity of an executor or a surety. *Goddard v. Cox*, 2 Stra. 1194; *Sawyer v. Tappan*, 14 N. H. 352; *Newman v. Meek*, 1 Smed. & M. Ch. (Miss.) 331.

Payment Precisely the Amount of a Certain Debt.—A payment may be presumed to have been intended for the discharge of one of several debts where it is exactly equal in amount to that debt. 3 Am. Law Reg. 707; *Marryatts v. White*, 2 Stark. 101, 3 E. C. L. 334; *Adams Express Co. v. Black*, 62 Ind. 128; *Robert v. Garnie*, 3 Cai. (N. Y.) 14; *Seymour v. Van Slyck*, 8 Wend. (N. Y.) 403; *Stone v. Seymour*, 15 Wend. (N. Y.) 19.

1. Civil-law Rule—Presumed Intention of Debtor.—Munger on the Application of Payments, 81. The intent of the debtor prevails and may appear by implication. *Roakes v. Bailey*, 55 Vt. 542. See also *Brett v. Marsh*, 1 Vern. 468; *Shaw v. Picton*, 7 D. & R. 201; *Taylor v. Kymer*, 3 B. & Ad. 320, 23 E. C. L. 81; *Marryatts v. White*, 2 Stark. 101, 3 E. C. L. 334; *Scott v. Fisher*, 4 T. B. Mon. (Ky.) 387; *Calvert v. Carter*, 18 Md. 84; *Robert v. Garnie*, 3 Cai. (N. Y.) 14; *Harker v. Conrad*, 12 S. & R. (Pa.) 305, 14 Am. Dec. 691; *Robinson v. Doolittle*, 12 Vt. 246. See *supra*, this title, *Civil-law Rule*.

Mortgage.—Where a mortgagor, at the request of the mortgagee, paid to the assignee of the mortgage a sum nearly equal to the amount secured, it was held that this payment should be applied towards canceling the mortgage debt, according to the presumed intention of the parties, unless some other indebtedness towards which it might have

been applied could be shown. *Miller v. Bingham*, 29 Vt. 83.

Debt Bearing Highest Interest.—In *Magarity v. Shipman*, 82 Va. 784, the court, by Lacy, J., said: "As the direction of the debtor would have controlled the application in the first place, the court did not err, in the absence of any application by the creditor, in applying them [the payments] in the manner most beneficial to the debtor, to the debt bearing the highest rate of interest."

Debts Due at Time of Payment.—In *Gass v. Stinson*, 3 Sumn. (U. S.) 98, where it was held that of debts that are due, preference would be given in applying an undirected payment to that which was due at the time of payment, the court, by Story, J., said: "Now, the whole of this doctrine of the Roman law turns upon the intention of the debtor, either express, implied, or presumed; express, when he has directed the application of the payment, as in all cases he had a right to do; implied, when he knowingly has allowed the creditor to make a particular application at the time of payment without objection; presumed, when, in the absence of any such special appropriation, it is most for his benefit to apply it to a particular debt. And notwithstanding there are contradictory and conflicting authorities on this subject in the English and American courts, I cannot but think that the doctrine of the Roman law is, or at least ought to be, held, and may well be held, to be the true doctrine to govern our courts. There is a great weight of common-law authority in its favor, and, in the conflict of judicial opinion, that rule may fairly be adopted which is most rational, convenient, and consonant to the presumed intention of the parties."

Debt Longest Due.—The above case was quoted with approval, and the principle applied, in *Milliken v. Tufts*, 31 Me. 500, where it was presumed to be the intention of the debtor to apply to the debt longest due when such an application was most for his benefit.

2. Mortgage Debt.—An undirected payment will be applied to a mortgage debt rather than to one not so secured. *Heyward v. Lomax*, 1 Vern. 24; *Gwinn v. Whitaker*, 1 Har. & J. (Md.) 754; *Dorsey v. Gassaway*, 2 Har. & J. (Md.) 412, 3 Am. Dec. 557; *Frazier v. Lanahan*, 71 Md. 131, 17 Am. St. Rep. 516; *McTavish v. Carroll*, 1 Md. Ch. 164; *Slaughter v. Milling*, 15 La. Ann. 526; *Spiller v. Creditors*, 16 La. Ann. 292; *Johnson v. Robbins*, 20 La. Ann. 569; *New Orleans Ins. Co. v. Tio*, 15 La. Ann. 174; *Hamer v. Kirkwood*, 25 Miss. 95; *Neal v. Allison*, 50 Miss. 175; *Windsor v. Kennedy*, 52 Miss. 164.

(c) **Injury to Debtor to be Avoided.**—Similarly it is held that the court will not direct an application so as to result injuriously to the debtor; as, for instance, where a particular application would have the effect of making the debtor a bankrupt,¹ or would deprive him of his homestead.²

(3) **Presumed Intention of the Creditor**—(a) **In General.**—A great number of the authorities, following a strict construction of the common-law rule in favor of the creditor, hold that undirected payments should be applied by the court in a manner best calculated to preserve the interests of the creditor.³

In *Prowse v. Worthing*, 2 Brownl. & G. 107, which is the earliest English case reported on this point (1611), it was decided that if a debt is due by obligation, and another debt is due by the same debtor to the same creditor, of equal sum, and the debtor pays one sum generally, this shall be intended payment upon the obligation.

To the Extinguishment of a Debt Secured by Lien in preference to one not so secured. The *Ship Antarctic*, Sprague (U. S.) 206.

Senior Mortgage.—In *Sanford v. Van Arsdall*, 53 Hun (N. Y.) 70, where there were two mortgages between the same parties on the same property, undirected payments were applied to the first mortgage because under that one the property would be soon liable to foreclosure.

To Obviate Forfeiture of Payments Already Made.—Where a debtor, in an agreement for extension of time upon certain contracts, assumed liability on other contracts, and agreed that upon default of payment amounts already paid should be forfeited, and it appeared that by applying payments which were undirected to the original contracts forfeiture would be prevented as to them, and if applied *pro rata* on all an entire forfeiture would result, the court, consulting the interest of the debtor, directed the former application. *Blair Town Lot, etc., Co. v. Hillis*, 76 Iowa 246.

Interest-bearing Debt.—To an interest-bearing debt, rather than to one not bearing interest. *Gass v. Stinson*, 3 Sumn. (U. S.) 98; *Scott v. Fisher*, 4 T. B. Mon. (Ky.) 387; *Blanton v. Rice*, 5 T. B. Mon. (Ky.) 253; *Bussey v. Gant*, 10 Humph. (Tenn.) 238; *Magarity v. Shipman*, 82 Va. 784.

In *Heyward v. Lomax*, 1 Vern. 24, it was held that "it is natural to suppose that a man would rather elect to pay off the money for which interest is to be paid than the money due on account for which no interest is payable." Cited with approval in *Bussey v. Gant*, 10 Humph. (Tenn.) 242, where the court, by McKinney, J., said: "Upon this principle we hold that the funds in the hands of Gant [the creditor] should have been and must be applied to the discharge, in the first place, of the purchase money of the tract of land in question, as that debt was bearing interest, and as its discharge in every view of the case was most beneficial for the debtor."

Where some of the items of an account bear interest, and others do not, payments will be appropriated to the former in the order in which they fall due. *Scott v. Cleveland*, 33 Miss. 447.

As between a judgment that bore interest,

and one that did not, to the former. *Hamer v. Kirkwood*, 25 Miss. 95.

In *Bacon v. Brown*, 1 Bibb (Ky.) 334, 4 Am. Dec. 640, it is held that this rule in equity differs in no wise from the rule at law.

Compound Interest.—To an obligation which is most onerous by reason of a liability to the computation of compound interest. *Murdock v. Clarke*, 88 Cal. 384.

Or a Higher Rate of Interest.—*Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40.

Principal before Interest.—Where payments are made upon a debt before either principal or interest becomes due, the presumption is that it was paid upon the principal, as that was bearing interest. *Starr v. Richmond*, 30 Ill. 276, 83 Am. Dec. 189; *McElrath v. Dupuy*, 2 La. Ann. 520.

Where there were three notes, and a payment made to be applied on the first had not been so applied, by reason whereof the addition of interest created a greater burden on the debtor, and it appeared that subsequently undirected payments had been made sufficient in amount, had the first payment been applied to the first note, to extinguish the entire indebtedness, in an action to recover a balance the court directed application so as to relieve the debtor from all liability. *Lyon v. Witters*, 65 Vt. 396. See also *infra*, this title, *Legal Interest*.

Most Stringent and Onerous Debt.—In *Wright v. Wright*, 7 Daly (N. Y.) 55, it was held that, in the absence of election by either party, application ought to be made in discharge of the defendant as trustee, rather than to a mere simple debt created by operation of law, the former being the more stringent and onerous.

1. Application Which would Cause Bankruptcy Avoided.—*Meggott v. Mills*, 1 Ld. Raym. 287; *Dawe v. Holdsworth*, Peake 64; *Peters v. Anderson*, 5 Taunt. 596.

2. Application Which would Destroy Homestead Avoided.—*Stewart First Nat. Bank v. Hollinsworth*, 78 Iowa 575.

3. Interests of the Creditor.—"It is presumed that the debtor, by neglecting to give any direction, consented to such an application as would be most beneficial to the creditor." *Strong, J.*, in *Johnson's Appeal*, 37 Pa. St. 268. See also *infra*, this title, *Most Precarious Security and Least Valuable Debts*.

It will be seen that those courts that profess to direct application according to the presumed intention of the creditor, and consequently for his best interests, belong to the same class that allow to the creditor the right to apply payments at any time before application is made under direction of the court.

(b) **Most Precarious Security.**—Some authorities, looking to the presumed intention of the creditor, hold that the court will direct payments to be applied in such manner as to give the creditor the best security for those obligations remaining unpaid; hence, where the degree of security upon different debts is unequal, that debt is discharged for which the security is most precarious;¹ and for a similar reason it is held that where some debts are secured and others are not, that which is unsecured will be extinguished in preference to a secured debt.²

(See *supra*, this title, *Time of Application*.) If both doctrines are conceded, the cases, it is obvious, would really be very few in number in which it could be said that the creditor had made no application, and it therefore had become the duty of the court to direct one.

1. To Hold a Surety.—Where a debtor is liable, individually and as surety for another, to the same creditor, a general payment is applied to discharge the individual liability, in order that the creditor may have a double source of collection for the unpaid debt.

United States.—Sanborn *v.* Stark, 31 Fed. Rep. 18.

Illinois.—Scheik *v.* School Trustees, 24 Ill. App. 369.

Indiana.—White *v.* Beem, 80 Ind. 239.

Kentucky.—Burks *v.* Albert, 4 J. J. Marsh. (Ky.) 97, 20 Am. Dec. 209; Blanton *v.* Rice, 5 T. B. Mon. (Ky.) 253.

Maine.—Livermore *v.* Claridge, 33 Me. 428; Hunt *v.* Brewer, 68 Me. 262.

Missouri.—Poulson *v.* Collier, 18 Mo. App. 583.

North Carolina.—Ramsour *v.* Thomas, 10 Ired. (N. Car.) 165; Moss *v.* Adams, 4 Ired. Eq. (N. Car.) 42; Sprinkle *v.* Martin, 72 N. Car. 92.

Rhode Island.—Burt *v.* Butterworth (R. I. 1895), 32 Atl. Rep. 167.

South Carolina.—Jones *v.* Kilgore, 2 Rich. Eq. (S. Car.) 63.

Judgment and Simple Contract.—In Field *v.* Holland, 6 Cranch (U. S.) 28, where there were debts evidenced by judgments, and others by instruments on which there were no judgments, application was directed to the latter; the court, by Marshall, C. J., saying: "It being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious."

Decree and Mortgage Security.—Where a decree was a safe and ample security for one debt, and there existed another with a mortgage security, application was directed to the latter, where it appeared that the mortgage security was so precarious that the creditor would be the loser even with such application. Terhune *v.* Colton, 12 N. J. Eq. 232.

Running Accounts.—This doctrine is not generally followed in cases of running accounts. Conduitt *v.* Ryan, 3 Ind. App. 1. See *infra*, this title, *Earliest Items*.

2. To Preserve a Lien.—Where payment was made generally, and there existed a book account and a debt which constituted a lien upon land, application was made so as to preserve the lien. Price *v.* Merritt, 55 Mo. App. 640; Clark *v.* Clark, 58 Miss. 68.

Vendor's Lien.—Where a debt was contracted by the purchase of both real and personal estate, in an action to enforce a vendor's lien upon the real estate prior payments were so applied as to extinguish the purchase price of the personalty, and a vendor's lien was decreed against the realty for the amount due. McCauley *v.* Holtz, 62 Ind. 205.

Maritime Lien.—Where some of the items of a materialman's account constituted a maritime lien, and others did not, payments received were deemed a discharged *pro tanto* of the latter. The Schooner D. B. Steelman, 5 Hughes (U. S.) 210.

Labor Lien.—Where a statute limited the time to six months within which wages earned should be a lien, payments were applied to wages due before the six months' period, in order that a lien for the full amount due might be enforced. Wagner's Appeal, 103 Pa. St. 185.

So, where one had a lien for labor and a claim upon a book account, payments were applied to the latter claim. Pierce *v.* Sweet, 33 Pa. St. 151; McKelvey *v.* Jarvis, 87 Pa. St. 414; Price *v.* Merritt, 55 Mo. App. 640.

Partially Secured by Mortgage.—Where part of a debt was secured by note and mortgage, and a part was not, application was directed to the unsecured part. The Katie O'Neil, 65 Fed. Rep. 111; Williams *v.* Reed, 3 Mason (U. S.) 405; Coons *v.* Tome, 9 Fed. Rep. 532; Planters' Bank *v.* Stockman, 1 Freem. Ch. (Miss.) 502; Jenkins *v.* Beal, 70 N. Car. 440.

Limitation.—In Griswold *v.* Onondaga County Sav. Bank, 93 N. Y. 301, it was held that, whether or not any rule existed, the court would prefer a mortgage to an open account when there were facts which made such application proper and equitable.

To Otherwise Unsecured Part of Mortgage Debt.—The proceeds of a sale of mortgaged premises were applied to discharge that part of the debt otherwise unsecured, where a portion included personally secured notes. Jackson *v.* May, 28 Ill. App. 305; Stamford Bank *v.* Benedict, 15 Conn. 437.

So, where the prompt payment of the interest on a note secured by mortgage was guaranteed, the judgment in foreclosure applied the proceeds to the principal of the note before payment of interest. Smythe *v.* New England Loan, etc., Co. (Wash. 1895), 41 Pac. Rep. 184.

To Charge an Indorser.—Where an indorser became liable as such on one of two notes, a fund applicable to both, but insufficient to pay either, was applied to extinguish the one on which the indorser was not liable. Pope *v.* Transparent Ice Co. (Va. 1895), 20 S. E. Rep. 940.

(c) **Least Valuable Debts.**—Similarly it is held that the court will apply undirected payments so as to extinguish those obligations which are least valuable to the creditor; as, to the oldest debt,¹ unless such debt be more valuable or more secure than a recent one,² or to a noninterest-bearing debt in preference to one that bears interest.³

4. Limitations of Power—*a. GENERAL RULES.*—As the courts generally hold that justice may most effectually be administered by carrying out the intentions of the parties, it follows that they will not direct an application which the parties could not themselves have elected to make in the first instance.⁴

(1) *Prior Agreement.*—The court will direct application so as to effectuate a prior valid agreement of the parties; such an agreement as would have precluded either of them from making a different application without the other's consent.⁵

Mortgage Interest and Dower.—Where a widow receives some of the produce of mortgaged premises in which she has a dower interest, and is also entitled to interest accruing on the mortgage, such produce, in the absence of application, will be presumed to have been accepted on her dower interest, that being the most precarious. *Ayers v. Staley* (N. J. Eq. 1889), 18 Atl. Rep. 1046.

That an Attachment May Stand.—Where attachment is made upon funds in part protected from attachment, and in part not so protected, payments made are applied to the protected fund, so that the attachment may stand as to the other. *Smith v. Brooke*, 49 Pa. St. 147.

Without Regard to the Order of Time.—Payments were applied by the chancellor to that portion of an account which was unsecured, without regard to the order of time in which the indebtedness for the different items was incurred. *Schuelenburg v. Martin*, 2 Fed. Rep. 747.

Set-Off.—By analogy, it has been held that a set-off will be applied to an unsecured in preference to a secured debt. *Planters' Bank v. Stockman*, 1 Freem. Ch. (Miss.) 502.

1. To Prevent Operation of Statute of Limitations.—Where one of two debts is several years older than the other, application will be made by the court on the older debt, because upon that the statute of limitations will the sooner operate. *Wentworth v. Manning*, 2 Eq. Abr. 261.

So, where a simple contract debt would sooner become barred by statute than a specialty debt, payment was directed to the former. *Hammer v. Rochester*, 2 J. J. Marsh. (Ky.) 144.

2. Junior Mortgage.—Where it was manifestly the intention of a mortgagee that payment be applied to a junior mortgage, because it was the least secure both in point of time and quantity of property, application was directed to the junior mortgage. *Foster v. McGraw*, 64 Pa. St. 464.

Secured and Unsecured Items of Account.—So, where the later items of an account were not secured and the earlier ones were, payments were applied to the later items. *Johnson's Appeal*, 37 Pa. St. 268. But see *infra*, this title, *Earliest Items*.

Oldest Debt.—In *Price v. Cutts*, 29 Ga. 142, 74 Am. Dec. 52, the court applied a payment to discharge a lien first, there existing another debt not secured by lien, and held that in such case the rule that the oldest debt will be extinguished first, applied. To the same effect is *Miller v. Miller*, 23 Me. 24, 39 Am. Dec. 597.

3. Noninterest-bearing Debt.—Where money was due upon a bond carrying interest and a book debt bearing no interest, an undirected payment was applied to discharge the book debt. *Chase v. Box*, 2 Freem. 261.

So an undirected payment was applied to a simple contract without interest, in preference to articles under seal carrying interest. *Manning v. Westerne*, 2 Vern. 606. But see *supra*, this title, *Most Burdensome Debt*.

4. See *infra* the subdivisions immediately following.

5. Court Effectuating Prior Agreement between Parties.—Where application has been made in accordance with a prior agreement of the parties, there is no question of application by the court, or of the propriety of any rule of law governing application of payments. *Mercer v. Tift*, 79 Ga. 174; *Hansen v. Rounsavell*, 74 Ill. 238; *Hughes v. McDougale*, 17 Ind. 399; *Pitzer v. Logan*, 85 Va. 374. See *supra*, this title, *By the Court*.

An agreement of the parties is to be implied that services rendered in payment of the plaintiff's claim should be so applied. *McIntyre v. Corss*, 18 Vt. 451.

Where it was found that an agreement had been made that the proceeds of certain notes should be applied to a particular claim, it was held that there was a settlement *pro tanto* of that claim, unaffected by a subsequent written agreement that the creditor might apply payments generally to any demand he chose to prefer. *McCathern v. Bell*, 93 Ga. 290.

In an action to enjoin judgments at law, where it was shown by the debtor that certain claims held against the judgment creditor should, under agreement of the parties, be set off against the judgments, the court enforced the agreement by decreeing the set-off. *Lansdale v. Mitchell*, 14 B. Mon. (Ky.) 281.

Where the vendor and purchaser of land have agreed that the former shall receive the

(2) *Enforceable Debts*.—So, also, application will be directed only to extinguish those debts or claims that are legally enforceable, and upon which judgment might have been recovered.¹ Application will not, therefore, be directed to debts that are not matured,² and, *a fortiori*,

crops raised, the proceeds to be applied on the purchase money, it has been held that when the crops are turned over and converted into money, it is a satisfaction of the purchase price *pro tanto*, and cannot be otherwise applied. *Williams v. Whiting*, 92 N. Car. 683.

Running Account.—Where payments are made and credited on account according to the terms of a contract, there is no question as to application. *Suter v. Ives*, 47 Md. 540, where the court, by Miller, J., said: "They are not payments of money on account, so as to fall within the doctrine requiring them to be applied to the antecedent unsecured indebtedness, or to the first items of debit in the account, but credits growing out of and springing from the contract itself."

Where it was shown to have been understood by the parties that the earlier items of an account, which were secured by a trust deed, were to remain so secured until the balance of the account was paid, payments were accordingly applied to the later items. *Mack v. Adler*, 22 Fed. Rep. 570.

Where it is agreed that debts due to a former partnership shall, upon the formation of a new firm between a partner of the old firm and a third party, be transferred to the new firm as a part of the capital of the new firm as against the debts from the old firm, payments made by customers of the old firm without appropriation must be applied in payment of the debts of the old firm. *Toulmin v. Copland*, 2 Cl. & F. 681, West 164.

So where by assent of both parties such an account continues open and current. *Morgan v. Tarbell*, 28 Vt. 498.

As to Third Parties.—An agreement between a creditor and debtor for the specific application of future payments, cannot be enforced by a general creditor, where the parties have agreed to and made a different application. *Whitney v. Traynor*, 74 Wis. 289.

Where a debtor has agreed that a fixed portion of a specific sum in the hands or to come into the hands of another person be paid to the creditor, the agreement, when assented to by the third party, is binding upon all subsequently claiming an interest in the fund, with notice. *Ketchum v. St. Louis*, 101 U. S. 306.

Where, under an agreement, one indebted for the purchase price of personal property was to perform services in payment of notes and mortgage given therefor, application must be made accordingly as against an assignee of the mortgagee. *Ross v. Crane*, 74 Iowa 375.

Statute of Frauds.—But a parol agreement between parties, on the settlement of a partnership loss, that one should extinguish a personal liability of the other, was held not enforceable because within the statute of frauds. *Brand v. Brand*, 49 Barb. (N. Y.) 346.

Mortgage Debt.—In a writ of entry to fore-

close a mortgage, a note and account held by the mortgagor against the mortgagee, which the parties have agreed shall be applied towards payment of the mortgage debt, are to be so applied. *Davis v. Thompson*, 118 Mass. 497.

Invalid Agreement Disregarded.—In a suit to foreclose a mortgage, which the defendant alleged had been paid, the plaintiff proved an agreement to change the appropriation of the payments, previously agreed to be applied on the mortgage debt, to another debt. The defendant was then allowed to prove that the agreement to change the appropriation was made after he had applied for the benefit of the insolvent laws, and was therefore invalid. *Richmond Iron Works v. Woodruff*, 8 Gray (Mass.) 447.

1. Debts Legally Enforceable.—Where the plaintiff held an account against the defendant, and also a claim upon drafts drawn by the defendant and accepted by himself which, though charged, were unpaid at the time of suit, application of a fund in the plaintiff's hands was made to discharge the book account, the other claim not being recoverable. *Parks v. Ingram*, 22 N. H. 283, 55 Am. Dec. 153.

So, where one of several claims was for labor done under a contract in writing, with no time fixed for its completion, and the contract was not completed until after suit brought, inasmuch as an action for labor could not be sustained until after the contract was completed, application of payment was directed to the other claim first. *Thompson v. Phelan*, 22 N. H. 339.

Claims Barred by Statute.—Application will not be directed to a claim barred by the statute of limitations when there exists another debt legally due. *Livermore v. Rand*, 26 N. H. 85.

2. Debts Not Matured.—*McGillivray v. Bennett*, 132 U. S. 445; *Bobe v. Stickney*, 36 Ala. 482; *McCurdy v. Middleton*, 82 Ala. 131; *Stamford Bank v. Benedict*, 15 Conn. 437; *Cloney v. Richardson*, 34 Mo. 370. See *supra*, this title, *Common-law Rule*.

The rule has been applied where it appeared that the debts were all of a like nature. *Bacon v. Brown*, 1 Bibb (Ky.) 334, 4 Am. Dec. 640; *Hunter v. Osterhoudt*, 11 Barb. (N. Y.) 33; *Seymour v. Sexton*, 10 Watts (Pa.) 255.

Note Held as Collateral.—The application will ordinarily be made to a note due absolutely to the creditor, rather than to one held by him as collateral security only. *Portland Bank v. Brown*, 22 Me. 295.

Moneys Paid upon an Outstanding Account cannot be applied to debts subsequently contracted. *Hill v. Morrison*, 46 N. J. L. 488.

So a General Payment to a Commission Merchant on account will be applied to an existing indebtedness rather than to future advances. *Harrison v. Johnston*, 27 Ala. 445.

Payments upon Rent will be applied to rent

it will not be directed to illegal debts.¹

(3) *Involuntary Payments*.—(a) *In General*.—In the case of payments which have been coerced by process of law and not made by the voluntary act of the debtor, there is generally no question of application by the parties, and their intention, in consequence, cannot be considered; but it will be the duty of the court which compelled the payment to direct the application,² and this will generally be effected by applying payments so made to extinguish the claim which was the basis of such action.³

due at the time; not to rent then accruing. *Hunter v. Osterhoudt*, 11 Barb. (N. Y.) 33.

In *Louisiana*, where the rule is followed that a payment must be imputed to the debt which, of those equally due, is most onerous or burdensome to the debtor, yet if only one has fallen due, though less burdensome than those which are not yet payable, application will be directed to that debt. *Spiller v. Creditors*, 16 La. Ann. 292; *Miller v. Steamer S. F. J. Trabue*, 16 La. Ann. 375.

1. *Illegal Demands*.—As where part of the items of a running account arose out of illegal transactions. *Ex p. Randleson*, 2 Dea. & C. 534; *Humphrey v. McCauley*, 55 Ark. 143; *Phillips v. Moses*, 65 Me. 70; *Hilton v. Burley*, 2 N. H. 193; *Dunbar v. Garrity*, 58 N. H. 575; *Adams v. Mahnken*, 41 N. J. Eq. 332, *reversing* 40 N. J. Eq. 373.

The Rule Is Otherwise, however, when payment is specifically made on the illegal items. On this point the rule is stated in *Treadwell v. Moore*, 34 Me. 112, where the court, by Appleton, J., said: "No case can be found where the law, by its own vigor, has withdrawn a payment deliberately applied to the discharge of a claim, however illegal, and appropriated it in payment of some legal claim existing against the individual making the payment. No such principle, as applicable to the appropriation of payments, is recognized." See also *supra*, this title, *Time of Application—When Made by Debtor*.

Usurious Contracts.—So application will not be made to satisfy a usurious contract, when there exists another claim not usurious. *Wright v. Laing*, 4 D. & R. 783, 3 B. & C. 165, 10 E. C. L. 44; *Rohan v. Hanson*, 11 Cush. (Mass.) 44; *Keane v. Branden*, 12 La. Ann. 20; *Storer v. Haskell*, 50 Vt. 341. See also *supra*, this title, *Least Valuable Debts*.

2. *Payments Coerced by Process of Law*.—2 Greenleaf on Evidence (15th ed.), § 529; *Munger on the Application of Payments* 60; *Forelander v. Hicks*, 6 Ind. 448.

In *Backhouse v. Patton*, 5 Pet. (U. S.) 160, the question of the application of funds which have come under the control of the court is extensively discussed. In that case one had given a bond as administrator, and acted also as commissioner for the sale of certain real estate without giving bond, and in each capacity held a large sum of money. Payment was made by him under decree of the court to certain creditors, sufficient to extinguish either of the sums, but not both. The question arose, upon his insolvency, whether the sureties could be discharged by showing that he had made the payment in the capacity of administrator, and it was held that he had no discretion in the matter, and it was clearly

not a case in which the creditor might apply. The court, by M'Lean, J., said: "The entire fund in the hands of Patton was subject to the distribution of the court. That part of the fund which, in the hands of the administrator, constituted legal assets, and under the law was directed to be applied in a special manner to the extinguishment of debts, was taken from his control by the court of chancery. The fund was applied by the court, and not by the administrator. His official capacity was only noticed to ascertain the extent of his responsibility, and the payment was directed accordingly. He had no discretion to exercise, no rule to observe, but that which the decree laid down. * * * The payment was made in pursuance of the decree. * * * The court think that the payment * * * should be deducted ratably from each of the funds in the hands of Patton at the time it was made."

Right of Creditor Recognized in Some Cases.—It has been held in some cases that the creditor has a right to make application although the debtor has not.

Thus in *Nichols v. Knowles*, 17 Fed. Rep. 494, 3 McCrary (U. S.) 477, by the terms of a mortgage all the notes became due and payable upon default as to those first falling due (which were indorsed), and upon such default the mortgage was foreclosed. It was held that the debtor could not insist that the notes first maturing should be paid from the proceeds, but that the creditor had the right to make the application.

In *Portland Bank v. Brown*, 22 Me. 295, an execution had issued upon a judgment obtained against one as maker of one note and as surety on another, and, the amount realized being insufficient to discharge both notes, it was held that the creditors might have applied to the former note; and inasmuch as that note was due absolutely, whereas the other was held merely as collateral, the court directed application to the former, according to the creditors' presumed intention, "other considerations being equal," and allowed them to maintain an action against another surety on the latter note for the balance; the court, by Whitman, C. J., saying: "The case here is of an involuntary payment, obtained by a levy of an execution upon the property of another. The debtor here, therefore, could have had no right to direct as to how the payment should be applied. It was exclusively with the creditors to make the application."

To practically the same effect is *Northern Nat. Bank v. Lewis*, 78 Wis. 475. But see *infra*, this title, *Particular Fund*.

3. *Mortgage*.—In the case of two or more

(b) **Different Claims.**—In case there are two or more such claims, and the fund realized is insufficient to satisfy all in full, application thereof will generally be directed to all ratably.¹

mortgages given upon separate pieces of property to secure distinct debts, the proceeds derived from each mortgage must be applied to extinguish the debt for which that mortgage was security, and the surplus cannot be applied to another mortgage debt. *Mahone v. Williams*, 39 Ala. 202; *Greer v. Turner*, 47 Ark. 17.

So the proceeds of a sale of mortgaged property, in the absence of provisions for the application in the instrument itself, must be directed to the mortgage debt. *Young v. English*, 7 Beav. 10; *Johnson v. Thomas*, 77 Ala. 367; *Taylor v. Cockrell*, 80 Ala. 237; *Orleans County Nat. Bank v. Moore*, 112 N. Y. 543, 8 Am. St. Rep. 775; *Ellis v. Mason*, 32 S. Car. 277.

Where a mortgagee assigned a mortgage debt guaranteeing its payment, and received a note for a part of the amount, payable when the debt should be collected, and the property was afterwards sold under foreclosure, the court applied the proceeds first to all expenses of the assignee, secondly to the mortgage debt, and finally to the note. *Fithian v. Corwin*, 17 Ohio St. 118.

Chattel Mortgage.—The proceeds of a sale of goods mortgaged or pledged for a debt can only be applied to the discharge of that particular debt. *Stoveld v. Eade*, 4 Bing. 154, 13 E. C. L. 385; *Marziou v. Pioche*, 8 Cal. 522; *Pattison v. Hull*, 9 Cow. (N. Y.) 747; *Hicks v. Bingham*, 11 Mass. 300; *Avera v. McNeill*, 77 N. Car. 50.

Execution.—Where money is realized on one of three distinct judgments, it should be applied to such judgment debt, if insufficient to satisfy all, and not to the interest upon all three. *Standifer v. Covington*, 35 La. Ann. 896.

Where execution is taken out and levied on the debtor's land by virtue of a judgment obtained in suit upon a note given for part only of an indebtedness, the amount realized cannot be applied to discharge the indebtedness not covered by the note nor included in the judgment. *Keyser v. Burd*, 43 N. J. Eq. 697.

Sale under Lien.—The proceeds of property sold under lien cannot be applied to satisfy any other debt than that lien, unless by mutual consent. *Strickland v. Hardie*, 82 Ala. 412; *Powell v. State*, 84 Ala. 444; *Jenkinson v. Monroe*, 61 Mich. 454; *Avera v. McNeill*, 77 N. Car. 50.

1. Two or More Claims.—Fund Insufficient.—5 American L. Reg. 257; *Bardwell v. Lydall*, 7 Bing. 489, 20 E. C. L. 213; *Backhouse v. Patton*, 5 Pet. (U. S.) 160; *Trimble v. Hurst*, 7 Houst. (Del.) 14; *Browning v. Carson*, 163 Mass. 255; *Cage v. Iler*, 5 Smed. & M. (Miss.) 410, 43 Am. Dec. 521; *Merrimack County Bank v. Brown*, 12 N. H. 320; *Jones v. Benedict*, 83 N. Y. 79; *Metzler v. Kilgore*, 3 P. & W. (Pa.) 245, 23 Am. Dec. 76.

Where several notes are secured by the same mortgage, and all of the notes are due at the time the money is realized under it, the money

will be applied to them all ratably. *Shelden v. Bennett*, 44 Mich. 634; *Parker v. Mercer*, 6 How. (Miss.) 320, 38 Am. Dec. 438.

And this whether a judgment at law had been obtained on one of the notes or not. *Wooten v. Buchanan*, 49 Miss. 386.

Foreclosure.—The proceeds of a foreclosure were so applied, there being no condition in the mortgage, where the mortgage was given as collateral security for two promissory notes and a draft, upon one of which notes and upon the draft the mortgagor was the principal debtor, and on the other note simply an indorser, while the maker was the principal debtor. *Orleans County Nat. Bank v. Moore*, 112 N. Y. 543, 8 Am. St. Rep. 775.

So also Where Several Notes are Given at Different Times, all secured by a deed of trust or mortgage, the money received under the instrument must be applied to all the notes ratably, if all are due. *Parker v. Mercer*, 6 How. (Miss.) 320, 38 Am. Dec. 438.

In *Iowa*, under section 3325 of the code, where several notes are secured by one chattel mortgage, the proceeds of a sale of the chattels are applied to the payment of the notes in the order of their maturity. *Battle Creek Nat. Bank v. Dean*, 86 Iowa 656.

The Avails of an Execution under a Judgment obtained upon several notes, some of which were made by the judgment debtor alone, and others were also signed by a surety, must be applied ratably. *Blackstone Bank v. Hill*, 10 Pick. (Mass.) 129. To the same effect are *Simmons v. Cates*, 56 Ga. 609; *Merrimack County Bank v. Brown*, 12 N. H. 320.

Where a Creditor Received Money from the Assignee of an insolvent debtor to apply on different debts, some of which were secured and others unsecured, it was held that the creditor could not make the application, but that the money would be applied to all the debts ratably. *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; *Scott v. Ray*, 18 Pick. (Mass.) 360.

Dividends from Insolvent Estate.—In the case of dividends paid from the estate of an insolvent upon debts, on some of which a guarantor is liable, the dividends should be applied ratably, so as to relieve the surety from liability. *Bardwell v. Lydall*, 7 Bing. 489, 20 E. C. L. 213; *Raikes v. Todd*, 8 Ad. & El. 846, 35 E. C. L. 546; *Thornton v. M'Kewan*, 1 H. & M. 525; *Midland Banking Co. v. Chambers*, L. R. 4 Ch. 398; *Scott v. Ray*, 18 Pick. (Mass.) 360; *Commercial Bank v. Cunningham*, 24 Pick. (Mass.) 270, 35 Am. Dec. 322; *Richardson v. Kidder*, 3 Dem. (N. Y.) 255.

Contrary View.—The rule of the text is not recognized in the following cases:

In *Wilson v. Allen*, 11 Oregon 154, it was held that the mortgagee might apply the proceeds of a foreclosure sale towards the payment of any one or more of different debts therein secured, in order to hold a surety for

(c) **Different Creditors in One Fund.**—So in case of a general fund, which, being subject to the claims of several creditors with equal rights, is insufficient to satisfy all in full, application will be directed *pro rata*.¹

b. **CERTAIN FIXED RULES.**—(1) *In General.*—There are certain other limitations upon the power of courts to direct application of payments, founded also upon the presumed intention of the parties, which have been followed, because manifestly in accordance with equitable principles, until they have come to be generally recognized as fixed rules.²

(2) *Earliest Matured Obligation.*—Thus it is a universal rule that, when application becomes the duty of the court, it will be directed so as to extinguish that obligation which is earliest in date of maturity, unless equity, considering the circumstances of the case, requires a different course.³

others. Or to hold a joint maker on one note. *Small v. Older*, 57 Iowa 326. To the same effect is *California Nat. Bank v. Ginty*, 108 Cal. 148. See also *supra*, this title, *Common-law Rule*.

In *Mathews v. Switzler*, 46 Mo. 301, it was held that a holder of a deed of trust, given to secure different notes, might apply the entire proceeds of a sale to the payment of those last maturing, and then obtain a judgment against a surety on the note first to mature.

And, again, it has been held that a mortgagee of chattels might apply the proceeds of a sale on any of several claims secured by the mortgage, according to his pleasure. *Northern Nat. Bank v. Lewis*, 78 Wis. 475.

1. **Mingling of Funds.**—Where one who was treasurer of a city and of its board of education, and of the township and its board of education, mingled together the money received from the several corporations, and there was a deficit at the end of his term, it was held that the money so mingled belonged to the corporations *pro rata*, and that the county commissioners, having appropriated the whole to the county deficit, were liable in equity to contribute their proportionate share of the fund to the other corporations. *Clark County v. Springfield*, 36 Ohio St. 643.

Joint Vendors.—Agency.—In the case of notes and a mortgage taken by joint vendors to secure the purchase price, it was held that a payment to one, who was also agent of the other, was a *pro rata* payment to both. *Ely v. Bush*, 89 N. Car. 358.

2. 2 *Greenleaf on Evidence* (15th. ed.), § 533.

Miller v. Miller, 23 Me. 24, 39 Am. Dec. 597, was a suit by a judgment creditor against the grantee of his debtor to recover the property granted before levy of execution. Application of payment was made to the earliest debt upon which the judgment had been rendered, so as to defeat the judgment lien against the grantee; the court, by Whitman, C. J., saying: "In the case at bar there does not appear to have been any appropriation of the payment by either party. In such case the court may make the appropriation; but in doing so we must be governed by general, and, as far as may be practicable, by established principles. In the case cited [*Seymour v. Van Slyck*, 8 Wend. (N. Y.) 403] it is laid down, that, in the absence of appropriation expressly or impliedly made by the parties,

the rule is to apply payments in extinguishment of the oldest debt. And this, as a general rule in such cases, must be deemed to be reasonable and in accordance with the presumed intention of the parties, and should be adhered to. The court cannot be at liberty to adopt its own notion of what may be equitable in each particular case."

3. **Earliest Matured Claim.**—*Lawton v. Blich*, 83 Ga. 663; *Wimberly v. Brown*, 42 Ga. 604; *Parks v. Ingram*, 22 N. H. 283, 55 Am. Dec. 153.

In *Sanford v. Van Arsdall*, 53 Hun (N. Y.) 70, it was held that the rule should be applied with no difference in principle in the case of secured debts and those which are unsecured.

In *Louisiana*, where the interests of the debtor are always preferred in directing application, imputation in the case of debts of like nature is made to the one longest due. *Bloom v. Kern*, 30 La. Ann. 1263.

Wages in the Order Earned.—In the case of a seaman who serves under two masters on the same voyage, payments made by the second master will be first applied to wages accruing under the former master. *Smith v. Oakes*, 141 Mass. 451, 55 Am. Rep. 487.

Under *California Civil Code*, § 1479, where one is indebted to his employee for services, and also upon other transactions, payments are applied to the earliest matured obligation. *Coalter v. Hurst*, 97 Cal. 290.

First of Sundry Bonds.—Payments generally upon several bonds to the amount of the first two were applied to discharge those two. *Huger v. Bocquet*, 1 Bay (S. Car.) 497.

Where the propriety of applying payments to a balance under the first of sundry bonds was questioned, it was held that in order to sustain such a position it must be shown that the payment came from receipts accruing under the second bond. *Boody v. U. S.*, 1 Woodb. & M. (U. S.) 150. See *infra*, this title, *Official Bonds*.

First Completed of Several Contracts.—In determining the amount of a lien to which a materialman is entitled for materials furnished for the last completed of three contracts, representing each a different property, payments by the owner to the general contractor upon an aggregate balance due on all three, were applied to the contract first completed. *Reynolds v. Patten*, 5 Misc. Rep. (N. Y. C. Pl.) 215.

(3) *Open Accounts*—(a) *Earliest Items*.—A similar rule obtains in the case of open accounts, where debits and credits are continuously blended. In such cases credits are applied so as to extinguish first those items which are earliest in point of time. This rule has found almost universal application both in *England* and the *United States*, it being held generally that, in the absence of allegation of a particular application by one or both of the parties, no question as to a direction by the court arises, the presumption being that the first item on the debit side is discharged by the first item on the credit side.¹

Drafts in the Order Presented.—The consignees of a cargo which had been lost were authorized by all parties in interest to accept two-thirds of a claim of insurance by way of settlement, that being the amount for which they had agreed to accept bills drawn by the consignors; but the consignors having overdrawn, and the insurance money, in consequence, being insufficient to pay all the drafts, they were ordered to be paid in full, in the order presented, until the fund should be exhausted. *Cabada v. De Jongh*, 10 Phila. (Pa.) 422.

Several Notes for One Debt.—Where several notes secured by one mortgage, payable successively each year, are given for the price of one sale of land, payment will be applied, after discharging the entire interest due, to extinguish the notes in their order. *Genin v. Ingersoll*, 11 W. Va. 549.

Legal and Equitable Demands.—The payment will be applied to a prior legal, in preference to a subsequent equitable, demand. *Goddard v. Hodges*, 1 Crompt. & M. 33, 3 Tyr. 209.

Where Several Notes Payable in Merchandise fall due on the first days of three successive years, merchandise delivered in the course of each year should be applied in satisfaction of the note maturing the first day of the succeeding year. *Anderson v. Mason*, 6 Dana (Ky.) 217.

1. Open Accounts—Application to Earliest Items—*England*.—*Field v. Carr*, 5 Bing. 13, 15 E. C. L. 348; *Brooke v. Enderby*, 2 Brod. & B. 70, 6 E. C. L. 41; *Pemberton v. Oakes*, 4 Russ. 154; *Ex p. Randleston*, 2 Dea. & C. 534; *London, etc., Banking Co. v. Ratcliffe*, 6 App. Cas. 722, 51 L. J. Ch. 28.

United States.—*Jones v. U. S.*, 7 How. (U. S.) 681; *Leef v. Goodwin*, Taney's Dec. (U. S.) 460; *U. S. v. Kirkpatrick*, 9 Wheat. (U. S.) 720; *Mack v. Adler*, 22 Fed. Rep. 570; *Postmaster-Gen. v. Furber*, 4 Mason (U. S.) 333; *The Mary K. Campbell*, 40 Fed. Rep. 906.

Alabama.—*Harrison v. Johnston*, 27 Ala. 445; *Marks v. Robinson*, 82 Ala. 69; *Golden v. Conner*, 89 Ala. 598.

Arkansas.—*Kline v. Ragland*, 47 Ark. 111; *Lazarus v. Freidheim*, 51 Ark. 371.

California.—*Wendt v. Ross*, 33 Cal. 650.

Colorado.—*Mackey v. Fullerton*, 7 Colo. 556.

Connecticut.—*Fairchild v. Holly*, 10 Conn. 175.

Delaware.—*Pickering v. Day*, 2 Del. Ch. 333, 3 Houst. (Del.) 474, 95 Am. Dec. 291.

Georgia.—*Green v. Ford*, 79 Ga. 130.

Illinois.—*Sprague v. Hazenwinkle*, 53 Ill. 419; *Carey-Lombard Lumber Co. v. Hunt*, 54 Ill. App. 314.

Indiana.—*Brigham v. Dewald*, 7 Ind. App. 115.

Iowa.—*Allen v. Brown*, 39 Iowa 330.

Kentucky.—*Helm v. Com.*, 79 Ky. 67.

Maine.—*McKenzie v. Nevius*, 22 Me. 138, 38 Am. Dec. 291; *Miller v. Miller*, 23 Me. 22, 39 Am. Dec. 597; *Thurlow v. Gilmore*, 40 Me. 378.

Maryland.—*Hammett v. Dudley*, 62 Md. 154.

Minnesota.—*Winnebago Paper Mills v. Travis*, 56 Minn. 480; *Hersey v. Bennett*, 28 Minn. 86, 41 Am. Rep. 271.

Missouri.—*McCune v. Belt*, 45 Mo. 174; *Goetz v. Piel*, 26 Mo. App. 634; *Kaufman-Wilkinson Lumber Co. v. Christophel*, 59 Mo. App. 80.

New Hampshire.—*Parks v. Ingram*, 22 N. H. 283, 55 Am. Dec. 153; *Bancroft v. Holton*, 59 N. H. 141.

New York.—*Allen v. Culver*, 3 Den. (N. Y.) 284; *Dows v. Morewood*, 10 Barb. (N. Y.) 183; *Webb v. Dickinson*, 11 Wend. (N. Y.) 62; *Berrian v. New York*, 4 Robt. (N. Y.) 538; *Nöstrand v. Ditmis*, 127 N. Y. 355; *Wheeler v. Cropsey*, 5 How. Pr. (N. Y. Supreme Ct.) 288.

Oregon.—*State v. Chadwick*, 10 Oregon 423.

Pennsylvania.—*McKee v. Com.*, 2 Grant's Cas. (Pa.) 23; *Pierce v. Sweet*, 33 Pa. St. 151; *Souder v. Schechterly*, 91 Pa. St. 83; *Pardee v. Markle*, 111 Pa. St. 548, 56 Am. Rep. 299.

Texas.—*Willis v. McIntyre*, 70 Tex. 34, 8 Am. St. Rep. 574; *Phipps v. Willis* (Tex. Civ. App. 1895), 32 S. W. Rep. 801.

Vermont.—*Shedd v. Wilson*, 27 Vt. 478; *Morgan v. Tarbell*, 28 Vt. 498; *Pierce v. Knight*, 31 Vt. 701; *St. Albans v. Failey*, 46 Vt. 448; *Langdon v. Bowen*, 46 Vt. 512.

Virginia.—*Smith v. Loyd*, 11 Leigh (Va.) 535, 37 Am. Dec. 621.

Wisconsin.—*Hannan v. Engelmann*, 49 Wis. 278.

Clayton's Case, which is often quoted as the leading authority, and relied upon for laying down the rule for the application of payments in cases of accounts current, was a case of a running bank account. Clayton had made deposits with, and drawn checks in the usual way on, Devaynes and others, who were partners in the banking business. Devaynes died when there was a balance due Clayton of one thousand seven hundred and thirteen pounds. Immediately after Devaynes's death, Clayton, without any additional deposit, drew for and received one thousand two hundred and sixty pounds of the survivors, leaving four hundred and fifty-three pounds still due from the old firm. Afterwards considerable sums were

(b) **Instances of Application—Partnership Accounts.**—The rule as to earliest items is applied in cases of partnership accounts to the entire account, where there are dealings with a firm followed by dealings with a surviving member of the firm.

by him paid to and drawn from the surviving partners, who pursued the former business. His drafts on them were much beyond the balance of four hundred and fifty-three pounds. The surviving partners becoming insolvent, a bill was filed to charge Devaynes with the whole one thousand seven hundred and thirteen pounds as still due, though it was much overdrawn if the payment of checks after Devaynes's death was to be applied to his debt. The decision went finally on the whole being a blended bankers' account both before and after Devaynes's death, and upon the course of business and understanding of the parties in respect to such accounts. The master of the rolls (Sir William Grant) said: "In such a case there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place and are carried into the account. Presumably it is the sum first paid in that is first drawn out. It is the first item on the debit side of the account that is discharged or reduced by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other. Upon that principle all accounts current are settled, and particularly cash accounts." The whole debt of Devaynes was therefore holden to be discharged. Devaynes v. Noble (Clayton's Case), 1 Meriv. 571, 3 Eng. Rul. Cas. 336.

This Case is Elaborated and Discussed in Baker v. Stackpoole, 9 Cow. (N. Y.) 420, 18 Am. Dec. 508; Pattison v. Hull, 9 Cow. (N. Y.) 747; Heilbron v. Bissell, Bailey Eq. (S. Car.) 430; Pemberton v. Oakes, 4 Russ. 154; Bodenham v. Purchas, 2 B. & Ald. 39; Stoveld v. Eade, 4 Bing. 154; 13 E. C. L. 385; Field v. Carr, 5 Bing. 13, 15 E. C. L. 348, where it is said that the rule laid down in Clayton's Case has received the sanction of every court in Westminster Hall.

1. Partnership Accounts.—Laing v. Campbell, 36 Beav. 3; Sterndale v. Hankinson, 1 Sim. 393; Simson v. Ingham, 2 B. & C. 65, 9 E. C. L. 25; Williams v. Rawlinson, 3 Bing. 71, 11 E. C. L. 34; Smith v. Wigley, 3 M. & S. 174, 30 E. C. L. 283; Scotland Royal Bank v. Christie, 8 Cl. & F. 227; Fairchild v. Holly, 10 Conn. 175; Sneed v. Wiester, 2 A. K. Marsh. (Ky.) 277; Stanwood v. Owen, 14 Gray (Mass.) 195; Allcott v. Strong, 9 Cush. (Mass.) 323; Skinner v. Hitt, 32 Mo. App. 402; Van Rensselaer v. Roberts, 5 Den. (N. Y.) 470; Jackson v. Johnson, 11 Hun (N. Y.) 509; Schuylkill County v. Com., 36 Pa. St. 524.

The rule also applies in case of a change in the membership of the debtor firm. Copland v. Toulmin, 7 Cl. & F. 349; Allen v. Brown, 39 Iowa 330; Coleman v. Lansing, 65 Barb. (N. Y.) 54; Morgan v. Tarbell, 28 Vt. 498.

Where a Partnership is Dissolved, and one or more of the partners continue the business, and a creditor of the firm continues the credit

and blends together his accounts with the old firm and the new, payments made by the new firm without specific application will be appropriated to the debts of the old firm. Hooper v. Keay, 1 Q. B. Div. 178, 34 L. T. N. S. 574, 24 W. R. 485.

But in Burns v. Pillsbury, 17 N. H. 66, it was held that after dissolution of a debtor firm, a consignor continuing to consign goods to one of the members, remittances from such member could not be carried to the firm debt.

The rule has been applied where the account continues open and current by the assent of both parties. Morgan v. Tarbell, 28 Vt. 498.

The Rule Applies where a Sole Debtor Takes a Partner, and the account continues to run with the firm. Lake v. Gaines, 75 Ala. 143.

The Rule was Applied where One, Being a Member of a Creditor Firm and also financial manager of a debtor corporation, kept the account. Kenton Furnace R., etc., Co. v. McAlpin, 5 Fed. Rep. 737.

Individual and Partnership Indebtedness.—Where one was liable for some of the items, and a partnership of which he was a member for the balance, a sum collected upon a judgment against him, sufficient only to discharge his individual debt, was applied to those items. Lee v. Fontaine, 10 Ala. 755.

Where such a one made a payment out of his individual funds, it was applied to his individual debts, and not so as to take the firm debts out of the operation of the statute of limitations. Camp v. Smith, 136 N. Y. 187.

Had he consented to have it otherwise applied, the rule would have been different. Johnson v. Boone, 2 Harr. (Del.) 172.

Transfer of Bank Account.—Where a firm indebted to its banker in the sum of nine hundred and seventy-nine pounds consented that its account, together with the banker's other business, be transferred to the Midland Bank, where the firm account, having commenced with the debit of nine hundred and seventy-nine pounds, continued open for some time, during which the firm paid in money amounting in the aggregate to more than that amount, the pass book being regularly sent to the firm, who made no objection, it was held that the original debit was extinguished. Beale v. Caddick, 2 H. & N. 326, 26 L. J. Exch. 356; Bodenham v. Purchas, 2 B. & Ald. 39.

Where a Firm Indebted on a Running Account took in a new member, and continued to run up the account, payments made by the new firm could not be applied by the creditor to the indebtedness of the old firm. St. Louis Type Foundry Co. v. Wisdom, 4 Lea (Tenn.) 695.

Resulting Trust in Favor of Creditors.—The operation of the rule is not changed by reason of the intervention of a resulting trust in favor of creditors. Hersey v. Bennett, 28 Minn. 86, 41 Am. Rep. 271.

Items Secured and Unsecured.—According to the great weight of authority, especially of the more recent cases, the rule should be followed without reference to the fact that some of the items are secured while others are unsecured,¹ or that the security for some of the items is more precarious than that for others.²

Nature of the Account—Interest of the Parties.—The nature of the account, or the relations or situation or interest of the parties to the account, will not in general be considered of importance in the application of this rule,³ exception only being made in a few cases where strict application of the rule would be inequitable because of the intervention of some superior right.⁴

1. Some Items Secured and Others Not.—As where the earlier items are secured and the later ones are not. *Dunnington v. Kirk*, 57 Ark. 595; *Conduitt v. Ryan*, 3 Ind. App. 1; *Cushing v. Wyman*, 44 Me. 121; *Worthley v. Emerson*, 116 Mass. 374; *Winnebago Paper Mills v. Travis*, 56 Minn. 480; *Truscott v. King*, 6 N. Y. 147; *Berghaus v. Alter*, 9 Watts (Pa.) 386.

Or there is an indemnity bond as security for the earlier items. *Pardee v. Markle*, 111 Pa. St. 548, 56 Am. Rep. 299.

The Converse Is Equally Applicable, as where the later items are secured and the earlier ones are not. *Moses v. Noble*, 86 Ala. 407.

Bankruptcy.—So where part of the items accrued before and part after the debtor's discharge in bankruptcy, the creditor not having had notice of the proceeding. *Hill v. Robins*, 22 Mich. 475.

Maritime Lien.—Or where the whole part, being evidenced by notes, constituted one maritime lien. *The Barges 2 and 4*, 58 Fed. Rep. 425.

Mortgage — Future Advances.—Where a mortgage was given to secure certain future advances, and other advances were made not secured by the mortgage, payments being made, it was held that the whole should be carried into a general account, according to the rule of the text, the balance to constitute the mortgage debt. *Williams v. Vance*, 9 S. Car. 344, 30 Am. Rep. 26.

Similarly Applied in Case of Successive Sales and general payments under contract that the title to the goods should remain in the seller until payment in full. *Swett v. Boyce*, 134 Mass. 381.

2. As where the Earliest Items Accrued during the Infancy of the Debtor.—*Thurlow v. Gilmore*, 40 Me. 378. Or have become outlawed. *Fletcher v. Gillan*, 62 Miss. 8.

Or that the Wife's Separate Estate Was Liable for Part, although the funds from which payments were made were derived from such estate. *Lee v. Tannenbaum*, 62 Ala. 501; *Lewis v. Dillard*, 66 Ala. 1; *May v. Taylor*, 62 Miss. 500.

Or that a Resulting Trust has Intervened in Favor of Creditors.—*Hersey v. Bennett*, 28 Minn. 86, 41 Am. Rep. 271. But see *supra*, this title, *Most Precarious Security*.

3. Sternberger v. Gowdy, 93 Ky. 146.

Right of Surety.—In *Pardee v. Markle*, 111 Pa. St. 548, 56 Am. Rep. 299, it was held that there might be an exception to the rule in favor of unsecured items, but the rule was

followed because the surety had a right to demand that the exception be not enforced to his detriment.

Single Contract for Several Articles.—The case of a single contract for several articles is governed by the same rule as are open accounts, and payments thereon cannot be applied to the price of any one of such articles as distinguished from the others. *Hill v. McLaughlin*, 158 Mass. 307.

So one cannot in case of an open account, after a number of payments have been made, select a particular item and claim that it has been paid. *Kehl v. Smith*, 87 Wis. 212.

Set-Off.—The intention of the rule is not to set off one independent debt against another, but that payments were presumably made to extinguish items of debit in their order. *Sanford v. Clark*, 29 Conn. 457.

Items of Labor.—Where items of labor claims extended over several years, payments on account having been made each year, they were applied by the court upon those items first accruing, and not upon the claim for the year in which payment was made. *Duncan v. Thomas*, 81 Cal. 56.

Account between Principal and Agent.—Where by an account between an agent and his principal the agent charges himself with a balance, and continues to receive moneys for the principal, subsequent payments are not necessarily to be applied to the extinction of the balance, especially if the subsequent receipts correspond in amount with the subsequent payment payments. *Lysaght v. Walker*, 5 Bligh N. S. 1.

Postmasters' Accounts.—The rule has been followed in case of running accounts between the postmaster-general and deputy postmasters, consisting of items of debit and credit. *Postmaster-Gen. v. Furber*, 4 Mason (U. S.) 333. See also *U. S. v. Wardwell*, 5 Mason (U. S.) 82. But see *infra*, this title, *Official Bonds*.

4. Intention of Parties.—The rule cannot be invoked where there are circumstances showing an intention of either of the parties to make a different application, whether express or implied. See *supra*, this title, *Intention of the Parties*.

Or where, from the dealings of the parties, it may be gathered that they intended the rule should not apply. See *supra*, this title, *From Course of Dealing*. Also *City Discount Co. v. McLean*, L. R. 9 C. P. 692, 43 L. J. C. P. 344, 30 L. T. 883; *Trotter v. Grant*, 2 Wend. (N. Y.) 413.

(c) **Official Bonds—Bonds with Different Sureties Covering Different Periods.**—An exception to the rule last stated is clearly allowed, mainly on the ground of public policy, although its effect is generally to do equal justice, in the case of two or more bonds, with different sureties, covering different periods of time, given by a public officer; in which case payments by such officer upon an account secured by such bonds are applied by the court so that those items that accrued during the period covered by each bond will be discharged by the payments made from funds properly applicable to such period,¹

Exception Made where Rule would Work Injustice.—In *Upham v. Lefavour*, 11 Met. (Mass.) 174, the court, by Hubbard, J., said: "The rule does not apply * * * when the law, looking at the relations of the parties and the nature of the account or transactions between them, finds another application required in order to do justice between them." *Keane v. Branden*, 12 La. Ann. 20. See also the observations in *Pickering v. Day*, 3 Houst. (Del.) 538, 95 Am. Dec. 291; *Berrian v. New York*, 4 Robt. (N.Y.) 538.

The Rule was Not Applied in *Dulles v. DeForest*, 19 Conn. 190, where a claim upon a note was blended with a book account, but there were circumstances which tended to show some application of the proceeds of the sales of goods by the creditors. In an action against the indorser of the note, that being the earliest item, the rule was urged by the defendant, but the trial court charged the jury that if they found the circumstances claimed by the plaintiff, the plaintiff had a right to recover. On appeal, the Supreme Court, by Storrs, J., said (p. 203): "This, we think, was correct. It was certainly so unless the rule relied on by the defendants is invariable. This, however, is not the case. The rule, although general, is by no means universal. It is not an artificial or arbitrary principle, but one founded merely on the presumed intention of the parties, and is applicable only where there is no evidence sufficient to show a different intention. But where there is such evidence, the presumption fails."

The Fact that the Creditor Minuted the Terms of the Delivery, which were that the title should remain in the creditor until payment, against the charges upon his books, when the entries were made, was held not such a circumstance as to show any controlling equity sufficient to require a disposition outside of the rule. *Crompton v. Pratt*, 105 Mass. 255.

The Rule was Applied, reversing the trial court, where an attorney had collected various amounts from different debtors, no specific application being made, and it not appearing upon what claim they were received by the attorney. *Smith v. Loyd*, 11 Leigh (Va.) 535, 37 Am. Dec. 621. The decision in this case upon the principles of application by the court is well considered, and the leading authorities on that point are discussed.

Partnership Transactions.—It has been held that where two successive firms of the same name, but consisting in part of different members, had dealings with one creditor in a continuous account, payments by such firms should be applied to that part of the account constituting the debt of the firm whose funds

were paid. *St. Louis Type Foundry Co. v. Wisdom*, 4 Lea (Tenn.) 695.

The court refused also to apply the rule as between joint creditors of a partnership estate and the separate creditors of the estate of one of the partners who had fraudulently drawn out moneys from the partnership funds and applied them to his own use. *Lacey v. Hill*, 4 Ch. Div. 537.

Items Not Matured.—An exception is made where some of the items are not due at the time of payment, in which case those due will be preferred in their order according to date. *Effinger v. Henderson*, 33 Miss. 449.

Trust Funds.—The rule was held not to apply as between a trustee or other person in a fiduciary capacity and the beneficiary. And so where trust funds had been improperly placed to his own general credit by the trustee with moneys of his own, sums drawn out for his own purposes were treated as drawn out of his own funds. *Hallett's Estate*, 13 Ch. Div. 696, 49 L. J. Ch. 415.

This case is followed in *Hancock v. Smith*, 41 Ch. Div. 461, which held also that the rule does not apply between two beneficiaries under a trust, where the sum which can be got from the trustee is not enough to make good the claims of both.

In *Alabama* the rule is abrogated, by section 2091 of the code of that state, to the extent that interest is first required to be discharged. *Bradley v. Murray*, 66 Ala. 269.

1. Where Payments were Made by a Collector of Tolls, after a new bond with new sureties was given by him, and there were no directions to apply, or circumstances from which could be inferred an intention on the part of the collector to apply such payments to any particular item, and the moneys were placed to his credit on a general account, the sureties in the first bond were not entitled to credit for the payments made subsequently to the execution of the second bond. *Stone v. Seymour*, 15 Wend. (N. Y.) 19.

Where the Receiver Is a Public Officer who is not interested in the event of the suit, and who receives on the account of the United States, and where different sureties, under distinct obligations, are interested, moneys arising and collected subsequently to the execution of the second bond cannot be applied to the discharge of the first bond, and *vice versa*. *U. S. v. January*, 7 Cranch (U. S.) 572. Cited with approval in *U. S. v. Irving*, 1 How. (U. S.) 250; *Myers v. U. S.*, 1 McLean (U. S.) 493; *Jones v. U. S.*, 7 How. (U. S.) 681, where the court, by Daniel, J., said: "In instances of official bonds, executed by the principal at different times with separate

in the absence of application by the parties.¹

Presumption.—But all payments made during any period will not be conclusively presumed, as a matter of law, to be exclusively applicable to that period, but it may be shown to be otherwise.²

(4) *Particular Fund.*—It is a general rule that where the creditor holds two or more claims, for one of which a particular fund is liable, and money is received by him which arose out of that fund, such payment, in the absence of a contrary agreement, will be applied to extinguish that particular claim.³

and distinct sets of sureties, this court has settled the law to be that the responsibility of the separate sets of sureties must have reference to, and be limited by, the periods for which they respectively undertake, by their contract, and that neither the misfeasance nor nonfeasance of the principal, nor any cause of responsibility occurring within the period for which one set of sureties have undertaken, can be transferred to the period for which alone another set have made themselves answerable." To the same effect is *Pickering v. Day*, 2 Del. Ch. 333.

Suitors on Bonds.—One of different creditors who first sues on an official bond, is entitled to have his claim first discharged, although he is prevented from obtaining judgment by a stay of proceedings upon defendant's paying the amount of the bond into court, all subsequent suitors at the same term being entitled *pro rata*. *M'Kean v. Shannon*, 1 Binn. (Pa.) 370; Note of *M'Kean, C. J.*, to *Dallas v. Chaloner*, 3 Dall. (Pa.) 501.

1. **An Application by a Collector of Revenue** of funds collected during a second term to a deficit in the account of his first term will not be disturbed if there is no evidence of bad faith in the party receiving the payments. *State v. Smith*, 26 Mo. 226, 72 Am. Dec. 204.

Where a Toll Collector made a payment in July corresponding precisely in amount with the account returned by him for May, and in August an amount corresponding to the return for June, it was held that the jury were warranted in finding that he intended to apply such payments to such corresponding returns, there being no other charge in the comptroller's office against him. *Seymour v. Van Slyck*, 8 Wend. (N. Y.) 403.

To Charge a County.—Where a county of a state was primarily liable as principal debtor for the quota of state taxes assessed upon its property, and it became charged thereon for a balance which the bond of its treasurer was insufficient to cover, general payments subsequently made by such treasurer were held to be properly applied by the accounting officers to other debts of the treasurer for which the county was not liable. *Schuylkill County v. Com.*, 36 Pa. St. 524.

2. *U. S. v. January*, 7 Cranch (U. S.) 573; *U. S. v. Linn*, 2 McLean (U. S.) 501; *St. Joseph v. Merlatt*, 26 Mo. 233, 72 Am. Dec. 207; *Speck v. Com.*, 3 W. & S. (Pa.) 324.

Tax Collector.—In *Pratt's Appeal*, 41 Conn. 191, where a tax collector held office two years, and, being largely indebted for taxes not turned over the first year, paid such balance out of money collected the second year, which was so credited by the town treas-

urer, it was held that the money so paid must be treated as paid from his own funds, and that the balance on the first year's accounts must be regarded as legally paid.

Oldest Item.—Where a collector has served successive terms, the presumption is that payments made during any one year are designed to extinguish the liabilities of that year; but if the payments are made before the officer is chargeable with the revenue of the year in which they are made, they will, in the absence of all proof of intention, and it not appearing from what source the money so paid was derived, be applied to the oldest item of indebtedness. *Draffen v. Boonville*, 8 Mo. 395.

Payments were applied to the oldest items first, where a sheriff, with different bonds for 1871 and 1872, paid in the latter year an amount sufficient to discharge a balance of the preceding year, it not appearing that any part was from taxes collected in 1872. *Helm v. Com.*, 79 Ky. 67.

So, where a county collector was indebted for two years of office to his successor, a payment less than the entire amount was applied to the older indebtedness. *Frost v. Mixsell*, 38 N. J. Eq. 586.

Different Funds.—Where there was a deficit in the account of a town sergeant for the year 1877, and another for the year 1879, there being no security for the former, and he presented vouchers which entitled him to a credit, it was held that such credit might, in the absence of application by him or his official sureties, be applied by the town to the unsecured account in order to hold the sureties on the bond for 1879, inasmuch as such vouchers may have been procured out of his own private funds; and the court would not interfere, and held that the securities could not object "unless it appears in some way that said vouchers were paid for out of money realized from taxes, etc., in his hands for the year 1879." *Grafton v. Reed*, 34 W. Va. 179.

3. **Proceeds of Mortgage.**—Payments made from the proceeds of mortgaged property must be applied in extinguishment *pro tanto* of the mortgage debt. *Young v. English*, 7 Beav. 10; *Levystein v. Whitman*, 59 Ala. 345; *Askew v. Steiner*, 76 Ala. 218; *Strickland v. Hardie*, 82 Ala. 412; *Taylor v. Cockrell*, 80 Ala. 237; *Marziou v. Pioche*, 8 Cal. 522; *Ellis v. Mason*, 32 S. Car. 277; *Summer v. Kelly*, 38 S. Car. 507.

Payment by a Wife upon a Mortgage covering in part her husband's debt, as to which it was void, was applied to her portion of the debt. *Kuker v. McIntyre*, 43 S. Car. 117.

Where Rents and Future Crops are Mortgaged to secure one indebtedness, payments of rent

(5) *Legal Interest*—Payments Insufficient for Both Principal and Interest.—Payments not sufficient to discharge both principal and interest of a debt, but which equal or exceed the legal interest, will be applied to extinguish the entire legal interest before application will be made to any part of the principal; the interest to be computed up to the time of the first payment, when, if there be a surplus, such surplus will be applied to extinguish or reduce the

must be applied upon that debt. *Darden v. Gerson*, 91 Ala. 323, where the court, by Coleman, J., said: "When money is derived from a particular source or fund, payment must be applied to the relief of such source or fund, unless there is a mutual agreement to apply it otherwise." *Citing* *Levystein v. Whitman*, 59 Ala. 345; *Taylor v. Cockrell*, 80 Ala. 238; *Burns v. Campbell*, 71 Ala. 286.

Where a Mortgagee, Holding a Mortgage upon Two Parcels of Land, released one to the assignee of the mortgagor, the amount received for the release was applied in satisfaction of the mortgage debt. *Hicks v. Bingham*, 11 Mass. 300.

So where an Agricultural Lien is given to secure advances, and the advances exceed the amount of the lien, proceeds of cotton covered by the lien, which are shipped to the creditor, should be first applied to the secured portion of the debt. *Thatcher v. Massey*, 20 S. Car. 542; *Strickland v. Hardie*, 82 Ala. 412.

It has been held, however, that where the advances were made to prevent waste and destruction of the growing crop, the proceeds of the crop might first be applied to such advances. *Caldwell v. Hall*, 49 Ark. 508, 4 Am. St. Rep. 64.

Where a Creditor Held a Claim upon a Bond, and also a judgment against another, the judgment being an incumbrance upon the estate of the debtor, and a purchaser of the estate made a payment without direction, this, being part of the purchase-money, was applied to the judgment. *Brett v. Marsh*, 1 Vern. 468. To the same effect is *Greenwood v. Taylor*, 14 Sim. 505.

Lease.—Money received from a lessee as rents upon a new lease, in the absence of a stipulation, cannot be applied to a balance due on a former lease of the same property. *Hill v. Bourcier*, 29 La. Ann. 841.

Assignment.—In case of payment to creditors by an assignee for the benefit of creditors, application is directed *pro rata* to all the assignor's obligations in the proportion that each bears to the amount of the payment, although a creditor holds other independent collateral security for some parts of his claim. *Cohen v. L'Engle*, 29 Fla. 655.

Partnership Assets.—Where a person has accounts against a firm, and others against its successor, payment from the assets of either firm should be credited to the account of that particular firm. *Warren v. Maloney*, 29 Mo. App. 101; *St. Louis Type Foundry Co. v. Wisdom*, 4 Lea (Tenn.) 695. So also where a surviving partner paid a creditor of himself and also of the firm out of the firm assets. *Wiesenfeld v. Byrd*, 17 S. Car. 106.

Payment made by one member of a firm to a creditor who also has a claim against the firm

will generally be applied to the individual indebtedness. *Johnson v. Boone*, 2 Harr. (Del.) 172; *Tootle v. Jenkins*, 82 Tex. 29; *Miles v. Ogden*, 54 Wis. 573.

But where it is shown that the moneys were the firm's moneys, or derived from the firm's assets, they must be applied to the firm's debt. *Thompson v. Brown*, 1 M. & M. 40, 22 E. C. L. 242; *Campbell v. Mathews*, 6 Wend. (N. Y.) 551; *Wiesenfeld v. Byrd*, 17 S. Car. 106.

And where one-half of the firm debt was secured by mortgage, one-half of such payment was applied to the mortgage. *Moore v. Riddell*, 11 Grant's Ch. (U. C.) 69.

Insurance Money.—Insurance money received by a mortgagee upon a loss of property mortgaged by a wife to secure her husband's debt, must be applied upon that debt, and not upon further advances. *Brighton v. Doyle*, 64 Vt. 616.

Joint Funds.—One who receives joint funds without directions, with knowledge that they are such, must apply them to a joint debt, in case such a debt exists. *Vanderwick v. Sumner*, 2 Wash. (U. S.) 41.

Where one was indebted individually and jointly on separate notes, the joint note being barred by the statute of limitations, a payment by such person was applied to the individual note; and an indorsement of the payment upon the joint note, in order to remove the bar, was held to be unwarranted. *Adams v. Tucker* (Colo. App. 1895), 40 Pac. Rep. 783.

Where one held two notes, one individually and another as executor, and called for a payment for the benefit of one of the heirs, it was held to be properly applied to the note held as executor. *Moose v. Marks*, 116 N. Car. 785.

Where the creditor holds a debt due to himself, and another from the same debtor due to himself and a third party, he must apply all payments ratably on the two debts. *Colby v. Copp*, 35 N. H. 434.

Where an agent has received money to pay on two notes, the holder of the notes cannot, by attaching one of them, appropriate the entire amount to the whole of that note. *Jones v. Perkins*, 29 Miss. 139, 64 Am. Dec. 136.

And under a similar state of facts, but where the money had been intrusted to the agent to compromise several claims, it was held that the debtor was not thereby deprived of his right to apply the money to whichever of the claims he pleased. *Dennis v. M'Laurin*, 31 Miss. 606.

Factor.—A principal cannot require his factor to apply the proceeds of cotton on which the latter has a lien for advances to another debt, after having surrendered personal property to him under a mortgage of the same given to secure the debt. *Baldwin v. Flash*, 59 Miss. 61.

principal; and the principal thus reduced will not at any time be suffered to accumulate by accruing interest.¹

1. Payments Not Equal to Both Principal and Interest—*United States*.—Russell v. Lucas, Hempst. (U. S.) 91; Smith v. Shaw, 2 Wash. (U. S.) 167; Story v. Livingston, 13 Pet. (U. S.) 359.

California.—Backus v. Minor, 3 Cal. 231.

Georgia.—Crane v. Goodwin, 77 Ga. 362.

Kentucky.—Steele v. Taylor, 4 Dana (Ky.)

445.

Louisiana.—Estebene v. Estebene, 5 La. Ann. 738; Union Bank v. Lobdell, 10 La. Ann. 130; Bird v. Lobdell, 10 La. Ann. 159.

Michigan.—Wallace v. Glaser, 82 Mich. 190, 21 Am. St. Rep. 556.

Minnesota.—Lash v. Edgerton, 13 Minn. 210; Weide v. St. Paul (Minn. 1895), 64 N. W. Rep. 65.

Mississippi.—Bond v. Jones, 8 Smed. & M. (Miss.) 368.

Montana.—Anderson v. Perkins, 10 Mont. 154.

Nebraska.—Mills v. Saunders, 4 Neb. 190.

New York.—Righter v. Stall, 3 Sandf. Ch. (N. Y.) 608; People v. New York County, 5 Cow. (N. Y.) 331; Eberlin v. Palmer (Supreme Ct.), 10 N. Y. Supp. 660; Merchants' Bank v. Freeman, 15 Hun (N. Y.) 359; Connecticut v. Jackson, 1 Johns. Ch. (N. Y.) 13; Hart v. Dewey, 2 Paige (N. Y.) 207.

Ohio.—Hammer v. Nevill, Wright (Ohio) 169.

Pennsylvania.—Penrose v. Hart, 1 Dall. (Pa.) 378; Spires v. Hamot, 8 W. & S. (Pa.) 17.

South Carolina.—Singleton v. Allen, 2 Strobb. Eq. (S. Car.) 166.

Texas.—Tooke v. Bonds, 29 Tex. 419.

Canada.—McGregor v. Gaulin, 4 U. C. Q. B. 378; Cummings v. Usher, 1 Ont. Pr. 15.

See also the titles INTEREST; PAYMENTS. This rule is illustrated in Miami Exporting Co. v. U. S. Bank, 5 Ohio 263, by Judge Hitchcock, as follows: "A bond or note is given for the payment of \$100 on or before the termination of one year. At the end of six months a payment of \$51.50 is made. This is not applied to sink the principal to \$48.50, but \$1.50 is applied to the interest of \$50 for six months, and \$50 to sink so much of the principal. At the end of the year there will be due \$50 of principal, and the interest on that \$50 for one year."

Amount Paid Equal to Amount of Principal.—The rule applies although the amount paid is equal to the amount of the principal. It will not in such case be applied to extinguish the principal until the accrued interest has been satisfied. Frazier v. Hyland, 1 Har. & J. (Md.) 98; Henderson Cotton Mfg. Co. v. Lowell Mach. Shops, 86 Ky. 668.

So Applied in the Case of a Penal Bond where the surety was held, although the sum of the payments amounted to more than the penalty. Smith v. Macon, 1 Hill Eq. (S. Car.) 339.

And This whether the Rule is Given by Positive Enactment or left to the determination of the jury. Peebles v. Gee, 1 Dev. (N. Car.) 341.

Or whether the Debt is One Expressly Drawing Interest or one on which the interest is

given as damages. Story v. Livingston, 13 Pet. (U. S.) 359.

Payments Precise Amount of Principal.—And even where the amount of the payment precisely equals the amount of the principal. People v. New York County, 5 Cow. (N. Y.) 331.

Where Interest on a Note is Paid in Advance for a stipulated time, and the principal is paid before the expiration of that time, the excess of interest thereby occasioned is to be applied as so much paid on the principal. Freeman's Bank v. Rollins, 13 Me. 202.

Less than Accrued Interest.—Where payments amount to less than the accrued interest, the whole principal will draw interest until the aggregate payments exceed the accrued interest. McCormick v. Mitchell, 57 Ind. 248.

In such case the balance of unpaid interest is not to be added to the principal, but set apart and satisfied by subsequent payments. Hart v. Dorman, 2 Fla. 445, 50 Am. Dec. 285; McFadden v. Fortier, 20 Ill. 509; Smith v. Coopers, 9 Iowa 376; Estebene v. Estebene, 5 La. Ann. 738; Dean v. Williams, 17 Mass. 417; Fay v. Bradley, 1 Pick. (Mass.) 194; Peyser v. Myers (Supreme Ct.), 45 N. Y. St. Rep. 413, 18 N. Y. Supp. 736; Spires v. Hamot, 8 W. & S. (Pa.) 17; DeBruhl v. Neuffer, 1 Strobb. (S. Car.) 426.

Usurious Interest.—It has been held that interest paid on a note in excess of the rate allowed by law will not be applied in payment of the principal unless the maker so requests. Peterborough Sav. Bank v. Hodgdon, 62 N. H. 300.

But the better rule undoubtedly is that payments will be applied to the principal by the court to the exclusion of usurious interest. Smith v. Coopers, 9 Iowa 376; Burrows v. Cook, 17 Iowa 436; Parchman v. McKinney, 12 Smed. & M. (Miss.) 631; Knox v. Williams, 24 Neb. 630, 8 Am. St. Rep. 220; North Bend First Nat. Bank v. Miltonberger, 33 Neb. 847; Cadiz Bank v. Slemmons, 34 Ohio St. 142, 32 Am. Rep. 364; Stanley v. Westrop, 16 Tex. 200; Turner v. Turner, 80 Va. 379; Gill v. Rice, 13 Wis. 549; Fay v. Lovejoy, 20 Wis. 403.

Where the law allows the recovery of legal interest on a usurious contract, application will be made first to such interest. Welch v. Wadsworth, 30 Conn. 149, 79 Am. Dec. 236; Morgan v. Michigan Air Line R. Co., 57 Mich. 430; Bartholomew v. Yaw, 9 Paige (N. Y.) 165.

And where a claim was allowed against an administrator for the principal of a note, and interest was not allowed on the ground of usury, and a dividend was paid on such allowance, it was held to apply to the principal, although the note was afterwards held not usurious. Loomis v. Eaton, 32 Conn. 552.

Interest upon Interest.—When a debt has remained so long unpaid that interest upon interest lawfully accrues, the rule is that payments shall be directed, first to the interest upon interest, secondly to the interest, and

Immaterial whether Principal Due or Not.—It is immaterial, so far as the operation of this rule is concerned, whether the principal is due or not.¹

When neither Principal nor Interest Is Due.—But in case neither principal nor interest is due, payment will be applied to discharge principal and interest ratably.²

VI. BY THIRD PARTIES—1. General Rule.—In the case of a payment voluntarily made direct to the creditor by his debtor from a fund belonging to the latter, the right of directing application is confined to one or the other as the case may be; and no third party, whatever his interest, has in such case any right of application.³

2. Qualifications of Rule—*a*. AGENTS.—A variation from the foregoing rule occurs, however, when the circumstances are slightly different. For instance, in the case of agents; as when an agent acts as such for both parties,⁴ or for the debtor under his authority;⁵ or where, upon default of the debtor or his

lastly to the principal. *Anketel v. Converse*, 17 Ohio St. 11, 91 Am. Dec. 115.

Where a mortgagee in possession holds a note calling for compound interest, enforceable by statute, besides other claims, the net receipts should be applied first to the interest on the note, and any surplus to the principal. *Murdock v. Clarke*, 88 Cal. 384.

Several Debts.—In the case of several interest-bearing debts, application will be made to discharge the interest on all the debts in preference to the principal of any one. *Steele v. Taylor*, 4 Dana (Ky.) 450.

Where seven notes were secured by one mortgage, payments were applied to extinguish the interest due upon all the notes as one debt before application to the principal. *Genin v. Ingersoll*, 11 W. Va. 549. See also *Smith v. Nettles*, 9 La. Ann. 455.

Where some of the makers of a joint and several note make payments of their shares of the principal and interest due from them at the time thereof, such payments shall be applied to the *pro rata* of principal as well as interest due by the makers so paying. *Donaldson v. Cothran*, 60 Ga. 603.

Where one of two obligors in a joint and several bond became bankrupt, dividends paid on his estate were, as to the co-obligor, to be considered as ordinary payments on account, and were to be applied first to the payment of interest due at the date of the dividend, and the surplus, if any, in the reduction of the principal. *Bower v. Marris*, 1 Craig & Ph. 351.

Legacies.—The rule was applied in the case of payments by an executor upon a legacy. *Johnson v. Johnson*, 5 Jones Eq. (N. Car.) 167.

Interest Otherwise Secured.—In *Smythe v. New England Loan, etc., Co.* (Wash. 1895), 41 Pac. Rep. 184, it was held that where the interest of a mortgage was otherwise secured the creditor might apply the proceeds to the principal.

To Acquire Jurisdiction.—Where suit was brought in a justice's court upon a note for one hundred dollars and ten cents, upon which a credit of twenty-five cents was indorsed, the court not having jurisdiction of more than one hundred dollars, and it appearing that more than twenty-five cents interest was due at the time of the indorsement, it was held to be error for the justice to assume jurisdiction by allowing application of the twenty-five

cents to the principal. *Hampton v. Dean*, 4 Tex. 455; *Hearn v. Cutberth*, 10 Tex. 216.

Monthly Payments by a Debtor, in excess of interest due, will be applied to the principal of the debt, and will not be treated as compensations for extensions of time, though they were so denominated by the parties when made. *Bateman v. Blake*, 81 Mich. 227. But see *McNamara v. Condon*, 2 McArth. (D. C.) 364, where such a compensation was held to be effective as such unless shown to be usurious.

1. *Jencks v. Alexander*, 11 Paige (N. Y.) 619; *Singleton v. Allen*, 2 Strobb. Eq. (S. Car.) 166.

2. **Where neither Principal nor Interest Due.**—Thus such part of the principal will be extinguished as will, together with interest on itself from the date of the note to the date of payment, amount to the sum paid. *Thompson v. Hudson*, L. R. 6 Ch. 320, 40 L. J. Ch. 28; *Starr v. Richmond*, 30 Ill. 276, 83 Am. Dec. 189; *Jacobs v. Ballenger*, 130 Ind. 231; *Righter v. Stall*, 3 Sandf. Ch. (N. Y.) 608; *Jencks v. Alexander*, 11 Paige (N. Y.) 619; *Miami Exporting Co. v. U. S. Bank*, 5 Ohio 260; *Williams v. Houghtaling*, 3 Cow. (N. Y.) 86.

Where neither principal nor interest is due, a payment less in amount than the legal interest will be deducted from the interest at the date it is due. *Tracy v. Wikoff*, 1 Dall. (U. S.) 124.

3. **Right of Third Parties.**—This rule, like that of the debtor to apply payment in the first instance, is recognized by every authority cited in this title in which the question arises. *Munger on the Application of Payments*, p. 75; 2 *Parsons on Contracts*, star p. 630; *Gordon v. Hobart*, 2 Story (U. S.) 243; *Case v. Fant*, 53 Fed. Rep. 41; *Stamford Bank v. Benedict*, 15 Conn. 444; *Coles v. Withers*, 33 Gratt. (Va.) 186; *Wells v. Hughes*, 89 Va. 543.

4. **Agent for Both Parties.**—Where one held several judgments against another, all of which bore interest, and as agent for such other collected funds to be applied in satisfaction of the judgments, it was held that he might apply them, in the absence of direction, first to the payment of interest accruing on all of the judgments. *Steele v. Taylor*, 4 Dana (Ky.) 445.

5. **Agent for the Debtor.**—*Stebbins v. Lardner*, 2 S. Dak. 127.

agent, one is authorized by the creditor to receive, but has no direction from him as to application;¹ or, again, where one is the agent of different creditors of the same debtor.²

b. PAYMENT IN DIFFERENT CAPACITIES—(1) *Generally*.—Where one acting as agent for the debtor is himself indebted to the same creditor, the question of application will be determined by the ownership of the fund.³

(2) *Joint Debtors*.—In case the payers are joint debtors, the indebtedness will be proportionately discharged.⁴

(3) *Joint and Several Debtors*.—But where the payer is indebted both jointly and severally, application will generally be directed to the several indebtedness.⁵

A, being indebted to B and C, drew on B in favor of C, which draft B accepted upon receiving a mortgage from C, conditioned that C would see that funds were provided to meet the drafts when they matured. Under an agreement between A and C, the former shipped produce to B, the proceeds to be applied to the payment of the drafts, and afterwards by letter directed B to dispose of the produce as he should see proper. B applied the proceeds first to the extinguishment of A's debt to him, and the balance to the payment of the drafts. In a proceeding to foreclose the mortgage it was held that the whole of the proceeds should have been applied to the payment of the drafts, and that the direction to dispose of the produce as he thought proper did not authorize B to use the proceeds as he pleased. *Sproule v. Samuel*, 5 Ill. 135.

Administrator.—There was held to be a sufficient authority to make an application, where an agent had collected money belonging to an estate, and the administrator, admitting the liability of the estate, sent a creditor to the agent to apply for payment of a claim. *Walkley v. Griffith*, 4 E. D. Smith (N. Y.) 343.

Collaterals.—Where an agent incurred liabilities on the strength of collaterals belonging to the principal which he held, the collaterals were deemed impressed with a trust in favor of all, and the agent was therefore not allowed to apply the collaterals to the payment of one of these obligations to the exclusion of the others. *Webster v. Mitchell*, 22 Fed. Rep. 869.

Married Women—Application by Husband.—In *Missouri*, under the Married Women's Act of 1875, a woman in possession of a farm purchased by her is not bound by an application by her husband, without her authority, of the proceeds to his own indebtedness to the vendor, but she may direct that they be applied to the purchase money. *Brown v. Brown*, 124 Mo. 79.

Payments Made after the Death of the Principal by an agent on an account for goods sold upon the principal's credit, partly after his death, must be applied to extinguish the charges for goods supplied after the principal's death, as the agency was thereby revoked. *Gifford v. Thomas*, 62 Vt. 34.

1. *Most Precarious Security*.—It has been held that money collected by an officer on claims placed in his hands for collection should be applied by him first to those for

which the security is most precarious. *State v. Thomas*, 11 Ired. (N. Car.) 251; *Ramsour v. Thomas*, 10 Ired. (N. Car.) 165.

Creditor Indebted to Agent.—An agent employed to receive money for his principal cannot, without the consent of the principal, apply such receipts to extinguish a claim held by him against the principal. *Morse v. Woods*, 5 N. H. 297.

2. *Agent for Different Creditors of Same Debtor*.—Where an attorney has in his hands the claims of several creditors against the same debtor, all of which are due, and the debtor makes a payment to the attorney without designating the debt to which he wishes it applied, the attorney may apply it to such of the debts as he sees fit, *Carpenter v. Goin*, 19 N. H. 479; or the several creditors may direct its application, *Taylor v. Jones*, 1 Ind. 17.

If the owner of any one of the notes has in fact received no part of such payment, the maker cannot, in an action brought on such note, insist that any part of such payment shall be appropriated to the note sued on. *Taylor v. Jones*, 1 Ind. 17.

3. *Ownership of Fund*.—When it appears that money was given by a debtor to his agent to be paid to a creditor, and the agent paid the money but applied it to his own indebtedness to the same creditor, it was held that the creditor could not retain the money unless he credited it to the principal debtor. *Clark v. Smith*, 7 Misc. Rep. (N. Y. City Ct.) 572, affirmed in 9 Misc. Rep. (N. Y. C. Pl.) 164.

4. A payment made by a joint debtor extinguishes the joint debt *pro tanto*, and it cannot thereafter be otherwise applied by agreement between the payer and creditor. *Tayer v. Denton*, 4 Mich. 192; *Donaldson v. Cothran*, 60 Ga. 603; *Goldbeck v. Kensington Nat. Bank*, 48 Leg. Int. (Pa.) 76, 10 Pa. Co. Ct. Rep. 97.

Joint Note Not Matured.—Where a joint promisor, to procure his discharge from liability on a joint note which was not due, transferred other notes, it was held that they must be applied to such instalments of the joint note as were not due, not to those already due. *Shaw v. Pratt*, 22 Pick. (Mass.) 305.

5. *Where One Indebted Individually and Also Jointly* with another to the same creditor, made a payment which was not shown to have been derived from a joint fund, and there was no evidence of application, it was applied to discharge the individual debt. *Livermore v. Claridge*, 33 Me. 428.

c. RECEIPT IN DIFFERENT CAPACITIES.—Payment may be received by one in his own behalf and also as agent or trustee of another, as where he holds two claims against the same debtor, one due to himself individually and another as such agent or trustee, and payment is made without direction by the debtor. Such a one is bound to have regard to the interests of his principal or *cestui que trust* equally with his own; and in case no intention is manifested by the debtor as to application at the time of payment,¹ the claims will be satisfied ratably.²

VII. CHANGE OF APPLICATION.—When application of a payment has once been properly made by either party, or by agreement of both parties, it cannot thereafter be changed except by mutual agreement,³ and not then, if

In *Van Rensselaer v. Roberts*, 5 Den. (N. Y.) 470, application by the creditor to the individual debt was upheld.

And in *Johnson v. Boone*, 2 Harr. (Del.) 172, it was held that unless the creditor could show a consent to have the payment otherwise applied, he must apply it to the individual account.

By a Surety.—Where one, indebted on his own account and also as surety for another, makes a payment without direction, it will be directed to the individual debt. *Newman v. Meek*, 1 Smed. & M. Ch. (Miss.) 331.

1. Payment Received in Different Capacities.—Payment received by one who held one claim individually and another as agent of a corporation against the payer, was applied by the court to the debt due the corporation upon the implied intention of the debtor, although the agent's personal claim arose from a matter in which he had attempted to bind the corporation, and, failing for want of authority, had bound himself. *Bangor Boom Corp. v. Whiting*, 29 Me. 123.

Where A purchased land from B, which was incumbered by a mortgage from B to C as agent of D, and C also held a debt in his own right against B, and A paid money to C on B's account, not knowing of the latter's indebtedness to C individually, and made no express appropriation of the payment, it was held that C could not apply the payment to the individual indebtedness, but would be held to appropriate it to reduce the incumbrance on the land. *Poindexter v. LaRoche*, 7 Smed. & M. (Miss.) 699.

2. Claims Satisfied Ratably.—*Favenc v. Bennett*, 11 East 36; *Barrett v. Lewis*, 2 Pick. (Mass.) 123; *Cole v. Trull*, 9 Pick. (Mass.) 325; *Colby v. Copp*, 35 N. H. 434; *Richards v. New Hampshire Ins. Co.*, 43 N. H. 263.

A bank was the holder of several notes by the same maker, some indorsed by its cashier and some by others. It was agreed between the cashier and the other indorsers that he would do what was best for all, and that the loss should be shared by all. Money having been realized on a mortgage given to secure all the notes, it was held that the cashier had no right, either as against the bank or the other indorsers, to apply it first to the notes on which he was indorser. *Bridenbecker v. Lowell*, 32 Barb. (N. Y.) 9.

Where one indebted to another, and otherwise to that other and a third person jointly, made a shipment with directions to apply the

proceeds upon the individual debt, after which there was a surplus, it was held that such surplus could not be applied by the consignee to his part only of the joint debt, but must be applied to the whole thereof; the court, by Parker, C. J., saying: "We rather think he should be considered as agent or trustee of the other joint owner for his moiety." *Cole v. Trull*, 9 Pick. (Mass.) 325.

A Widow Who Received Money as Executrix under the will of her deceased husband, which gave her a legacy and also created a trust for her benefit, was deemed to have received it in a trust capacity, and should therefore be held to have applied it most beneficially for the estate; *i. e.*, to the payment of the legacy in preference to the trust fund. *Stevens v. Melcher*, 80 Hun (N. Y.) 514.

3. Mutual Consent Necessary to Change Application.—*United States.*—*Bank of North America v. Meredith*, 2 Wash. (U. S.) 47; *Alexandria v. Patten*, 4 Cranch (U. S.) 317; *Page v. Lloyd*, 5 Pet. (U. S.) 304.

Alabama.—*Pearce v. Walker*, 103 Ala. 250.

Connecticut.—*Coon's Appeal*, 52 Conn. 186.

District of Columbia.—*Offutt v. King*, 1 McArthur (D. C.) 312.

Illinois.—*Miller v. Montgomery*, 31 Ill. 350.

Maine.—*Rundlett v. Small*, 25 Me. 29; *Codman v. Armstrong*, 28 Me. 91; *Brown v. Burns*, 67 Me. 535.

Maryland.—*Dorsey v. Wayman*, 6 Gill (Md.) 59.

Michigan.—*Shelden v. Bennett*, 44 Mich. 634.

Ohio.—*Muskingum Bank v. Carpenter*, 7 Ohio 21, 28 Am. Dec. 616.

Virginia.—*Hill v. Southerland*, 1 Wash. (Va.) 128.

Canada.—*Winch v. Weller*, 11 U. C. Q. B. 233.

When application has once been made by the debtor, equity will not interfere in favor of another debt. *Selfridge v. Northampton Bank*, 8 W. & S. (Pa.) 320.

A different application will not in any way bind the debtor. *Fargo First Nat. Bank v. Roberts*, 2 N. Dak. 195.

Where a Factor Received a Consignment of Merchandise, with directions to sell and apply the proceeds to a bill drawn in favor of the shipper by the owner in repayment of an advance from the shipper, the factor was not allowed to apply the proceeds to any balance due to himself. *Farmers', etc., Bank v. Franklin*, 1 La. Ann. 393.

the rights of third persons have intervened and would be invaded by the change.¹

APPLY.—See note 2.

Where a Tenant having Agreed to Pay Rent Quarterly, in Advance, paid the first quarter's rent, and before the end of the quarter his goods, which were liable for rent, were sold under execution by a judgment creditor, it was held that the landlord could not apply the first payment to the rent of the second quarter, and recover for the first quarter from the proceeds of the sale. *Purdy's Appeal*, 23 Pa. St. 97.

Debits and Credits Once Made by the Consent of Both Parties cannot afterwards be shifted by the creditor in order to apply payments to unsecured liabilities. *McMaster v. Merrick*, 41 Mich. 505.

Where the Law has Made Application of a Payment, by agreement of all parties whose interests are affected by it the application may be changed to another indebtedness. *Rundlett v. Small*, 25 Me. 29.

1. When Change would Be Injurious to Third Parties.—*Smith v. Wood*, 1 N. J. Eq. 74. A payment once made and applied by one of two joint debtors cannot afterwards be changed by agreement between the payer and creditor. *Thayer v. Denton*, 4 Mich. 192; *Miller v. Montgomery*, 31 Ill. 350.

Where one receiving payments credited them upon a note of the payer, and afterwards erased the credit and made a credit upon a joint note of the payer and a third person, it was held that an indorser upon both notes, in a suit on the former, was entitled to insist upon the credits originally made. *Harding v. Wormley*, 8 Baxt. (Tenn.) 578.

By separate engagements, two persons were liable to make up a deficiency of property assigned as security, being also equally liable as indorsers. The deficiency having been ascertained and an account rendered, and the proceeds of the property credited equally to both indorsers, the court refused to permit another application of the credits to the entire liability of one, he having become insolvent, in order to hold the other for the entire deficiency. *Bank of North America v. Meredith*, 2 Wash. (U. S.) 47.

It has been held that a third person cannot, in the absence of fraud or unfair dealing, require an application in compliance with a pre-existing agreement, where a different application made by debtor and creditor has been in existence for some time. *Merchants', etc., Bank v. Hervey Plow Co.*, 45 La. Ann. 1214.

2. Promise to Pay Note.—An instrument was in the following words: "This is to certify that I have this day received a deed from M. and wife for certain real estate, in consideration of which I am to *apply* the payment thereof to a note that S. holds against M." and others. It was held that this was not a complete and enforceable contract. The court said: "The word *apply* precludes the conclusion that there was a direct or absolute promise to pay the note. The utmost that can be conceded the appellee is that the writing binds the appellant to apply the value of the land to

the payment of the note described in the instrument." *Freed v. Mills*, 120 Ind. 27.

Applying for a Tax Deed.—In *Mead v. Nelson*, 52 Wis. 402, it was held that to make an affidavit and allege that it is made for the purpose of obtaining a tax deed, is equivalent to *applying* for such deed.

Statute Authorizing the Creation of Trusts.—A statute authorized the creation of trusts to receive the rents and profits of lands and *apply* them to the use of any person. It was held that a trust to receive the rents and profits of land and pay them over to the beneficiary was valid within the statute. The court said upon the use of the word *apply*: "*Apply*, for example, which means the act of *applying*, and includes obviously any act of the trustee by which the trust fund is *applied* for the benefit of the *cestui que trust*, whether expressly directed by the donor or performed according to the discretion of the trustee, is limited to the latter exclusively, and the trustee by force of it constituted in all cases the discretionary almoner of the donor's bounty. 'In no other way,' it is said, 'can we give force to the word *apply*.' It seems to me very clear that the term is robbed of half its power by the restriction." *Leggett v. Perkins*, 2 N. Y. 310. Compare *Hawley v. James*, 16 Wend. (N. Y.) 266. See also the title SPENDTHRIFTS AND SPENDTHRIFT TRUSTS.

"Applied" in the Sense of "Paid."—A statute provided that in case an administration bond should be forfeited, the moneys recovered upon it should be *applied* towards making good the damages sustained by not performing the condition. It was held that the statute meant by the word *applied* that the money should be paid towards making good the damages. *Ordinary v. Snook*, 10 N. J. L. 67.

Shares of Stock to be Applied.—An agreement contemplating the issue of shares of stock to be *applied* to the payment of interest due, was held to mean not that the stock was to be *applied*, but that it should be sold and the proceeds *applied*. *Manice v. Hudson River R. Co.*, 3 Duer (N. Y.) 426.

Patent Law.—An act of Congress provided for the recovery of certain damages against persons who "*apply* the design secured by such letters patent, or any colorable imitation thereof." It was held that one who infringes in ignorance of the patent is not necessarily within the statute. The court said: "It contemplates a wilful appropriation of the design. The words '*apply* the design secured by such letters patent or any colorable imitation thereof,' clearly imply knowledge of the design. It could not be *applied* without such knowledge; and a different reading would render the words 'or a colorable imitation thereof,' unmeaning." *Schofield v. Dunlop*, 42 Fed. Rep. 326.

Patent Applied For.—See also the title PATENT LAW.

APPOINT. (See also the title **APPOINTMENT**.)—"Appoint" is a term well known in law, and whether regarded in its legal or in its ordinary acceptation, is applied to the nomination of an individual or the constituting of an agent or deputy. It is never employed to convey an estate.¹

APPOINTING POWER. (See the titles **GOVERNOR**; **PRESIDENT**; **PUBLIC OFFICERS**.)—This phrase, when employed in reference to matters pertaining to government or to the distribution of the powers of government, means the power of appointment to office; the power to select and indicate by name individuals to hold office and to discharge the duties and exercise the powers of officers.²

The Rev. Stat. of the *United States*, § 4901, provides that any person who marks upon an unpatented article the word "patent," or any word importing that the same is patented, for the purpose of deceiving the public, shall be liable, etc. It was held that marking an unpatented article with the words "Patent applied for," would not render one liable under the statute. *Schwebel v. Bothe*, 40 Fed. Rep. 478.

United States Courts.—In a provision that the laws of a state shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they *apply*, the question arises when a law *applies*. In *Wayman v. Southard*, 10 Wheat. (U. S.) 25, the court, by Chief Justice Marshall, said: "But by the words of the section, the laws of the state furnish a rule of decision for those cases only 'where they *apply*,' and the question arises, do they *apply* to such a case? In the solution of this question, it will be necessary to inquire whether they regulate the conduct of the officer serving the execution; for it would be contrary to all principle to admit that in the trial of a suit depending on the legality of an official act, any other law would *apply* than that which had been previously prescribed for the government of the officer. If the execution is governed by a different rule, then these laws do not *apply* to a case depending altogether on the regularity of the proceedings under the execution. If, for example, an officer take the property of A, to satisfy an execution against B, and a suit be brought by A, the question of property must depend entirely on the law of the state. But if an execution issue against A, as he supposes irregularly, or if the officer should be supposed to act irregularly in the performance of his duty, and A should in either case proceed against the officer, the state laws will give no rule of decision in the trial, because they do not *apply* to the case, unless they be adopted by this section as governing executions on judgments rendered by the courts of the United States. Before we can assume that the state law *applies* to such a case, we must show that it governs the officer in serving the execution; and, consequently, its supposed application to such a case is no admissible argument in support of the proposition that it does govern the execution. That proposition, so far as it depends on the construction of the 34th section, has already been considered; and we think that in framing it, the legislature could not have extended its views beyond the judgment of the

court." See also the title **UNITED STATES COURTS**.

1. *State v. Dews*, R. M. Charl. (Ga.) 403.

Delegation of Power.—In *Brown v. O'Connell*, 36 Conn. 447, 4 Am. Rep. 89, it was held that a constitutional provision that judges shall be *appointed* by the General Assembly in such manner as shall by law be prescribed, does not authorize the delegation of the power of *appointment* to any other body. The court said: "The term 'manner' is a comprehensive one, but it is evident that it has reference, in that connection, to the mode of doing the act prescribed—to the proceedings of the two houses of the General Assembly in making the *appointment*, whether by ballot or by resolution, and whether by joint or concurrent action of the two houses—and could not have been intended to authorize a delegation of the power to *appoint* any and all the judges, to any officer or tribunal to whom they might think proper to delegate it. The term *appointed* means 'named' or 'designated for,' or 'assigned to,' an office. The act of naming, designating, or assigning is necessarily the direct act of the body or person by whom the *appointment* is made. An *appointment*, therefore, by a common council, pursuant to a law of the General Assembly, is not an *appointment* by the assembly, and the construction supposed would render the words, 'by the General Assembly,' superfluous. But those words are there, and for a purpose, and, if operative, are conclusive. And such was the contemporaneous construction given to the constitution by those who framed and adopted it."

Nominate, Select, Choose, etc.—The words "nominate," "select," "designate," "choose," would either of them be equivalent to *appoint* if used in that sense. *People v. Fitzsimmons*, 68 N. Y. 519; *Speed v. Crawford*, 3 Metc. (Ky.) 210. See also *Rex v. Adams*, 2 Ad. & El. 409, 29 E. C. L. 126.

Annually Appoint.—The right to annually *appoint*, if duly exercised, entitles the appointee to office for one year, and a resolution rescinding such appointment is void. *Buffalo v. Mackay*, 15 Hun (N. Y.) 204. See the title **AMOTION**.

2. *State v. Kennon*, 7 Ohio St. 556.

In *Walker v. Cincinnati*, 21 Ohio St. 14, 8 Am. Rep. 24, the Legislature of Ohio, having authorized the judges of the Superior Court to *appoint* trustees of a contemplated railroad, it was held that this was not an exercise of the *appointing* power forbidden to the legislature by the State Constitution.

APPOINTMENT.

- I. DEFINITION, 474.
- II. APPOINTMENT TO OFFICE, 474.
- III. APPOINTMENT UNDER A POWER, 475.

CROSS-REFERENCES.

- As to the Appointment of Agents, see the titles AGENCY, vol. 1, p. 948; OFFICERS AND AGENTS (OF PRIVATE CORPORATIONS).*
- Of Public Officers, see the titles COUNTIES; MUNICIPAL CORPORATIONS; PUBLIC OFFICERS; STATES; TOWNS AND TOWNSHIPS; UNITED STATES; and the titles treating of particular officers.*
- Under powers generally, see the title POWERS.*
- Of Assignees, see the title ASSIGNMENT FOR THE BENEFIT OF CREDITORS.*
- Of Attorneys, see the title ATTORNEY AND CLIENT.*
- Of Commissioners to Condemn Land, see the title EMINENT DOMAIN.*
- Of Committees and Guardians of Insane Persons, see the title INSANITY.*
- Of Executors and Administrators, see the titles EXECUTORS AND ADMINISTRATORS; WILLS.*
- Of Guardians, see the title GUARDIAN AND WARD.*
- Of Receivers, see the titles RECEIVERS; RECEIVERS OF RAILROADS.*
- Of Trustees, see the titles INSOLVENCY; TRUSTS AND TRUSTEES.*

I. DEFINITION.—Appointment is the designation of a person, by the person or persons having authority, to discharge the duties of some office or trust, or to take an estate or interest in property under a power.¹

II. APPOINTMENT TO OFFICE—By Whom Made.—The power to appoint public officers belongs solely to those departments of government to which it has been either expressly or by implication confided or reserved by the people in their constitutions.²

As Distinguished from Election.—Appointment is thus distinguished from election: whenever the office is to be conferred by an individual, as by the

1. Bouv. Law Dict.

It is attempted here only to give a few of the general principles relating to appointment. For the detailed treatment of the specific instances, see the appropriate titles.

2. Hovey v. State, 119 Ind. 386.

For a full treatment of this branch of the subject, see the titles PUBLIC OFFICERS; STATES; COUNTIES; TOWNS AND TOWNSHIPS; MUNICIPAL CORPORATIONS; and the titles for the several offices. For the appointment of senators, see the title CONGRESS. As to ap-

pointments by the governor, see the title GOVERNOR.

Continuance in Office beyond the time for which the incumbent is appointed, is equivalent to an appointment. *De Forest v. Brainerd*, 2 Day (Conn.) 528. See also *Beers v. Botsford*, 3 Day (Conn.) 159.

It seems that the Prolongation of the Term of Office by Legislative Act is equivalent to an appointment. *People v. McKinney*, 52 N. Y. 379, *overruling* *People v. Batchelor*, 22 N. Y. 129. See also *People v. Bull*, 46 N. Y. 57, 7 Am. Rep. 302.

governor, or by a select number of individuals, as by a judicial court, or by the general assembly, the act of conferring the office is spoken of as an appointment; whenever the office is to be conferred by the people, or by any considerable body of the people, the act of conferring it is spoken of as an election.¹

When Complete.—Appointment to office is complete when the last act required of the appointing power has been performed;² and where the appointing officer or body has not the power of removal, a power of appointment once exercised is irrevocable.³

Nature of the Act.—An appointment, by whomsoever made, is intrinsically an executive act.⁴

Evidence of Appointment.—Where the office is one which is held under a commission, the commission is conclusive evidence of appointment.⁵

Presumption of Appointment.—Where one has acted as a public officer and is generally recognized as such, he will be presumed to have been regularly appointed until the contrary appears.⁶

III. APPOINTMENT UNDER A POWER—Definitions.—Appointment under a power is the exercise of the right to designate the person or persons to take the use of real estate.⁷

Exclusive Appointment.—An appointment to one or more of the objects of a particular power, to the exclusion of the others, is called an exclusive appointment.⁸

Illusory Appointment.—Where, by the terms of the instrument creating the power, none of the objects can be excluded, and a mere nominal share is appointed to one or more of them, such an appointment is termed illusory.⁹

An Excessive Appointment is an appointment made in favor of persons not the objects of the power, or for a greater estate or interest than authorized by it, or subject to unauthorized conditions.¹⁰

Rule against Perpetuities.—With regard to the rule against perpetuities a distinction is made between a general power, enabling the donee to appoint to whomsoever he pleases, as if he were seised in fee of the estate, and a particular power in which the donee is restricted to some objects designated in the

1. *Conger v. Gilmer*, 32 Cal. 75; *State v. McCollister*, 11 Ohio 46. See also *Speed v. Crawford*, 3 Metc. (Ky.) 207.

2. **When Appointment Complete.**—*Marbury v. Madison*, 1 Cranch (U. S.) 137; *U. S. v. Bradley*, 10 Pet. (U. S.) 343; *U. S. v. Le Baron*, 19 How. (U. S.) 73; *U. S. v. Stewart*, 19 How. (U. S.) 79; *Conger v. Gilmer*, 32 Cal. 75; *State v. Barbour*, 53 Conn. 76, 55 Am. Rep. 65; *Jefferson County v. Clark*, 1 T. B. Mon. (Ky.) 82.

The Acceptance of an Office is a thing distinct from the appointment and nowise necessary to its completion. *Jefferson County v. Clark*, 1 T. B. Mon. (Ky.) 82.

3. **Where No Power of Removal Exists.**—*Marbury v. Madison*, 1 Cranch (U. S.) 137; *State v. Barbour*, 53 Conn. 76, 55 Am. Rep. 652; *Achley's Case*, 4 Abb. Pr. (N. Y. Supreme Ct.) 35.

4. **Appointment an Executive Act.**—*State v. Barbour*, 53 Conn. 76, 55 Am. Rep. 65; *State v. Noble*, 118 Ind. 350; *Evansville v. State*, 118 Ind. 436; *State v. Hyde*, 121 Ind. 20; *Taylor v. Com.*, 3 J. J. Marsh. (Ky.) 401; *Achley's Case*, 4 Abb. Pr. (N. Y. Supreme Ct.) 35. See also *State v. Denny*, 118 Ind. 387; *Baltimore v. State*, 15 Md. 376, 74 Am. Dec. 572.

5. **Evidence of Appointment.**—*Marbury v.*

Madison, 1 Cranch (U. S.) 137. See also *State v. Allen*, 21 Ind. 516.

6. **Presumption of Appointment.**—*Carter v. Simpson*, 8 B. Mon. (Ky.) 155; *Callison v. Hedrick*, 15 Gratt. (Va.) 244.

7. *Bouv. Law Dict.*; 2 Washb. on Real Prop. 302. For full treatment of this subject, see the titles **POWERS**; **LEGACIES AND DEVISES**.

8. *Rap. & Lawr. Dict.*; 1 Sugd. on Powers 537.

9. **Illusory Appointment.**—1 Sugd. on Powers 543. Formerly, in *England*, a court of equity, in case of an illusory appointment, would interfere in order to ascertain what proportion each appointee was entitled to, but by 1 Wm. IV., c. 46, and 37 & 38 Vict., c. 37, this rule is abolished and an illusory appointment is made a valid execution of a power where the instrument creating it does not declare the amount from which no object shall be excluded. See 1 Sugd. on Powers 543. This rule of equity has also been disapproved in the *United States*. *Ingraham v. Meade*, 3 Wall. Jr. (C. C.) 432; *Graeff v. DeTurk*, 44 Pa. St. 527; *Fronty v. Fronty*, 1 Bailey Eq. (S. Car.) 529; *Cowles v. Brown*, 4 Call (Va.) 477; *Aleyn v. Belchier*, 1 Hare & W. Lead. Cas. 318.

10. 2 Sugd. on Powers 55.

deed creating the power. In the former case, the period for the commencement of the limitation is the time of the execution of the power and not of its creation. In the case of particular powers, no estate can be created which would not have been valid if limited in the deed creating the power.¹

Effect of Appointment.—The appointee under a power takes under the power as if named in the instrument, that is, he takes in the same manner as if the power and instrument executing it had been incorporated in one instrument,² but he does not take as from the time the power is created.³

Execution.—How and by what instrument the power is to be executed by the donee in making the appointment, is generally determined by the terms of the instrument creating the power, which must be strictly complied with.⁴

Defective Execution.—Equity, however, will afford relief in some cases of defective execution, and in favor of certain persons.⁵

The Execution is Not Void because It Exceeds the Power, if the part in excess is separable from the part authorized by the power. The appointment will be valid so far as authorized, but void as to the excess.⁶

But if the Two Parts Are Not Separable, the whole appointment will be void.⁷

General Disposition without Reciting the Power.—While it is better for the instrument of execution to recite the power in express terms, and to state that the execution is in pursuance thereof, this is not essential, and a general disposition of property held under a power of appointment may be a good execution of the power without any reference to it, where it clearly appears that it was so intended by the donee.⁸

APPORTION. (See also the title APPORTIONMENT.)—"Apportion" signifies the dividing or partitioning of a rent common, etc., or a making of it into parts.⁹

APPORTIONMENT.—See also the titles ABANDONMENT AND TOTAL LOSS (IN MARINE INSURANCE); ANNUITIES; CONSTITUTIONAL LAW; CONTRACTS; CONTRIBUTION AND EXONERATION; CORPORATIONS (PRIVATE); DAMAGES; DEBTOR AND CREDITOR; DIVIDENDS; DRAINS AND SEWERS; ELECTIONS; EMINENT DOMAIN; EQUITY; ESTATES; INCUMBRANCES; INSOLVENCY

1. 1 Sugd. on Powers 470-472; Mifflin's Appeal, 121 Pa. St. 205, 6 Am. St. Rep. 781.
See the title PERPETUITIES AND TRUSTS FOR ACCUMULATION.

2. **Effect of Appointment.**—2 Sugd. on Powers 23; 2 Washb. on Real Prop. 304; Marlborough v. Godolphin, 2 Ves. 61; Mosley v. Mosley, 5 Ves. Jr. 248; Bringloe v. Goodson, 4 Bing. N. Cas. 726, 33 E. C. L. 509; Bradish v. Gibbs, 3 Johns. Ch. (N. Y.) 523; Doolittle v. Lewis, 7 Johns. Ch. (N. Y.) 45, 11 Am. Dec. 389. See also Doe v. Britain, 2 B. & Ald. 93.

3. 2 Sugd. on Powers 23; Marlborough v. Godolphin, 2 Ves. 61. See also Southby v. Stonehouse, 2 Ves. 610.

4. Porter v. Thomas, 23 Ga. 467; Stuyvesant v. Neil, 67 How. Pr. (N. Y. Supreme Ct.) 16; Haslen v. Kean, Term (N. Car.) 279, 7 Am. Dec. 718; Horwitz v. Norris, 49 Pa. St. 213; Wickersham v. Savage, 58 Pa. St. 365; Moore v. Diamond, 5 R. I. 121; Bentham v. Smith, Cheves' Eq. (S. Car.) 33, 34 Am. Dec. 599; Jarnagin v. Conway, 2 Humph. (Tenn.) 50.

5. Sugd. on Powers, c. X.

6. Sadler v. Pratt, 5 Sim. 632; Alexander v. Alexander, 2 Ves. 640.

7. 2 Sugd. on Powers 75.

8. Blagge v. Miles, 1 Story (U. S.) 426; Yates v. Clark, 56 Miss. 212; Baird v.

Boucher, 60 Miss. 326; White v. Hicks, 33 N. Y. 383; Hutton v. Benkard, 92 N. Y. 295; Bishop v. Xemple, 11 Ohio St. 277; Weir v. Smith, 62 Tex. 1. See also Blake v. Hawkins, 98 U. S. 315.

But the Intention to Execute must be Apparent and Clear, so that the transaction is not fairly susceptible, of any other interpretation. Blagge v. Miles, 1 Story (U. S.) 426; Bilderback v. Boyce, 14 S. Car. 528. To the same effect see Mory v. Michael, 18 Md. 227; Foos v. Scarf, 55 Md. 309.

9. Co. Litt. 147b; Stroud's Judicial Dict. To *apportion* does not *per se* mean to divide equally. Stotesbury v. St. Giles, 57 L. J. M. C. 114, 59 L. T. 473.

Whether All must Receive a Portion.—In Clarke v. Brooklyn Bank, 1 Edw. Ch. (N. Y.) 368, it was held that when commissioners were authorized to *apportion* stock among subscribers, the words *apportion* and "among" did not require that every subscriber should receive some stock.

And see the similar case of Haight v. Day, 1 Johns. Ch. (N. Y.) 18, where it is said: "The word *apportion* must mean here to assign to each subscriber or give him such portion as the commissioners should deem meet."

AND BANKRUPTCY; INSURANCE; INTEREST; LANDLORD AND TENANT; MASTER AND SERVANT; RENT; TAXATION; TOWNS AND TOWNSHIPS.

Definition.—Apportionment is the division or distribution of the subject-matter into proportionate parts.¹

Use of the Term.—There are several kinds of apportionment known to the law.²

Apportionment of Rights.—Rights may be apportioned in two ways: in respect of the fulfilment of the conditions which give rise to the rights, as in the case of contracts;³ and in respect of the specific thing out of which the right issues, as where the owner of a rent acquires a portion of the land out of which the rent issues.⁴

Apportionment of Liabilities. (For example damages, incumbrances, etc.) In this sense the term is rather loosely used to denote contribution by different persons, having different rights, towards the discharge of a common burden.⁵

Apportionment of Representatives and Taxes.—In addition to the foregoing uses of the term, “apportionment” is frequently employed in reference to the proportionate distribution of taxation,⁶ and of representation in the Congress of the United States and in the state legislatures.⁷

1. Bouv. Law Dict.

Coke’s definition is, “This cometh of the word *partio quasi partio*, which signifieth a part of the whole, and apportion signifieth a partition of a rent, common, etc., or a making of it into parts.” Co. Litt. 147*b*.

“To apportion”—for example, expenses—does not *per se* mean equally to divide, and, therefore, the apportionment of expenses of street paving under section 77 Metrop. Man. Act, 1862, need not be made on any uniform principle, but is in the discretion of the vestry or board and can only be challenged for *mala fides*. *Stotesbury v. St. Giles*, Camberwell, 57 L. J. M. C. 114, 59 L. T. 473, 53 J. P. 5. See also *Prouty v. Stover*, 11 Kan. 235; *Haight v. Day*, 1 Johns. Ch. (N. Y.) 18.

2. The various instances of apportionment are best studied as they occur in connection with the subjects mentioned in the cross-references. All that is attempted here is a general explanation of the use of the term.

3. A Contract is Said to Be Apportionable when the amount of the consideration to be paid by the one party depends upon the extent of the performance by the other. 2 Pars. Contr. *520. Thus, it has been held that if the part of a contract to be performed by one party consists of several distinct items, and the price to be paid by the other is apportioned to each item, or is left to be implied by law, it is an apportionable contract. *Lucesco Oil Co. v. Brewer*, 66 Pa. St. 351. See also *Dayton v. Dean*, 23 Conn. 100.

Where, on the other hand, the contract is to do an entire thing for a certain specified compensation, there can be no apportionment.

Sinclair v. Bowles, 9 B. & C. 92, 17 E. C. L. 340; *Cox v. Western Pac. R. Co.*, 44 Cal. 18; *Coburn v. Hartford*, 38 Conn. 290; *Quigley v. DeHaas*, 82 Pa. St. 267; *Barker v. Reagan*, 4 Heisk. (Tenn.) 590.

The Apportionment Acts of 2 Geo. II., c. 19, § 15; 4 & 5 Wm. IV., c. 22, 33; and 34 Vict., c. 35, have greatly modified the strict common-law rule as to entire contracts, especially with regard to the apportionment of annuities, rents, dividends, interests, salaries, wages, etc., in respect of time. Similar statutes exist to some extent in the *United States*.

4. A Rent Service Was Always Apportionable under such circumstances, but a rent charge was extinguished, unless the acquisition of the land was by operation of law. Co. Litt. 147*b*; Vin. Abr., “Apportionment;” 2 Washb. Real Prop. 302, note.

5. 1 Washb. Real Prop. 130, 549; 2 Washb. Real Prop. 209; 1 Story’s Eq., §§ 470, 477, 478.

6. For complete discussion of this question, see the title TAXATION.

7. Representatives in the Congress of the United States are apportioned among the several states according to their respective numbers, excluding Indians not taxed, and not exceeding one representative for every thirty thousand inhabitants; but each state may have at least one representative. The apportionment is based on the decennial census. U. S. Const., art. 1, § 2, art. 14, § 2; U. S. Rev. Stat., §§ 20, 21. The various state constitutions provide for the apportionment of representatives in the state legislatures. See *Prouty v. Stover*, 11 Kan. 235; *State v. Campbell*, 48 Ohio St. 435.

APPORTIONMENT ACTS.

BY JOSEPH R. LONG.

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CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the titles CONSTITUTIONAL LAW; ELECTIONS; JUDICIAL NOTICE; STATUTES.

I. WHO MAY APPORTION—1. National Elections.—The power to establish election districts for the choice of electors of President and Vice-President of the United States is vested in the legislatures of the several states. The power to establish districts for the election of representatives in Congress is vested in the state legislatures, subject to the supreme power of Congress.¹

2. State Elections.—The power to apportion a state into districts for the election of members of the state legislature is vested in that body by the state constitutions.² In some states it is provided by the constitutions that where a county is entitled to more than one member of assembly, the board of

1. Apportionment for National Elections.—Paine on the Law of Elections, § 331; Constitution of the United States, art. I.

2. Apportionment for State Elections.—Atty.-Gen. *v. Bradley*, 36 Mich. 447; Paine on the Law of Elections, § 331. See also the several state constitutions.

Whether or not the power to apportion the state into senatorial districts is deemed legislative, it is expressly vested in the legislative department by the constitution. *People v. Thompson*, 155 Ill. 451.

To Create a Representative or Senatorial District requires a law, the consent of both houses; neither house, by itself, can create a district. *Prouty v. Stover*, 11 Kan. 235.

Acts creating legislative districts are public acts. *Gardner v. Newark*, 40 N. J. L. 297.

As to Apportionment by a Board composed of the governor, auditor, and secretary of state, under the *Ohio* Constitution, art. II, § 11, see *State v. Campbell*, 48 Ohio St. 435.

In *Mississippi* power to change election districts exists only in the commissioners of election, to whom it has been intrusted by law. *Perkins v. Carraway*, 59 Miss. 222.

Election Districts, within the meaning of the *Pennsylvania* statutes, denote subdivisions of state territory marked out by known boundaries, prearranged and declared by public authority. Though not defined in the constitution, they have in it the same meaning as in the statutes, and the formation of election districts is intrusted by the constitution to the civil and not to the military power. *Chase v. Miller*, 41 Pa. St. 403.

supervisors of the county may divide the same into assembly districts according to the number of members to which the county is entitled.¹

3. County and Township Elections.—For local elections the division of a county or township into election districts or precincts is made by the governing board of the county or township.²

II. TIME OF MAKING APPORTIONMENT.—The apportionment is generally to be made at the next session of the legislature after a new state or federal census.³

1. Power of Board of Supervisors under Some of the State Constitutions.—*Michigan* Constitution, art. 4, § 3; see *Houghton County v. Blacker*, 92 Mich. 638. *New York* Constitution, art. 3, § 5; see *Baird v. Kings County*, 138 N. Y. 95, 142 N. Y. 523; *People v. Westchester County*, 147 N. Y. 1. See *Massachusetts* Constitution, Amend. xxi.; *Opinion of Justices*, 10 Gray (Mass.) 613.

As to the Division of Cities Containing Two or More Assembly Districts, by the mayor and common council, under the *New Jersey* Constitution, see *Gardner v. Newark*, 40 N. J. L. 297.

2. County and Township Districts.—See the titles **COUNTIES; TOWNS AND TOWNSHIPS.**

Illinois.—While, under the general election laws, for other purposes there may be several precincts in a township, yet for the purpose of a town election merely there can be but one precinct, and this is coextensive with the township itself. The county board has ample authority to make additional precincts for general election purposes whenever it thinks the convenience of the voters requires it, without regard to their number. *Williams v. Potter*, 114 Ill. 628.

The New York Act of 1892 (Laws of 1892, c. 680, § 8) requiring the town board of a town containing more than four hundred voters, and the common council of a city in which there shall be a ward containing more than four hundred voters, to divide such town or ward, at least thirty days before the election of inspectors of elections into election districts, each to contain not more than four hundred voters, is mandatory. *People v. Richmond*, 5 Misc. Rep. (N. Y. Supreme Ct.) 26.

Under the Minnesota General Village Law of 1885 (c. 145), villages, for the purposes of state and county elections, do not constitute election districts separate from the townships in which they are situated. *Stemper v. Higgins*, 38 Minn. 222; *State v. Spaude*, 37 Minn. 322. See also *Bradish v. Lucken*, 38 Minn. 186. But see the Act of 1893, *Minnesota Statutes* 1894, § 1209.

Division of Township by Court of Quarter Sessions—Pennsylvania.—The power to divide townships into election districts is, by the constitution, vested in the court of quarter sessions, and the Pennsylvania Act of May 18, 1876, P. L. 178, is unconstitutional in commanding the court to confirm the report of the commissioners appointed under the said act, unless exceptions thereto be filed within a given time. The court may, upon petition, constitutionally divide a township into election districts without the appointment of commissioners and without proceedings by view, review, and exceptions.

In re Division of Bern Tp., 115 Pa. St. 615.

The division of a township into election districts is not a proceeding to annex one district to another, and therefore does not require an election under the Pennsylvania Act of 1876. The court of quarter sessions has exclusive power to determine as to the propriety of such division, and is not deprived of the power of making the division because it had previously made a different division. *In re* Boggs Tp., 112 Pa. St. 145.

Under the Act of May 10, 1878 (P. L. 51), the absolute confirmation of the report of commissioners dividing a borough into wards is sufficient of itself to establish each ward as a separate election district, no further action of the court being necessary. *In re* Columbia, 11 Lanc. L. Rev. (Pa.) 9.

In a proceeding for the division of an election district, the court may inform itself either by the statements of the petition, the depositions of witnesses, the testimony of witnesses produced before the court, the report of commissioners, or the report of a master or auditor. *New Garden Election Dist.*, 3 Pa. Dist. Rep. 375.

3. When Apportionment to be Made.—See the state constitutions; also *Bay County v. Bullock*, 51 Mich. 544.

Under the Colorado Constitution, art. 5, § 45, providing that "the general assembly shall provide by law for an enumeration of the inhabitants of this state in the year of our Lord 1885, and every tenth year thereafter; and at the session next following such enumeration, and at the session next following an enumeration made by the authority of the United States, shall revise and adjust the apportionment for senators and representatives, on the basis of such enumeration, according to ratios to be fixed by law," it was held that where the governor vetoed a reapportionment bill passed at the session next following the enumeration of 1885, a reapportionment bill might be passed at the next session thereafter, being the second session after such enumeration. *In re* Legislative Apportionment, 12 Colo. 186.

The New York Apportionment Acts of 1857 are not void because they were not passed at the first session of the legislature after the return of the enumeration made in 1855, according to the direction of the Constitution (art. 3, § 4), that direction not being so peremptory as to prohibit the performance of these acts at another time. *Rumsey v. People*, 19 N. Y. 41.

The California Apportionment, under the census of 1860, was not effective until the Thirty-eighth Congress. *Lowe's Case*, 1 Bart. Election Cas. 418.

Extraordinary Session of Legislature.—It has been held that the power to make an apportionment is not limited to regular sessions of the legislature after an enumeration, but that the apportionment may be made by an extraordinary session called by the governor; and where the first legislature, whose duty it is to provide for the apportionment, fails to do so, the duty devolves upon each succeeding legislature until it is performed.¹

Effect of Invalid Apportionment.—In the case of the failure of the legislature to make a valid apportionment, the existing apportionment will remain in force.²

III. REQUISITES OF A VALID APPORTIONMENT—1. In General.—As to the particular provisions regulating apportionment, the constitutions and statutes of the several states must be consulted. It is proposed here to consider only the more important requirements, common to most of the states, and to which the attention of the courts has been directed.

2. Districts must Be Equal in Population.—The districts into which a state is apportioned should contain, as far as practicable, an equal number of inhabitants. This does not mean that the apportionment is to be conducted with mathematical exactness, but is a general rule to be observed by the legislature, who must exercise an honest and fair discretion in making the apportionment so as to preserve, as nearly as may be, the equality of representation.³

1. *People v. Rice*, 135 N. Y. 473, *reversing*, as to power of extraordinary session, *People v. Monroe County*, 65 Hun (N. Y.) 263.

2. Where an Apportionment Act has been Declared Void, election notices must be given under the next preceding valid apportionment act, unless in the meanwhile the legislature has made a new and valid apportionment. *Houghton County v. Blacker*, 92 Mich. 638; *Giddings v. Blacker*, 93 Mich. 1.

Legislature Failing to Apportion.—Power to Compel It to Act.—The requirement of the Constitution of *South Dakota*, art. 3, § 5, that the legislature shall provide by law for the enumeration of the inhabitants of the state in 1895, and every ten years thereafter, and apportion the senators and representatives according to the number of inhabitants, is mandatory, but there is no authority to enforce the command, the action of the legislature depending upon its own volition, determined by its sense of responsibility and public duty. In case of the failure of the legislature to provide for such enumeration and apportionment, the existing apportionment will remain in force. *In re State Census* (S. Dak. 1895), 62 N. W. Rep. 129. But see, as to the validity of an election held under an old apportionment where there has been no division of the state into districts after a new apportionment, *Field's Case*, 1 Bart. Election Cas. 580.

3. **Apportionment must Be According to Population**, but mathematical exactness is not required.

Illinois.—*People v. Thompson*, 155 Ill. 451.

Indiana.—*Parker v. State*, 133 Ind. 178.

Kansas.—*Prouty v. Stover*, 11 Kan. 235.

Maine.—*Opinion of Justices*, 18 Me. 458.

Michigan.—*Giddings v. Blacker*, 93 Mich.

1; *Houghton County v. Blacker*, 92 Mich. 638.

New York.—*People v. Broome* (Supreme Ct.), 20 N. Y. Supp. 470; *People v. Board of Aldermen*, 14 Misc. Rep. (N. Y. Circuit Ct.) 105; *People v. Rice*, 135 N. Y. 473; *Mat-*

ter of Baird, 142 N. Y. 523; *Matter of Whitney*, 75 Hun (N. Y.) 581.

Ohio.—*State v. Dudley*, 1 Ohio St. 437.

Wisconsin.—*State v. Cunningham*, 81 Wis. 440, 83 Wis. 90.

See also the state constitutions as to the requirement of equality in population, as well as the other requirements considered in the succeeding sections.

Under the Idaho Constitution, art. 3, § 4, providing that "members of the legislature shall be apportioned to the several legislative districts of the state in proportion to the number of votes polled at the last general election for delegate to Congress, and thereafter to be apportioned as may be provided by law, provided each county shall be entitled to one representative," the legislature is prohibited from passing an apportionment act which does not give substantially just and equal representation to the people of each county, based upon either the voting or entire population or upon some other fair basis. *Ballentine v. Willey*, 2 Idaho 1208.

Legislature to Use Discretion.—An apportionment cannot be overthrown because the representatives are not distributed with mathematical accuracy according to the population. Something must be left to the discretion of the legislature, and it may, without invalidating the apportionment, make one district of a larger population than another. It may rightfully consider the compactness of territory, the density of population, and also the probable changes of the future, in making the distribution of representatives. *Per Brewer, J.*, in *Prouty v. Stover*, 11 Kan. 235.

An act apportioning senatorial districts cannot be declared void because, although no district, as formed, contains less than the minimum number of inhabitants but several thousand more, some districts should have contained still more and others still less to more nearly approximate equality, or because

3. Districts must Consist of Compact and Contiguous Territory.—The districts must consist of contiguous territory,¹ and be in as compact form as practicable.² The provision requiring compactness of territory, like the one just

some districts are not as compact as possible. *People v. Thompson*, 155 Ill. 451.

An apportionment under which all the members of assembly to which a county is entitled may be chosen, impairs no right of suffrage because more electors vote for a representative in one district than in another. *People v. Broome* (Supreme Ct.), 20 N. Y. Supp. 470.

The Expression "as Nearly as may Be," used in the *New York* Constitution, art. 3, § 5, with reference to the apportionment of members of the assembly, does not mean as nearly as a mathematical process can be followed. It is a direction addressed to the legislature in the way of a general statement of the principles upon which the apportionment should be made. The legislative purpose should be to make a district of an equal number of inhabitants as nearly as may be, and how far that may be carried out in New York depends generally upon the integrity of the legislature. *People v. Rice*, 135 N. Y. 473.

The *New York* Act of 1892 Is Not Unconstitutional because, in apportioning the remaining members of the assembly after each county had been awarded the full number to which it was entitled, the members thus remaining were in some instances awarded to counties which had a less surplus over their ratio than some other counties, no county having enough to entitle it to another member upon the ratio existing. *People v. Rice*, 135 N. Y. 473, 65 Hun (N. Y.) 236, reversing *People v. Monroe County*, 65 Hun (N. Y.) 263.

Under the *New York* Constitution of 1894, art. 3, § 5, providing for the apportionment of a county into assembly districts by the board of supervisors, and requiring that each district shall be as nearly equal in population as may be, in as compact form as practicable, that no town, or block in a city, shall be divided, and that no district shall contain a greater excess in population over an adjoining district in the same senate district than the population of a town therein adjoining such assembly district, it was held that an apportionment making a difference in population between two districts of seven hundred and sixteen, which difference might have been considerably reduced by the transposition of two towns on the dividing line, was not, in this case, unconstitutional, but a proper exercise of the discretion vested in the board of supervisors to determine whether the location of a town is such as to justify placing it in a district that will more nearly secure numerical equality; or whether the demands of convenience, contiguity, and compactness require a reasonable departure from equality of population, each case being determined by its peculiar facts. *Smith v. St. Lawrence County*, 148 N. Y. 187, reversing *Smith v. St. Lawrence County*, 90 Hun (N. Y.) 568.

Legislative Discretion Limited.—Where the constitution provides that the apportionment must be made "according to the number of inhabitants" as shown by the last census, the legislature cannot act upon the theory that the census is not reliable, nor can it disregard the standard of population, and base its action upon other considerations, as the wealth of certain localities, the character of their population and business interests, or differences in the rapidity of the increase of population. *State v. Cunningham*, 83 Wis. 90.

The Rule Securing Equality of Representation Applies not only in the formation of a district out of two or more counties, but also in the formation of two or more assembly districts in one county, although in the latter case there is necessarily a new unit of representation. *State v. Cunningham*, 83 Wis. 90.

Improperly Counting Aliens Not Necessarily Fatal.—An apportionment of a county into assembly districts is not necessarily invalid because it was not based upon the citizen population, but aliens were included. The court will not presume a material disproportion in a distribution of aliens throughout the county. *Matter of Whitney*, 142 N. Y. 531, 60 N. Y. St. Rep. 110, affirming *Matter of Whitney*, 75 Hun (N. Y.) 581. See also *People v. Rice*, 135 N. Y. 473, 65 Hun (N. Y.) 236.

Colored Persons Not Taxed—New York.—The provision of the *New York* Constitution excluding colored persons not taxed from the enumeration of inhabitants in apportioning senate districts has been abrogated. *People v. Rice*, 135 N. Y. 473, 65 Hun (N. Y.) 236.

The Principle of Equality in Representation Is to Some Extent Subordinate to the purpose of making counties the representative territorial units in the apportionment of senators. *People v. Westchester County*, 147 N. Y. 1.

1. Contiguous Territory.—*Parker v. State*, 133 Ind. 178; *Houghton County v. Blacker*, 92 Mich. 638.

Island Counties.—The provision in the *Michigan* Constitution, art. 4, § 3, that each representative district shall consist of "convenient and contiguous territory," does not necessarily mean contiguous in contact by land. So far as island counties are concerned, they may be contiguous, although separated by wide reaches of navigable deep waters. *Houghton County v. Blacker*, 92 Mich. 638.

Counties Fully Represented cannot be used for the purpose of joining counties not otherwise contiguous. *Parker v. State*, 133 Ind. 178.

2. Compact Territory.—By the word "compact," as used in the provision of the *Illinois* Constitution that districts shall be formed of contiguous and compact territory, is intended "closely united," and the meaning of the provision is, that the counties or subdivisions of counties, when combined to form a district, must not only touch each other, but must be closely united territorially. *People v. Thompson*, 155 Ill. 451.

considered, is subject to legislative discretion, and to other more definitely expressed rules, and may also be modified by the requirement of equality in population.¹

4. Rule as to Division of Counties and Towns.—In some states it is provided that counties shall not be divided in the apportionment of election districts, except where the county has sufficient population to constitute in itself two or more districts.² In other states conformity to county lines is not mandatory, but left to the discretion of the legislature.³

5. Districts must Remain Unaltered until New Census.—It is a common provision that where an apportionment has been made on the basis of one enumeration, the boundaries of the districts shall remain unaltered until the next enumeration.⁴

Compactness—Function of Court and Legislature.—Whether the principle of compactness of territory has been applied at all or not, is a question to be finally determined by the courts. Whether or not the nearest approximation to perfect compactness has been attained, is a question for the legislature. *People v. Thompson*, 155 Ill. 451.

1. *People v. Thompson*, 155 Ill. 451.

Compactness, Being of Lesser Importance, may to some extent yield in aid of securing a nearer approach to equality of representation. *State v. Cunningham*, 83 Wis. 90.

An Act of Apportionment Is Unconstitutional if it clearly appears that in the formation of any district the requirement of compactness of territory and equality in population has been wholly ignored and not considered or applied to any extent; but if this requirement has been considered and applied, though to a limited extent only, subject to the other more definitely expressed limitations in the constitution, then the legislature has not transcended its power, although it may have very imperfectly performed its duty, and the act is constitutional. *People v. Thompson*, 155 Ill. 451.

2. Division of Counties.—*People v. Thompson*, 155 Ill. 451; *Houghton County v. Blacker*, 92 Mich. 638; *State v. Wrightson*, 56 N. J. L. 126. See *Mortland v. Christian*, 52 N. J. L. 521.

Under the Michigan Constitution, art. 4, § 3, providing that representative districts shall contain as nearly as may be an equal number of inhabitants, and shall consist of convenient and contiguous territory, but no township or city shall be divided in the formation of a district, and, also, that if any county shall be entitled to more than one representative, the board of supervisors shall divide the same into districts equal to the number of representatives to which it is entitled, it was held that the Act of 1891, dividing the county of Houghton and setting off a portion of its territory into another district, was unconstitutional. *Houghton County v. Blacker*, 92 Mich. 638.

Under the Wisconsin Constitution, art. 4, § 4, requiring assembly districts to be "bounded by county, precinct, town, or ward lines," a county is the primary territorial unit of representation, and the integrity of its lines must be preserved. No district shall consist of one or more counties and a fraction of another, or

include fractions of two or more counties. For a violation of this provision the Act of 1891 (Laws 1891, c. 482) is unconstitutional. *State v. Cunningham*, 81 Wis. 440.

Town in Two Townships.—Under the *California* Act of 1865-66 (see Cal. Polit. Code, § 1130), for the registration of voters, an incorporated town lying in two townships may be divided into election districts, each district being confined to one township. *People v. Laine*, 33 Cal. 55.

City Wards Are Not Towns within the purview of the *New York* Constitution, art. 3, § 5, providing that no town shall be divided in the formation of assembly districts. *People v. Broome* (Supreme Ct.), 20 N. Y. Supp. 470.

The Word "County," as Used in the New York Constitution of 1895, art. 3, § 3, dividing the state into senate districts by counties, refers to political organizations and not to fixed territories. *People v. Board of Aldermen*, 89 Hun (N. Y.) 460, *affirmed* in 42 N. E. Rep. 726. See also *People v. Westchester County*, 147 N. Y. 1.

3. Maine Constitution, art. 4, pt. 2, § 1; Opinion of Justices, 18 Me. 458.

The Ohio Act of 1851, creating Noble County out of parts of two districts, was held constitutional. *State v. Dudley*, 1 Ohio St. 437.

4. Districts must Remain Unaltered.—Atty.-Gen. v. Holihan, 29 Mich. 116; Atty.-Gen. v. Bradley, 36 Mich. 447; *Bay County v. Bullock*, 51 Mich. 544; *State v. Dudley*, 1 Ohio St. 437; *People v. Board of Aldermen*, 89 Hun (N. Y.) 460, *affirmed* in 147 N. Y. 685; *Kinne v. Syracuse*, 3 Keyes (N. Y.) 110, 2 Abb. App. Dec. (N. Y.) 534, *affirming* *Kinney v. Syracuse*, 30 Barb. (N. Y.) 349. In this last case the *New York* Act of 1858, changing the boundaries of the city of Syracuse by annexing territory belonging to an assembly district in that county to territory in another assembly district therein, was held unconstitutional on the ground that it violated the provision in the constitution then in force, that assembly districts when once fixed should remain unaltered until the next decennial enumeration.

The Arkansas Act of 1879, distributing portions of Clark County to other counties, conflicts with the constitutional provision that, until a designated time, the county shall be a representative district, and with certain other counties a senatorial district, and is void. *Bittle v. Stuart*, 34 Ark. 224.

Incidental Alterations.—The authorities are not harmonious as to whether this provision applies to those incidental alterations resulting from an act of the legislature in changing the boundaries of counties or towns, or in erecting new counties or towns.¹ It is clearly within the power of the legislature to change such boundaries where the change does not affect the established representative or senatorial districts.²

Where New Counties or Towns have been Organized, or the boundaries of existing ones changed, the electors of the territory affected, in the absence of special provision otherwise, will continue to vote in the districts to which they were previously attached.³

Change after Enumeration, but before Apportionment.—The legislature has power, at its first session after a new enumeration, to change the boundaries of a city so as to take in part of another district, although the new apportionment has not been made. *Atty.-Gen. v. Bradley*, 36 Mich. 447.

Alteration between Elections.—The *New Hampshire* Act of 1846 divided the state into congressional districts, and after an election for all the districts, by a subsequent apportionment four towns of one district were transferred to an adjacent district, and the result of an election to fill a vacancy occasioned by the resignation of the representative of the new district was decided by the votes of the electors of these towns. The House, by a close vote, sustained the report of the majority of the committee that these votes were properly counted. *Perkins's Case*, 1 Bart. Election Cas. 142.

Provision for New Counties.—An apportionment act defining the boundaries of some districts is not void because it leaves others to be determined by the organization of new counties. *Prouty v. Stover*, 11 Kan. 235.

1. Incidental Changes in Election Districts have been held constitutional. *Bay County v. Bullock*, 51 Mich. 544; *Rumsey v. People*, 19 N. Y. 41; *Slauson v. Racine*, 13 Wis. 398. See also *Opinion of Justices*, 6 Cush. (Mass.) 578; *People v. Westchester County*, 147 N. Y. 1, 69 N. Y. St. Rep. 343. *Compare Kinne v. Syracuse*, 3 Keyes (N. Y.) 110, 2 Abb. App. Dec. (N. Y.) 534, *affirming Kinney v. Syracuse*, 30 Barb. (N. Y.) 349; *Lanning v. Carpenter*, 20 N. Y. 447, *affirming* 23 Barb. (N. Y.) 402; *Atty.-Gen. v. Holihan*, 29 Mich. 116.

The provisions of §§ 3 and 4 of art. 4 of the *Wisconsin* Constitution, providing for the apportionment and establishment of senate and assembly districts at stated periods, do not, by implication, prohibit such changes in these districts as may result incidentally from the exercise of the acknowledged power of the legislature to organize counties, towns, and cities, and change the boundaries of such as are already organized, occasions for the exercise of such power being constant and frequent and having no connection with or relation to the periods prescribed for apportionment, and the restriction being upon the power to apportion and organize these districts by laws having that object alone. *Slauson v. Racine*, 13 Wis. 398.

The Provisions of the Arkansas Constitution regulating the apportionment of representa-

tive or senatorial districts, does not inhibit the legislature from passing an act changing county boundaries. *Howard v. McDiarmid*, 26 Ark. 100. See also *Bittle v. Stuart*, 34 Ark. 224.

County Elections—Change of Precinct.—The *Indiana* statute (Rev. Stat. 1881, § 4687) prohibiting a change in the boundaries of the election precincts by the county commissioners after the June term of the board next preceding any election, does not apply to cases in which the readjustment of an election precinct becomes necessary on account of a change of the boundary line between the townships. *Duncan v. Shenk*, 109 Ind. 26.

2. Stone v. Charlestown, 114 Mass. 214; *Opinion of Justices*, 6 Cush. (Mass.) 575; *Wade v. Richmond*, 18 Gratt. (Va.) 583.

The New York Act of 1895, annexing a part of Westchester County to the city and county of New York, was held constitutional, but the voters of the annexed territory are entitled to vote the same as though the act had not been passed, the elections being held in New York, and the returns being made to the authorities of Westchester County. *People v. Board of Aldermen*, 147 N. Y. 685; *People v. Westchester County*, 147 N. Y. 1, *affirming* 89 Hun (N. Y.) 460.

3. Creating New Counties.—The boundaries of a representative district remain as fixed by the constitutional apportionment until changed by a new apportionment, regardless of the creation of a new county out of a portion of the county composing such district. The electors of the new county are not deprived of representation, but have the same right in the election of senators in the original district as they had prior to the creation of the county. *Sabin v. Curtis* (Idaho 1893), 32 Pac. Rep. 1130. See also *Allen v. Curtis* (Idaho 1893), 32 Pac. Rep. 1133.

Unattached New County.—Under the *Nebraska* statute (Comp. Stat., c. 18, §§ 146-147) providing for the attachment of unorganized territory to the nearest county directly east, for election purposes, it was held that a new county, formed from unorganized territory not attached by the legislature to any representative district, remained a part of the nearest district, notwithstanding its organization as a county. *State v. Van Camp*, 36 Neb. 9, 91. See also *Miller v. Thompson*, 1 Bart. Election Cas. 118; *Daily v. Estabrook*, 1 Bart. Election Cas. 299.

The Rhode Island Act of 1882, incorporating a portion of the town of South Kingstown into the district of Narragansett, is not unconstitutional

6. Gerrymandering.—While the legislature is allowed considerable latitude in making the apportionments, the discretion reposed in it is liable to great abuse, and must be fairly and honestly exercised. If, in making the apportionment, there is so wide a departure from the constitutional rules as to compactness and numerical equality in population, that it cannot possibly be justified by the exercise of any judgment or discretion, but evinces an intention on the part of the legislature to utterly ignore and disregard the rules of the constitution, in order to promote some other object than a constitutional apportionment, the apportionment is unconstitutional and void.¹ In some

as an attempt to create a town without giving it a representative in the general assembly, the district being represented as a part of the town. *State v. Narragansett Dist.*, 16 R. I. 424.

Change of City Boundaries.—The *Virginia* Act of 1867, extending the boundaries of the city of Richmond, is not unconstitutional. Being silent as to its effect upon the right of voting and of representation of the inhabitants of the annexed territory, it leaves them in respect to these rights as before, and, their municipal government only being changed, they would still vote as a part of Henrico County. *Wade v. Richmond*, 18 Gratt. (Va.) 583, *distinguishing* *Warren v. Charlestown*, 2 Gray (Mass.) 84, and *Kinney v. Syracuse*, 30 Barb. (N. Y.) 349.

1. *Giddings v. Blacker*, 93 Mich. 1; *State v. Cunningham*, 81 Wis. 440, 83 Wis. 90.

Fatal Inequality of Representation—Illustrations.—The *Indiana* Act of 1891, by which a county having more than the representative unit, and being therefore entitled to a separate representative, is denied such representative, and other counties having less than the unit of representation are each given a separate representative, is unconstitutional and void.

The Act of 1879 is void for a similar reason. *Parker v. State*, 133 Ind. 178.

The Wisconsin Act of 1891 creating senate districts varying in population from thirty-eight thousand six hundred and ninety to sixty-eight thousand six hundred and four, and assembly districts varying from six thousand eight hundred and twenty-three to thirty-eight thousand eight hundred and one, the numerical unit of representation by the census of 1890 being fifty-one thousand one hundred and seventeen in the Senate, and sixteen thousand eight hundred and sixty-eight in the Assembly, was held to be in violation of the constitutional provision that the apportionment should be "according to the number of inhabitants." *State v. Cunningham*, 81 Wis. 440.

The Act of 1892 is invalid on account of a similar inequality of apportionment. *State v. Cunningham*, 83 Wis. 90.

Similarly the Michigan Act of 1891 is unconstitutional. *Giddings v. Blacker*, 93 Mich. 1; *Houghton County v. Blacker*, 92 Mich. 638.

Under the Michigan Constitution, art. 4, § 3, requiring that representative districts shall contain, "as nearly as may be," an equal number of inhabitants, there can be no legislative discretion to give a county of less pop-

ulation than another a greater representation. *Houghton County v. Blacker*, 92 Mich. 638.

The North Carolina Act of 1875, amending the charter of the city of Wilmington, is unconstitutional and void so far as it gives to wards having respectively four hundred and twenty-eight hundred voters an equal representation in the board of aldermen. *Van Bokkelen v. Canaday*, 73 N. Car. 198.

Division of County by Board of Supervisors—New York.—Under the New York Constitution, art. 3, § 5, providing that where, under an apportionment, a county is entitled to more than one member of assembly, the board of supervisors of such county may divide the same into assembly districts equal to the number of members to which the county is entitled, and prescribing the method of making such division, the board must exercise an honest and fair discretion arising out of the circumstances of the case in making an equal division, and, in order to render such division unconstitutional, the deviation from equality of population must be so great, palpable, and unreasonable that, when the facts are presented, argument will not be necessary to convince a fair man that a very great and wholly unnecessary inequality has been intentionally provided for. But where the board of supervisors of Kings County, in making a division, utterly disregarded the principle of equality, it was held that such division was unconstitutional and void, and that the board might be compelled, by mandamus, to make a proper division according to the constitution. *Baird v. Kings County*, 138 N. Y. 95, 51 N. Y. St. Rep. 690, *reversing* *Matter of Baird*, 66 Hun (N. Y.) 335.

In pursuance of the decision in this case, a mandamus was procured directing the supervisors of Kings County to divide the county into districts, each to consist of convenient and contiguous territory, and to be made equal in population, so far as possible, while making each district of convenient and contiguous territory and keeping the towns in the county undivided. The board accordingly made a redistricting, in which the average number of inhabitants in each district was fifty-four thousand eight hundred and seventy-seven, and the variation from that standard only about six thousand in any case, and in most cases much less. It was held that this deviation from the standard of equality was not sufficient, under the rule as to discretion announced by the court in the former case, to make the division unconstitutional. *Matter of Baird*, 142 N. Y. 523, 60 N. Y. St. Rep. 105,

of the constitutions the primary object of certain requirements is to prevent that form of legislative evil known as gerrymandering.¹

7. Legislature cannot Disfranchise.—The legislature cannot, under the pretense of subdividing the county or state for election purposes, disfranchise a part of the people by making no provision for the exercise of their constitutional rights.²

IV. JURISDICTION OF COURTS TO DETERMINE CONSTITUTIONALITY OF APPORTIONMENT ACTS—General Rule.—The courts have jurisdiction to determine whether or not an act of apportionment is in conflict with the limitations fixed by the constitution, and, if such conflict is found to exist, to declare the act void.³

affirming Matter of Baird, 75 Hun (N. Y.) 545.

The Acts of a Legislature Elected under an Invalid Apportionment Act are not necessarily invalid on that account. *State v. Cunningham*, 81 Wis. 440. But see *People v. Laine*, 33 Cal. 55.

An Apportionment Act Void in Part is entirely void, unless the part not in conflict with the constitution can be separated from the rest, and is complete in itself and capable of enforcement, in which case the act may be valid to that extent. *Ballentine v. Willey*, 2 Idaho 1208; *State v. Cunningham*, 81 Wis. 440; *State v. Van Duyn*, 24 Neb. 586. See also *Bittle v. Stuart*, 34 Ark. 224, and the title *Statutes*.

1. Prevention of Gerrymandering.—The requirement of compactness in the *Illinois* Constitution of 1870 was added to the constitution as it originally stood to guard against the legislative evil known as "gerrymandering." *People v. Thompson*, 155 Ill. 451.

The restrictions imposed upon the legislature in the Constitution of *Indiana* had the same object, *Parker v. State*, 133 Ind. 178; and of *New York*, *Kinne v. Syracuse*, 3 Keyes (N. Y.) 110; *Smith v. St. Lawrence County*, 148 N. Y. 187; and of *Wisconsin*, *State v. Cunningham*, 81 Wis. 440.

2. Murphy v. Ehey (Md. 1893), 25 Atl. Rep. 993; *Warren v. Charlestown*, 2 Gray (Mass.) 84; *People v. Maynard*, 15 Mich. 463; *State v. Fitzgerald*, 37 Minn. 26; *State v. Van Duyn*, 24 Neb. 586; *State v. Van Camp*, 36 Neb. 9, 91.

Apportionment Leaving Voters Unprovided for, Invalid.—The *Idaho* Act of March 13, 1891, dividing the state into senatorial and representative districts, and declaring the representation to which each district is entitled, is unconstitutional, a prior act creating Alta and Lincoln counties out of territory previously comprising Alturas and Logan counties having been declared unconstitutional, so that the said apportionment act failed to provide apportionment for two existing counties, Alturas and Logan, and provided representation for two other counties having no existence. *Ballentine v. Willey*, 2 Idaho 1208. But see *Cox v. Strait*, *Smith's Cases in Congress* 428.

The *Maryland* Act of 1892, amending the Act of 1882 which divided the city of Baltimore into wards and precincts and apportioned the same into legislative districts, is unconstitutional, in that in changing the boundaries of the districts one ward was en-

tirely omitted, and its voters left unprovided for, the act repealing all inconsistent laws to the extent of the inconsistency. *Murphy v. Ehey* (Maryland 1893), 25 Atl. Rep. 993.

The *Massachusetts* Act of 1854, which undertook to erect the territory of Charlestown, until the next decennial census, into a representative district which was neither a town nor a city, and which act contained no adequate provisions to secure to the inhabitants of Charlestown their rights to elect representatives and senators in the general court, and representatives in Congress, was held unconstitutional and void. *Warren v. Charlestown*, 2 Gray (Mass.) 84.

A Special Act of Legislature Creating a New Election District within a town was held unconstitutional, there being no provision of law under which an election could be held in the proposed new district, so that electors there residing would be deprived of their right to vote. *State v. Fitzgerald*, 37 Minn. 26.

Omission of County.—Where in making a reapportionment a county is omitted, it will retain its representation under the preceding apportionment. *State v. Van Duyn*, 24 Neb. 586.

3. Constitutionality of Apportionment—Question for Court.—*Parker v. State*, 133 Ind. 178; *Giddings v. Blacker*, 93 Mich. 1; *State v. Wrightson*, 56 N. J. L. 126; *Baird v. Kings County*, 138 N. Y. 95; *State v. Cunningham*, 81 Wis. 440, 83 Wis. 90. See also *Fletcher v. Tuttle*, 151 Ill. 41; *Prouty v. Stover*, 11 Kan. 235; *Van Bokkelen v. Canaday*, 73 N. Car. 198; *State v. Dudley*, 1 Ohio St. 437; and cases in the preceding section, where the constitutionality of acts has been passed upon. But see *Wise v. Bigger*, 79 Va. 269, in which the court seems to incline against the power of the courts to review the action of the legislature in making an apportionment. In this case, however, the point was not involved.

Judicial Notice.—In determining the constitutionality of an act of apportionment, the courts will take judicial notice of a census, whether taken under the authority of the state or of the United States, and also of the location, general boundaries, and juxtaposition of the several counties, towns, and wards mentioned in the act, and all matters of common knowledge. *Per Pinney, J.*, in *State v. Cunningham*, 81 Wis. 440. To the same effect, see *Parker v. State*, 133 Ind. 178.

The court will take judicial notice that the mere observance of county lines, as required

This Jurisdiction is Not Affected, when the question is properly raised in a suit at law, by the fact that only political rights of the parties are involved, and that the statute is the mere product of the exercise of that political power residing in the legislature wherein its decision is final.¹

Jurisdiction of Courts Limited.—So far as the act in question is the expression of the discretion, in the matter of apportionment, reposed in the legislature by the constitution, the decision of the legislature is final, and not subject to review by the courts,² unless this discretion has been plainly and grossly abused.³ But the courts have jurisdiction to interpret and construe the constitution and the statute in order to determine whether the act is within the legislative discretion or not.⁴ An apportionment act is not to be declared void merely because an apportionment conforming more nearly to the constitutional requirements could have been made.⁵

APPRAISAL—APPRAISEMENT.—See also the titles ADMIRALTY JURISDICTION; ARBITRATION AND AWARD; CONDITIONS; DAMAGES; EMINENT DOMAIN; EXECUTORS AND ADMINISTRATORS; FIRE INSURANCE; FORECLOSURE OF MORTGAGES; HOMESTEAD; INSURANCE; JUDICIAL SALES; LEASES; PARTITION; REVENUE LAWS; SHERIFF'S SALES; SHIPS AND SHIPPING; SUCCESSION TAXES; TAXATION.

An appraisal or appraisement of property signifies a valuation of it, or an estimation of its value,⁶ which is generally made by impartial and disinterested persons known as appraisers.⁷

by the *Illinois* Constitution, in apportioning senatorial districts, did not, in many instances, make the inequalities existing under the *Illinois* Apportionment Act of 1893. *People v. Thompson*, 155 Ill. 451.

1. *People v. Thompson*, 155 Ill. 451; *State v. Cunningham*, 81 Wis. 440.

2. **Legislative Discretion.**—*People v. Thompson*, 155 Ill. 451.

The action of county supervisors in dividing their respective counties into assembly districts is discretionary and judicial, and not subject to the control of the courts. *People v. Broome* (Supreme Ct.), 20 N. Y. Supp. 470.

The Court cannot inquire into the Motives of the legislature in making an apportionment. *People v. Thompson*, 155 Ill. 451.

It is the effect of the act and not the intention of the legislature that determines the constitutionality of the act. *Van Bokkelen v. Canaday*, 73 N. Car. 198.

3. **Abuse of Discretion.**—*People v. Rice*, 135 N. Y. 473, 65 Hun (N. Y.) 236. Where an apportionment has been made, a new apportionment cannot be compelled by mandamus or otherwise, unless the apportionment as made so far disregards the principles prescribed by the constitution as to warrant the court in saying that it is no apportionment, and should be treated as a nullity. *State v. Campbell*, 48 Ohio St. 435.

4. *People v. Thompson*, 155 Ill. 451.

5. **Apportionment Not Void because Not the Best Possible.**—*People v. Thompson*, 155 Ill. 451; *People v. Rice*, 135 N. Y. 473, 65 Hun (N. Y.) 236; *State v. Campbell*, 48 Ohio St. 435.

6. *Cocheco Mfg. Co. v. Strafford*, 51 N. H. 482.

7. *Pool v. Hennessy*, 39 Iowa 192, 18 Am. Rep. 44.

Appraiser.—"One who appraises, or esti-

mates worth of any kind, intellectual, moral, or material; specifically, a person licensed and sworn to estimate and fix the value of goods or estate." Cent. Dict.

Must Be Disinterested.—An appraiser must be an impartial and disinterested person, and it is not necessary that these words should be used in an agreement for their appointment.

An award made where one of the appraisers was the brother and business agent of the party choosing him will be set aside. *Pool v. Hennessy*, 39 Iowa 192, 18 Am. Rep. 44.

It may be stated generally that partiality of appraisers will authorize the vacation of an award. *Leonard v. Cox*, 64 Mo. 34.

Merchant Appraiser.—A merchant appraiser is a statutory reviewer appointed under the revenue laws for each case. He does not hold an office, but merely a designation to appraise in that specific instance. *Auffmordt v. Hedden*, 30 Fed. Rep. 360. Although he is a quasi-judicial officer, he is a competent witness in a suit to recover back duties paid under protest, and the claimant has a right to show by him that the statutory provisions have not been complied with. *Oelbermann v. Merritt*, 123 U. S. 356, reversing 19 Fed. Rep. 408.

Appraisers under Revenue Laws.—Appraisers under revenue laws are required to appraise, estimate, and ascertain the true value of the importation, regardless of the name which may be affixed thereto by the importer. *Belcher v. Linn*, 24 How. (U. S.) 508. See also *Wilson v. Maxwell*, 2 Blatchf. (U. S.) 321; *Grinnell v. Lawrence*, 1 Blatchf. (U. S.) 346.

Sworn Appraisers.—The phrase "two sworn appraisers" in the statute 2 W. & M., sess. 1, c. 5, § 2, merely means two indifferent persons who are sworn to appraise the goods distrained, according to the best of their understandings. They must be persons who are

APPRAISED. (See also APPRAISAL—APPRAISEMENT.)—See note 1.

APPRECIATE.—See note 2.

APPREHEND.—To apprehend is to understand, to conceive, to believe.³ The word strictly construed means the seizure or taking hold of a man.⁴

reasonably competent; otherwise it would be an abuse of the statute. *Roden v. Eyton*, 6 C. B. 429, 60 E. C. L. 429.

Appraiser Chosen by One Party.—If an appraiser chosen by one party, without the concurrence of the other, makes an appraisement, it is an irregular proceeding and void. *Copper v. Wells*, 1 N. J. Eq. 10.

Must Give Notice.—When a statute requires the posting and serving of notices of an appraisal, a failure to give such notice will vitiate the appraisement. *Salomon v. Heichel*, 4 Dem. (N. Y.) 176.

Court cannot Direct.—The court cannot direct appraisers as to the manner in which they are to estimate the value of property; this they are to do according to the best of their knowledge and ability. *Matter of McCaffrey*, 50 Hun (N. Y.) 371.

Manner of Appraisal.—The gross value of the property should be ascertained, and from this should be deducted, if any, the amount due upon any liens thereon. *Rosenfield v. Chada*, 10 Neb. 421.

Appraisal without Evidence.—Where appraisers, appointed in pursuance of the terms of a lease to fix the value of land for the purposes of renewal, make their valuation without evidence, it seems that this is no ground for impeaching their conclusion. *Zorkowski v. Astor*, 13 Misc. Rep. (N. Y. Super. Ct.) 507; *Cobb v. Dolphin Mfg. Co.*, 108 N. Y. 463.

Refusal of Appraisers to Agree.—Where one of the appraisers refuses to agree to the basis of valuation which the others have agreed upon, it is not necessary for the others to submit to him their appraisements made in accordance with such basis. *Zorkowski v. Astor*, 13 Misc. Rep. (N. Y. Super. Ct.) 507.

But in *Evans v. Landon*, 6 Ill. 307, it is held that where property levied on is to be appraised by three householders, all the appraisers must agree in order to constitute a valid appraisement.

Appraisal under Lease.—Where a lease provides for an appraisal of the value of land, and that a renewal shall be at the rental sum equal to a specified percentage upon the value thus ascertained, the appraisers will be bound by the terms of the lease, and their duty is to simply fix the value, and not to place the value so as to make a reasonable rent. *Zorkowski v. Astor*, 13 Misc. Rep. (N. Y. Super. Ct.) 507.

Statements of Appraiser Not Evidence.—What an appraiser is reported to have said in relation to having read certain briefs presented to the appraisers on the hearing, is incompetent evidence to impeach the award. *Zorkowski v. Astor*, 13 Misc. Rep. (N. Y. Super. Ct.) 507.

Void Appraisement—No Fees.—Where an appraisement is void, the appraisers are not entitled to fees. *Salomon v. Heichel*, 4 Dem. (N. Y.) 176.

1. Appraised Value. (See also VALUE.)—In construing the *United States Tariff Act* of July 30, 1846 (9 U. S. Stat. at Large 42), the court said: "The 'appraised value,' as used in this Act of 1846, and in that of August 30, 1842, and indeed in all the revenue acts, means the value of the goods, to be estimated and ascertained by the appraisers, either according to the 'actual cost,' 'actual value,' or 'market value,' as the case may be, exclusive of charges." *Wilson v. Maxwell*, 2 Blatchf. (U. S.) 321. See *Grinnell v. Lawrence*, 1 Blatchf. (U. S.) 346.

2. Testamentary Capacity—Instruction.—In an instruction upon testamentary capacity, the trial court said the testator might understand and *appreciate* his relation to his daughter, and yet his insane prejudice against her husband enter into the making of the will. The appellate court construed *appreciate*, as used in this sense, to mean that the testator was able to estimate justly his relation towards his daughter. *Brace v. Black*, 125 Ill. 33.

3. Golden v. State, 25 Ga. 531.

Law of Self-defense.—*Apprehend*, as used in this connection, is not synonymous with "fear," but with "believe." The party assailed need not fear the threatened danger. It is sufficient if he believes in good faith that there is actual danger that he will suffer bodily if he does not resist and meet force with force. *Trogon v. State*, 133 Ind. 1. See also the title SELF-DEFENSE.

Concealed Weapons. (See also the title CONCEALED WEAPONS.)—The *Alabama* statute forbidding the carrying of concealed weapons permits the doing so where any person has "good reason to *apprehend* an attack." Code of 1876, § 4109; *Hardin v. State*, 63 Ala. 38.

The *apprehension* must, however, be founded on good reason; and the court properly refused to charge the jury "that if they believe from the evidence that the defendant had reason to *apprehend* an attack, they must acquit him." *Baker v. State*, 49 Ala. 350.

4. Reg. v. Weil, 47 L. T. 631, 15 Rep. 413. And in that case, it was held that the word *apprehend* would not be limited to taking hold of a man who was not already in custody. A person already in custody may be *apprehended*. See the title ARREST.

Act of Congress—Jurisdiction.—Where an act of Congress "for the punishment of certain crimes," etc. (vol. 1, p. 103, § 8), provided that "the trial of crimes committed on the high seas, or in any place out of the jurisdiction of any particular state, shall be in the district where the offender is *apprehended* or into which he may first be brought," it was held that the word *apprehend* did not imply a legal arrest to the exclusion of a military arrest or seizure. *Ex p. Bollman*, 4 Cranch (U. S.) 75.

APPRENTICES.

BY A. S. H. BRISTOW.

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CROSS-REFERENCES.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the titles: ABDUCTION, vol. I, p. 162; CONTRACTS; GUARDIAN AND WARD; INFANTS; MASTER AND SERVANT; PARENT AND CHILD; POOR AND POOR LAWS; RESTRAINT OF TRADE (CONTRACTS).

I. DEFINITION.—An apprentice is one who is bound by indenture to serve some particular individual or company for a specified time, in order to learn some art, trade, profession, manufacture, etc., in which his master, or masters, become bound to instruct him.¹

II. MODE OF BINDING APPRENTICES—1. The Instrument in General—Indenture—At Common Law.—A legal apprenticeship can be created at common law only by deed.²

By Statute.—Moreover, by statute, both in *England*³ and in most of the *United States*,⁴ an apprentice can be bound only by indenture.

1. Century Dict. See also *Lyon v. Whitmore*, 3 N. J. L. 413; *Hopewell v. Amwell*, 3 N. J. L. 19; *North Brunswick v. Franklin*, 16 N. J. L. 537; *Hill v. Spencer*, 61 N. Y. 279; *Wakefield v. Fargo*, 90 N. Y. 219; *Com. v. St. German*, 1 Browne (Pa.) 24.

2. **Binding Apprentice—Common-law Rule.**—*Parish of Castor & Aicles*, 1 Salk. 68; *Squire v. Whipple*, 1 Vt. 69, 2 Vt. 111.

3. **Binding Apprentice—English Statutes.**—*Aldridge v. Ewen*, 3 Esp. 188; *Rex v. Eccleston*, 2 East 298; *Rex v. St. Margaret's, King's Lynn*, 6 B. & C. 97, 13 E. C. L. 108; *Rex v. Newtown*, 1 Ad. & El. 238, 28 E. C. L. 79.

Necessity for the Paper to be in Fact Indented.—In *Smith v. Birch*, 1 Sess. Cas. 222, in an action brought by the plaintiff against the defendant for enticing away his apprentice, where it appeared that although the contract was in writing and began, "This indenture, etc.," yet the paper was not in fact indented but was a mere deed poll, it was held that, inasmuch as the statute required the binding to be by indenture, a valid contract of apprenticeship could be made in no other way, and, therefore, the action could not be maintained. But in *Rex v. Ditchingham*, 4 T. R. 769, it is held that under Statute 31, George II., c. 11, to enable the apprentice to obtain a settlement in the parish in which he was bound, a binding by deed not indented is sufficient, but it is still necessary that the binding should be by deed. See also *Rex v. Rainham*, 1 East 531.

4. **Binding Apprentice—Statutes in United States.**—*Peters v. Lord*, 18 Conn. 337; *Bolton v. Miller*, 6 Ind. 262; *Tague v. Hayward*, 25 Ind. 428; *Hall v. Gardner*, 1 Mass. 172; *Overseers of Poor v. Overseers of Poor*, 6 N. J. L. 169; *North Brunswick v. Franklin*, 16 N. J. L. 535; *Dowd v. Davis*, 4 Dev. (N. Car.) 61; *Com. v. Wilbank*, 10 S. & R. (Pa.) 416; *Phelps v. Pittsburgh, etc.*, R. Co., 99 Pa. St. 108.

Action by Apprentice for Damages.—Thus in an action by an apprentice against the master to recover damages occasioned by wrongful discharge from service, it has been held that an action could not be sustained, where the contract of apprenticeship was not in writing and sealed as required by statute. *Phelps v. Pittsburgh, etc.*, R. Co., 99 Pa. St. 108.

Master's Claim against Apprentice for Damages.—Also where, in an action against the master for work and labor, etc., performed by an infant, the master set up in his answer the failure on the part of the apprentice to per-

form the contract, by which he had sustained damages, it was held that the contract, being by parol, did not amount to a legal apprenticeship under the statute, and hence would not give the master the right to control the plaintiff's person, and that the infant would not be liable for damages for breach of the contract. *Tague v. Hayward*, 25 Ind. 428. But in this case the indenture contained a covenant on the part of the mother of the apprentice, and the court delivered a dictum to the effect that she would be liable in damages for a breach of her contract.

Liability of Father.—An agreement in writing not under seal was made by the apprentice's father to a master for a certain time, and the master agreed to teach him a certain art. Subsequently, the master sold his business, and the father agreed to continue the apprenticeship with the successor. The son afterwards had an opportunity to work for some one else, and his then master released him from his apprenticeship, in consideration of the father giving a promissory note for a certain sum payable to the master. It was held that, although the agreement of apprenticeship did not comply with the statutory requirements, it was good at common law, and that the note was given for a sufficient consideration. *Crombie v. McGrath*, 139 Mass. 550.

Also where a father agreed to bind his son by indentures of apprenticeship, and, in consequence of such agreement, the son entered upon the service, and the master instructed him in his trade, and furnished clothing and necessities, and the son left his master, it was held that the father was liable to pay the master for the instructions, supplies, etc., though the agreement had not been reduced to writing. *Squires v. Whipple*, 2 Vt. 111. *Hutchison, J.*, delivering the opinion of the court in this case, said: "Although the plaintiff cannot recover upon a special contract of apprenticeship of a minor, unless it be in writing, as was decided in the former case between these parties (see *Squire v. Whipple*, 1 Vt. 69), yet the defendant must not be permitted to agree to make a regular written contract of that description, and thereby obtain the property and the labor of the plaintiff, and then refuse to execute the written contract and go off with what he thus obtains from the plaintiff."

Necessity of Indenture for Obtaining Settlement.—In *Connecticut*, it has been held that where an infant, who was a bastard, went in pursuance of a parol agreement between his mother and a mechanic, and by his mother's

A Custom of apprenticing minors otherwise, being contrary to the positive mandate of statute, is illegal.¹

2. Parties to the Indenture—*a. WHO MAY BIND OUT AN APPRENTICE—*(1) *At Common Law.*—At common law, an infant may alone² enter into an indenture of apprenticeship, or, as is most usual, he may join with his parent or guardian;³ but he is, in all cases, an indispensable party.

Binding by Father Alone.—Thus an indenture executed by the father alone will be inoperative as an indenture of apprenticeship, and the fact of the infant's taking the benefit of the indenture by serving under it does not bind him to the fulfilment of his covenants.⁴

Binding by Stranger.—Moreover, where a stranger, having no authority over a minor, undertakes to bind him as an apprentice, and covenants for his faithful service, the contract has been held not to be valid at common law as to either of the parties.⁵

Where Apprentice is an Adult.—An adult may be bound under an indenture of apprenticeship, as well as an infant,⁶ but the indenture must be executed by himself, and not by some third person as his parent or guardian.⁷

consent, into a different town from that of his settlement, to learn a trade, and there lived with such mechanic in the situation of apprentice until he was twenty-one years of age, he was an apprentice within the meaning of the statute of that state so as to gain a settlement. But see the decisions in *New Jersey* upon this question. *North Brunswick v. Franklin*, 16 N. J. L. 535; *Overseers of Poor v. Overseers of Poor*, 6 N. J. L. 169.

Instrument must Be in Two Parts.—By statute in *New Hampshire*, it is provided that to constitute a valid contract of apprenticeship, the instrument must be of two parts. *Campbell v. Cooper*, 34 N. H. 49; *Public Stat. N. H.*, p. 509 (1891).

Writing must Be under Seal.—In many states, there are decisions to the effect that the writing, to constitute an indenture of apprenticeship, must be sealed. *Bolton v. Miller*, 6 Ind. 262; *North Brunswick v. Franklin*, 16 N. J. L. 535; *Overseers of Poor v. Overseers of Poor*, 6 N. J. L. 169; *Com. v. Wilbank*, 10 S. & R. (Pa.) 416; *Phelps v. Pittsburgh*, etc., R. Co., 99 Pa. St. 108.

In *New Jersey*, it has been held that a seal of wax or wafer is necessary, and that a scroll or scribble, by way of seal, is not sufficient. *Overseers of Poor v. Overseers of Poor*, 6 N. J. L. 169.

Writing Required by Statute of Fraud.—In *Connecticut*, it has been held that if a father engages by parol that a son shall serve another as an apprentice for a longer time than one year, the contract is void by the statute of frauds, and neither party can maintain an action for breach thereof, though it has been in part performed on both sides. *Hall v. Rowley*, 2 Root (Conn.) 161.

1. *Lally v. Cantwell*, 40 Mo. App. 44.

2. **Undertaking of Infant Alone.**—*Gylbert v. Fletcher*, Cro. Car. 179; *Rex v. Mountsorrel*, 3 M. & S. 497; *Rex v. Arundel*, 5 M. & S. 259; *Rex v. Hindringham*, 6 T. R. 557; *Ashcroft v. Bertles*, 6 T. R. 652; *Kingwood v. Bethlehem*, 13 N. J. L. 221.

Infant may Enforce Contract.—Where an infant signs an indenture alone, and is retained

and serves in the best manner he can, he may enforce the contract against the master. *Dalt. Jus.*, c. 58; 6 Bac. Abr. 508.

For infant's liability on such contract, see *infra*, this title, *Obligation of Parties—Of Apprentice*.

3. **Infant Joining with Parent or Guardian.**—*Whitley v. Loftus*, 8 Mod. 191; *Branch v. Ewington*, Doug. 518; *Cumming v. Hill*, 3 B. & Ald. 59, 5 E. C. L. 229; *Rex v. Bow*, 4 M. & S. 383; *Rex v. Great Wigston*, 3 B. & C. 484, 10 E. C. L. 161.

As to liability of master, see *infra*, this title, *Rights of Parties—Of Father*.

As to liability of father, see *infra*, this title, *Obligation of Parties—Of Father*.

4. **Binding by Father Alone.**—*Rex v. Cromford*, 8 East 25; *Rex v. Arnesby*, 3 B. & Ald. 584, 5 E. C. L. 385; *Rex v. Ripon*, 9 East 295; *Lobdell v. Allen*, 9 Gray (Mass.) 377; *Stringfield v. Heiskell*, 2 Yerg. (Tenn.) 550; *Pierce v. Massenburg*, 4 Leigh (Va.) 493, 26 Am. Dec. 333. See also *U. S. v. Bainbridge*, 1 Mason (U. S.) 78. *Compare Matter of M'Dowle*, 8 Johns. (N. Y.) 328; *Lyon v. Whitmore*, 3 N. J. L. 413; *Ivins v. Norcross*, 3 N. J. L. 531; *Musgrove v. Kornegay*, 7 Jones (N. Car.) 71.

5. **Binding by Stranger.**—*Butler v. Hubbard*, 5 Pick. (Mass.) 250.

6. **Adults.**—*Com. v. St. German*, 1 Browne (Pa.) 24. Under a statute of law in *Ohio* in which a female was an adult at eighteen, for no other purpose than to enable her to contract matrimony, and to exempt her from service under indentures for apprenticeship, it was held that an indenture executed by her and her father, when she was over eighteen and under twenty-one years of age, was inoperative as an indenture of apprenticeship, but that the father was entitled to wages for services performed by her (they being performed when she was under twenty-one years of age). *M'Clintock v. Chamberlin*, Wright (Ohio) 547.

7. In *Rex v. Ripon*, 9 East 295, it was held that an indenture binding an adult as an apprentice, which was not executed by herself,

(2) *By Statute—Father.*—By statute, in some states, the father is authorized to bind his infant child by an indenture of apprenticeship.¹

Father, Mother, or Guardian, with Consent of Minor.—In other states, there are statutes authorizing the binding of a minor as an apprentice by the father, or, under certain circumstances, by the mother or legal guardian, with the minor's consent.²

How Minor's Consent is to be Evidenced.—In most of these states, it is provided by statute that the consent of the minor shall be evidenced not only by his signature, but by express language to that effect in the indenture.³ In *New*

but only by her father-in-law and the master, though with her consent, does not constitute her an apprentice, and that, consequently, no settlement can be gained by her under such indenture.

1. Who may Bind Out Apprentice—Statutes.—In *Maryland*, under a statute declaring that any father may bind out his child as an apprentice on reasonable terms for any time not longer than the full age of such child—that is to say, boys till twenty-one, and girls till eighteen years of age—it has been held that where the father was dead and the mother entered into a written agreement to bind her son, then twenty years of age, as apprentice for five years, the contract was void. *Baker v. Lauterbach*, 68 Md. 64. *Bryan, J.*, in giving the opinion of the court, said: "A father may bind out his son as an apprentice until he reaches the age of twenty-one years, provided he pursues the mode authorized by the 20th section of article 6 of the code, but a contract of apprenticeship executed by the mother is simply void." Under the same statute it has been held that an infant cannot bind himself as an apprentice. *Handy v. Brown*, 1 Cranch (C. C.) 610.

By statute in *Georgia*, all minors may, by whichever parent has the legal control of them, be bound out as apprentices to any respectable person, until they attain the age of twenty-one years, or for a shorter period. *Ga. Code* (1882), § 1875. Thus where a colored child was born before the 9th day of March, 1866, within what was regarded as a state of wedlock between his parents while slaves, and he was acknowledged by his father, if the mother voluntarily yielded the control to the father and he took the child away with him, she could not afterwards resume control without the assent of the father; and if, under these circumstances, the mother was induced to sign articles apprenticing the child to a third person, under representations made to her by that person that if she did not do so he would send the child off to another state, out of her reach, it was held that the articles were void as against the rights of the father and any master to whom he might have apprenticed the child. *Mitchell v. McElvin*, 45 Ga. 558.

In *Arkansas*, it has been held that an indenture of apprenticeship of a child by his father, under the provisions of § 5, c. 11, Gould's Dig., is not valid unless approved by the Probate Court. *Morrill v. Kennedy*, 22 Ark. 324. See Dig. Stat. Ark. (1894), § 255.

2. Binding by Father, Mother, or Guardian, with Minor's Consent.—*Peters v. Lord*, 18

Conn. 337; *Gen. Stat. Conn.* (1882), § 1738; *Fisher v. Lunger*, 33 N. J. L. 100. See also *Stokes v. Hatcher*, 4 N. J. L. 93.

In several of the states, there are statutes providing that children under the age of fourteen years may be bound by their father, or, in case of his death or incompetency, by their mother or legal guardian, * * * and that minors above the age of fourteen years may be bound in the same manner, but when bound by their parent or guardian the minor's consent shall be expressed in the indenture and testified by his signing the same. *Harper v. Gilbert*, 5 Cush. (Mass.) 417; *Pub. Stat. Mass.* 1888, p. 827; *Whitmore v. Whitcomb*, 43 Me. 458; *Rev. Stat. Me.* (1883), c. 62, §§ 1, 2; *Balch v. Smith*, 12 N. H. 437; *Pub. Stat. N. H.* (1891), c. 180, §§ 1, 2; *Hudson v. Worden*, 39 Vt. 382.

Under the statute in *Maine*, it was held that where a minor above the age of fourteen years is bound to service, indentures should be made by the mother, the minor consenting, and not by the minor with the consent of the mother. *Whitmore v. Whitcomb*, 43 Me. 458.

Under a statute in *Virginia*, providing that any apprentice bound by his father may, with the approbation of the county or corporation court, after he shall be sixteen years of age, agree to serve until he shall be twenty-four, or any shorter time, it has been held that a father cannot bind his infant child apprentice by indentures to which the child is not a party. *Pierce v. Massenburg*, 4 Leigh (Va.) 493, 26 Am. Dec. 333. The present law in *Virginia* on this question is to be found in the *Code* 1887, § 2581: "Any minor may be bound as an apprentice by his guardian, or, if none, by his father, or, if neither father nor guardian, by his mother, with the consent, entered of record, of the court of the county or corporation in which the minor resides, or without such consent if the minor, being fourteen years of age, agree in writing to be so bound."

In *West Virginia*, there is a statute similar to the present *Virginia* statute. *Code W. Va.*, c. 81, § 1. *State v. Reuff*, 29 W. Va. 751, 6 Am. St. Rep. 676.

3. How Minor's Consent Evidenced.—*Harper v. Gilbert*, 5 Cush. (Mass.) 417; *Balch v. Smith*, 12 N. H. 437. It has been held, however, in *Maine*, that where indentures of apprenticeship are signed and sealed by the father, the minor son, and the master, and conclude with the words "to the true performance of the foregoing agreement we have hereunto signed and sealed the same," it is a

Jersey, however, it is held that his consent is sufficiently shown by his voluntarily executing and delivering the instrument.¹

Minor with Consent of Father.—In still other states, there are statutory provisions to the effect that a minor may bind himself as an apprentice with the consent of his father,² and, in certain events, with the consent of his mother³ or legal guardian.⁴

How Consent is to be Evidenced.—In *Pennsylvania*, the consent of the parent or guardian is evidenced by his signing and sealing the indenture.⁵ In *New York*, however, the party consenting must do so by a certificate at the end of, and indorsed upon, the indenture.⁶

Overseers of the Poor, etc.—Special provision is ordinarily made by statute for binding out poor orphan children, or minor children of paupers. In some

sufficient consent by the minor in the deed. *Dodge v. Hills*, 13 Me. 151.

1. *Fisher v. Lunger*, 33 N. J. L. 100.

2. **Consent of Minor's Father.**—Laws of New York 1871, c. 934, § 1. See *Ackley v. Hoskins*, 14 Johns. (N. Y.) 374; *Pennsylvania Act of September, 1790*, § 1; *Com. v. Vanlear*, 1 S. & R. (Pa.) 248. See also *Com. v. Atkinson*, 8 Phila. (Pa.) 375.

3. **Consent of Minor's Mother.**—In *New York*, under 2 Rev. Stat. 154, § 1, providing that "if he [the father] be dead or be not in a legal capacity to give his consent, or if he shall have abandoned and neglected to provide for his family, and such fact be certified," etc., the mother has been held competent to give her consent to an indenture of apprenticeship, where the father was dead. *People v. Gates*, 43 N. Y. 40. See also *Potter v. Greene*, 39 Hun (N. Y.) 72.

In *Pennsylvania*, where the father was living with the mother at the time of the binding of their infant as an apprentice, it was held that the assent of the mother was not sufficient, and that the father's assent was necessary. *Com. v. Crommie*, 8 W. & S. (Pa.) 339.

But where the father was found by inquest to be an habitual drunkard, which finding was confirmed by the verdict of the jury, it was held that his children might be bound as apprentices with the mother's consent. *Com. v. Cox*, 1 Ashm. (Pa.) 71.

A mother, although married to a second husband, has been held to be a parent within the meaning of the *Pennsylvania Act* of 29th of September, 1770, and may, as such, independently of her husband, give assent to an indenture. *Com. v. Eglee*, 6 S. & R. (Pa.) 340.

Necessity of Justice's Certificates.—In January, 1871, the plaintiff, then of the age of fourteen years, became a party to an indenture of apprenticeship by the terms of which he, with the consent of his mother, bound himself as apprentice, until he attained the age of twenty-one years, to the defendants' testator. The instrument, which recited that the plaintiff's father had abandoned his family and was dead, was properly executed, except that there was not, as required by the statute, a certificate indorsed thereon by a justice of the peace, to the effect that the father had abandoned and neglected to support his family, although such

abandonment and neglect had in fact occurred. It was held that the omission of the certificate of the justice of the peace rendered the indenture voidable at the election of the infant. *Potter v. Greene*, 39 Hun (N. Y.) 72.

But it is held that a widow may, under this statute, apprentice her minor child, without any certificate by a justice of the peace, of the death of the father. *People v. Gates*, 43 N. Y. 40.

4. **Consent of Minor's Guardian.**—In *Pennsylvania*, it has been held under statute that an indenture of apprenticeship executed by a minor, where he has a guardian, is void without his guardian's consent. *Guthrie v. Murphy*, 4 Watts (Pa.) 80, 28 Am. Dec. 681.

When Guardian's Right to Assent Arises.—There is a dictum in *Com. v. Atkinson*, 8 Phila. (Pa.) 375, to the effect that the guardian's right to assent arises only where there is no parent.

Next Friend.—In *Pennsylvania*, where there is neither parent nor guardian, the right of the infant's next friend to assent to the apprenticeship arises. *Com. v. Atkinson*, 8 Phila. (Pa.) 375. It is not necessary that the person who consents as next friend to the minor should receive an appointment as such from legal authority. *Com. v. Roach*, 1 Ashm. (Pa.) 27; *Com. v. Atkinson*, 8 Phila. (Pa.) 375. He must, however, have evinced by his regard for the minor a more than ordinary care and interest in his welfare. *Com. v. Atkinson*, 8 Phila. (Pa.) 375. Thus, it has been held that an indenture executed by the minor's sister as next friend is valid. *Com. v. Roach*, 1 Ashm. (Pa.) 27; and this, though the binding was to her own husband, *Com. v. Leeds*, 1 Rawle (Pa.) 191.

But an indenture executed by the master in a prior apprenticeship as next friend of the apprentice is void. *Com. v. Kendig*, 1 S. & R. (Pa.) 366. The next friend should be one who, by his age, condition, and conduct, gives evidence of a proper discretion. *Com. v. Atkinson*, 8 Phila. (Pa.) 375. Thus, a minor sister has been held incompetent to act as next friend in the binding of an apprentice. *Com. v. Penott*, Bright. (Pa.) 189.

5. *Velde v. Levering*, 2 Rawle (Pa.) 269.

6. 2 Rev. Stat. N. Y. 154, § 3; *People v. First Judge*, 2 Hill (N. Y.) 596.

states, this power is vested in such officers as the overseers of the poor,¹

1. Power of Overseers of Poor—Statutes—Massachusetts.—In Massachusetts it has been held that by the statute of 1793, c. 59, overseers of the poor were not authorized to bind out a child as an apprentice unless the parent was actually chargeable to the town at the time of the binding out, notwithstanding he might have formerly received aid from the town, or unless they had adjudicated or formed an opinion that the parent was unable to maintain the child. *Reidell v. Morse*, 19 Pick. (Mass.) 358.

Under the same statute which provided that in certain cases male children might be bound out as apprentices by the overseers of the poor "until they come to the age of twenty-one years," it has been held that the overseers were not authorized to bind out a male child as an apprentice until he should be twenty years of age. *Reidell v. Congdon*, 16 Pick. (Mass.) 44.

It has also been held, under this statute, that where selectmen of a town, who were *ex officio* overseers of the poor, no persons having been specially chosen overseers, bound out a child as an apprentice, pursuant to the statute, by an indenture wherein they designated themselves simply as selectmen, the indenture was valid, and an action brought upon it by the overseers of the poor was sustained. *Powers v. Ware*, 2 Pick. (Mass.) 451.

The law at present in this state is to be found in Pub. Stat. Mass. 1882, c. 149, § 4, which provides that a minor child who is, or either of whose parents is, chargeable to a town as having a lawful settlement therein, or supported there at the expense of the commonwealth, may, whether under or above the age of fourteen years, be so bound by the overseers of the poor—a female to the age of eighteen years, or to the time of her marriage within that age, and a male to the age of twenty-one years. Under this statute, it has been held that a parent with whose consent relief is furnished by the town to some of his minor children, by reason of his having a lawful settlement in the town and not being able to support them, is actually chargeable to the town so as to enable the overseers of the poor to bind his minor children as apprentices or servants. *Bardwell v. Purrington*, 107 Mass. 419.

It has been also held, under the same statute, that an instrument executed to bind J. S. as an apprentice, which purports to bind him from its date until a day named, "when the said J. S. will arrive at the age of twenty-one years, during which time said J. S. shall faithfully serve," is not wholly void because, under the rule of law excluding fractions of a day in computation of time, J. S. will become of full age on the day next preceding that so named, but binds him during his minority. *Bardwell v. Purrington*, 107 Mass. 419.

Pennsylvania.—Under the statute of this state it has been held that in the binding of an infant apprentice by overseers of the poor, it is not necessary that the infant should join in the indenture. *Com. v. Jones*, 3 S. & R.

(Pa.) 158. See also *Com. v. Walker*, 12 S. & R. (Pa.) 169.

New York.—A mother shown to have received merely temporary relief from the overseers of the poor has been held not to be a person chargeable to the public within the meaning of the provision of 2 Rev. Stat. 155, § 6, allowing a child who becomes or whose parents become chargeable, to be bound out by the overseers of the poor. *People v. Hoster*, 14 Abb. Pr. N. S. (N. Y.) 414. Compare *Schermerhorn v. Hull*, 13 Johns. (N. Y.) 270, decided under a prior statute which was repealed.

Superintendents of Poor.—Under 2 Rev. Stat. N. Y. 155, § 5, providing that the county superintendents of the poor in the several counties may bind out any child under the age specified therein who shall be sent to any county poorhouse, or who is or shall become chargeable, or whose parent or parents are or shall become chargeable to such county, to be clerks and apprentices or servants, etc., it has been held that the term "sent to the county poorhouse" has reference to the object for which such poorhouse was erected, and that where a child was sent by the mother to the overseers of the poor, who took the child to the superintendents and requested them to bind him out as apprentice, this was not in accordance with the statute. *People v. Hanna*, 3 How. Pr. (N. Y. Supreme Ct.) 39.

Power of Majority of the Superintendents.—It has been held under statute in New York that a majority of the superintendents of the poor of a county may bind minors as apprentices without a meeting of or notice to all. *Johnson v. Dodd*, 56 N. Y. 76.

Orphan Asylum.—Where a woman who was employed in an orphan asylum placed her child in the asylum and applied a portion of her wages, equivalent to one dollar per week, to the child's support, it was held that the child had not been absolutely surrendered to the care and custody of the asylum within the meaning of New York Laws 1884, c. 438, § 5, which authorized certain charitable corporations to bind out indigent children who had been absolutely surrendered to their care and custody. *People v. Paschal*, 68 Hun (N. Y.) 344.

Commissioners of Public Charities in New York City.—Where the board of commissioners of public charities and correction of the city and county of New York received a child five years old from her father, under his agreement to pay a stipulated sum per week for her board, and he paid for one month only, came to see her but once, and soon left the state, it was held that the commissioners had legal authority under the statute to bind her out as an apprentice. *People v. Weissenbach*, 60 N. Y. 385.

South Carolina.—Under the South Carolina Statute of 1712, it has been held that the commissioners of the poor have power to bind minors as apprentices only where they shall become chargeable to the district, and that they have no right to bind them if their

selectmen,¹ or supervisors;² and in others it is vested in the county³ or probate courts.⁴

parents are living. *Welborn v. Little*, 1 Nott & M. (S. Car.) 263. For the present law on this question in this state, see *Laws S. Car.* 1893, § 30.

Virginia.—Under statute in Virginia authorizing overseers of the poor to bind out bastard children, it has been held that if one overseer of the county executes the indenture it is sufficient. *Brewer v. Harris*, 5 Gratt. (Va.) 285. For the law at present in Virginia, see *Code Va.* (1887), § 2583.

1. Power of Selectmen.—*Rumney v. Ellsworth*, 4 N. H. 138. See also *Pub. Stat. N. H.* (1891), 508.

In *Connecticut*, under a statute giving to selectmen power to bind infants as apprentices, it has been held that a minor who is not one of the poor of the town is not liable to be bound by them, and the assent of some one of the civil authority in the town is necessary. *King v. Brockway*, 2 Root (Conn.) 86. For the law on this question in Connecticut at present, see *Gen. Stat. Conn.* (1888), § 1740.

2. Power of Supervisors.—In *Mississippi*, under *Code* 1892, §§ 289, 3159, vesting the board of supervisors with jurisdiction over paupers, and authorizing them to apprentice poor orphan children, and other children whose parents are unable to support them, it has been held that it is not necessary, in order to give the board jurisdiction, that a citation to a minor to appear and show cause why he should not be apprenticed be served on the mother or guardian of such minor, or that it appear that he has no mother living or guardian; but it is sufficient if the minor be personally served with such citation. *Moore v. Allen*, 72 Miss. 273. Compare *Howry v. Calhoun*, 48 Miss. 587, decided under *Code* of 1871.

3. Power of County Court.—In *Texas*, under the constitution, art. 5, § 16, providing that the County Court may bind a minor as an apprentice when the parents of such minor, not being a charge upon the county, shall consent in writing to such apprenticeship, etc., it has been held that the consent of the father of an illegitimate minor child will not authorize the court to apprentice such child against the opposition of the mother if she is able to support him. *Timmins v. Lacy*, 30 Tex. 115. See further upon this question, *Sayles' Texas Civ. Stat.*, vol. 1, art. 18.

In *Kentucky*, under a statute giving the County Court jurisdiction to bind out infant children, it has been held that the court has no authority to bind the child where it appears that his father was qualified and willing to bring him up in moral courses. *Thomas v. Newcom*, 1 Bush (Ky.) 83. See also *Chaudet v. Stone*, 4 Bush (Ky.) 210; *Baker v. Winfrey*, 15 B. Mon. (Ky.) 499. See present statute in *Ky. Stat.* (1894), § 2591.

Under statute in this state it has also been held that before the County Court may make an order binding out an infant, notice of the proceeding must be given to the parent or next friend. *Mendall v. Rickets*, 6 J. J.

Marsh. (Ky.) 592; *Roberts v. Desforges*, 2 A. K. Marsh. (Ky.) 39; *Rachel v. Emerson*, 6 B. Mon. (Ky.) 280; *Curry v. Jenkins*, Hard. (Ky.) 501. See *Ky. Stat.* (1894), § 2592.

Alaska.—It has been held that the United States District Court for the District of Alaska has no jurisdiction to apprentice a minor. *Ex p. Emma*, 48 Fed. Rep. 211.

4. Power of Probate Court.—In *Alabama*, under a statute providing that the judge of probate of each county may bind out as apprentices the children of any person unable to provide for their support, until the age of twenty-one years if a male, and eighteen if a female, it has been held that the jurisdiction of a probate judge in any particular case sufficiently appears, if it be stated in the indenture of apprenticeship itself that the parents of the child thereby bound out are unable to provide for its support. *Owen v. State*, 48 Ala. 328. See also *Brinster v. Compton*, 68 Ala. 299.

Stone, J., delivering the opinion of the court in *Brinster v. Compton*, 68 Ala. 299, said: "The statute prescribes no form of proceedings for having an infant pauper apprenticed. The duty is confided to the judge of probate, and no machinery is furnished for putting his powers into exercise. Section 1737 of the Code contemplates that he shall take action whenever the sheriff, a justice of the peace, or other civil officer of the county, reports to him a minor under the age of eighteen years who is an orphan, without visible means of support, or whose parents have not the means or refuse to provide for the support of such minor; and he must apprentice all other such minors as may otherwise come to his knowledge. This, we are bound to hold, he may do *ex proprio motu*."

Under the same statute, it has been held that an order of the probate court apprenticing a minor on the application of his mother, because she is unable to support him, is not void on the ground that the application was made by the mother, it not appearing that he had no father, nor because no notice was given to the minor and no guardian *ad litem* appointed to represent him. *Cockran v. State*, 46 Ala. 714. The court in this case said: "Provision is made for notifying the father of a minor, or the mother, if there is no father, of the proceedings to apprentice the child, but there is no such requisition of notice to the child, nor even of its consent." See also *Brinster v. Compton*, 68 Ala. 299. See *Code Ala.* (1886), § 1474.

In *Georgia*, under a statute giving to the ordinary the power to bind out infant children, it has been held that the ordinary has no power to apprentice a colored child who resides with and is maintained by its father, the father being a resident of the county and able to support the child. *Comas v. Reddish*, 35 Ga. 236. See also *Adams v. Adams*, 36 Ga. 236. The law in this state upon this question at present is to be found in *Code Ga.* (1882), § 1876.

b. TO WHOM APPRENTICE MAY BE BOUND.—Any person legally capable of exercising a trade, business, or profession *sui juris*, may take an apprentice.¹

Signing by the Master.—In *England*, when an apprentice is bound, it is not necessary to the validity of his indenture that the master should sign a counterpart.² In *New Jersey*, a similar doctrine has been laid down.³ For the law upon this question in this country generally, however, the statutes of the various states should be consulted.⁴

Where the Apprentice is Bound to a Partnership consisting of two persons, it has been held that the indenture, to be binding upon the partnership, must be executed by both partners.⁵

3. Stipulations in Indenture—*a. ON MASTER'S PART*—At Common Law.—The contract of apprenticeship, at common law, must contain a stipulation on the part of the master for the instruction of the apprentice in his trade or profession;⁶ and usually contains, also, provisions for the care and mainte-

Under Rev. Stat. *Indiana* (1881), § 5337, which makes the assent of the court having probate jurisdiction necessary to the validity of an indenture of apprenticeship of pauper children, such an indenture made by the superintendent of the county asylum under the authority conferred by section 6092, and not approved by such judge, is void. *Owens v. Frager*, 119 Ind. 532.

In *North Carolina*, under Acts 1889, c. 169, § 2, it has been held that the clerk of the Superior Court is authorized to apprentice an illegitimate minor child to a suitable person of good moral character, though not related to it, by proof that the mother is of bad character and not fit to have its custody. *Ashby v. Page*, 108 N. Car. 6.

For decisions under prior statutes, see *In re Ambrose*, Phil. (N. Car.) 91; *Prue v. Hight*, 6 Jones (N. Car.) 265; *Midgett v. McBryde*, 3 Jones (N. Car.) 21; *Spears v. Snell*, 74 N. Car. 210.

1. Who may Take an Apprentice.—Wood's Master and Servant (2d ed.), § 40.

Married Woman.—At common law a married woman cannot take an apprentice. *Rex v. Guildford*, 2 Chit. Rep. 284, 18 E. C. L. 338; *Com. v. Medwinter*, Purdy's Pa. Dig. (10th ed.) 73.

It is otherwise where, by statute, she can contract. Wood's Master and Servant (2d ed.) § 40.

Infant.—Where the party to whom an apprentice is bound is an infant, the indenture is not void, but only voidable, hence a settlement may be gained under it. *Rex v. St. Petrox*, 4 T. R. 196.

Corporation.—A contract of apprenticeship has been held not to be invalid by reason of the fact that the master to whom the apprentice is bound is a corporation. *Burnley Equitable Co-operative, etc., Soc. v. Casson* (1891), 1 Q. B. 75.

A Partnership may also take an apprentice. *Rex v. St. Martin*, 2 Ad. & El. 655, 29 E. C. L. 172; *Hiatt v. Gilmer*, 6 Ired. (N. Car.) 450; *Com. v. Leeds*, 1 Ashm. (Pa.) 405. But in *Thorpe v. Rankin*, 19 N. J. L. 36, 38 Am. Dec. 531, an indenture binding an apprentice to three masters as partners was held to be void, as against the apprentice.

Shaker Community.—In *People v. Gates*, 43

N. Y. 40, it is held that a binding to a Shaker community is valid.

2. Signing by Master—England.—*Rex v. Fleet*, Cald. 31; *Rex v. St. Peter's on the Hill*, 2 Bott's P. L. 367.

3. Overseers of Poor v. Overseers of Poor, 13 N. J. L. 221.

4. In *New York*, it has been held, where a mother had entered into an indenture apprenticing her son, and it appeared, amongst other defects of form in the indenture, that it had not been subscribed or executed by the master, that she might regain the custody of her son upon a writ of habeas corpus. *People v. Hoster*, 14 Abb. Pr. N. S. (N. Y.) 414.

5. Execution of Indenture by Partnership.—*Taylor's Case*, 1 Browne (Pa.) Appendix lxxiii. See also *Judge v. Thomson*, 29 U. C. Q. B. 523.

6. Stipulations by Master—Common Law.—*Rex v. Billinghay*, 5 Ad. & El. 676, 31 E. C. L. 405; *Nickerson v. Easton*, 12 Pick. (Mass.) 110; *Hopewell v. Amwell*, 3 N. J. L. 19; *Respublica v. Keppele*, 2 Dall. (Pa.) 197. See also *Baker v. Winfrey*, 15 B. Mon. (Ky.) 507; *Bowes v. Tibbets*, 7 Me. 457.

Contract of Apprenticeship as Distinguished from Contract of Service.—In *England*, the rule has been laid down that where the substantial object of the parties to a contract is to learn and not to serve, the contract should be deemed one of apprenticeship and not of hiring and service. *Rex v. Edingale*, 10 B. & C. 739, 21 E. C. L. 158; *Rex v. Newtown*, 1 Ad. & El. 238, 28 E. C. L. 79; *Rex v. Combe*, 8 B. & C. 82, 15 E. C. L. 155; *Rex v. Crediton*, 2 B. & Ad. 493, 22 E. C. L. 128; *Rex v. St. Margaret's, King's Lynn*, 6 B. & C. 97, 13 E. C. L. 108.

But where the principal object of the contract is the service under it, although one of the objects is the instruction of the apprentice, it will be considered a contract of hiring and service, and not one of apprenticeship. *Rex v. Coltishall*, 5 T. R. 193; *Rex v. Little, Bolton*, Cald. 367; *Rex v. Burbach*, 1 M. & S. 370; *Rex v. Eccleston*, 2 East 298.

Formal Language Unnecessary.—In *England*, it has been determined that no technical words are necessary to constitute the relation of master and apprentice. Thus, it has been held that a party serving need not be retained

nance of him during the term of his service.¹

By Statute.—In many of the states, there are statutes making it necessary to the validity of the indenture that it shall contain a covenant on the part of the master to instruct the apprentice in the art or profession to which he is indentured.²

Care and Support.—Statutes in a number of the states also provide for a stipulation in the indenture on the part of the master to maintain and support the apprentice during the term of the apprenticeship.³

Education of Apprentice.—Moreover, in many states, it is provided by statute that the indenture shall contain a covenant for the education of the apprentice, and an indenture failing to make this provision will be invalid.⁴

Where the Indenture is More Extensive than That Prescribed by Statute.—Where the indenture contains a covenant on the part of the master for the infant's education, more extensive in its requirements than that prescribed by statute, it will, nevertheless, be valid at common law.⁵

eo nomine as an apprentice, but that it is enough if the purpose of the contract be that the one shall teach, and the other learn, the trade. *Rex v. Laindon*, 8 T. R. 379; *Rex v. Rainham*, 1 East 531.

1. *Nickerson v. Easton*, 12 Pick. (Mass.) 110.

But it seems that, independently of express stipulations, the master is bound to supply the apprentice with necessities. See *infra*, this article, *Care and Maintenance of Apprentice*.

2. **Instruction in Art or Profession—Statutes.**—In *Wisconsin*, an indenture of apprenticeship has been held void for not specifying some "profession, trade or employment in which the apprentice was to be instructed." *In re Goodenough's Petition*, 19 Wis. 274. See Sanborn and Berryman, Annotated Stat. (Wis.), § 379.

But in *New York*, it has been held that indentures of apprenticeship are not rendered invalid by omitting to specify the profession, trade, or employment in which the apprentice is to be instructed, and it is sufficient if the master covenants that he will teach the apprentice, or cause him to be taught, such manual occupation or branch of business as shall be found best adapted or most suitable to his business and capacity. *Fowler v. Hollenbeck*, 9 Barb. (N. Y.) 309; *People v. Pillow*, 1 Sandf. (N. Y.) 672. But for the law at present on this question in *New York*, see *Laws of New York*, 1893, p. 567.

For further law on this question, see the statutes of the various states.

3. **Stipulations as to Care and Support.**—*Com. v. Bowen*, 5 Phila. (Pa.) 220; *Com. v. Atkinson*, 8 Phila. (Pa.) 375. See also the statutes of the various states.

But in *Pennsylvania*, it has been held under statute that an indenture of apprenticeship binding a boy for a term of years, during which the master, in lieu of the common covenants for lodging, etc., agreed to pay him a certain sum per week for at least nine months or a year, was valid. *Com. v. Conrow*, 2 Pa. St. 402.

4. **Stipulations as to Education of Apprentice.**—In *Pennsylvania*, it is well settled under statute that, to make the indenture valid, the

master must covenant to give the apprentice a reasonable education, unless it appears that the apprentice is sufficiently educated and intelligent not to require additional schooling. *Com. v. Atkinson*, 8 Phila. (Pa.) 375; *Com. v. Bowen*, 5 Phila. (Pa.) 220; *Com. v. Penott, Bright*. (Pa.) 189.

In several states, it is provided that where the apprentice is bound out by the overseers of the poor, the indenture shall contain a provision for the instruction of the minor in reading, writing, and ciphering. *Butler v. Hubbard*, 5 Pick. (Mass.) 250; *Pub. Stat. Mass.* 1882, p. 827.

In *Maine*, the requirement as to ciphering is restricted to cases where the minor is a boy. *Burnham v. Chapman*, 17 Me. 385; *Rev. Stat. Me.* (1883), p. 286, § 21.

In *Burnham v. Chapman*, 17 Me. 385, it was held that to substitute, for the statute requirement, a covenant by the master to see that the minor was properly educated and instructed, is not sufficient.

Under 2 *Rev. Stat. New York* 155, § 5, requiring that when a child shall be bound out by the overseer of the poor of any city or town, "the indenture shall contain an agreement on the part of the person to whom such child shall be bound, that he will cause such child to be instructed to read and write, and, if a male, will cause him to be instructed in the general rules of arithmetic," it has been held that an indenture containing a clause that the master "will teach the child, or cause it to be taught, to read, write and cipher," is not sufficient. *People v. Hoster*, 14 Abb. Pr. N. S. (N. Y.) 414.

For similar requirements in *Ohio*, see *Francis v. Thompson*, *Tappan* (Ohio) 289.

Indenture Binding Negro Child.—In *In re Turner*, 1 Abb. (U. S.) 84, it was held that an indenture purporting to bind as apprentice a child of negro descent, which does not contain important provisions for the benefit of the apprentice, such as a covenant for his education, which are required by the general laws of the state in indentures of white apprentices, is void.

5. *Cochran v. Davis*, 5 Litt. (Ky.) 118; *Davis v. Bratton*, 10 Humph. (Tenn.) 179; *Finch v. Gore*, 2 Swan (Tenn.) 326.

Security of Consideration to Sole Use of Apprentice.—In addition to the foregoing stipulations, it is required by statute in some of the states that all considerations allowed by the master in any contract of apprenticeship shall be secured by the indenture to the sole use of the apprentice.¹

b. ON APPRENTICE'S PART.—At Common Law, the stipulations on the part of the apprentice are that he will faithfully serve the master in all such lawful business as he shall be put to by him, and that he will behave himself honestly and obediently towards the master, and honestly and orderly towards his family.²

For Statutory Provisions upon this question, the statutes of the various states should be consulted.³

4. Validity of Indenture Not Conformable to Statute—In Some States Void.—In some states, indentures defective on account of not conforming to the statutes under which they were made are held to be void.⁴

In Other States Voidable.—But in other states they are held to be voidable, and not void, and that by the apprentice only.⁵

Contract Not by Indenture in Two Parts.—Thus, contracts of apprenticeship have been held to be voidable at the instance of the apprentice, where they were not by indenture in two parts as required by statute.⁶

Omission to State Age of Apprentice.—Also, they have been held not to be void, but voidable by the apprentice only, for omitting the age of the apprentice.⁷

So the Failure of the Master to Record an Indenture as directed by statute does not make it absolutely void, so that he may avoid his covenants, though the apprentice might avoid it.⁸

Thus, where there was a clause in an indenture which required the master to teach the apprentice common arithmetic, including the rule of three, which was not required by statute in the case of a female, it was held, notwithstanding, to be binding on the master. *Cochran v. Davis*, 5 Litt. (Ky.) 118.

1. Consideration Secured to Apprentice.—Rev. Stat. *Maine* 1883, p. 526; *Doane v. Covell*, 56 Me. 527; *Dodge v. Hills*, 13 Me. 151; Pub. Stat. of *Massachusetts* 1882, p. 828; *Day v. Everett*, 7 Mass. 145.

Under statute in *Maine*, it has been held that an indenture providing that in consideration of certain services of the apprentice "to be paid to him or his mother, the apprentice is to board himself," is a sufficient "security to the sole use of the minor" within the meaning of the statute. *Doane v. Covell*, 56 Me. 527. See also *Dodge v. Hills*, 13 Me. 151.

2. Hen. Jus. 69; Grayd. Forms 304.

3. Under statute in New York, it has been held that articles of apprenticeship which do not contain the provision and covenant specified in the second subdivision of section 2, c. 934, 1871, to the effect that the apprentice shall not leave during the term, and may be compelled to return if he does, are, because of such omission, rendered invalid. *Barton v. Ford*, 35 Hun (N. Y.) 33.

4. Defective Indentures Held to be Void—Alabama.—*Englehardt v. Yung*, 76 Ala. 534. Compare *Cockran v. State*, 46 Ala. 714.

Indiana.—*Hunsucker v. Elmore*, 54 Ind. 209. *Massachusetts.*—*Butler v. Hubbard*, 5 Pick. (Mass.) 250; *Day v. Everett*, 7 Mass. 145.

Pennsylvania.—*Com. v. Atkinson*, 8 Phila. (Pa.) 375; *Com. v. Bowen*, 5 Phila. (Pa.) 220; *Com. v. Penott, Bright*, (Pa.) 189; *Guthrie*

v. Murphy, 4 Watts (Pa.) 80, 28 Am. Dec. 681. Compare *McGunigal v. Mong*, 5 Pa. St. 269.

South Carolina.—*Welborn v. Little*, 1 Nott & M. (S. Car.) 263; *Austin v. McCluney*, 5 Strobb. (S. Car.) 104.

Wisconsin.—*In re Goodenough's Petition*, 19 Wis. 274.

5. Defective Indentures Held to Be Voidable at Instance of Apprentice—Delaware.—*Luby v. Cox*, 2 Harr. (Del.) 184.

Maine.—*Doane v. Covell*, 56 Me. 527.

New Hampshire.—*Page v. Marsh*, 36 N. H. 305; *Campbell v. Cooper*, 34 N. H. 49; *Brown v. Whittemore*, 44 N. H. 369.

New York.—*Fowler v. Hollenbeck*, 9 Barb. (N. Y.) 309.

Ohio.—*Haber v. Heis, Wright* (Ohio) 19; *Francis v. Thompson, Tappan* (Ohio) 289.

Vermont.—*Hudson v. Worden*, 39 Vt. 382.

See also *Webster v. McBride*, 5 U. C. C. P. 109; *Dillingham v. Wilson*, 6 U. C. Q. B. (O. S.) 85; *Fish v. Doyle, Draper* (U. C.) 328.

As to setting up the fact that the indenture is voidable in an action for enticing away an apprentice, see *infra*, this title, *Enticing Away or Harboring Apprentice*.

6. Contract of Apprentice Not by Indenture in Two Parts as Required by Statute.—*Page v. Marsh*, 36 N. H. 305; *Brown v. Whittemore*, 44 N. H. 369. See also *Campbell v. Cooper*, 34 N. H. 49.

7. Omission of Age of Apprentice.—*Francis v. Thompson, Tappan* (Ohio) 289. See also *Doane v. Covell*, 56 Me. 527.

A Stranger to the Indenture cannot take advantage of the omission to insert the age of the apprentice. *Heinecke v. Rawlings*, 4 Cranch (C. C.) 699.

8. Failure of Master to Record Indenture.—*Haber v. Heis, Wright* (Ohio) 19.

What Amounts to an Avoidance.—Any act of a minor clearly showing his intention not to be bound by the indenture is a sufficient avoidance.¹ Thus, the act of an apprentice, in leaving his service under circumstances indicative of an intention to avoid the contract, will constitute a good avoidance.²

Discharge from Defective Indenture on Habeas Corpus.—Where an apprentice is restrained under an indenture defective under statute, he will be entitled to a release on a writ of habeas corpus.³

5. Indentures Made in Another State.—The rule has been laid down that an indenture of apprenticeship with covenants, valid in the state where executed, will be enforced in another state, unless *contra bonos mores*, or against the policy of the state.⁴ Thus, under this rule, it has been held in *New Jersey* that an indenture binding to a master in that state a minor, an inhabitant of *New York*, was valid where the instrument was executed in *New York* and was valid according to the laws of that state.⁵ But in *New Hampshire* it has been held that where an indenture binding an apprentice to his master, both being inhabitants of that state, is executed by overseers of the poor in *Vermont*, it will be void.⁶ Moreover, where overseers of the poor in *Rhode Island* bound out one of its inhabitants as apprentice according to the laws of that state, to a resident in *Massachusetts*, the indenture was held to be invalid in the latter state.⁷

III. ASSIGNMENT OF INDENTURES—Validity as between Apprentice and Assignee.—It is a general rule that an indenture of apprenticeship is not assignable, even with the consent of the apprentice, so as to create in him the duty to yield his obedience and services to the assignee,⁸ unless so provided by statute.⁹

1. What Amounts to Avoidance by Minor.—*Brown v. Whittemore*, 44 N. H. 369.

2. Apprentice Abandoning the Service—Avoidance.—*Brown v. Whittemore*, 44 N. H. 369; *Campbell v. Cooper*, 34 N. H. 49; *State v. Plaisted*, 43 N. H. 413; *Hudson v. Worden*, 39 Vt. 382. Compare *Dowd v. Davis*, 4 Dev. (N. Car.) 68.

3. Apprentice Held under Defective Indenture—Habeas Corpus.—*Rex v. Delaval*, 3 Burr. 1434; *Cannon v. Stuart*, 3 Houst. (Del.) 223; *Comas v. Reddish*, 35 Ga. 236; *Ballenger v. McLain*, 54 Ga. 159; *Matter of M'Dowle*, 8 Johns. (N. Y.) 328; *Matter of Brennan*, 1 Sandf. (N. Y.) 711; *Musgrove v. Kornegay*, 7 Jones (N. Car.) 71; *Com. v. Atkinson*, 8 Phila. (Pa.) 375. See also *People v. Weisenbach*, 60 N. Y. 385.

4. Petrie v. Voorhees, 18 N. J. Eq. 285.

In *New York*, it has been held that an indenture of a minor to service in a trade for the period of his minority, executed by the New York Juvenile Asylum to a resident of Illinois, with the written consent of the minor's mother after a previous surrender by her of the child to the custody and control of the asylum for and during his minority, constitutes a legal contract for binding the child to an employment, where it appears that such indenture contains all the covenants for the minor's benefit required by the laws of Illinois and conforms to the laws of this state. *People v. New York Juvenile Asylum*, 2 Thomp. & C. (N. Y.) 475.

5. Petrie v. Voorhees, 18 N. J. Eq. 285.

6. Dyer v. Hunt, 5 N. H. 401.

7. Himes v. Howes, 13 Met. (Mass.) 84. Dewey, J., in giving the opinion of the court in this case, said: "The very nature of the trust, the source from which the authority to

bind out is derived, the duties and obligations resulting from such contract, and the proper supervision of it by the appropriate tribunals, all tend to one view of this question and clearly show it to be a local indenture, and one that must have its force and effect as a statutory binding out to service only within the territorial limits of Rhode Island."

8. Assignment of Indenture—Validity as between Apprentice and Assignee—England.—*Coventry*, Hob. 134a.

United States.—*Handy v. Brown*, 1 Cranch (C. C.) 610.

Alabama.—*Tucker v. Magee*, 18 Ala. 99.

Kentucky.—*Shult v. Travis*, Sneed (Ky.) 142. See also *Hudnut v. Bullock*, 3 A. K. Marsh. (Ky.) 299.

Massachusetts.—*Hall v. Gardner*, 1 Mass. 172; *Ayer v. Chase*, 19 Pick. (Mass.) 556; *Randall v. Rotch*, 12 Pick. (Mass.) 108; *Nickerson v. Easton*, 12 Pick. (Mass.) 110; *Kelly v. Sprout*, 97 Mass. 169.

New Hampshire.—*Campbell v. Cooper*, 34 N. H. 49.

Tennessee.—*Stewart v. Rickets*, 2 Humph. (Tenn.) 151; *Stringfield v. Heiskell*, 2 Yerg. (Tenn.) 546.

In *Tucker v. Magee*, 18 Ala. 100, it was held that if one, to whom a slave is bound as an apprentice for a term of years, before the expiration of such term, renounces his trust and suffers his slave to be converted by a third person, the owner will become entitled to the immediate possession and may bring trover for the conversion.

9. Assignment of Indenture—Statutes.—Under *Pennsylvania* Act, 17th April, 1799, § 2, it has been held that the consent of the parent or guardian, as well as that of the apprentice,

The Reason of the Rule is that the interest is a personal trust reposed in and peculiar to the depository, which is in its nature incapable of assignment.¹

Apprentice may Gain Settlement under Assignment Compensation.—However, if the apprentice is assigned over by the first master, and continues in the service of the assignee with the consent of all the parties, he may gain a settlement in the new service,² and he will be entitled to the stipulated compensation.³

As between Assignor and Assignee.—There is some diversity of opinion as to the common-law doctrine in regard to the validity of the assignment as between the assignor and assignee. According to some of the authorities, the assignment is void as being against public policy, and affords no good and lawful consideration for a contract,⁴ while by others it is held that the assignment in such a case, though not good as passing an interest, is good by way of covenant,⁵ both as not being illegal,⁶ and as not being without consideration, and this whether the services have been fully performed⁷ by the apprentice or not.⁸

Where Statute is Violated.—In *Kentucky*⁹ and *North Carolina*,¹⁰ such assignment

is necessary to the assignment of the apprentice. *Com. v. Vanlear*, 1 S. & R. (Pa.) 248.

Thus, where an apprentice was bound to two copartners, or the survivor of them, and it was provided by the indenture that in case of dissolution he was to have the right to elect or choose which of the said copartners he would serve, and afterwards the partnership was dissolved, and one of the partners assigned to the other all his right, title, and interest in the said indenture, the court held that, to make the election of the apprentice valid and binding, it must be done with the consent of the parent or guardian, and that the dissolution of the partnership abrogated the indenture, the parent not consenting to the election. *Com. v. Leeds*, 1 Ashm. (Pa.) 405.

And this rule is true even where the overseers of the poor originally executed the indenture. *Com. v. Jones*, 3 S. & R. (Pa.) 158.

But it has been held, under the statute, that an indenture binding an apprentice to a man, his heirs and assigns, without naming the executors, cannot be assigned by his executors. *Com. v. King*, 4 S. & R. (Pa.) 109.

1. See cases cited in note 8, p. 498.

2. **Acquiring Settlement under the New Service.**—*Rex v. Stockland*, Doug. 70; *Guilderland v. Knox*, 5 Cow. (N. Y.) 365; *Overseers of Poor v. Overseers of Poor*, 13 N. J. L. 221.

The new service must be performed with the consent of the first master. *Rex v. St. Paul's Bedford*, 6 T. R. 452. See also *Rex v. Maidstone*, 5 Ad. & El. 326, 31 E. C. L. 352; *Rex v. St. Martin*, 2 Ad. & El. 655, 29 E. C. L. 172.

Also it has been held that though a service for the term required by the statute with a second master will give a settlement, if such service was under the indenture, yet, to constitute a service under the indenture, there must be an assignment express or implied. Thus it has been held that if the master discharges the apprentice without making any assignment of him, or without turning him over, but suffers him to go at large, without claiming any benefit from his services, the apprentice will acquire no settlement by living with another person in another parish.

Overseers of Poor v. Overseers of Poor, 14 N. J. L. 321. See also *Trenton v. Nottingham*, 1 N. J. L. 335.

But it has been held sufficient if the indenture was handed over without any assignment in writing. *Overseers of Poor v. Overseers of Poor*, 13 N. J. L. 221; *Guilderland v. Knox*, 5 Cow. (N. Y.) 365.

3. **Compensation.**—*Kelly v. Sprout*, 97 Mass. 169; *Randall v. Rotch*, 12 Pick. (Mass.) 108; *Nickerson v. Easton*, 12 Pick. (Mass.) 110; See also *Ayer v. Chase*, 19 Pick. (Mass.) 556.

Promise to Pay Not to be Implied.—In *New York*, however, it has been held that where the plaintiff was bound as an apprentice to another until the age of twenty-one years, and subsequently the indentures were assigned to the defendant with the assent of the apprentice, who went to live with the defendant and continued to live with him until he was twenty-one years old, the plaintiff could not recover of the defendant under the common counts for work, labor, and services on the implied assumption by the latter to pay him therefor; the voluntary continuance of the plaintiff in the service of the assignee being deemed a continuance of his apprenticeship with his own consent. *Williams v. Finch*, 2 Barb. (N. Y.) 208.

4. **Assignment of Indenture—Validity as between Assignor and Assignee.**—*Walker v. Johnson*, 2 Cranch (C. C.) 203; *Davis v. Coburn*, 8 Mass. 299.

In the latter case cited above it appeared that the apprentice, after partial performance of service, absconded from his new master, but in the first case the new master had enjoyed the services of the apprentice for the full term.

5. See *Parish of Castor & Aicles*, 1 Ld. Raym. 683.

6. *Martin v. Rice*, 2 Browne (Pa.) 191; *Shoppard v. Kelly*, 2 Bailey (S. Car.) 93.

7. *Nickerson v. Howard*, 19 Johns. (N. Y.) 113.

8. *Shoppard v. Kelly*, 2 Bailey (S. Car.) 93. See also *Welborn v. Little*, 1 Nott & M. (S. Car.) 263.

9. *Huffman v. Rout*, 2 Metc. (Ky.) 50.

10. *Allison v. Norwood*, Busb. (N. Car.)

has been held to be in direct violation of statute, and hence a contract founded upon a consideration of the assignment must necessarily be illegal and void.

IV. DISSOLUTION OF CONTRACT—1. By Expiration of Term.—Where, by the stipulations in the indenture itself, a period is fixed at which the apprenticeship is to terminate, the parties will be concluded thereby.¹

Where No Definite Time Named.—But where there is no stipulation for any definite period of service, either party may terminate the contract at pleasure.²

Where Term Extends beyond Full Age of Apprentice.—Where an infant is bound as an apprentice to serve beyond full age, he is entitled to be discharged from the contract upon attaining his majority.³ However, it has been held that such contract may be ratified by him after majority, but the ratification must be express, and cannot be implied from his continuing to work after full age.⁴

Conclusiveness of Indenture as to Age of Apprentice.—The master is concluded by the recital in the indentures as to the age of his apprentice.⁵ As to the infant, however, such recital is only *prima facie* evidence and may be rebutted.⁶

2. By Mutual Consent.—An indenture of apprenticeship may, at common law, be vacated by the consent of all the parties.⁷

414. Compare *Futrell v. Vaun*, 8 Ired. (N. Car.) 402.

1. Expiration of Term of Service.—*Moore v. Ann*, 9 B. Mon. (Ky.) 36. In this case, it was held that the master of a person of color, to whom the latter had been apprenticed, after holding and enjoying her services as an apprentice, could not be permitted to question the right of the apprentice to freedom after the term of service had expired.

2. Where No Time is Fixed.—*Wright v. Delano*, 62 N. H. 252.

3. Term Extending beyond Majority of Apprentice.—*Ex p. Davis*, 5 T. R. 715; *Cuming v. Hill*, 3 B. & Ald. 59, 5 E. C. L. 229; *Drew v. Peckwell*, 1 E. D. Smith (N. Y.) 408; *Walker v. Chambers*, 5 Harr. (Del.) 311.

Under statute in *Virginia*, directing that female apprentices shall be bound out until they are eighteen years old, a binding out until seventeen has been held valid. *Brewer v. Harris*, 5 Gratt. (Va.) 285.

In *Georgia*, indentures of apprenticeship binding a female during her minority, have been held to mean until the apprentice arrives at the age of twenty-one, and are, therefore, not void at eighteen as being in restraint of marriage. *Dent v. Cock*, 65 Ga. 400.

4. Ratification by Apprentice upon Attaining His Majority.—*Walker v. Chambers*, 5 Harr. (Del.) 311.

5. Recital in Indenture of Apprentice's Age—Conclusiveness.—*McCutchin v. Jamieson*, 1 Cranch (C. C.) 348.

In *North Carolina*, it has been held that the recital of the age of an apprentice in the indenture of apprenticeship, is conclusive of that fact as to the master in a suit by him against a third person for harboring the apprentice. *Hooks v. Perkins*, Busb. (N. Car.) 21.

6. Recital in Indenture of Apprentice's Age—Prima Facie Only as to Him.—*Ex p. Davis*, 5 T. R. 715.

Under statute in *New York*, declaring that the age of every infant shall be inserted in the indenture of apprenticeship, and that it shall be taken to be the true age without further

proof thereof, it has been held that such recital is only *prima facie* evidence as to the apprentice, and he may show his true age by extrinsic testimony. *Banks v. Metcalfe*, 1 Wheel. Cr. Cas. (N. Y.) 381; *Matter of Brennan*, 1 Sandf. (N. Y.) 711; *Drew v. Peckwell*, 1 E. D. Smith (N. Y.) 408.

Conclusiveness as to Third Person.—In *Bonnel v. Brozman*, 3 W. & S. (Pa.) 178, in an action by the master against a third person for harboring and concealing an apprentice, it was held that the indenture of apprenticeship was *prima facie* evidence as to the age of the apprentice, and that it lay upon the defendant to rebut this presumption by showing the true age of the apprentice.

7. Termination of Apprenticeship by Consent of the Parties.—*Graham v. Graham*, 1 S. & R. (Pa.) 330. See also *Rex v. Mountsorrel*, 3 M. & S. 497; *Manchester v. Smith*, 12 Pick. (Mass.) 113.

If a Master License an Apprentice to Leave Him, he cannot afterwards recall that license. *Anonymous*, 6 Mod. 70; *Black v. Stevenson*, 3 U. C. Q. B. 160; *Lewis v. Wildman*, 1 Day (Conn.) 153.

Where, However, a Condition is Attached to the agreement to discharge the apprentice, it must be shown that the condition has been observed. *Gray v. Cookson*, 16 East 13.

Whether Discharge must Be under Seal.—At one time it was laid down as the law that an apprenticeship, being created by deed, could not be discharged but by deed. *Reg. v. Daniel*, 6 Mod. 182; *Parish of Castor & Aicles*, 1 Salk. 68; *Rex v. Bow*, 4 M. & S. 386. But the more recent authorities are not in favor of this requirement in all cases. *Wood's Law of Master and Servant* (2d ed.), p. 88; *Weddington v. Chilvers*, Burr. (Sc.) 770; *Black v. Stevenson*, 3 U. C. Q. B. 160. See also *Gray v. Cookson*, 16 East 13; *Lewis v. Wildman*, 1 Day (Conn.) 153.

In *Nickerson v. Easton*, 12 Pick. (Mass.) 110, it was held that an apprenticeship *de facto* may be waived by a written agreement without seal.

3. By Death of Master—Effect upon Apprentice.—An apprentice is not bound to serve the master's administrator or executor upon the master's death,¹ in the absence of express contract² or of statutory provision³ to the contrary.

The Reason of This Rule is that the contract of apprenticeship is in its nature fiduciary on the part of the master, and the apprentice and his parent or guardian may be unwilling to repose the same confidence in an executor or administrator as in the master.⁴

Contract Voidable.—But it has been held that as to the apprentice, an indenture of apprenticeship becomes voidable merely,⁵ and not void, upon the death of the master, and, accordingly, if he serves the administrator or executor, he acquires the rights and incurs the duties of an apprentice, and if he subsequently leaves his employment, he cannot avoid the indenture so as to recover for his services upon a *quantum valebat*.⁶

Effect upon Master's Representatives—As to Covenant to Teach Trade, etc.—It is the common-law rule that a covenant on the part of a master to teach the apprentice a trade or profession, is personal and dies with the master.⁷

As to Covenant to Educate.—It has been held in *Kentucky* that where the indenture contains a covenant to educate the apprentice, as prescribed by statute, the master's personal representative will be bound thereby upon the master's death.⁸

As to Covenant to Support.—According to the better authority, the executor or administrator will be bound by the master's covenant for the support and maintenance of the apprentice.⁹

In *New Jersey*, however, it has been held that from the nature of the contract of apprenticeship the covenant to support must be limited to the time of service, and ceases when that ends.¹⁰

Infant's Note in Purchase of Release.—In *Haley v. Taylor*, 3 Dana (Ky.) 221, it was held that where an apprentice is bound to his master by his own contract only, and he gives his note to the master in consideration of his release from service for the unexpired term, the note is valid and may be enforced. Where, however, the apprentice had been bound by his father, and had, without his father's concurrence or privity, made a contract with his master for liberation from his apprenticeship, it was held that the apprentice would not be liable upon the contract. *Hudnut v. Bullock*, 3 A. K. Marsh. (Ky.) 299.

1. Rights of Master's Executor or Administrator.—*Baxter v. Burfield*, 2 Stra. 1266.

But it was the custom in England and Scotland at one time for the personal representative of the master to find another master for the apprentice. *Cutter v. Lebberton*, 5 Supp. (Sc.) 70. See also *Petrie v. Voorhees*, 18 N. J. Eq. 289.

2. Cooper v. Simmons, 7 H. & N. 707.

3. Statutes in some of the states provide, under certain restrictions, for the assignment of the apprentice to a new master by the personal representative of the master. *Pennsylvania Act 1799*, § 2; *Com. v. King*, 4 S. & R. (Pa.) 109; *Kennedy v. Savage*, 2 Browne (Pa.) 178; *Gen. Stat. South Carolina 1882*, § 2075; *Shoppard v. Kelly*, 2 Bailey (S. Car.) 93.

4. Baxter v. Burfield, 2 Stra. 1266.

5. Phelps v. Culver, 6 Vt. 430. See also *Shoppard v. Kelly*, 2 Bailey (S. Car.) 94.

6. Phelps v. Culver, 6 Vt. 430.

7. Death of Master—Effect upon Covenant to Instruct in Trade, etc.—*Rex v. Peck*, 1 Salk. 66; *Wadsworth v. Gye*, Sid. 216; *Cochran v.*

Davis, 5 Litt. (Ky.) 118; *Frazer v. Wright*, 16 U. C. Q. B. 514. Compare *Walker v. Hall*, Liv. 177.

8. Death of Master—Effect upon Covenant to Educate.—*Cochran v. Davis*, 5 Litt. (Ky.) 119.

9. Death of Master—Effect upon Covenant to Support.—*Wadsworth v. Gye*, Sid. 216; *Rex v. Peck*, 1 Salk. 66; *Cochran v. Davis*, 5 Litt. (Ky.) 118. See also *Phelps v. Culver*, 6 Vt. 430. Compare *Com. v. King*, 4 S. & R. (Pa.) 109.

Covenant for Support by Administrator.—In *Eastman v. Chapman*, 1 Day (Conn.) 31, it was held that an express covenant in an indenture of apprenticeship whereby the master binds himself and his administrators to provide meat and drink for the apprentice, extends to the administrator.

10. Death of Master—Effect upon Covenant to Support—New Jersey Rule.—*Petrie v. Voorhees*, 18 N. J. Eq. 285. The chancellor, in giving the opinion of the court in this case, said: "It seems to me that a correct application of the usual rules of construction to such contracts should limit the contract to support in this way. Else the injustice and absurdity would follow, that upon the death of his master an apprentice, having years to serve, could call upon his master's executor for board, clothing, and pocket money as covenanted, and spend his time in idleness, or in other service; and the estate of an honest mechanic, who left half a dozen apprentices with five years to serve, would be eaten up in their gratuitous support, and his wife and children left penniless, and this, too, when he had maintained them during the first unremunerative years of their service."

4. By Apprentice's Abandonment—For Misconduct of Master.—Where the misconduct of the master is such as to render it unsafe or improper for the apprentice to remain longer in his service, as where the master treats him cruelly,¹ or compels him to work on Sunday,² he may lawfully leave his employment.

Discharge by Court.—Moreover, in several states, provision is made by statute for the court to discharge the apprentice from his indentures in case of cruel or improper treatment by the master.³

5. By Removal of Apprentice from Commonwealth.—Where the master removes an apprentice from the commonwealth, it will be a sufficient ground for the release of the apprentice from his apprenticeship.⁴

Mere Intention to Remove Insufficient.—But a mere intention of removal on the part of the master will not have this effect.⁵

Consent of the Parties.—Nor will a father be justified in taking his son from the master's service, where it appears that the removal was undertaken with the consent of the minor and his father.⁶

6. By Discharge by Master—For Breach of Covenants by Apprentice.—The covenants in an indenture of apprenticeship are, according to the better authority, independent, and, consequently, acts of misconduct on the part of the apprentice, in violation of his covenants, will not justify his discharge by the master.⁷

Apprentice Absconding or Embezzling.—Thus it has been held that where the apprentice absconds, but afterwards offers to return,⁸ or where he embezzles or steals

1. Abandonment by Apprentice—Cruelty of Master.—*Argles v. Heaseman*, 1 Atk. 518; *McGrath v. Herndon*, 4 Mon. (Ky.) 480. See also *Berry v. Wallace*, *Wright (Ohio)* 657.

But it has been held in *Pennsylvania*, that the law will not sustain an apprentice in absconding whenever he may fancy he is ill-treated. *Com. v. Linker*, 8 Phila. (Pa.) 455.

2. Abandonment by Apprentice—Compelled to Labor Sundays.—*Warner v. Smith*, 8 Conn. 14.

3. Discharge of Apprentice by Court—Statutes.—*Cannon v. Davis*, 1 Cranch (C. C.) 457; *Schermerhorn v. Hull*, 13 Johns. (N. Y.) 270; *Com. v. St. German*, 1 Browne (Pa.) 24; *Com. v. Linker*, 8 Phila. (Pa.) 455.

Validity of Indenture as to Service Previous to Discharge.—In *New York*, it has been held that the discharge of certain apprentices by the justices, under statute, on a complaint of misusage, etc., cannot affect the validity of the indentures as to any time of service rendered previous to their interference, and the master, upon that ground, cannot be prevented from defending himself in a suit by showing that there could be no indebtedness for such services because at that time they were his indented apprentices. *Schermerhorn v. Hull*, 13 Johns. (N. Y.) 270.

4. Removal by Master of Apprentice from State—Release.—*U. S. v. Scholfield*, 1 Cranch (C. C.) 255; *Gusty v. Diggs*, 2 Cranch (C. C.) 210; *Com. v. Edwards*, 6 Binn. (Pa.) 203; *Com. v. Deacon*, 6 S. & R. (Pa.) 526. See also *Randall v. Rotch*, 12 Pick. (Mass.) 108; *Nickerson v. Easton*, 12 Pick. (Mass.) 110.

5. Mere Intent to Remove Not Sufficient.—In covenant on an indenture of apprenticeship, where the defendant pleaded that the plaintiff intended to remove to a distant state for the purpose of there carrying on his trade, and to carry the apprentice with him against the will of the apprentice and of the defendant, and that the plaintiff did actually remove thither;

that if the apprentice had remained with him till he went, and had refused to accompany him, he would have been abandoned by him, whereupon the apprentice, to avoid being carried out of the commonwealth, and to provide against being deserted, left the plaintiff's services; it was held, upon general demurrer, that the plea was bad, as alleging only an intention of the plaintiff to violate his covenant. *Coffin v. Bassett*, 2 Pick. (Mass.) 357.

6. Removal with Consent of Apprentice and His Father.—*Lobdell v. Allen*, 9 Gray (Mass.) 377.

Case Depending upon Election of Apprentice.—Where a child had been duly bound an apprentice in Upper Canada, and the master had removed with the child into Massachusetts, the court refused to order her to be delivered to her mother, who had relinquished her rights as guardian by nurture by marriage to a second husband, but permitted her to remain with her master, she declaring herself to be so inclined. *Com. v. Hamilton*, 6 Mass. 273.

7. Covenants Held to be Independent—Misconduct of Apprentice.—*Winstone v. Linn*, 1 B. & C. 460, 8 E. C. L. 196; *Wise v. Wilson*, 1 C. & K. 662, 47 E. C. L. 662; *Phillips v. Clift*, 4 H. & N. 168; *Powers v. Ware*, 2 Pick. (Mass.) 451. See also *Clancy v. Overman*, 1 Dev. & B. (N. Car.) 402. Compare *Warner v. Smith*, 8 Conn. 14.

Discharge by Courts—Statutes.—However, special provision may be made by statute for the courts having jurisdiction in a proper case to discharge the master from his indenture. *Hawkesworth & Hillary's Case*, 1 Saund. 315; *Winstone v. Linn*, 1 B. & C. 460, 8 E. C. L. 196; *Powers v. Ware*, 2 Pick. (Mass.) 451.

8. Where Apprentice Absconds but Offers to Return.—*Winstone v. Linn*, 1 B. & C. 460, 8 E. C. L. 196.

the master's goods,¹ it does not follow that the master may, of his own authority, put an end to the contract.

Apprentice an Habitual Thief.—However, in a recent *English* case, where it appeared that the apprentice was an habitual thief while in the master's service, the master was held to be sufficiently justified in dismissing him. The *ratio decidendi* being, not that the master was absolved because the apprentice had not performed the obligation imposed upon him by the articles, but because the apprentice, by his own acts, had put it out of the power of the master to carry out what he had contracted to do, namely, to teach the apprentice to carry on his trade honestly.²

For Sickness of Apprentice.—The master takes the apprentice for better or worse, and he may not discharge him on account of incurable sickness.³

For Marriage of Apprentice.—Nor will the marriage of the apprentice, without the privity of his master, justify his dismissal.⁴

7. Return of Premium.—Where the Master Dies.—According to the more recent authorities in *England*, the partial failure of consideration by the death of the master will not authorize a recovery of part of the premium money which has been paid by the apprentice,⁵ though by the earlier decisions such recovery was allowed.⁶

Where He Becomes a Bankrupt.—But where the contract of apprenticeship has been discharged by the bankruptcy of the master, the apprentice has been held to be entitled to a recovery of a *pro rata* portion of the premium.⁷

Where Apprentice Dies.—It has been said that the master is not bound to return a portion of the premium upon the death of the apprentice before the expiration of his term.⁸

Where He Absconds.—Moreover, where the apprentice, of his own accord, runs away, and is afterwards willing to return, but the master will not receive him, it has been held that the master is not compellable to return any part of the apprentice's fee.⁹

Where He has been Rightfully Discharged.—There are cases holding that where an apprentice is rightfully discharged, the court may, notwithstanding, order a restitution of a due proportion of the premium.¹⁰ Thus, a partial recovery of premium money has been allowed the apprentice where he was discharged by the master for negligence and misdemeanor.¹¹ But in a case where the apprentice was dismissed from service as being an habitual thief, he was held not to be entitled to the return of a proportionate part of the premium.¹²

V. INDENTURES AS EVIDENCE—Mode of Proving Indentures.—Where an indenture of apprenticeship is offered as evidence, its execution must be proved as other deeds.¹³

1. Where Apprentice Embezzles or Steals Master's Goods.—*Phillips v. Clift*, 4 H. & N. 168; *Powers v. Ware*, 2 Pick. (Mass.) 451.

2. Where Apprentice an Habitual Thief.—*Learoyd v. Brook* (1891), 1 Q. B. 431. See also *infra*, this title, *Obligation of Parties*.

3. Sickness of Apprentice.—*Rex v. Hales Owen*, 1 Stra. 99; *Powers v. Ware*, 2 Pick. (Mass.) 451.

4. Marriage of Apprentice.—*Stephenson v. Houlditch*, 2 Vern. 491. See also *Powers v. Ware*, 2 Pick. (Mass.) 457.

By statute in *Indiana*, it is provided that the marriage of a female shall annul her indentures. *King v. Snedeker*, 137 Ind. 503.

5. Death of Master.—Recovery of Part of Premium Allowed by Recent English Cases.—*Whincup v. Hughes*, L. R. 6 C. P. 78; *In re Thompson*, 1 Exch. 864.

6. Such Recovery Denied by Early English Cases.—*Newton v. Rowse*, 1 Vern. 460; *Soam v. Bowden*, Fin. 396; *Hirst v. Tolson*, 2 M. & Gord. 134.

7. Bankruptcy of Master — Recovery of Premium.—*Ex p. Sandby*, 1 Atk. 149.

8. Death of Apprentice—Recovery of Premium.—*Fraser's Master and Servant* 447.

Where an Apprenticeship Deed Contained a Special Provision that in the event of the health of the apprentice failing so as to incapacitate him from performing his part of the contract, the master would refund a portion of the premium, it was held that the father was entitled to recover that amount upon the death of his son. *Derby v. Humber*, L. R. 2 C. P. 247.

9. Recovery of Premium where Apprentice Runs Away.—*Cuff v. Brown*, 5 Price 297.

10. Apprentice Rightfully Discharged—Recovery of Premium.—*Therman v. Abell*, 2 Vern. 64; *Hawkesworth & Hillary's Case*, 1 Saund. 314.

11. *Therman v. Abell*, 2 Vern. 64.

12. *Learoyd v. Brook* (1891), 1 Q. B. 431.

13. Manner of Proving Execution of Indentures.—In *Alabama*, it has been held that indentures

Indenture Made in Another State.—Moreover, a copy of an indenture of apprenticeship purporting to be made in one state, and authenticated in the mode prescribed by the Act of Congress of 1790,¹ has been held not to be competent evidence in another state without proof of its execution, or that it was properly placed upon record; or proof as to the effect of such an instrument in the state from which it came.²

In Case of the Loss of the Instrument secondary evidence of its contents will be authorized where its loss is sufficiently proved to excuse its nonproduction.³

VI. RIGHTS OF PARTIES—1. Of Apprentice—As Regards Master.—The discussion of the rights of the apprentice as regards the master will be found elsewhere in this article.⁴

As to Acquiring Settlement.—In *England*,⁵ and in some of the *United States*,⁶ provision is made by statute whereby the apprentice gains a settlement in the parish or township in which he serves for the prescribed period under articles of apprenticeship.

Where Indenture is Voidable.—Where the apprentice serves the prescribed period under an instrument voidable for not conforming to statute, it has been held that he may gain a settlement although the instrument should afterwards and before the completion of the term be avoided by the apprentice.⁷

Where the Indenture is Void.—But no settlement can be gained where the defect or irregularity in the instrument makes it void.⁸

2. Of Father.—Where the Father Joins with the Apprentice in the execution of an indenture, he may, in the absence of statutory provisions to the contrary, maintain an action for breach of covenant on the part of the master. Thus, it has been held that where the master agrees to pay wages to the infant for his services as an apprentice, he will be liable to an action by the father.⁹

of apprenticeship made by the probate judges under statute are to be regarded as deeds rather than records, and that they do not prove themselves, but their execution must be proved as other deeds are proved. *Owen v. State*, 48 Ala. 328.

1. See *Moore v. Ann*, 9 B. Mon. (Ky.) 36.

2. *Moore v. Ann*, 9 B. Mon. (Ky.) 36.

3. **Loss of Instrument—Secondary Evidence.**—Where an indenture of apprenticeship had been traced into the hands and among the papers of the apprentice, long after his time had expired, and after he had married and had a family, and where his wife had testified that she knew not what had become of the few papers he once had, that they were either lost or destroyed, it was held that these circumstances would excuse its nonproduction and authorize secondary evidence of its contents. And in the absence of instrumental witnesses, and of proof of the handwriting of the witnesses and parties, it was held that the next best evidence was the acknowledgment of the parties of its being their deed. *Overseers of Poor v. Overseers of Poor*, 13 N. J. L. 222.

4. See *infra*, this title, *Obligation of Parties—Of Master*.

5. **Apprentice Acquiring Settlement—England.**—*Rex v. St. Petrox*, 4 T. R. 196; *Rex v. Arundel*, 5 M. & S. 257; *St. Pancras v. Clapham*, 6 Jur. N. S. 700; *Reg. v. Somerby*, 9 Ad. & El. 310, 36 E. C. L. 150; *Rex v. Aldstone*, 2 B. & Ad. 207, 22 E. C. L. 61; *Reg. v. Burslem*, 11 Ad. & El. 52, 39 E. C. L. 27; *Rex v. Clossworth*, 6 Ad. & El. 286, 33 E. C. L. 83; *Rex v. Linkinhorne*, 3 B. & Ad. 413, 23 E. C. L. 109; *Rex v. Banbury*, 3 B. & Ad.

706, 23 E. C. L. 168; *Rex v. Stratford-upon-Avon*, 11 East 176; *Rex v. Chelmsford*, 3 B. & Ald. 411, 5 E. C. L. 330; *Reg. v. Elswick*, 7 Jur. N. S. 45. See also *Rex v. Stoke Damerel*, 7 B. & C. 563, 14 E. C. L. 99; *Rex v. Hipswell*, 8 B. & C. 466, 15 E. C. L. 267; *Rex v. Gravesend*, 3 B. & Ad. 240, 23 E. C. L. 61; *Rex v. Ilkeston*, 4 B. & C. 64, 10 E. C. L. 277; *Rex v. Barmby-in-the-Marsh*, 7 East 381; *Reg. v. Barton-upon-Irwell*, 9 Jur. N. S. 795.

6. **Apprentice Acquiring Settlement—Cases in United States.**—*Bloomfield v. Acquackanunck*, 8 N. J. L. 257; *Upper Alloways Creek v. Elsingborough*, 1 N. J. L. 445; *Overseers v. Independence*, 14 N. J. L. 549; *Hopewell v. Amwell*, 3 N. J. L. 16; *Franklin v. Bridgewater*, 20 N. J. L. 563; *Overseers of Poor v. Overseers of Poor*, 13 N. J. L. 187; *Hudson v. Taghkanac*, 13 Johns. (N. Y.) 245; 1 Rev. Stat. *New York*, § 29, as Am'd L. 1830, c. 320.

7. **Settlement—Service under Voidable Instrument.**—*Rex v. St. Petrox*, 4 T. R. 196; *Bloomfield v. Acquackanunck*, 8 N. J. L. 257.

8. **Settlement—Service under Void Instrument.**—*Hopewell v. Amwell*, 3 N. J. L. 19.

9. **Breach of Covenant by Master—Rights of Father of Apprentice.**—*Caden v. Farwell*, 98 Mass. 137. See also *Ford v. McVay*, 55 Ill. 119.

Where Apprentice has Arrived at Age.—In *Delaware*, it has been held that an apprentice indentured according to statute in that state may, on arriving of age, and at the end of the term, maintain against his master an action for a breach of the indentures. *Cann v. Williams*, 3 Houst. (Del.) 78.

Where Contract Is Void as Indenture of Apprenticeship.—Moreover, it is the prevailing doctrine in this country that though a contract may not be good as an indenture of apprenticeship so as to be binding on the infant, as where it is not signed by the infant, or is otherwise not conformable to statute, it may yet be good at common law as between the contracting parties, and the master may be held liable on his covenants.¹

3. Of Master.—*a.* AS TO APPRENTICE—(1) *Custody.*—It is well settled that the master is entitled to the custody of his apprentice.²

Removing Apprentice out of Commonwealth.—But an indenture of apprenticeship is, by the intendment of law, a contract for services to be performed within the commonwealth where it is executed, and the master may not take the apprentice elsewhere, unless the power is given by the contract itself, or unless it follows from the nature of the service for which the apprentice is bound, as in the case of a sailor's apprentice.³

Waiver by Consent of Parties.—This condition of the agreement, however, may be waived by the consent of the parties.⁴ Thus, in an action by the master against the father for taking away the apprentice before the expiration of the term, it has been held that the removal of the apprentice by the master out of the commonwealth is no defense where it appears that the apprentice, with the acquiescence of the father, consented to such removal, and performed actual services under this assent.⁵

Parol Evidence of Consent.—Parol evidence may be admitted to show the assent of the father and apprentice to the latter's removal.⁶

(2) *Punishment.*—The master has a right to use moderate correction in the case of an offending apprentice,⁷ but he is not allowed to inflict punishment upon him cruelly or from motives of malice.⁸

1. Contract Void as Indenture of Apprenticeship—Liability of Master on His Covenants.—*Day v. Everett*, 7 Mass. 145; *Austin v. McCluney*, 5 Strobb. (S. Car.) 104; *Stewart v. Rickets*, 2 Humph. (Tenn.) 151. See also *Ford v. McVay*, 55 Ill. 119; *Stokes v. Hatcher*, 4 N. J. L. 93.

Execution by Mother.—In *South Carolina*, the deed of indenture by which a mother bound out her illegitimate son as an apprentice was affirmed to be void under the Act of 1740, of that state, so far as the son was concerned, because he was not a party to it. But it was held that the mother could maintain an action at law to enforce its covenants for the benefit of the son. *Austin v. McCluney*, 5 Strobb. (S. Car.) 104.

2. Right of Master to Custody of Apprentice.—*Com. v. Beck*, 1 Browne (Pa.) 277.

As to the master's rights to have apprentice delivered to him on habeas corpus when restrained, see *Ex p. Landsdown*, 5 East 38; *Com. v. Robinson*, 1 S. & R. (Pa.) 353; *Com. v. Harrison*, 11 Mass. 63.

3. Right of Master to Take Apprentice beyond the State.—*Coventry v. Woodhall*, Hob. 134a; *U. S. v. Scholfield*, 1 Cranch (C. C.) 255; *Gusty v. Diggs*, 2 Cranch (C. C.) 210; *Com. v. Edwards*, 6 Binn. (Pa.) 202; *Com. v. Deacon*, 6 S. & R. (Pa.) 526. See also *Randall v. Rotch*, 12 Pick. (Mass.) 108; *Nickerson v. Easton*, 12 Pick. (Mass.) 110.

Thus, where one under indentures to learn the trade of a house carpenter, entered into with a person resident in Maine, refused to go with his master to work in a foreign jurisdiction, such refusal was held to be no violation of his covenant that he would well and faithfully

serve his master as an apprentice. *Vickere v. Pierce*, 12 Me. 315.

Also, where a master changed his place of residence to another state, but, before so doing, offered to take his apprentice with him and the apprentice refused, it was held that the master had committed a breach of covenant, and was liable to the other party in damages. *Walters v. Morrow*, 1 Houst. (Del.) 527.

For the law upon this question as regulated by statute, see the statutes of the different states.

4. Waiver of Condition as to Removal.—*Lobdell v. Allen*, 9 Gray (Mass.) 377; *People v. New York Juvenile Asylum*, 2 Thomp. & C. (N. Y.) 476. See also *Olney v. Myers*, 3 Ill. 311; *Com. v. Hamilton*, 6 Mass. 273.

5. Lobdell v. Allen, 9 Gray (Mass.) 377.

6. Parol Evidence of Assent to Removal.—Thus, in an action of covenant against a master for sending his apprentice out of the country, parol evidence is admissible on the plea of not guilty, to prove that the plaintiff consented to the act. *Burden v. Skinner*, 3 Day (Conn.) 126.

7. Moderate Chastisement for Cause.—*Bleke v. Grove*, 1 Keb. 661; *Gylbert v. Fletcher*, Cro. Car. 179. See also *Com. v. Baird*, 1 Ashm. (Pa.) 267.

8. Punishment Inflicted Wantonly.—*McGrath v. Herndon*, 4 T. B. Mon. (Ky.) 480; *People v. Sniffen*, 1 Wheel. Cr. Cas. (N. Y.) 502; *State v. Dickerson*, 98 N. Car. 708.

Assault.—Where the master was indicted for an assault upon his apprentice, and it appeared that the punishment inflicted was excessive, it was held that this justified an inference of

(3) *Services and Earnings*.—General Rule.—It may be stated as a general rule that the master has a right to the services of the apprentice, and, consequently, to his earnings in the way of his business, or of any other business which is substituted for it without the master's consent.¹

Indenture as Bar to Recovery by Apprentice.—Where It Is Valid.—Thus, in action by a minor for work, labor, and services, proof that the services were performed under a valid indenture of apprenticeship is a good bar to the action.²

Where It Is Defective.—It appears to be the prevailing rule in this country, moreover, that where the covenants in a defective indenture have been mutually performed by the parties, a recovery cannot be had by the apprentice for his services.³

Where there Is a Promise to Pay for Extra Work.—In *Pennsylvania* it has even been held that an apprentice cannot maintain an action against the master to recover compensation for extra work done by him for the latter during the term of apprenticeship, although the work was done upon the express promise of the master to pay for it; the enforcement of such agreement being forbidden by considerations of policy.⁴

Extraordinary Earnings.—But the master is not entitled to the extraordinary earnings of his apprentice, which are produced by his labor when not employed in his master's services, and which do not interfere with the profits the master may legitimately derive from his service. Thus, it has been held that the master is not entitled to salvage earned by a mariner's apprentice.⁵

In the Same Way, Prize Money⁶ Gained by an Apprentice, and Bounty Money,⁷ to which he has become entitled by enlistment as a soldier, cannot be claimed by the master.

Wages of Apprentice Enlisted in the Army.—In *New York* it has been held, moreover, that where an apprentice enlists in the military service of the government without the knowledge or consent of the master, the wages earned belong exclusively to the apprentice, although the enlistment was a voluntary act on his part.⁸

malice and a conviction. *State v. Dickerson*, 98 N. Car. 708. See the title ASSAULT AND BATTERY.

Chastisement for Obeying Process of Law.—In *People v. Sniffen*, 1 Wheel. Cr. Cas. (N. Y.) 502, it was held that the master had no right to chastise his apprentice, even in moderation, for attending a trial without his knowledge, in pursuance of a subpoena, or whether subpoenaed or not, if he was sworn as a witness, since he was then under the protection of the court, which is paramount to the authority of the master, and that accordingly the master might be convicted upon an indictment for assault and battery.

Damages for Excessive Punishment.—In an action on an apprentice bond, where there was evidence tending to show that the apprentice was required to work beyond his capacity, that in order to complete his task he sometimes worked in the night, and that if he failed he was whipped, it was held that these facts warranted the charge that the plaintiff could not recover exemplary or punitive damages, and that he could recover, if anything, only the damages, if any, caused by breach of the bond, and that if the jury should find that the plaintiff suffered actual damage by a permanent injury to his health they should say from the evidence what the damage was. *Creech v. Creech*, 98 N. Car. 155. See also *Vinalhaven v. Ames*, 32 Me. 299.

1. Right of Master to Services and Earnings of Apprentice.—*Barber v. Dennis*, 1 Salk. 68; *Hill v. Allen*, 1 Ves. 83; *Bailey v. King*, 1 Whart. (Pa.) 113, 29 Am. Dec. 42. See also *Mason v. Ship Blaireau*, 2 Cranch (U. S.) 240; *Meriton v. Hornsby*, 1 Ves. 49.

2. *Olney v. Myers*, 3 Ill. 312.

3. When Indentures Defective.—*Ford v. McVay*, 55 Ill. 119; *Page v. Marsh*, 36 N. H. 305; *Maltby v. Harwood*, 12 Barb. (N. Y.) 473. Compare *Hunsucker v. Elmore*, 54 Ind. 209; *Garner v. Board*, 27 Ind. 323, overruling *Harney v. Owen*, 4 Blackf. (Ind.) 337, 30 Am. Dec. 662.

4. Express Promise of Master to Pay for Extra Work.—*Bailey v. King*, 1 Whart. (Pa.) 113, 29 Am. Dec. 42.

5. Extra Earnings.—Salvage by Mariner's Apprentice.—No Interference with Master's Rights.—*Mason v. Ship Blaireau*, 2 Cranch (U. S.) 240.

6. Prize Money.—*Carsan v. Watts*, 3 Doug. 350, 26 E. C. L. 137.

7. Bounty Money.—*Kelly v. Sprout*, 97 Mass. 169; *Johnson v. Dodd*, 56 N. Y. 76.

8. Voluntary Enlistment.—Wages.—*Johnson v. Dodd*, 56 N. Y. 76.

Reason of the Rule.—In this case, *Andrews, J.*, said: "But in the case of an apprentice who has enlisted in the army, the master cannot intercept the wages due to the apprentice. The government recognizes the employment

Where Master Consents to Substituted Service.—Where the apprentice, with the master's consent, enters upon a substituted service, so that he is placed out of the master's control and instruction, he, and not the master, will be entitled to the earnings. Thus, it has been held that the earnings of a cooper's apprentice on a whaling voyage, which he has performed with the master's consent, belong to the apprentice.¹

b. AS TO THIRD PARTIES—(1) *Enticing Away or Harboring Apprentice.*—Where a person entices away and harbors an apprentice, he will be liable to an action of damages by the master.²

as a personal contract with the soldier. The wages earned are paid to him, and if he dies before payment, his administrator is the only person entitled to receive them. The government has the right to require the personal services of its citizens for the public defense. Minors and adults are alike subject to this supreme authority. The government may dissolve the relation of master and apprentice, existing by force of municipal regulations, and the obligation of service resulting from indentures executed under or sanctioned by the local law. If the relation is dissolved by the action of the government in calling the apprentice into its service in time of war, it is reasonable that his right to the wages earned in this perilous service should be recognized, and if the obligation of service on the part of the apprentice under the indentures is discharged, the correlative duty of protection and maintenance on the part of the master will be discharged also. It has long been settled that bounty or prize money paid to an apprentice cannot be claimed by the master; and the majority of the court are of opinion that the same rule should be applied in respect to money received by him as wages for service in the army of the country of which he is a subject, irrespective of the fact whether the master consented to the enlistment, and although the enlistment was the voluntary act of the apprentice and was not compelled by the government."

1. Consent of Master to Substituted Service.—*Randall v. Rotch*, 12 Pick. (Mass.) 107; *Nickerson v. Easton*, 12 Pick. (Mass.) 112. See also *Kelly v. Sprout*, 97 Mass. 169; *Hill v. Allen*, 1 Ves. 83. Compare *Meriton v. Hornsby*, 1 Ves. 49.

Where Assigned Apprentice Absconds from New Master.—Where the plaintiff put his apprentice into the service of another person exercising the plaintiff's trade, for a short time, on wages to be paid to the plaintiff, and during that period the apprentice absconded and went to sea, it was held that by such transfer the plaintiff's right to the apprentice's services was suspended, and that it did not revive upon his absconding, so as to entitle the plaintiff to his earnings upon the voyage. *Ayer v. Chase*, 19 Pick. (Mass.) 556. See further on this question *supra*, this title, *Assignment of Indentures*.

2. Enticement of Apprentice from Master's Service.—*Hays v. Borders*, 6 Ill. 46; *Ferguson v. Tucker*, 2 Har. & G. (Md.) 183; *McKay v. Bryson*, 5 Ired. (N. Car.) 216; *Stout v. Woody*, 63 N. Car. 37. See also *Hooks v. Perkins*, Busb. (N. Car.) 21.

Measure of Damages.—In *North Carolina*, it has been held that, in an action for enticing away an apprentice, the plaintiff is entitled to recover damages as for total loss of his services, if the total loss has in reality been the consequence of the acts of the defendant; if not, then the damages should be estimated according to the chances the plaintiff had of regaining his apprentice. *McKay v. Bryson*, 5 Ired. (N. Car.) 216.

In *Illinois*, it has been held, in a similar action, that the following instruction to the jury was properly given: "That the plaintiff, if entitled to recover at all, would be entitled to recover the value of the services lost up to the time of the commencement of this suit, the reasonable expenses necessarily incurred in getting said servants back again, and damages for the loss of time, trouble, and injury sustained until the commencement of this suit in consequence of the taking away of the negroes." *Hays v. Borders*, 6 Ill. 46.

In *Vermont*, there is a dictum to the effect that "the ground of recovery is the injury the plaintiff sustains by the loss of the service, that is, what the service would have been worth to the plaintiff, not what it was worth to the defendant." *Conant v. Raymond*, 2 Aik. (Vt.) 243.

Choice of Remedies—Assumpsit.—It has been held that where an apprentice has been enticed away and harbored, the master is entitled to waive the tort and bring assumpsit against the defendant for the work and labor of his apprentice and to recover a reasonable compensation for his service. *Foster v. Stewart*, 3 M. & S. 191; *Lightly v. Clouston*, 1 Taunt. 112.

Statutory Penalty.—In *Illinois*, an action will lie against a party who shall "counsel, entice, and persuade" an apprentice to depart from the service of his master, to recover the penalty prescribed by statute, whether the apprentice shall act upon the counsel given or not. *Holliday v. Gamble*, 18 Ill. 35. See Rev. Stat. Illinois 1893, p. 163.

For similar penalty by statutes in *Pennsylvania*, see *Pennsylvania Act of 29 Sept. 1770*. See also *Bonnel v. Brotzman*, 3 W. & S. (Pa.) 178.

As to penalty given by statute in *New Jersey*, see *Brooks v. Farmer*, 3 N. J. L. 222.

Indictment.—In *England*, it has been held that the enticing an apprentice to depart from his master is not an offense of a public nature, and an indictment will not lie therefor. *Reg. v. Daniel*, 6 Mod. 182.

In *Alabama*, under statute, the enticing, decoying, or persuading an apprentice to leave the service of the master is an indictable

Notice of Apprenticeship Necessary.—But to support the action, there must be proof that the defendant knew of the existence of the apprenticeship.¹ However, it has been held in *Maryland* that although, at the time of hiring an apprentice, the party may have been ignorant of the apprenticeship, yet, if, after obtaining that information, he continues to harbor him, he is liable to an action at the suit of the master, without any proof of either a demand or a refusal.²

Where the Master Refuses to Receive the Apprentice into Service Again.—The doctrine has been laid down that if the master, whose apprentice has wrongfully left his service, gives out that he will not receive him again, others may lawfully employ such apprentice, though specially notified by the master not to harbor him, unless the master also makes known a change of resolution, and signifies a willingness to receive the apprentice again.³

Defenses to Action—Where Provisions of Indenture of Apprenticeship Unreasonable.—It has been decided in *England* that where the provisions of the indenture of apprenticeship are unreasonable and cannot be enforced against the infant or his parent, no action will lie against a person for enticing the apprentice away from the employ of the alleged master.⁴

Where Contract Is by Parol.—Also, in an action against a person for employing and harboring an apprentice, it has been held to be a sufficient defense that the apprentice was serving under a parol contract of apprenticeship, and had left the service, as he had a right to do.⁵

Where the Indenture is Not Signed by Apprentice.—In the same way, where it appeared that an indenture was signed only by the parent of the apprentice, and not by the apprentice himself as required by statute, it was held that no action would lie against a person enticing away the apprentice.⁶

Where the Indenture is Voidable Merely.—But the defendant in such an action will not be allowed to set up the defense that an indenture is void, where it is voidable only at the instance of the apprentice, and he has not avoided it.⁷

offense. *Owen v. State*, 48 Ala. 328; *Code of Alabama*, 1886, §§ 3756, 3757.

But in *Delaware*, the Act of 1837, making the enticing away of negro slaves and servants an indictable offense, has been held not to extend to indentured apprentices. *State v. Conover*, 3 Harr. (Del.) 565.

For the law at present on this question, see *Laws of Delaware*, as amended, 1893, p. 613. See also *State v. Hooper*, 1 Houst. Crim. Cas. (Del.) 17.

1. **Notice of Apprenticeship.**—*Stuart v. Simpson*, 1 Wend. (N. Y.) 377; *Conant v. Raymond*, 2 Aik. (Vt.) 243.

2. *Ferguson v. Tucker*, 2 Har. & G. (Md.) 182.

3. *Conant v. Raymond*, 2 Aik. (Vt.) 243.

4. **Provisions of Indentures Unreasonable.**—By an apprenticeship deed between an infant and parent and the plaintiff, the infant was bound an apprentice to the plaintiff for seven years, to be taught stage dancing upon certain terms, by one of which the infant contracted that she would not accept any professional engagement, or contract matrimony, during the said term, without the consent of her master. The deed also contained mutual covenants by the master and the parent that the master would properly instruct the infant and make certain payments to her for all dancing engagements at home and in foreign or colonial countries, in return for which the infant's services were to be entirely at the disposal of

the master. But there was no stipulation that the master should provide engagements for the infant or maintain her while unemployed. There was also a provision that the master might put an end to the apprenticeship if the infant should be found, after fair trial, unfit for the work of stage dancing, or should break any of the engagements in the deed, or in any way misconduct herself. The infant having made a professional engagement with the defendant, the plaintiff brought an action to enforce the provisions of the deed and for damages for breach of it. It was held that the provisions of the deed were unreasonable and could not be enforced against the infant or her parent, and consequently that no action would lie against the defendant for enticing the infant away from the plaintiff's employment. *DeFrancesco v. Barnum*, 45 Ch. Div. 430.

5. **Parol Contract of Apprenticeship.**—*Peters v. Lord*, 18 Conn. 337.

But Ellsworth, J., said in this case: "Had the defendant seduced the minor from the service of the plaintiffs, they might, according to the cases, have treated him as their servant *de facto*, and recovered of the defendant." *Compare Campbell v. Cooper*, 34 N. H. 66.

6. **Indenture Not Signed by Apprentice.**—*Ivins v. Norcross*, 3 N. J. L. 531; *Lyon v. Whitmore*, 3 N. J. L. 413; *Pierce v. Massenburg*, 4 Leigh (Va.) 493, 26 Am. Dec. 333.

7. **Indentures Voidable at Instance of Apprentice.**—*Doane v. Covell*, 56 Me. 527; *Jones*

(2) *Recovery from Person Employing Apprentice.*—Where an apprentice is employed by a third person without the knowledge or consent of the master, the latter is entitled, in an action of assumpsit, to recover the value of his earnings against the employer, whether the latter did¹ or did not² know that his employee was an apprentice, and the mere fact that the apprentice has already been paid for his services without the knowledge or default of the master affords no defense to the action.³

Valid Contract of Apprenticeship Essential.—But to entitle the master to recover in such action, he must establish a valid contract of apprenticeship.⁴

(3) *Recovery for Injury to Apprentice.*—The relation of master and apprentice is such as will sustain an action in the name of the master for an injury to the apprentice causing loss of service to the master.⁵

VII. OBLIGATION OF PARTIES—1. Of Apprentice—In General.—The apprentice is bound to conduct himself respectfully towards his master, to obey his lawful commands, and to be faithful in the service.⁶

Not Bound to Perform Menial Services.—But he is not bound to render services in matters not connected with the trade or profession which the one was to

v. Mills, 2 Dev. (N. Car.) 540. Thus, when, in an action under statute in *Maine* for "enticing an apprentice to leave his master," it did not appear in the indenture that the binding was "to the age of twenty-one years," it was held that the defendant could not take advantage of the voidable indenture. *Doane v. Covel*, 56 Me. 527.

Action against Father.—Where the father is a party to indentures of apprenticeship, and conveys to the master his right to the custody and services of the apprentice, and covenants not to take or entice him away, such covenant is obligatory upon him, both at common law and by statute, notwithstanding the fact that the covenants, not being conformable to statute, are voidable at the instance of the apprentice. *Fowler v. Hollenbeck*, 9 Barb. (N. Y.) 309.

Whether Abandonment of Service Amounts to Avoidance.—In *New Hampshire*, it has been held that the act of an infant in leaving the service in violation of a voidable indenture of apprenticeship, and under circumstances indicative of an intention to avoid it, constitutes an avoidance, and no action will lie against a third person for holding out an inducement to the infant to leave the service. *Campbell v. Cooper*, 34 N. H. 49.

But in *North Carolina*, it has been held that where the apprentice can avoid an indenture he must do so by some formal and authentic notice of his intention to dissolve the contract; and that it will not do for a third person who has harbored the apprentice to set up the fact that the apprentice has quit his master's employment, as a justification for the invasion of the rights of the master *de facto*. *Dowd v. Davis*, 4 Dev. (N. Car.) 61.

1. *Foster v. Stewart*, 3 M. & S. 191; *Lightly v. Clouston*, 1 Taunt. 112; *Munsey v. Goodwin*, 3 N. H. 272.

2. *Bowes v. Tibbets*, 7 Me. 457; *James v. Leroy*, 6 Johns. (N. Y.) 274. See also *Conant v. Raymond*, 2 Aik. (Vt.) 243.

Where an Apprentice Ran Away from His Master and went on board of a ship, and signed articles by which he engaged to perform the whole voyage, and to forfeit his wages in case

of desertion or embezzlement, and during the voyage he deserted, having been guilty of embezzlement, it was held that the master was entitled to recover his whole earnings from the ship owners during the time he was on board, though neither the owners nor captain knew that he was an apprentice. *James v. Leroy*, 6 Johns. (N. Y.) 274.

Notice Given by Apprentice Sufficient.—In *Eades v. Vandeput*, 4 Doug. 1, it was held that the master of an apprentice is entitled to the wages earned by him on a man-of-war, and may recover them from the captain, although the latter had no notice of the apprenticeship beyond the assertion of the apprentice. In this case Lord Mansfield said: "The information of the boy was not conclusive, but it was sufficient to make it necessary for the defendant to inquire into the truth of the case."

3. *Bardwell v. Purrington*, 107 Mass. 419; *James v. Leroy*, 6 Johns. (N. Y.) 274.

4. *Barton v. Ford*, 35 Hun (N. Y.) 32.

5. **Recovery by Master for Injuries to Apprentice.**—*Hodsoll v. Stallebrass*, 11 Ad. & El. 301, 39 E. C. L. 94; *Ames v. Union R. Co.*, 117 Mass. 541, 19 Am. Rep. 426. See also *Lewis v. Fog*, 2 Stra. 944.

Thus, where a declaration in tort alleged that the defendant was the common carrier of passengers between two places, that the plaintiff's apprentice was on the defendant's car on a day stated, for hire paid by the apprentice in the absence of the master, that by the defendant's negligence in carrying the apprentice he was injured, and the plaintiff thereby lost his services, it was held that the declaration disclosed a good ground of action. *Ames v. Union R. Co.*, 117 Mass. 541, 19 Am. Rep. 426.

Prospective Damages.—In action in tort for wounding plaintiff's apprentice, whereby he is disabled from serving, the jury may give damages for the loss of service not only before action brought, but afterwards, so long as, upon the evidence, the disability may be expected to continue. *Hodsoll v. Stallebrass*, 11 Ad. & El. 301, 39 E. C. L. 94.

6. **Duties of Apprentice to Master.**—*Com. v. Bowen*, 5 Phila. (Pa.) 220; *McPeck v. Moore*, 51 Vt. 269.

teach and the other to learn. Thus, the master has no right to require menial services of him,¹ unless it is so stipulated in the contract.²

Liability to Control and Punishment.—For the enforcement of these duties, the apprentice is made liable at common law to a reasonable punishment,³ and where he abandons his service, he may be seized and compelled to return.⁴

In *England*,⁵ and in some of the *United States*,⁶ there are statutes regulating the control and discipline of the master over the apprentice.

Where Infant Executes Instrument Alone.—Where, however, the infant executes the instrument alone, it is voidable at common law at the instance of the infant, and whenever he chooses to quit the service of his master it is at an end.⁷

Liability on Covenants.—It is an old rule of the common law, that whether the infant signs alone or with his father as guardian, no action will lie against him on the covenants contained in the indenture.⁸ This rule is unaltered by statute in *England*,⁹ and has been sanctioned by decisions in the *United States*.¹⁰

2. Of Father.—The rule is that where the indenture contains personal covenants on the part of the father or guardian with the master, the father¹¹

1. Services Not Connected with the Trade or Profession.—*Com. v. Hemperly*, 3 Am. L. J. (Pa.) 17.

But in *McPeck v. Moore*, 51 Vt. 269, there is a dictum to the effect that the opening and repairing of a drain under a shop in which a person apprenticed to learn the art and trade of finishing marble was employed, was such service as, without any express stipulation, might reasonably be required of the apprentice.

2. Express Stipulation as to Service Not Connected with the Trade or Profession.—*McPeck v. Moore*, 51 Vt. 269.

3. See *supra*, this title, *Punishment*.

4. Abandonment of Service—Right of Master to Compel Apprentice's Return.—*Raeburn v. Reed*, 3 Sess. (Sc.) 29; *Beard v. Hudson*, Phil. (N. Car.) 180; *Pennsylvania v. Kerr*, Add. (Pa.) 324.

5. Control and Discipline—Statutes.—In *England*, if the apprentice misbehaves himself in the service, or absconds, the master may complain to a justice of the peace and have him punished according to statute. *Cooper v. Simmons*, 7 H. & N. 707; *Gylbert v. Fletcher*, Cro. Car. 179.

6. *Barton v. Ford*, 35 Hun (N.Y.) 33; *Beard v. Hudson*, Phil. (N. Car.) 180. See *Day v. Everett*, 7 Mass. 145.

As to the present law on this question, in these and other states, consult the various statutes.

7. Voidable Indentures—Rights of Apprentice.—*Gylbert v. Fletcher*, Cro. Car. 179; *Clark v. Goddard*, 39 Ala. 164, 84 Am. Dec. 777; *Harney v. Owen*, 4 Blackf. (Ind.) 337, 30 Am. Dec. 662.

8. Liability of Minor Apprentice on the Covenants.—*Gylbert v. Fletcher*, Cro. Car. 179; *Lyly's Case*, 7 Mod. 15; *Whittingham v. Hill*, Cro. Jac. 494. See also *Whitley v. Loftus*, 8 Mod. 191; *Branch v. Ewington*, Doug. 518; *Cuming v. Hill*, 3 B. & Ald. 59, 5 E. C. L. 229. Compare *Walter v. Everard* (1891), 2 Q. B. 369.

By Custom of London.—It has been held that by the custom of London an infant, unmarried and above the age of fourteen, may bind himself apprentice to a freeman of London by

indenture with proper covenants, and the master shall have the same remedies against him on the covenants of the indenture as if he had been of full age. *Code v. Hulme*, 2 Rolle 305; *Horn v. Chandler*, 1 Mod. 271.

9. *Gylbert v. Fletcher*, Cro. Car. 179; *Whittingham v. Hill*, Cro. Jac. 494; *Lyly's Case*, 7 Mod. 15.

Enforcement of Contract against Apprentice.

—By an apprenticeship deed between an infant, her parent, and the master, the infant was bound for a term of seven years to be taught stage dancing under certain terms, by which the infant bound herself not to contract or accept any professional engagement during such term without the consent of the master. It was held, on the authority of *Gylbert v. Fletcher*, Cro. Car. 179, that inasmuch as an action could not be brought against an infant on a covenant to serve, the negative clauses in the deed could not be enforced by injunction against either the infant or the parties employing her during such term of apprenticeship. *De Francesco v. Barnum*, 43 Ch. Div. 165.

10. *Lobdell v. Allen*, 9 Gray (Mass.) 377; *McKnight v. Hogg*, 3 Brev. (S. Car.) 44; *Compare Woodruff v. Logan*, 6 Ark. 276, 42 Am. Dec. 695.

11. Personal Covenants of Father of Apprentice.—*Whitley v. Loftus*, 8 Mod. 191; *Branch v. Ewington*, Doug. 518; *Cuming v. Hill*, 3 B. & Ald. 59, 5 E. C. L. 229; *Shepherd v. Beecher*, 2 P. Wms. 288; *Mead v. Billings*, 10 Johns. (N. Y.) 99; *Fowler v. Hollenbeck*, 9 Barb. (N. Y.) 309. See also *Trigg v. Northcut*, Litt. Sel. Cas. (Ky.) 414; *Mountague v. Tidcombe*, 2 Vern. 518.

Breach of Covenant to Account for Master's Goods.—In *Whitley v. Loftus*, 8 Mod. 191, where, under an indenture of apprenticeship, the father and son on their part covenanted with the master that the son should faithfully account for such of his master's goods as should come to his hands, it was held, in an action on the covenant against the father and son, that the father was liable to answer the wrong done by the son to the master.

Where Apprentice Absents Himself from Service.—Where, in an indenture of apprenticeship, it was stated that the apprentice bound

or guardian¹ will be bound thereby, but not otherwise,² and this rule prevails though the indenture is not signed by the apprentice, and is, as a consequence, not binding upon him.³

No Formal Terms Necessary.—But no precise or formal terms are necessary to constitute a covenant.⁴

Where Father Limits His Obligation.—Where the father binds himself "so far as it is in his power," to see the contract fulfilled, it has been held that his intention is to limit his obligation to his legal ability to perform his undertaking, but no further.⁵

3. Of Master—*a. IN GENERAL*—Performance of Covenants.—It may be laid down as a general rule that the master is compellable to perform all the covenants on his part contained in the indenture.⁶

himself with the consent of the father, and the indenture concluded with the remark that "for the true performance of all and singular the covenants and agreements aforesaid, the said parties bind themselves each unto the other," and the father actually signed and sealed the indenture with the son, though he was not named in the indenture as a party, it was held that the father was bound for the son and responsible to the master in case the apprentice left his service before the expiration of the term fixed by the indenture. *Mead v. Billings*, 10 Johns. (N. Y.) 99.

Enticing Apprentice Away.—Where the father is a party to indentures of apprenticeship, and conveys to the master his right to the custody and services of the apprentice, and covenants not to take nor entice him away, it has been held that such covenant is obligatory upon him both at common law and by statute, and he cannot be protected in violating it. *Fowler v. Hollenbeck*, 9 Barb. (N. Y.) 309.

Where the Agreement is Not in Writing—Performance.—If A agrees to bind his son to B by written indentures of apprenticeship, and, in consequence of such agreement, the son enters upon service with B, and is by him instructed in the art of his trade, and furnished with clothing, necessaries, etc., and then leaves B's employment, B may recover of A the value of such services, clothing, etc., so furnished, though the agreement has not been reduced to writing. *Squires v. Whipple*, 2 Vt. 111.

1. Personal Covenants of Guardian of Apprenticeship.—*Berry v. Wallace*, Wright (Ohio) 657; *Bull v. Follett*, 5 Cow. (N. Y.) 170.

Thus, an indenture of an apprenticeship between a ward and his guardian, and the master, declaring the duties of the apprentice in the usual form, and concluding thus, "for the true performance of all and singular the said covenants and agreements, the said master, apprentice, and guardian have hereunto interchangeably set their hands and seals," etc., binds the guardian to see that the apprentice fulfils all his duties to his master. *Bull v. Follett*, 5 Cow. (N. Y.) 170.

Where Breach Occurs with Master's License.—In *Lewis v. Wildman*, 1 Day (Conn.) 153, it was held that a master to whom an apprentice is bound by indenture, having given him license to depart, cannot, though he afterwards revokes that license, maintain an action on the indenture against the guardian for such departure.

2. Indentures without Personal Covenants on Part of Parent or Guardian—Indiana.—*Sacket v. Johnson*, 3 Blackf. (Ind.) 61.

Maine.—*Chapman v. Crane*, 20 Me. 172.

Massachusetts.—*Blunt v. Melcher*, 2 Mass. 228; *Holbrook v. Bullard*, 10 Pick. (Mass.) 68.

New Jersey.—*Woodruff v. Corey*, 3 N. J. L. 129.

New York.—*Ackley v. Hoskins*, 14 Johns. (N. Y.) 374. See *People v. First Judge*, 2 Hill (N. Y.) 596.

Pennsylvania.—*Velde v. Levering*, 2 Rawle (Pa.) 269; *Com. v. Leeds*, 1 Rawle (Pa.) 191.

Compare Woodrow v. Coleman, 1 Cranch (C. C.) 171; *Paddock v. Higgins*, 2 Root (Conn.) 316.

3. Indentures Not Signed by Apprentice.—*Lobdell v. Allen*, 9 Gray (Mass.) 377; *Matter of M'Dowle*, 8 Johns. (N. Y.) 328; *Van Dorn v. Young*, 13 Barb. (N. Y.) 286. See also *Day v. Everett*, 7 Mass. 145; *Ford v. McVay*, 55 Ill. 119. *Compare Rex v. Cromford*, 8 East 25.

Measure of Damages.—Where a boy was bound by his father as an apprentice to a copartnership, to be taught a mechanical trade, and the father took away the boy before his time had expired, and soon afterwards the copartnership was dissolved, the period of apprenticeship being still unexpired, it was held, by a majority of the court (*Ruffin, C. J., dissenting*), that the persons composing the copartnership could recover damages only for the loss of the boy's services during the time the copartnership continued, and not afterwards. *Hiatt v. Gilmer*, 6 Ired. (N. Car.) 450.

4. Bull v. Follett, 5 Cow. (N. Y.) 170.

5. Where a minor, thus apprenticed, left and abandoned the service of his master, after having been in his employ some years under the contract, and refused to work for him any longer, it was held in an action by the master against the father, for such breach of the contract, that the defendant was bound to do what he had the legal power to do, in order to effect the return of his son; and that an allegation in the complaint that he had not used any endeavors, and refused to do anything, sufficiently showed a breach of his obligation. *Van Dorn v. Young*, 13 Barb. (N. Y.) 286.

6. Master's Duties—General Rule.—*Warner v. Smith*, 8 Conn. 14; *Cann v. Williams*, 3 Houst. (Del.) 78; *Barger v. Caldwell*, 2 Dana

Payment of Wages.—Thus, where he covenants for the payment of wages to the apprentice, an action will lie against him for the recovery thereof.¹

b. CARE AND MAINTENANCE OF APPRENTICE.—As to the care and maintenance of the infant apprentice, the master seems to be placed *in loco parentis*, and subject to the same obligations as the father, unless otherwise stipulated.²

Support during Illness.—Thus, in the absence of express stipulations, he must support the infant in sickness as well as in health.³

Provision of Medical Aid.—So he is bound during the illness of his apprentice to provide him with proper medicines and medical assistance.⁴

In *South Carolina*, however, it has been held that the master is not liable without special contract for medical aid, where it was not rendered at his request or under his roof.⁵

c. INSTRUCTION IN TRADE, ETC.—Express Stipulations.—The master's duty to instruct the apprentice in a trade or profession is usually a matter of express covenant in the indenture of apprenticeship, and the master will, of course, be bound thereby.⁶

Where Duty may be Implied.—Moreover, where the infant is bound out by an order of court, it has been held that although there is no indenture, the law raises an implied promise on the part of the master to teach the apprentice according to the terms of that order.⁷

Degree and Extent of Skill or Knowledge to be Imparted.—The doctrine has been laid down that a covenant to teach an apprentice an art and mystery, binds a master to make the apprentice as good a workman in the trade as those generally are who have regularly learned it.⁸ Moreover, it has been held in

(Ky.) 132; *Wright v. Brown*, 5 Md. 37; *Powers v. Ware*, 4 Pick. (Mass.) 106; *Clancy v. Overman*, 1 Dev. & B. (N. Car.) 402.

In *Maw v. Jones*, 25 Q. B. Div. 107, the master was held liable on a covenant not to dismiss the apprentice without notice. See also *Orphan House v. Magill*, Cheves (S. Car.) 56.

1. Payment of Wages.—*Cann v. Williams*, 3 Houst. (Del.) 78; *Caden v. Farwell*, 98 Mass. 137. See also *Cochran v. Davis*, 5 Litt. (Ky.) 118; *Bedford v. Newark Mach. Co.*, 16 N. J. Eq. 117.

2. Care and Maintenance—Master Stands in Loco Parentis.—*Com. v. Bowen*, 5 Phila. (Pa.) 220; *Easley v. Craddock*, 4 Rand. (Va.) 423. See also *Ayer v. Chase*, 19 Pick. (Mass.) 556.

Diet and Lodgings.—In *Taylor v. Hutchinson*, 3 N. J. L. 508, it was held that the master, after receiving the boy as an apprentice and keeping him in that capacity several years, cannot maintain an action against his father for his diet and lodging, where it did not appear that the father had contracted to pay for the same.

Damages Recoverable.—In *Massachusetts*, it has been held that, both at common law and under statute in that state, damages are recoverable only to the date of the writ, and not to the end of the term, where action is brought for breach of covenant to maintain the apprentice, before the term of apprenticeship has expired. *Powers v. Ware*, 4 Pick. (Mass.) 106.

Supervision as to Religious Duties.—In *Pennsylvania*, it has been held that a master discharges his duty by sending an apprentice of tender age to the church that he himself attends with his family, but after the apprentice attains an age which renders him capable of obeying the dictates of an enlightened conscience, all in-

terference with his religious principles is unlawful. *Com. v. Farley*, 4 Pa. L. J. 396.

3. Care and Maintenance of Apprentice during Illness.—*Rex v. Hales Owen*, 1 Stra. 99; *Powers v. Ware*, 2 Pick. (Mass.) 451; *Caden v. Farwell*, 98 Mass. 137.

4. Medical Attendance.—*Reg. v. Smith*, 8 C. & P. 153, 34 E. C. L. 333; *Easley v. Craddock*, 4 Rand. (Va.) 423.

In *Easley v. Craddock*, 4 Rand. (Va.) 423, it was held that the father of the apprentice is bound for medical assistance only when it has been rendered at his instance.

Where Apprentice Agrees to Provide Medicines, etc.—But in *Wright v. Tuttle*, 4 Day (Conn.) 313, it was held that the apprentice was liable for all physic or attendance of physicians, where he had covenanted to become so in the indenture.

5. Percival v. Nevill, 1 Nott & M. (S. Car.) 452.

6. Instruction in Trade or Profession.—*Warner v. Smith*, 8 Conn. 14; *Barger v. Caldwell*, 2 Dana (Ky.) 132; *Wright v. Brown*, 5 Md. 37; *Clancy v. Overman*, 1 Dev. & B. (N. Car.) 402.

Kind of Trade.—In *Pennsylvania*, it has been held under statute that housewifery is a mystery within the meaning of the statute. *Com. v. Jennings*, 1 Browne (Pa.) 197.

In the same state it has been also held under statute that an agreement made with a father that his son about eleven years old shall serve three years as a sweep is binding. *Com. v. Moore*, 1 Browne (Pa.) 275.

7. Binding Out by Court.—*Adams v. Miller*, 1 Cranch (C. C.) 5.

8. Degree of Knowledge and Skill in Trade or Profession.—*Barger v. Caldwell*, 2 Dana (Ky.) 129.

Pennsylvania, that where an apprentice is bound to a master to learn a trade, the master is bound to teach him the whole of that trade in all its branches, and the keeping of an apprentice to a subordinate branch, however such division of labor might expedite and perfect the whole work when completed, is a violation of this covenant.¹

When Master will be Excused.—The covenant to teach an apprentice, or cause him to be taught, a trade or profession, however, is not an absolute engagement that he shall at all events learn that trade or profession, but is only a covenant faithfully, diligently, and skilfully to instruct him and to act towards him in the matter of coercion as an ordinarily prudent and sensible parent would act towards his own child.²

Where Apprentice is Incapable of Learning.—Thus, if the apprentice is incapable of learning a trade or profession, the master will be excused.³

The Burden of Proving such excuse, however, is on the master.⁴

Where the Time is Too Limited for Learning the Trade.—In the same way, where there was a covenant to teach an apprentice a trade “in all the branches thereof,” it was held competent for the master to prove that it was impossible to teach all the branches in the time specified, and it would be injurious to the apprentice to attempt to do so; that he was placed at one branch no longer than was necessary, and was then placed at another, and that he had attained considerable proficiency in the branches taught him.⁵

Where the Apprentice Refused to be Taught.—Similarly, where the apprentice refused to be taught, this will be a good plea to an action of covenant against the master for not teaching him.⁶

d. EDUCATION.—It does not appear that the common law obliged a master to educate an apprentice, any more than a parent a child,⁷ but in many states there are statutory provisions requiring the master to afford the apprentice a fair or reasonable instruction in reading, writing, and arithmetic.⁸ For these provisions the reader is referred to the local statutes.

APPROACHES.—See note 9.

Evidence Inadmissible as Not Tending to Show Proper Instruction.—In an action for breach of a covenant to teach an apprentice a trade it is not competent for the defendant to show that he employed the apprentice at the same work as others of like experience, making no distinction between them, this having no tendency to show that the apprentice was properly employed in learning the trade agreed upon. *Bell v. Walker*, 3 Jones (N. Car.) 320.

1. *Com. v. Aitken*, Com. Pleas Phila. 22 Dec. 1845; 1 *Bright*. *Purd. Dig.* (11th ed.), p. 100.

2. **Limit of Master's Duty as to Instruction.**—*Barger v. Caldwell*, 2 Dana (Ky.) 132; *Wright v. Brown*, 5 Md. 37; *Clancy v. Overman*, 1 Dev. & B. (N. Car.) 402; *Bell v. Walker*, 5 Jones (N. Car.) 43.

3. **Apprentice Incapable of Learning.**—*Barger v. Caldwell*, 2 Dana (Ky.) 129; *Clancy v. Overman*, 1 Dev. & B. (N. Car.) 402.

4. *Barger v. Caldwell*, 2 Dana (Ky.) 129.

5. *Wright v. Brown*, 5 Md. 37.

6. **Apprentice Refusing to be Taught.**—*Raymond v. Minton*, L. R. 1 Exch. 244. See also *Learoyd v. Brook* (1891), 1 Q. B. 431.

Where by Proper Measures Apprentice's Obstinacy may be Overcome.—Where, however, a slave of ordinary capacity was apprenticed to a ship carpenter to learn the trade of ship carpenter and caulker, it was held to be no defense, in an action for breach of his covenant,

that the apprentice was obstinate and unwilling to learn the trade, where it appeared that proper measures had not been taken to overcome his obstinacy. *Bell v. Walker*, 5 Jones (N. Car.) 43. See also *Barger v. Caldwell*, 2 Dana (Ky.) 132.

7. 1 *Minor's Inst.* 203.

8. *Burnham v. Chapman*, 17 Me. 385; *Rev. Stat. Me.* (1883), p. 286, § 21; *Butler v. Hubbard*, 5 Pick. (Mass.) 250; *Pub. Stat. Mass.* (1882), p. 827; *Com. v. Bowen* 5 Phila. (Pa.) 220; *Com. v. Atkinson*, 8 Phila. (Pa.) 375; *People v. Hoster*, 14 Abb. Pr. N. S. (N. Y.) 414, 2 *Rev. Stat. (N. Y.)* 155, § 10. See also statutes in various other states. See *supra*, this title, *Stipulations in Indenture*.

9. **Dock Approach.**—“An approach must mean that portion of the frontage of a dock which a vessel must pass through to reach the same even bow-on.” *McCaldin v. Parke*, 66 Hun (N. Y.) 323. In that case, it was held that bow-on was the legitimate manner of approach to the dock, so that, the bow being fastened to the dock, the stern would be carried alongside by the tide.

Bridge Approaches—Highway Crossings. (See also the title *BRIDGES*.)—In *O'Fallon v. Ohio*, etc., R. Co., 45 Ill. App. 572, it is said: “It is common knowledge what an approach is to a bridge on a highway. It is simply that prepared or made condition on each side of the bridge that makes * * * a safe, easy, and

APPROBATION. (See CONSENT.)—The term “approbation” means sanction, consent, concurrence.¹

APPROPRIATE—APPROPRIATION.—To appropriate is to set apart for, or assign to, a particular person or use, in exclusion of all other persons or uses.²

convenient way of getting across the bridge.” In that case, it was held that the phrases “railroad crossings of highways and streets,” and “the *approaches* thereto within their respective rights of way,” in a statute requiring safe crossings and *approaches* to be constructed, described different portions of the space within the right of way of the railroad company. “Railroad crossing” means that portion comprising the track or roadbed; the “*approaches* thereto,” that portion extending from the track, on each side thereof, back so far as may be necessary, so that at all times the crossing shall be safe. The words do not necessarily include the entire width of the railroad’s right of way.

In *Bloomington v. Illinois Cent. R. Co.*, 49 Ill. App. 133, *approach* is thus defined: “The term *approach* means a structure of some sort necessary to reach the railroad track from the common surface. It does not signify an ordinary sidewalk. It may be an embankment or a bridge, or whatever is required for the purpose at the particular place.”

Within a statute requiring that bridge *approaches* should be kept up by municipalities, it was held that the word *approaches* means all such artificial structures as may be reasonably necessary and convenient for the purpose of enabling the public to pass from the road onto the bridge, and from the bridge onto the road, and does not include the highway to the distance of one hundred feet from each end of the bridge, unless the artificial structure extends so far. *Traversy v. Gloucester*, 15 Ont. Rep. 214.

A portion of a highway in a city, lowered for the purpose of having a railroad pass over it by means of a bridge, is not included in the *approaches* to the bridge within the meaning of the *Massachusetts* statute rendering railroad corporations liable for injuries caused by a defect in the *approaches* to a bridge. The court said: “The *approaches* to a bridge are the ways at the ends of it, which are a part of the bridge itself, or are appendages to it.” *Whitcher v. Somerville*, 138 Mass. 454.

A Part of the Bridge.—The *approaches* to a bridge within reasonable limits constitute a part of the bridge. *Rush County v. Rushville, etc.*, Gravel Road Co., 87 Ind. 505; *Whitcher v. Somerville*, 138 Mass. 455; *Driftwood Valley Turnpike Co. v. Bartholomew County*, 72 Ind. 236; *Rex v. West Riding*, 7 East 588. See also ABUTMENT, vol. I, p. 223.

The question how far the ways constituting the *approaches* to a bridge are included within the franchise of the corporation which is bound to maintain it, if there is nothing in the statute creating the franchise to define the extent of the bridge in this respect, must be determined by a consideration of what is

reasonable under the circumstances; and this may be fixed by the practical construction which has been applied in the exercise of the franchise by its owners, with the acquiescence of the public. *Com. v. Deerfield*, 6 Allen (Mass.) 449.

1. *Welton v. Thomaston*, 61 Conn. 397. In that case, it was held that the selectmen of any town might, with its *approbation*, by a writing signed by them, discontinue any highway therein, and that the action of the town might precede or follow that of the selectmen. The court said: “*Approbation* means sanction, consent, concurrence. Doubtless the *approbation* by the town must be of the precise act of discontinuance made by the selectmen; and when this is found to be the fact, the corporate expression by the town of its *approbation* may as well precede the act of discontinuance as follow it.”

2. *State v. Sioux City, etc.*, R. Co., 7 Neb. 373; *Murdock v. Memphis*, 7 Coldw. (Tenn.) 500.

To set apart a sum of money for a particular object. *Woodward v. Reynolds*, 58 Conn. 490.

It is to allot, assign, set apart, or apply anything to the use of a particular person or thing, or for a particular purpose. *State v. Bordelon*, 6 La. Ann. 68.

Exclusive Use.—The term *appropriate* is derived from the Latin *ad* and *proprius*, and signifies “to take as one’s own by exclusive right.” Worcester’s Dict.

A space, therefore, is not *appropriated* to the use of passengers, so long as any one else is allowed the use of it also. *U. S. v. Nicholson*, 12 Fed. Rep. 524.

Same—in a Will.—A testator first charged all of his estate, both real and personal, with the payment of his debts. He then directed that the revenue should be used for that purpose, together with such other *appropriations* as he should make. It was held that the word *appropriations* evinced the intention of the testator to designate and set apart from his other property the portion referred to for a specific object, viz., to constitute a fund in the hands of his executors to pay his debts, and that these *appropriations* were primarily liable. The court said: “The word *appropriations* is significant. It evinces the intention of the testator to designate and set it apart from his other property for a specific object. The word means a designation to a particular exclusive use. He orders his blood horses to be sold, and certain obligations to be collected with all possible dispatch, to constitute a fund in the hands of his executors to pay his debts. It cannot be that he meant the ‘revenues of his estate as the primary fund,’ and this fund, thus ‘earmarked’ as it were, and *appropriated* to the very object, to be a secondary or auxiliary

Appropriation is originally the act of appropriating.¹

In a number of the *United States* there are constitutional provisions to the effect that no money shall be drawn from the treasury but in pursuance of "appropriations made by law." "Appropriation," as applicable to the general fund in the treasury, is defined to be an authority from the legislature, given at the proper time and in legal form to the proper officers, to apply sums of money, out of that which may be in the treasury in a given year, to specified objects or demands against the state.²

fund. The revenues of the estate are sufficient to pay the debts without the aid of the *appropriations* in the second, fifth, and twelfth items of the will. Did the testator ever contemplate such a result as that these *appropriations* should never be used for this object? It is quite as clear he could not have meant the two funds as a common fund to pay the debts." *Whitehead v. Gibbons*, 10 N. J. Eq. 235.

Wills—Same—Whether All may be Taken.—

"A power in a will enabling a person to *appropriate* or 'select,' for his own use, such parts of the testator's property as he may desire, intimates a confidence that a reasonable selection, and not the whole, will be taken; and though the exact extent to which the donee may go in benefiting himself could not, in the nature of things, be laid down beforehand, yet it is submitted that the court would find a mode of restraining any palpably unreasonable exercise of the power. *Kennedy v. Kennedy*, 10 Hare 438. See also *Davis v. Davis*, 1 H. & M. 255; *Reid v. Reid*, 30 Beav. 388. But where the power extends over only a small class of property—*e. g.*, testator's plate—and the donee is his widow, it would seem that she might take the whole of it. *Arthur v. Mackinnon*, W. N. 79. *Compare* 1 Jarm. 362." Stroud's Jud. Dict.

Same—Direction to appropriate.—A direction to an executor to *appropriate* is a clear implication that the executor is assumed to hold that which he is directed to *appropriate*. *Blake v. Dexter*, 12 Cush. (Mass.) 568.

Same—Realty.—"In a general testamentary gift of all property of whatever description that the testator might die possessed of, to be *appropriated* as the donee might think fit, Leach, V. C., thought a criticism founded upon the words 'possessed of' and *appropriated*, too nice to exclude realty. *Noel v. Hoy*, 5 Madd. 38, *stated* 1 Jarm. 730." Stroud's Jud. Dict.

Pre-emption Laws.—The term *appropriation*, used in the pre-emption laws, means an application of lands to some specific use or purpose, by virtue of law, and not by any other power. *McConnell v. Wilcox*, 2 Ill. 344.

Grant of Public Lands Not Otherwise Appropriated.—As to the meaning of *appropriated* as thus used, see *Houghton County v. Land Office Comrs.*, 23 Mich. 270; *Ayers v. State Auditors*, 42 Mich. 422; *Burlington, etc., R. Co. v. Fremont County*, 9 Wall. (U. S.) 95; and the titles LAND GRANTS; PUBLIC LANDS; STATE LANDS.

Fire Insurance—Appropriated to Hazardous Use.—See the title FIRE INSURANCE.

Where a policy of insurance provided that

if the premises should at any time be *appropriated*, applied, or used for anything hazardous or extra hazardous, or specified in the memorandum of special rates, the policy should become void, it was held that a change from the manufacturing of carpets to that of blankets was no such change or different *appropriation* as was contemplated by that clause. *Smith v. Mechanics*, etc., Ins. Co., 32 N. Y. 399. See *U. S. Fire, etc., Ins. Co. v. Kimberly*, 34 Md. 224, 6 Am. Rep. 325.

A policy provided that it should be void if the premises were used or *appropriated* for carrying on the business of a carpenter. It was held that the building was not *appropriated* to the prohibited use, where the machinery for the use was set up, but at the time of the fire the use had been abandoned. *U. S. Fire, etc., Ins. Co. v. Kimberly*, 34 Md. 234, 6 Am. Rep. 325.

1. Application of Payments.—*Appropriation* is thus used in contracts to denote the application of a sum of money, paid by a debtor to his creditor, to one or more of several debts due from the former to the latter. This may be made by the debtor himself, or, in case of his neglect, by the creditor, or, where neither has made it, by the law. See *Stone v. Seymour*, 15 Wend. (N. Y.) 19. For a full view of the doctrine, see the title APPLICATION OF PAYMENTS, p. 433. And see *Postmaster-Gen. v. Furber*, 4 Mason (U. S.) 333; *U. S. v. Wardwell*, 5 Mason (U. S.) 82; *Reed v. Boardman*, 20 Pick. (Mass.) 441; *Hoyt v. Story*, 3 Barb. (N. Y.) 262.

Sales. (See also the title SALES.)—"The word *appropriation* may be understood in different senses. It may mean a selection on the part of the vendor, where he has a right to choose the article which he has to supply in performance of the contract, and the contract will show when the word is used in that sense. Or, the word may mean that both parties have agreed that certain articles shall be delivered in pursuance of the contract, and yet the property may not pass in either case. *Appropriation* may also be used in another sense, viz., where both parties agree upon the specific article in which the property is to pass, and nothing remains to be done in order to pass it." *Wait v. Baker*, 2 Exch. 9, 17 L. J. Ex. 311.

2. Ristine v. State, 20 Ind. 338; *Stratton v. Green*, 45 Cal. 149; *State v. Lindsley*, 3 Wash. 126, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 639d. See also the titles MUNICIPAL CORPORATIONS; PUBLIC OFFICERS; STATES.

An *appropriation* is the act of setting apart or assigning to a particular use or person in

To appropriate is to take from another to one's self, with or without

exclusion of all others; application to a special use or purpose, as of money to carry out some public object. Webster's Dict., followed in *Proll v. Dunn*, 80 Cal. 227.

The case of *Ristine v. State*, 20 Ind. 338, arose upon a demand made by bond-holding creditors of the state of Indiana upon the auditor of that state for a warrant for interest on the public debt, contracted under a statute requiring the treasurer to pay the interest upon warrants of the auditor. The Constitution of Indiana pledged all the revenues of the state, after the payment of the ordinary expenses of government, to the payment (1) of the interest and (2) of the principal of the public debt. But art. 10, § 3, of that constitution prescribed: "No money shall be drawn from the treasury but in pursuance of *appropriations* made by law." It was held that in the absence of an act of *appropriation* by the legislature, designating a fund for the payment of interest, the auditor could not be required to issue his warrant even for such a purpose.

Auditor Refusing to Draw Warrant.—In such a case, when an *appropriation* made by the legislature for any specific purpose has been exhausted, the action of the auditor, in refusing to draw further warrants for that specific purpose, is proper and right. *Collins v. State*, 3 S. Dak. 18.

In *State v. Lindsley*, 3 Wash. 125, it was held that under the constitutional provisions forbidding the payment of money out of the treasury, except in pursuance of any *appropriation* by law, the state treasurer might, on that ground, lawfully question the legality of any warrant issued by the state auditor.

Nebraska.—Under the provision of the Constitution of the State of *Nebraska*, that "no money shall be drawn from the treasury, except in pursuance of a specific *appropriation* made by law," the auditor of public accounts has no authority to draw a warrant upon the treasurer for commissions due county treasurers for money collected by them and paid into the treasury, unless a specific *appropriation* has been made for that purpose. *State v. Babcock*, 18 Neb. 221.

The *Nebraska* Act of February 28, 1823, entitled "An act making *appropriations* for the current expenses of a state government," etc., does not *appropriate* any money for the purpose of returning prisoners from the penitentiary to the counties in which they were convicted for retrial. *State v. Wallichs*, 15 Neb. 457.

Money Appropriated by Law.—The Constitution of *Arkansas* provides that no money shall be paid out of the treasury until the same shall have been *appropriated* by law. In *Clayton v. Berry*, 27 Ark. 131, the court said: "The expression '*appropriated* by law' means the act of the legislature setting apart or assigning to a particular use a certain sum of money to be used in the payment of debts or dues from the state to its creditors."

Distinguished from Fund.—*Appropriation* and

"fund" are not synonymous terms. *Proll v. Dunn*, 80 Cal. 226.

Special Fund.—Use of the Word "*Appropriate*."—In *Proll v. Dunn*, 80 Cal. 226, it was held that the Constitution of *California* does not require that in making an *appropriation* the legislature should designate any particular fund, or state specifically that the money is "*appropriated* out of any moneys in the treasury not otherwise *appropriated*."

And in *State v. Bordelon*, 6 La. Ann. 68, it was held that it was not necessary that the legislature should use the word *appropriate* in making an *appropriation*.

Towns. (See also the title TOWNS AND TOWNSHIPS.)—A statute authorized a town to issue bonds for park purposes, providing that the act should take effect from the date of its acceptance at a special town meeting. It forbade the park commissioners to expend more than the amount previously *appropriated* by the town. It was held that a vote at a special town meeting, directing the selectmen to prepare bonds and dispose of them from time to time, in such a manner and at such times as might be required by the park commission in order to provide the necessary sums, was an *appropriation* within the act. *Woodward v. Reynolds*, 58 Conn. 486.

Public Officers—Salaries. (See the titles MANDAMUS; PUBLIC OFFICERS.)—Where the constitution provides that state officers shall receive a certain sum as compensation, and declares that no law shall increase or diminish their salaries, it is not necessary that an *appropriation* shall be made by the legislature for the payment of the officers' salaries, as the constitution itself provides for the *appropriation*. *State v. Hickman*, 9 Mont. 370. In that case it was said: "When, therefore, it is plainly declared that the secretary of state, or any other officer, shall receive a certain sum as compensation for his services, an *appropriation* is 'made by law,' and the proper officer is empowered to draw his warrant on the state treasurer in pursuance thereof."

To the same effect, see *Thomas v. Owens*, 4 Md. 189. In this latter case, Thomas, the comptroller of the state, applied for a writ of mandamus to be directed to Owens, the state treasurer, commanding him to pay the amount of a draft drawn in payment of his salary. Owens refused payment on several grounds, including the following: "That no sufficient *appropriation* has been made by law specifying a sum applicable to the payment of the amount claimed by the petitioner." The court said: "The inquiry, then, is, is there an *appropriation* for the period intervening between the 10th of December, 1851—the time from which we think he is entitled to pay—and the 1st day of January, 1852? We are of opinion the constitution, *proprio vigore*, makes such *appropriation*." See also *State v. Weston*, 4 Neb. 216, 6 Neb. 16; *Reynolds v. Taylor*, 43 Ala. 420.

The doctrine, of course, is different where the salaries of the officers are not prescribed

violence; to take to one's self to the exclusion of others.¹

by the constitution. *State v. Weston*, 6 Neb. 16; *Myers v. English*, 9 Cal. 341.

1. To take to one's self in exclusion of others; to claim or use as by an exclusive right; to make peculiar, as to *appropriate* words to ideas. Webster's Dict., followed in *Murdock v. Memphis*, 7 Coldw. (Tenn.) 500.

Appropriated by Army or Navy.—The Act of Congress of July 4, 1864 (13 Stat. at Large 381), declares that the jurisdiction of the Court of Claims shall not extend to or include any claim against the United States growing out of the destruction of, *appropriation* of, or damage to, property by the army or navy, or any part of the army or navy, engaged in the suppression of the Rebellion from the commencement to the close thereof. It was held that the term *appropriation* in this act included all taking and use of property by the army and navy in the course of the war, not authorized by contract with the government. *Filor v. U. S.*, 9 Wall. (U. S.) 45. See *Pugh v. U. S.*, 13 Wallace (U. S.) 633.

In *Waters' Case*, 4 Ct. of Cl. 393, it was held that the statute which provided that the jurisdiction of the Court of Claims should not extend to claims growing out of the *appropriation* of property by the army or navy engaged in the suppression of the Rebellion did not apply where a building was taken by the military governor of Washington as a military hospital, but was treated by the War Department as held under an implied lease. The court said that the term *appropriation* excluded the idea of purchase.

Where, during the late war, a vessel transported a load of coal for the United States by agreement, and was impressed to undertake another voyage, it was held that the Court of Claims had jurisdiction of the claim under the contract, but not of the claim for the other voyage which was outside of the contract. *U. S. v. Kimbal*, 13 Wall. (U. S.) 636.

In *U. S. v. Russell*, 13 Wall. (U. S.) 623, it was held that the taking of steamers by a military officer for temporary use, without intention to *appropriate* them, but with the belief that the United States would pay for the service rendered, was not an *appropriation* within the statute.

Appropriation of Water. (See the titles DAMS; IRRIGATION; MILLS; RIPARIAN RIGHTS; PRESCRIPTION; UNDERGROUND WATERS; WATER COURSES.)—In *McDonald v. Bear River, etc., Water, etc., Co.*, 13 Cal. 233, the court said: "The ownership of water, as a substantive and valuable property, distinct, sometimes, from the land through which it flows, has been recognized by our courts; and this ownership, of course, draws to it all the legal remedies for its invasion. The right accrues from *appropriation*; this *appropriation* is the intent to take, accompanied by some open, physical demonstration of the intent, and for some valuable use. We have held that there is no difference in respect to this use, or rather purpose, to which the water is to be applied; at least, that an *appropriation* for the uses of a

mill stands on the same footing as an *appropriation* for the use of the mines."

This definition was *approved* in *Laramore County v. People*, 8 Colo. 616, and in that case *Thomas v. Guirard*, 6 Colo. 530, is also *quoted*, where it is said: "The true test of *appropriation* of water is the successful application thereof to the beneficial use designed, and the method of diverting or carrying the same, or making such application, is immaterial." See also *Clough v. Wing* (Arizona 1888), 17 Pac. Rep. 453; *Lehigh Irrigation Co. v. Moyle*, 4 Utah 327; *Farmers' High Line Canal, etc., Co. v. Southworth*, 13 Colo. 119; *Wyatt v. Larimer, etc., Irrigation Co.*, 1 Colo. App. 480; *Fuller v. Swan River Placer Min. Co.*, 12 Colo. 12.

Priority.—"The *appropriation* of water within the meaning of the constitution consists of two acts: First, the diversion of the water from the natural stream; and second, the application thereof to beneficial use. These two acts may be performed by the same or different persons; but the *appropriation* is not complete until the two are conjoined. Hence, when the acts are performed by different persons at different times, it becomes necessary to determine which is the essential act to which the 'better right' attaches." *Farmers' High Line Canal, etc., Co. v. Southworth*, 13 Colo. 130. And the court further said: "It will be observed that, by the express language of the constitution, the 'better right' is guaranteed 'as between those using the water for the same purpose.' The different purposes specified are domestic, agricultural, and mechanical. Whether there are other purposes not specified, need not now be discussed. Can the carrier of water for hire be said to be using the water in the sense spoken of in the constitution? The railroad company which carries farming implements from the great manufactories of the East to supply the farmers residing on the broad prairies of the West, can hardly be said to be *using* such implements by the mere act of thus transporting them. From the specification of the purposes for which the water may be used, it would seem that the 'better right' which attaches to the priority of *appropriation* was primarily intended for the benefit of those who apply the water to the cultivation of the soil, or other beneficial use, rather than for the benefit of those engaged in diverting and carrying it to be used by others. The diversion and carriage of water in point of time are necessarily prior to the application of it to agricultural or other useful purposes, but they are subordinate in point of right."

Actual Use—Condition in Deed.—Property was conveyed to the United States on condition that the premises should be *appropriated* for the purpose of a naval depot. It was held that when the United States received the conveyance in good faith, with the *bona fide* intent to construct a naval depot thereon, took actual possession, and commenced the construction of the depot, the property was *appropriated* for that purpose. The court

"Appropriate," used adjectively, is the equivalent of "necessary and proper,"¹

said: "The condition is not that the property shall be used and applied in the course of the regular business and offices of a perfect and complete navy yard and depot; but it is, that the grounds 'designated for the naval depot' shall be 'appropriated for that purpose,' for that object, end, aim, result, consequence. (Webster's Dictionary.) Property may be appropriated to a particular purpose or object, by applying it to the accomplishment or completion of that purpose or object, though it may, in fact, never be accomplished or completed. A person desiring to build a house may appropriate timber and brick to 'that purpose,' though the house may never rise above its foundations." *Murdock v. Memphis*, 7 Coldw. (Tenn.) 500.

Same—Distinguished from Occupancy.—"Webster's first definition of *appropriation* is: 'Setting apart for a particular use.' Occupancy may always include an *appropriation*, but an *appropriation* does not necessarily include occupancy. For instance, the government may appropriate lands for military reservations or Indian reservations, but they may or may not occupy them as such." *McSorley v. Hill*, 2 Wash. 649.

Eminent Domain.—As to what will constitute an *appropriation* within the constitutional provisions forbidding the taking or *appropriating* of private property without compensation, see the title EMINENT DOMAIN.

Under the Declaration of Rights of the *Massachusetts* Constitution, which provides that "whenever the public exigencies require that the property of any individual should be appropriated to public uses, he shall receive a reasonable compensation therefor," the court said: "Here again the term *appropriate* is of the largest import, and embraces every mode by which property may be applied to the use of the public. Whatever exists, which public necessity demands, may be thus *appropriated*," *Boston, etc., R. Corp. v. Salem R. Co.*, 2 Gray (Mass.) 35. See *Eidemiller v. Wyandotte City*, 2 Dill. (U. S.) 376.

Same—Appropriation of Highway.—In *Douglas County R. Co. v. Canyonville, etc., R. Co.*, 8 Oregon 102, it was held that where a statute provided that a corporation might appropriate a highway, the word *appropriate* was not to be understood in the same sense as in the *appropriation* of lands belonging to private individuals. By the *appropriation* of a part of the highway, the corporation acquired no right, except to use the public road in common with others. See also *Oregon R. Co. v. Portland*, 9 Oregon 238.

In the Sense of Devoted to Use—Cemeteries—Condemnation Proceedings.—A statute provided for the *appropriation* in the sense of condemnation, by eminent domain proceedings, of lands to be used for cemetery purposes. It was further provided that no land within two hundred yards of a dwelling house should be appropriated without the consent of the owner. It was held that the trustees of a township under this statute could not acquire, by purchase or otherwise, land within two

hundred yards of a dwelling house, without the consent of the owner; and that the term *appropriate* was used in the statute in two different senses. The court said: "There is no question but that the section treats of *appropriation* proceedings, and has in contemplation that lands may be acquired in that way; nor that the purpose of the inhibition against the *appropriation* of lands on which there is any house, barn, etc., is to make it impossible for the trustees to compel an owner to part with such property against his will, even though a compensation should in the same proceeding be awarded. Why is it not reasonable to presume that, with like regard for the rights of the citizen, the purpose of the clause following is to make it impossible for the trustees to inflict damage upon the owner of a dwelling house by a location within the prescribed distance? It follows that if a meaning other than one implying a reference to lands acquired by an *appropriation* proceeding, one which will be in accord with the manifest purpose of the act, can be given to the term 'be so *appropriated*,' in the last clause of the act, the court is not only at liberty to adopt it, but it is its duty to do so. One definition of the term 'to *appropriate*' is to consign to some particular purpose or use; to set apart for some use. In this sense, therefore, 'to be *appropriated*' is to be devoted to some purpose or use, and we think it not violative of the canons of construction to give to the term that meaning in this connection. The clause under this interpretation means the same as though it had been written: 'Nor shall any land be devoted to cemetery purposes lying within two hundred yards of a dwelling house.' This construction makes the several parts of the law consistent with each other, is in the line of the object to be subserved, and suppresses the mischief which the legislature evidently had in mind in passing the act, while the construction claimed by the defendants renders the section self-contradictory, and results in a nullification of the policy of the enactment." *Henry v. Trustees*, 48 Ohio St. 671.

1. *People v. Washington*, 36 Cal. 669; as in a provision that Congress shall have the requisite power to pass all laws *appropriate* to the end in view. See also *M'Culloch v. Maryland*, 4 Wheat. (U. S.) 421.

The Fifteenth Amendment to the Constitution of the United States empowered Congress to enforce the rights therein given, by *appropriate* legislation. But an act of Congress broad enough to cover wrongful acts, without as well as within the constitutional jurisdiction, is not such *appropriate* legislation. *U. S. v. Reese*, 92 U. S. 214.

Appropriate Business.—Where an act provided that the real estate of any private corporation "above what was required and used for the transaction of its *appropriate* business" should be liable to be assessed and taxed to the same extent as if owned by an individual, it was held that land owned by a bridge company and used for wharves was liable to

adapted to carry out the end in view.¹

APPROVE—APPROVER—APPROVEMENT.—This group of words has several meanings. First, it signifies much the same as “improve;” thus “improvement of common” means the inclosing a part of a common by the lord of the manor, for the purpose of cultivating the same, leaving sufficient for the commoners.² Second, to cultivate land after inclosing it; to make the best benefit or profit of it, by increasing the rent, the profits of a farm.³ Third, to accuse an accomplice by giving evidence against him, in order to secure the approver’s own pardon.⁴ Finally, to be satis-

taxation under the statute. Toll-Bridge Co. v. Osborn, 35 Conn. 7.

1. *Ex p.* Virginia, 100 U. S. 346.

Specific Appropriation.—See **SPECIFIC APPROPRIATION**.

2. There can be no *approver* in derogation of a right of common of turbary. At common law, the lord might approve against common of pasture appendant. *Grant v. Gunner*, 1 Taunt. 434.

3. Cowell’s Interpreter (Law Dict.), *sub voce*. Thus the “king’s *approvers*” were those that had the letting of the king’s demesnes in small manors to his best advantage. Stat. 51 Hen. III. c. 5.

So the bailiff of a lord in his franchise. Stat. 9 Hen. VI., c. 10.

4. See the title **ACCOMPLICES**, vol. I, pp. 389-407. An *approver* is one who confesses himself guilty of felony, and accuses others of the same crime to save himself from punishment. *Myers v. People*, 26 Ill. 173. See *Gray v. People*, 26 Ill. 344; *Whiskey Cases*, 99 U. S. 594; *State v. Graham*, 41 N. J. L. 15, 32 Am. Rep. 174.

In *Myers v. People*, 26 Ill. 176, it was held that the fact that the witness confessed that he had been guilty of other felonies did not constitute him an *approver*.

Requisites.—“A person desiring to be an *approver* must be one indicted of the offense, and in custody on that indictment. He must confess himself guilty of the offense, and desire to accuse his accomplices. He must likewise upon oath discover, not only the particular offense for which he is indicted, but all treasons and felonies which he knows of; and after all this, it is in the discretion of the court whether they will assign him a coroner and admit him to be an *approver* or not. For if on his confession it appears that he is a principal and tempted the others, the court may refuse and reject him as an *approver*. When he is admitted as such, it must appear that what he has discovered is true, and that he has discovered the whole truth. For this purpose, the coroner puts his appeal into form; and when the prisoner returns into court, he must repeat his appeal, without any help from the court, or from any by-stander. And the law is so nice, that if he vary in a single circumstance, the whole falls to the ground, and he is condemned to be hanged; if he fail in the color of a horse, or in circumstances of time, so rigorous is the law, that he is condemned to be hanged; much more, if he fail in essentials. The same consequences follow if he does not discover the whole truth. And in all these cases, the *approver* is convicted

on his own confession. See this doctrine more at large in Hale’s *Pleas Crown*, vol. 2, pages 226 to 236; Staunf. Pl. Crown, lib. 2, c. 52 to c. 58; 3 Inst. 129. A further rigorous circumstance is that it is necessary to the *approver*’s own safety that the jury should believe him; for if the partners in his crime are not convicted, the *approver* himself is executed.” *Rex v. Rudd*, 1 Cowp. 335.

Approver and Accomplice—Admissibility of Testimony.—“It is a mistake to suppose that the competency of accomplices depends on, or grew out of, the doctrine of *approvement*. An *approver* is one who, being indicted for treason or felony, and arraigned, confesses the fact before he pleads, and accuses others, his accomplices, in order to obtain his pardon. His *approvement* is equivalent to an indictment, and if he supports it in all respects, and the person accused by him is found guilty, the *approver* is entitled to his pardon, but if he is acquitted, the *approver* receives judgment to be hanged, upon his own confession of the indictment. 4 Bl. Com. 329; *Rudd’s Case*, 1 Leach 115. An accomplice who voluntarily gives his evidence is not exonerated from punishment, nor entitled to a pardon, if he succeeds in convicting a fellow prisoner, nor is he subjected to punishment in consequence of his failure. In both cases, his acquittal or his conviction depends on the evidence to be adduced on his own trial. His competency depends on the ancient principle of the common law, * * * that no person is to be excluded from giving evidence on account of infamy, unless he has been convicted of an infamous crime.” *Byrd v. Com.*, 2 Va. Cas. 493.

Accomplice and Approver Distinguished.—In *Gray v. People*, 26 Ill. 347, the court said: “Our criminal code, section 17, declares that *approvers* shall not be allowed to give testimony. (Scates’ Comp. 377.) What is meant by an *approver*? Who is he? We must look to the common law to ascertain, as our statute does not define him. By the common law, *approvement* is said to be a species of confession, and incident to the arraignment of a prisoner indicted for treason or felony who confesses the fact before plea pleaded, and appeals or accuses others, his accomplices, in the same crime, in order to obtain his own pardon. In this case, he is called an *approver*, or *prover*, *probator*, and the party appealed or accused is called the appellee. Such *approvement* can only be in capital offenses, and it is, as it were, equivalent to an indictment, since the appellee is equally called upon to answer it. 4 Blackstone’s Com. 267. This course of admitting

fied with; to commend; to accept.¹

APPURTENANCE—APPURTENANT. (See also APPERTAINING; APPENDAGE; APPENDANT; and the titles DEEDS; EASEMENTS; PRIVATE WAYS.)—

improvements has been long disused, and is now more a matter of curiosity than use, and it is strange that the legislature should have turned their attention to it. Porter was in no sense an *approver*. He was not indicted with Gray and Van Allen. He was an accomplice, and, being such, turned state's evidence, no doubt, with the hope of escaping a prosecution. The evidence of such persons is, in general, admissible against the prisoner on trial. Hawkins, in his Pleas of the Crown, bk. 2, c. 46, § 94, says the rule is founded on necessity, since, if accomplices were not admitted, it would frequently be impossible to convict the greatest offenders. The party that is to be made a witness ought not to be indicted, for that would weaken and disparage his testimony. He is usually admitted on motion to the court, and the court considers not only whether the prisoners can be convicted without the evidence of the accomplice, but also whether they can be convicted with his evidence. So an accomplice, not joined in the indictment, is a competent witness for the prisoner in conjunction with whom he himself committed the crime."

1. **Codicil.**—Where a codicil recited the will with this expression, "which I fully *approve* of," it was held to have the effect of a republication. *Rich v. Cockell*, 9 Ves. Jr. 369.

Bishop's Approval.—Where a statute prohibited any one to be received as a lecturer, etc., in any church, chapel, etc., unless he were first *approved* and thereunto licensed by the bishop of the diocese, the court refused a mandamus to the Bishop of London upon affidavit made by the bishop that he could not consistently with his duty *approve* of the applicant as a fit person, holding that it was in the discretion of the bishop. *Rex v. Archbishop of Canterbury*, 15 East 117.

Approved Sureties.—Where the charter of the Bank of the United States required the cashier to give a bond with two or more *approved* securities, in a suit upon the bond it was held that the fact of such *approval* might be proved by presumptive evidence, there being no record of such approval. *U. S. Bank v. Dandridge*, 12 Wheat. (U. S.) 64.

Revisory.—The term *approved* is only appropriate to a revisory proceeding. *Thaw v. Ritchie*, 5 Mackey (D. C.) 225.

Approved Security—Trustees.—See also the titles INVESTMENTS; TRUSTS AND TRUSTEES.

A power to lend on "*approved* securities," though it will justify an investment on an ordinary mortgage, might not be held to extend to railway securities. See *In re Simpson's Trusts*, 1 J. & H. 89.

And where trustees are empowered to lend "on such securities as they may *approve*," they are still bound to make inquiries, and exercise a sound discretion whether the securities are of sufficient value; and if in such a case the trustees lend on any irregular securities, the onus lies on them to show the sufficiency of the security. *Stretton v. Ash-*

mall, 3 Drew 9. And see *Zambaco v. Cassavetti*, L. R. 11 Eq. 439; *New London, etc., Bank v. Brocklebank*, 21 Ch. Div. 302.

Approved Paper.—In *Guier v. Page*, 4 S. & R. (Pa.) 1, it was held that on sales for *approved* indorsed paper, the construction of law is paper which ought to be *approved*.

If it is stated generally in a bought and sold note that goods are to be paid "by bill," parol evidence cannot be received to show that by "bill" was meant *approved* bill. *Semble*, an *approved* bill is a bill to which there is no reasonable objection, and that ought to be *approved*. *Hodgson v. Davies*, 2 Campb. 532.

Same—Purchaser to Give Approved Notes.—Where the terms of a sale provided that the purchaser should give *approved* notes as security, it was held that the seller could not arbitrarily refuse to accept a surety proven to be good and solvent. The court said: "The notes to be taken were not *approved* in the sense of the contract, Sweeney insisting that this term meant to reserve to him the right to *approve* or disapprove the notes offered, however good or bad. This is not the sense in which this word in its connection here must be understood and construed. There is no difficulty in a vendor contracting to sell property only on such security as he shall personally *approve*, if such contract is so specific as to fix the right, but a sale made on terms of acceptance of *approved* security or surety, without more, is properly held to mean good and solvent security which ought to be *approved*, which the vendee can show to be good and meriting *approval*. One of the definitions of *approve* given by Mr. Webster is 'to make or show to be worthy of approbation or acceptance.' This is the proper meaning of the word, as used in this contract. *Hodgson v. Davies*, 2 Campb. 530; *Andis v. Personett*, 108 Ind. 202; *Guier v. Page*, 4 S. & R. (Pa.) 1. In a controversy arising under such a contract, the onus is on the vendee to show that the note offered was such a note as the vendor ought to have *approved* and received. *Mills v. Hunt*, 20 Wend. (N. Y.) 431. This he has done in this case by evidence not controverted. The judgment must be affirmed." *Sweeney v. Vaughn*, 94 Tenn. 534.

So in *Andis v. Personett*, 108 Ind. 202, it was held, where a lessee was to execute his note at the end of the term, for the amount of the rent, with good and *approved* freehold surety, that the provision for good and *approved* freehold surety did not give the lessor the right to arbitrarily reject any note tendered, but should be construed to mean good freehold surety worthy of *approval*.

Same—Purchase to Pay in Approved Banker's Bill.—An *approved* banker's bill is a banker's bill to which no reasonable mercantile objection can be made. *Smith v. Mercer*, L. R. 3 Exch. 51.

Approved Note.—A contract to furnish a note to be *approved* by the contractee is not

An "appurtenance" is a thing used with, and related to or dependent upon,

performed by a tender of the ordinary note of hand of the contractor. *Hale v. Jones*, 48 Vt. 227.

Old Bond for New.—In *U. S. v. Haynes*, 9 Ben. (U. S.) 25, it was held, where a new bond was to be substituted for an old one, that the indorsement *approved* by the secretary of the department on the new bond did not necessarily import more than that the bond was deemed a sufficient security to be accepted, and did not necessarily include a direction that the bond was to stand in lieu of the existing bond, and that the existing bond should be discharged.

Approval of Statutes.—"Approved" distinguished from "Passed."—The proper word to express a governor's concurrence in the passage of a bill is *approved*. The term "passed" is used to denote the action of the assembly, and the term *approved* to denote the action of the governor. *Chumasero v. Potts*, 2 Mont. 285. To the same effect, see *State v. Mounts*, 36 W. Va. 186.

Approval of Executive Officer—Necessity of Writing. (See also the title *STATUTES*.)—In *New York, etc., R. Co. v. Waterbury*, 55 Conn. 19, the court said: "Whenever, either by constitutional or legislative requirement, the President of the United States, the governor of a state, or the mayor of a city is required to *approve* an act of Congress, or of a legislature, or of a court of common council, the word *approve* means more than the unexpressed mental acquiescence of the individual in the propriety of what has been done. It means that the officer, in his official capacity, as the guardian of the interests of a community, having in view its welfare, and not his personal wish or advantage, shall consider the proposed legislation, and determine that it is proper, and make that fact known to all men with absolute certainty by some visible, unmistakable, and enduring mark, to wit: by written declaration attested by his signature. It is not enough that in the future, when the question is made: Is such an act of Congress, of legislature, or of common council, binding upon the country, state, or municipality, it should depend for decision upon the memory and testimony of an officer as to what was his unexpressed thought at a former time concerning it. Such uncertainty would be unendurable, and, therefore, we must assume it to be outside of the meaning of any constitution or law. The fact that the mayor omitted to *approve* in writing many other resolutions of the court of common council is no legal justification of his omission in the case before us."

Approval of Tax Roll.—An order made by a board of supervisors that the tax roll be received, and that the clerk certify copies thereof to the auditor as the law directs, sufficiently shows an *approval* of the bill by the board. "The context clearly shows that the word 'received' is not used to indicate only that the board has accepted the custody of the roll, but that its meaning is that the board adopted it as corrected by them as a completed *approved* roll." *Grayson v. Rich-*

ardson, 65 Miss. 222, citing *Wolfe v. Murphy*, 60 Miss. 1; *Mills v. Scott*, 62 Miss. 525.

Accounts. (See the titles *ACCOUNTS*, vol. 1, p. 433; *TRUSTS AND TRUSTEES*.)—As to the conclusiveness of the word *approved* affixed to the signature of a beneficiary to trustees' accounts, see *Amory v. Lowell*, 104 Mass. 272.

Instructions—Indictment for Murder—Aiders and Abettors. (See the title *AIDERS AND ABETTORS*.)—It is error, for which a judgment of conviction will be reversed, to instruct a jury in a trial for murder that if the defendant "was present, aiding, abetting, counseling, advising, inciting, encouraging, or *approving*," etc., he is guilty. *Approving* might be a mere mental assent to the fact of killing, without any external manifestation that could make it aid or abet, etc., the slayer. *State v. Cox*, (Mo.) 5 Cent. L. J. 195.

The court, in *Omer v. Com.*, 95 Ky. 360, said: "In the case of *True v. Com.*, 90 Ky. 651, the words '*approve* of' and '*consent to*' were condemned as not suitably expressing the idea of aiding and abetting. The instruction was: 'If they believe from the evidence that Samuel Sellars shot and killed Robertson, they should acquit the defendant True, unless they believe from the evidence, beyond a reasonable doubt, that the defendant True, at the time of said shooting and killing, was present and did, in some manifest manner, encourage, incite, *approve* of, or aid, or consent to said shooting of said Robertson,' etc. The words 'encourage, aid, or abet,' and 'counsel, advise, or assist' were said to be words in appropriate use 'to describe the offense of a person who, not actually doing the felonious act, by his will contributes to or procures it done, and thereby becomes a principal or accessory,' etc. 'But,' say the court, 'the words "*approve* of" and "*consent to*" do not, singly or combined, express the idea of wilful contribution to, or procurement of, a felonious act, which is necessary to constitute guilt.'"

Certificate of Grand Jury.—In a proceeding to incorporate a borough under the *Pennsylvania* statute the certificate of the grand jury should set forth substantially that after a full investigation of the case the jurors find that the conditions prescribed by law have been complied with, and that they believe it is expedient to grant the prayer of the petitioners. A certificate *approved*, simply, is not in conformity with the requirements of the act. *In re Summit Borough*, 114 Pa. St. 362.

Relocation of Passenger Station—Approval by Selectmen and Commissioners.—The records of the board of railroad commissioners contained a vote that the board *approved* the relocation of a passenger station of a railroad corporation "as proposed by the selectmen of the town." The records of the selectmen contained a vote, written by the town clerk, who was not a member of the board or sworn as its clerk, but who acted as such, that the station "be relocated" at the place named, "in concurrence with the vote of the railroad commissioners." It was held that there was an

another thing more worthy, and agreeing in its nature and quality with the thing whereunto it is appendant or appurtenant.¹

"approval in writing" by the railroad commissioners and by the selectmen, within the *Massachusetts* Pub. Stat., c. 112, § 15. *Atty.-Gen. v. Eastern R. Co.*, 137 Mass. 45.

Certificate—Forgery.—A statute provided against the forgery of any certificate of any public officer in relation to any matter wherein such certificate might be received as legal evidence. It was held that a time check *approved* by a road supervisor was a subject of forgery, though attached to the certificate was an order for the payment of money, addressed to the county, with a blank for the foreman's signature, which was not filled. The court said: "The word *approved*, written beneath the account, with the signature of the supervisor subscribed in his official capacity, is, as we think, a sufficient official certification of the account. It identifies the account as that of the supervisor, and is equivalent to marking it 'O K' or 'correct,' which is usually recognized as a certification in ordinary business affairs. The fact that what purports to be an order drawn upon Multnomah County intervenes between the account and the word *approved* does not change the effect of the certificate. Apparently, it was intended that this order should be signed by somebody as foreman, but, with or without the order, the account may be said to have been certified to the County Court by the supervisor." *State v. Gee* (Oregon 1895), 42 Pac. Rep. 9.

On Approval.—Where a broker gave a receipt for diamond ear-knobs, "on approval to show to my customers, said knobs to be returned on demand," it was held that on its face the contract did not import an authority to sell, the words "on approval," as ordinarily interpreted, being neither inconsistent with an authority to show, nor an obligation to return on demand, and that the court erred in excluding parol evidence offered as to the intent of the parties to the contract. *Smith v. Clews*, 114 N. Y. 190, 11 Am. St. Rep. 627.

Insurance Application.—See also the titles INSURANCE; FIRE INSURANCE; LIFE INSURANCE; MARINE INSURANCE.

If the contract between the agent and the person applying for insurance is fair and strictly in accordance with the rules of the company, the company's liability will exist, although there is printed on the blank application the qualification that the policy will issue "if approved" by the company. Such qualification only gives the company the right to object to an unfair or improper contract. *Palm v. Medina County Mut. F. Ins. Co.*, 20 Ohio 530.

1. *Wilson v. Beckwith*, 117 Mo. 61, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 641; *Snoddy v. Bolen*, 122 Mo. 479, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 641; *Gullman v. Sharp*, 81 Hun (N. Y.) 462, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 641; *Woodhull v. Rosenthal*, 61 N. Y. 390; *Riddle v. Littlefield*, 53 N. H. 508, 16 Am. Rep. 388; *Lucas v. Bishop*, 15 Lea (Tenn.) 167, 54

Am. Rep. 410; *Humphreys v. McKissock*, 140 U. S. 304; *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42.

In *Meek v. Breckenridge*, 29 Ohio St. 649, the court said: "An *appurtenance* is a 'thing belonging to another thing as principal, and which passes as incident to the principal thing.' 1 Bouvier L. D. 136. 'Appendant is any inheritance belonging to another, that is superior or more worthy.' Coke Litt. 121; *Riddle v. Littlefield*, 53 N. H. 508, 16 Am. Rep. 388, 3 Wash. Real Prop. 394; U. S. v. Appleton, 1 Sumn. (U. S.) 492. These authorities settle the principle that that which is claimed to be an easement or servitude must not only be appendant in utility, and fitness for use, to the principal or dominant estate, but there must be a unity of title or right in the same person to both the superior estate and the easement claimed."

Appurtenance must Be Necessary to the Principal Thing.—An easement will not pass as an *appurtenance*, unless it is necessary to the enjoyment of the thing granted. *Fond du Lac Water Co. v. Fond du Lac*, 82 Wis. 331; *Linthicum v. Ray*, 9 Wall. (U. S.) 243; *Humphreys v. McKissock*, 140 U. S. 313.

Nothing passes by the word *appurtenance*, except such incorporeal easements, or rights, or privileges, as are strictly necessary and essential to the proper enjoyment of the estate granted. A mere convenience is not sufficient to thus create such a right or easement. *Root v. Wadhams*, 107 N. Y. 384. See also *Woodhull v. Rosenthal*, 61 N. Y. 390; *Ogden v. Jennings*, 62 N. Y. 526; *Green v. Collins*, 86 N. Y. 246, 40 Am. Rep. 531; *Griffiths v. Morrison*, 106 N. Y. 165; *Gale v. Heckman* (Supreme Ct.), 38 N. Y. Supp. 86. *Compare Simmons v. Cloonan*, 81 N. Y. 565; *Hoskins v. Brawn*, 76 Me. 68.

Thus one who hires a tanyard and barkmill cannot throw the contents into the stream, nor put his waste bark on the lessor's adjoining land, for that is a convenience, not a necessity. *Howell v. McCoy*, 3 Rawle (Pa.) 256.

Whether Necessary in a Conveyance. (See also the title DEEDS.)—It has been held that the word *appurtenances* is not needed to carry incidents of the principal thing; that its absence or presence will not materially affect a grant, and that as well without it as with it everything that appertains or belongs to the principal thing will pass. *Witte v. Quinn*, 38 Mo. App. 692, *citing* Wood on Landlord and Tenant, § 213; *Riddle v. Littlefield*, 53 N. H. 503, 16 Am. Rep. 388. See also U. S. v. Appleton, 1 Sumn. (U. S.) 492; *Jackson v. Trullinger*, 9 Oregon 393; *Seavey v. Jones*, 43 N. H. 441.

The words "with the *appurtenances*" cannot affect the rights of the parties or enlarge the scope of the deed, as the *appurtenances* would pass without such words, for it is a general rule that whatever is in use for the land as an incident or *appurtenance* is conveyed by the deed. *Huttemeier v. Albro*, 18 N. Y. 48.

The term "appurtenant" expresses the notion of being annexed to, or

Light and Air. (See the title **LIGHT AND AIR**.)—In *Hazlett v. Powell*, 30 Pa. St. 296, it is said: "In no case is the ordinary enjoyment of light and air an *appurtenance* to property. It only becomes so by a right of way or approach derived by purchase." And in that case, it was held that the word *appurtenances* in a lease did not apply.

Same—Store with Appurtenances.—The plaintiffs leased a store with the *appurtenances* in a building occupied by several tenants. A yard adjoined the building and furnished light necessary for the back part of the plaintiff's store. A door led from the plaintiff's store to the yard. It was held that the plaintiffs had an easement in the yard for light and air. The court said: "In the case supposed the yard would have passed with the store, not by force of the word *appurtenances*, but as portions of the premises demised. *Riddle v. Littlefield*, 53 N. H. 503, 16 Am. Rep. 388. If all the rooms in the building had at the same time been rented to different tenants, each taking his room with the *appurtenances*, and no mention had been made of the yard, a different case would have been presented. The demise of a room in the building would pass no portion of the yard. Each tenant would take only the room which he hired, and would take no other portion of the premises. Whatever else he took would be by virtue of the word *appurtenances*. That word would give him whatever was attached to or used with the premises, as incident thereto, and convenient or essential to the beneficial use and enjoyment thereof, and he would take any easement or servitude used or enjoyed with the demised premises. 2 Washb. Real Prop. 667; Washb. Easem. 32; *Sheets v. Selden*, 2 Wall. (U. S.) 177; *Riddle v. Littlefield*, 53 N. H. 503, 16 Am. Rep. 388; *Voorhees v. Burchard*, 55 N. Y. 98; *Huttemeier v. Albro*, 18 N. Y. 48. It would not give him an interest in the yard as a portion of land demised, because land cannot pass as *appurtenant* to land, but it would give him an easement in the yard in common with all the other tenants, for all purposes for which it could be used in common, for access to the privies, for play ground for children, and for light and air for rooms in the rear of the building." *Doyle v. Lord*, 64 N. Y. 438.

Booms.—Where one owning the right of fastening a boom to the shore of an adjoining owner, and exercising that right in connection with his booms along his own shore, conveys his land "together with all the booms and piers thereon, and privileges thereto appertaining as heretofore used by me," the right of fastening the boom as enjoyed by the grantor passes to the grantee. *Hoskins v. Brawn*, 76 Me. 68.

The Right to Rest a House Partly on Another's Land will pass under the term *appurtenances*, *Bramble v. Kingsbury*, 39 Ark. 135.

Easement to Which Grantor Has No Title.—The word *appurtenance* will not pass an easement which the grantor could not effectually convey; therefore, a deed conveying land sub-

sequent to the statutory closing of a highway adjoining does not convey an easement in the highway which entitles the grantee to the damages subsequently awarded. *King v. New York*, 102 N. Y. 171. See also *Philbrick v. Ewing*, 97 Mass. 134.

Same—Covenant of Warranty.—If a grantor of premises and their *appurtenances* has no right or title to a certain use of adjoining premises, then such use does not pass under the term *appurtenances*, and is not covered by the grantor's covenant of warranty. *Meek v. Breckenridge*, 29 Ohio St. 648.

The Right to Overflow Adjoining Lands, like the right of way across the lands of another, is an easement, and will pass by a conveyance as an *appurtenant*, when agreeing in nature and quality with the principal thing granted. *Jackson v. Trullinger*, 9 Oregon 393.

Stairway.—In *National Exch. Bank v. Cunningham*, 46 Ohio St. 575, it was held that the sale of a part of the premises occupied by a building, the hall of which connected with the landing of a stairway leading from the street, and situate upon the other part of said premises, and furnishing the only means of access to the second floor of the building sold, passed to the purchaser a right to the use of the stairway as an easement *appurtenant* to the premises conveyed. In that case, the stairway was an *appurtenance*, and it passed as an incident to the principal thing.

Side Doors—Windows.—A block of buildings consisted of a central building and two wings. In front of the central building was a piazza upon which opened doors and windows in the wings. It was held that the use of the doors and windows would pass as *appurtenances* to the wings. *U. S. v. Appleton*, 1 Sumn. (U. S.) 492.

Fire Insurance. (See also the title **FIRE INSURANCE**.)—*Hall v. Benner*, 1 P. & W. (Pa.) 402, 21 Am. Dec. 394.

A policy insuring all articles making up the stock of a pork-house, and within and *appurtenant* to the building, covers everything in the building properly belonging to a pork-house, without regard to the particular ownership of each and every article contained in, or *appurtenant* to, the building. *Ætna Ins. Co. v. Jackson*, 16 B. Mon. (Ky.) 242.

"Appendant" Distinguished from "Appurtenant."—The word *appendant* denotes a thing which, by prescription, has belonged to another principal and more worthy thing, as commons, ways, and other easements of a manor. The word *appurtenant* signifies that which may commence and be created at any time by grant or use. *Jackson v. Striker*, 1 Johns. Cas. (N. Y.) 291, 1 Chit. Gen. Prac. 154.

In *New Ipswich W. L. Factory v. Batchelder*, 3 N. H. 192, 14 Am. Dec. 346, it is said: "An *appendant* is that which, beyond memory, has belonged to another thing more worthy. One thing is said to be *appendant* when it has been immemorially connected with another." Com. Dig., *Appendant*, A.; *Leonard v. White*, 7 Mass. 8, 5 Am. Dec. 19; *Watts v. Coffin*, 11 Johns. (N. Y.) 498;

belonging to, some more important thing.¹

Whether Things Corporeal may Be Appurtenant to Things Corporeal.—A thing corporeal cannot properly be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal.²

Coke Litt. 121*b* and 122*a*; *Grant v. Chase*, 17 Mass. 448. An *appurtenant* is that which belongs to another thing, but which has not belonged to it immemorially. *Atkyns v. Clare*, 1 Vent. 407; Coke Litt. 121*b* and 122*a*; Moore 682."

A matter *appendant* must arise by prescription, while a matter *appurtenant* may be created at any time. 2 Vin. Abr. 594, 3 Kent 404.

1. *Lister v. Pickford*, 34 Beav. 576; *Farmer v. Ukiah Water Co.*, 56 Cal. 14; *Empire Land, etc., Co. v. County Treasurer*, 1 Colo. App. 212.

Appurtenant is something belonging, as an accessory or incident, to the thing granted. *Ogden v. Jennings*, 66 Barb. (N. Y.) 307, affirmed 62 N. Y. 526.

"*Appurtenant* denotes annexed or belonging to." Abbott Law Dict., tit. *Appurtenance*. "An *appurtenance* is that which belongs to another thing, but which has not belonged to it immemorially." *Atkyns v. Clare*, 1 Vent. 407; Co. Litt. 121*b*; *Empire Land, etc., Co. v. County Treasurer*, 1 Colo. App. 205.

Things to be *appurtenant* must belong to, or be a part of, the principal thing to which they are *appurtenant*. *Farmers' Loan, etc., Co. v. Commercial Bank*, 11 Wis. 210.

An *appurtenant* easement is an incorporeal right which, as the term implies, is attached to, and belongs to, some greater or superior right. *Cadwalader v. Bailey*, 17 R. I. 495.

2. *Jackson v. Hathaway*, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263; *Harris v. Elliott*, 10 Pet. (U. S.) 25; *Cook v. Whiting*, 16 Ill. 483; *Jackson v. Striker*, 1 Johns. Cas. (N. Y.) 284.

An *appurtenance*, and the thing to which it is *appurtenant*, must agree in nature and quality. Thus a seat in a church may be *appurtenant* to a house, but not to land. Where a mill was sold with the *appurtenances*, a kiln occupied with the mill for many years did not pass, it not appearing but that the kiln was a lime-kiln, having no relation to the mill, though had it been shown to be a malt-kiln it might have passed. "Appertaining," 3 Salk. 40.

In *Leonard v. White*, 7 Mass. 6, 5 Am. Dec. 19, it is said: "By the grant of a message *cum pertinentiis*, a shop, annexed to it for thirty years, does not pass, unless it be found to be a parcel of the message. By the grant of a house or land *cum pertinentiis*, another house or land does not pass, unless it be found to be a parcel. By the grant of a mill *cum pertinentiis*, the close where the mill is, or the kiln there, does not pass without some further expression. Land cannot be appendant to land, nor can it be appendant to a meadow or message. So a meadow cannot be *appurtenant* to a pasture, nor a pasture to a wood."

Personal Property.—In *Ottumwa Woolen*

Mill Co. v. Hawley, 44 Iowa 57, 24 Am. Rep. 719, it was held that personal property could not pass under the word. The court said: "Counsel for appellant claim that as the mortgage or trust deed conveyed the premises 'with the *appurtenances*,' something more is conveyed than the real estate. This being the usual form of conveyance of real estate, we are unable to see how personal property can be embraced therein. *Appurtenances* are things belonging to another thing as principal, and which pass as incident to the principal thing. The term as used in conveyances passes nothing but the land and such things as belong thereto and are part of the realty."

The word *appurtenances* means something which belongs to another thing as principal, and which passes as incident to the principal thing; and, therefore, is not broad enough to include articles of personal property leased which were totally disconnected with the demised premises. *Scheidt v. Belz*, 4 Ill. App. 437; *Philadelphia Invest. Co. v. Ohio, etc., R. Co.*, 41 Fed. Rep. 380.

Same—Sheriff's Levy.—In *Munroe v. Thomas*, 5 Cal. 470, it was held that the term *appurtenances* used in the return of a levy by a sheriff was too general, vague, and indefinite to comprehend in its meaning any personal property as the subject of the levy, and nothing, therefore, passed by the sale.

Same—Kettle.—A kettle situated upon a lot not included in the lease of hotel property, and not indispensable to its enjoyment, although a convenience to such property, and used by the grantor in connection therewith, is not an *appurtenance* thereto, and the grantee may, at any time, be deprived of its use, by the grantor. The court said: "The term *appurtenances* carries with it no rights or interest in property of the grantor on other lands which he owns, lands not included in the deed under which the grantee claims. *Bolton v. Bolton*, 11 Ch. Div. 968; *Leonard v. White*, 7 Mass. 6, 5 Am. Dec. 19. It cannot be made to include anything not situate on the land described, though it belong to the grantor and be used by him in his business. *Frey v. Drahos*, 6 Neb. 1, 39 Am. Rep. 353. In that case, the mortgage described the property as 'one frame grain elevator warehouse situated on the ground of the Sioux City & Pacific R. Co., east of their side track, etc., with all the *appurtenances* thereto belonging.'" *Barrett v. Bell*, 82 Mo. 110, 52 Am. Rep. 361.

Elevator and Appurtenances. (See generally the title ELEVATORS.)—Property was described in a chattel mortgage as "one frame grain elevator warehouse * * * with all the *appurtenances* thereto belonging." Fifty feet distant was an engine house containing an engine and boiler, connected by a rubber belt with the elevator when in operation. One hundred feet distant were an office building

Land.—Thus it is a familiar maxim of the law that land cannot pass as appurtenant to land.¹

and a stationary scale, entirely disconnected from the elevator, and used also in other business. The buildings were all on leased ground. It was held that the outbuildings and the machinery and scales were not *appurtenant* to the elevator, and did not pass under the mortgage. The court said: "What is an *appurtenance*? It is said that 'the term is commonly confined in law to the purely incorporeal hereditaments that are commonly annexed to lands or to houses, and may as well include common as any other right.' Bouvier's Law Dictionary 29; *Lister v. Pickford*, 34 Beav. 576. And in *Harris v. Elliott*, 10 Pet. (U. S.) 25, is mentioned a saying of Lord Coke that 'a thing corporeal cannot properly be *appurtenant* to a thing corporeal, nor a thing incorporeal to a thing incorporeal.' It is, however, doubtless true that the word is frequently used in a more enlarged and comprehensive sense, and when it can be gathered from all the attendant circumstances that it was so understood and used by the parties, a corresponding effect should be given to it in the interpretation of a contract. But here we have no fact or circumstance to indicate that the parties intended to use it in any other than its purely legal sense." *Frey v. Drahos*, 6 Neb. 1, 39 Am. Rep. 353.

Same—Elevator and Mills.—In *Rosenbaum v. Foss*, 4 S. Dak. 184, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 641, it was held that an elevator could not be an *appurtenance* of a mill.

Same—Railroad.—In *Humphreys v. McKissock*, 140 U. S. 304, it was held that a railroad company joining in the construction of an elevator on land not belonging to it, and situated at some distance from its road, does not acquire an interest in it which will pass as an *appurtenance* under a mortgage of its railroad as constructed or to be constructed, and the *appurtenances* thereunto belonging. The court said: "A thing is *appurtenant* to something else only when it stands in the relation of an incident to a principal, and is necessarily connected with the use and enjoyment of the latter. *Harris v. Elliott*, 10 Pet. (U. S.) 54; *Jackson v. Hathaway*, 15 Johns. (N. Y.) 455, 8 Am. Dec. 263; *Linthicum v. Ray*, 9 Wall. (U. S.) 241. Of two parcels of land, one can never be *appurtenant* to the other, for, though the possession of the one may add greatly to the benefit derived from the other, it is not an incident of the other or essential to the possession of its title or use; one can be enjoyed independently of the other."

Minerals. (See generally the title MINES AND MINING.)—In *Snoddy v. Bolen*, 122 Mo. 479, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 641, it was held that minerals in a street would not pass as *appurtenant* to lots bordering on the street. But the right to take ore out of certain mine hills is an easement, and is such a right as can be annexed to other land by express grant, and will pass as *appurtenant* to it. *Grubb v. Grubb*, 74 Pa. St. 25.

1. *England.*—*Smith v. Ridgway*, L. R. 1 Exch. 46; *Buszard v. Capel*, 8 B. & C. 141, 15 E. C. L. 169; *Doe v. Hubbard*, 15 Ad. & El. 247, 69 E. C. L. 247; *Lister v. Pickford*, 34 Beav. 580.

Canada.—*McNish v. Munro*, 25 U. C. C. P. 295.

United States.—*Philadelphia Invest. Co. v. Ohio*, etc., R. Co., 41 Fed. Rep. 380; *Harris v. Elliott*, 10 Pet. (U. S.) 25; *New Orleans Pac. R. Co. v. Parker*, 143 U. S. 42.

Illinois.—*St. Louis Bridge Co. v. Curtis*, 103 Ill. 410; *School Trustees v. Schroll*, 120 Ill. 509.

Massachusetts.—*Leonard v. White*, 7 Mass. 6, 5 Am. Dec. 19.

Minnesota.—*McDonald v. Minneapolis Lumber Co.*, 28 Minn. 262.

Missouri.—*Wilson v. Beckwith*, 117 Mo. 61, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 641.

New York.—*Jackson v. Hathaway*, 15 Johns. (N. Y.) 447, 8 Am. Dec. 263; *Ex p. New York Cent. R. Co.*, 49 N. Y. 414; *Ogden v. Jennings*, 62 N. Y. 526; *Armstrong v. Dubois*, 90 N. Y. 102; *Lawrence v. Whitney*, 115 N. Y. 410.

North Carolina.—*Helme v. Guy*, 2 Murph. (N. Car.) 341.

Pennsylvania.—*Philadelphia v. Philadelphia*, etc., R. Co., 58 Pa. St. 262.

In *Woodhull v. Rosenthal*, 61 N. Y. 390, the court said: "A thing *appurtenant* is defined to be a thing used with and related to or dependent upon another thing more worthy, and agreeing in its nature and quality with the thing whereunto it is appendant or *appurtenant*. It results from this definition that land can never be *appurtenant* to other land or pass with it as belonging to it. * * * All that can be reasonably claimed is that the word *appurtenances* will carry with it easements and servitudes used and enjoyed with the lands for whose benefit they were created. Even an easement will not pass, unless it is necessary to the enjoyment of the thing granted."

Not Necessary to Show that the Word Applies to Something.—In *U. S. v. Harris*, 1 Sumn. (U. S.) 37, Story, J., said: "It may be admitted that land may pass as *appurtenances* to other land, if such be the clear intent of the parties, as gathered from the terms of the deed or other instrument of conveyance; for, in such a case, the law does not insist upon strict propriety in the use of language, but is content to expound the words of the parties, and give effect to the instrument, according to the real and unquestionable meaning of the parties. But strictly speaking, in a legal sense, land can never be *appurtenant* to land. But a thing to be appurtenant to another must be of a different and congruous nature, such as an easement or servitude, or some collateral incident belonging to, and for the benefit of, the land. In *Co. Litt. 121b*, it is said that nothing can be appurtenant, unless the thing agree in quality and nature to the

Water.—In the case of a grant of a house receiving its water supply from other lands, it would seem by the weight of authority that the right to take water and maintain the pipes would pass as appurtenant to the house.¹

thing whereunto it is appurtenant; as a thing corporeal cannot properly be appurtenant to a thing corporeal, nor a thing incorporeal to a thing incorporeal. And there are many other authorities to the same effect in Com. Dig., *Appendant* and *Appurtenant*, and Grant E. 9. In a case, therefore, where the words of a grant pass land 'with its *appurtenances*,' the law will, in the absence of any controlling words, deem the word *appurtenances* to be used in its technical sense; and that construction will not be displaced, until it is made manifest from other parts of the grant that some other thing was actually intended by the parties. I say, until it is made manifest; by which I mean, clearly and definitely ascertained that the word is used in another sense. I add also, from other parts of the same grant; for it is not open to parol evidence to explain or vary the legal sense. If there is nothing in *rerum natura*, upon which the word can operate, that does not entitle the court to desert the legal sense. It has been said by the counsel for the defendant that there were buildings on No. 2 to which the word *appurtenances* is commonly applied. But such buildings are in no just sense *appurtenances*; but if annexed to the freehold, they are a parcel of the land and pass as such by the deed. It is not, however, necessary to show that there are things granted to which the word applies. It is often thrown in by conveyancers without any actual knowledge of the premises, to avail, as far as it may avail, by way of cautionary enlargement of the principal grant, if there be anything on which it may operate. If there be in fact no *appurtenances*, then the word, like other expletives in a deed, is merely nugatory."

Road Not Annexed as an Easement to the Land.—A county road not in any way annexed as an easement to the land conveyed, or used in connection therewith, does not pass by the use of the word *appurtenances* in a deed. *Lankin v. Terwilliger*, 22 Oregon 97. See also *Jackson v. Striker*, 1 Johns. Cas. (N. Y.) 284.

Soil and Freehold on Certain Streets were held not to pass under and by virtue of the term *appurtenances*, as used by a jury in its verdict in certain proceedings by which the lands were taken by the United States. *Harris v. Elliott*, 10 Pet. (U. S.) 25.

Will.—Where a testator devised to his son the tract "whereon I now live, together with all *appurtenances*," it was held that only the tract upon which he lived passed, and that other and distinct tracts would not pass under the word *appurtenances*. *Helme v. Guy*, 2 Murph. (N. Car.) 341.

Lands usually occupied with a house will not pass under a devise of a "message, with the *appurtenances*," unless it clearly appears that the testator meant to extend the word *appurtenances* beyond its technical sense. *Buck v. Nurton*, 1 B. & P. 53.

1. See also the titles EASEMENTS; DEEDS; WATER COURSES.

In the case of *Nicholas v. Chamberlain*, Cro. Jac. 121, Croke says: "It was held by all the court, upon demurrer, that if one erects a house, and builds a conduit thereto, in another part of his land, and conveys water by pipes to the house, and afterwards sells the house with the *appurtenances*, excepting the land, or sells the land to another, reserving to himself the house, the conduit and pipes pass with the house, because they are necessary and quasi-appendant thereto." Cited with approval in *Hazard v. Robinson*, 3 Mason (U. S.) 279; *U. S. v. Appleton*, 1 Sumn. (U. S.) 502; *Lampman v. Milks*, 21 N. Y. 508; *New Ipswich W. L. Factory v. Batchelder*, 3 N. H. 190, 14 Am. Dec. 346; *Seymour v. Lewis*, 13 N. J. Eq. 446.

It is submitted, however, that in that case the right was not, strictly speaking, an *appurtenance* of the house, as there existed that unity of title in the dominant and servient tenements which renders an *appurtenance* impossible. See *infra*, *Unity of Title*.

Upon the principle of the maxim that whoever grants a thing is supposed also, tacitly, to grant that without which the grant itself would be of no effect, it is held that by a conveyance of a house and lot (warranty deed in usual form) supplied with water by an aqueduct running through the land granted, from a spring belonging to, and on other land of, the grantor, the grant conveys the water as it was then running, with a right to the spring and aqueduct sufficient for its continuance as an *appurtenance* to the house and land. *Coolidge v. Hager*, 43 Vt. 9, 5 Am. Rep. 256, citing *New Ipswich W. L. Factory v. Batchelder*, 3 N. H. 190, 14 Am. Dec. 346; *Dunklee v. Wilton R. Co.*, 24 N. H. 489; *Vermont Cent. R. Co. v. Hills*, 23 Vt. 681.

Convenience.—B was the owner of two lots, by title obtained from different sources, and at different dates, separated by some land owned by a third party, whom he had permitted to take water from a spring on one of his lots, charging rent therefor, and allowing his tenant on the other lot, by parol license, to take water by a pipe supplying the intervening lot. He sold the lot without the spring to one who sold to the grantor of the plaintiff. The deed conveyed the land by metes and bounds, "with the *appurtenances* thereto belonging," but did not mention any water rights. B. never intended that any right to the spring should go to the grantee, and the latter understood that he had the right to the water only by parol license. It was held that the right did not pass by the use of the word *appurtenance* in any of the deeds, nor as an easement by implication. The court said: "Nothing passes by the word *appurtenance*, except such incorporeal easements or rights or privileges as are strictly necessary and essential to the proper enjoyment of the estate granted. A mere convenience is not sufficient to thus create such a right or easement. See *Ogden v. Jennings*, 62 N. Y. 526; *Green v. Collins*,

Mill and Appurtenances.—By the grant of a mill with its appurtenances, the right to the use of the water necessary to the use of the mill passes to the grantee or devisee.¹

86 N. Y. 246, 40 Am. Rep. 531; Griffiths v. Morrison, 106 N. Y. 165." Root v. Wadhams, 107 N. Y. 384, 37 Alb. L. J. 33.

Habendum.—The *habendum* of a deed, though it may sometimes enlarge the estate granted, can never extend the subject-matter of the grant. Therefore, when the subject-matter of a deed, as described in the premises, was a certain piece of land, and the *habendum* was of "the premises, with all their *appurtenances*," it was held that a right to the use of water conducted artificially to the premises from other land of the grantor, in the manner in which it was enjoyed by him at the time of the grant, did not pass by such deed. Manning v. Smith, 6 Conn. 289.

A. conveyed to S. a tract of land with buildings thereon, supplied with water from a spring on land of H. by an aqueduct. In describing the premises conveyed, no mention was made of the aqueduct, or of any easement in the land of H. Following the description was the *habendum* in these words: "To have and to hold the said granted premises, with all the privileges and *appurtenances* to the same belonging." It was held that the word *appurtenances* in the *habendum* would not be construed to convey an easement in the land of H., which, not having ripened into a legal right, had not become legally attached to the premises conveyed. Spaulding v. Abbot, 55 N. H. 423. See also Swazey v. Brooks, 34 Vt. 451.

Irrigation—California. (See also the title **IRRIGATION**.)—Under the statutory definition of an *appurtenance* in the Civil Code of California, § 662, viz.: "A thing is deemed to be incidental or *appurtenant* to land when it is by right used with the land for its benefit; as in the case of a way, or water course, or of a passage for light, air, or heat, from across the land of another," it has been held that water used for purposes of irrigation would pass under a deed of the land and *appurtenances*. Farmer v. Ukiah Water Co., 56 Cal. 11; McShane v. Carter, 80 Cal. 315; Ely v. Ferguson, 91 Cal. 190; Crooker v. Benton, 93 Cal. 365. See also Hungarian Hill Gravel Min. Co. v. Moses, 58 Cal. 168.

Same—Colorado.—But in Bloom v. West, 3 Colo. App. 212, following Strickler v. Colorado Springs, 16 Colo. 61, it was held that water used in irrigating land is not and cannot be *appurtenant* to the land. The court said: "In the decree it is said, after describing the land, the water decreed shall pass 'as an *appurtenance* to said land;' and counsel, upon the trial, appear to have been in harmony with the court in regarding the water as *appurtenant* to the land. This view originated either in a misconception of the law, or in the unfortunate use of a word for want of a better. Webster defines *appurtenance* as 'that which belongs to something else; an adjunct; an appendage; something annexed to another thing more worthy,' etc. Blackstone defines *appurte-*

nance: 'belonging; pertaining; incident; as, a right of way *appurtenant* to land or buildings.' Bouv. Law Dict.: 'Things belonging to another thing as principal, and which pass as incident to the principal thing;' and this definition is sustained by numerous legal decisions, both English and American. Technically, property tangible and corporeal, capable of sale, of transfer, and of use in another place, cannot be regarded as *appurtenant* to land. It must be incorporeal; an easement; a servitude. In Co. Litt. 121, it is said 'that nothing can be *appurtenant*, unless the thing agrees in quality and nature to the thing whereunto it *appertaineth*; as, a thing corporeal properly cannot be *appurtenant* to a thing corporeal, nor a thing incorporeal to a thing incorporeal;' and this legal fact is recognized to the present day. According to the recent legal decisions, a party who owns land, and the right to use water from an irrigating ditch or canal, has two separate and distinct rights of property, either of which could pass by assignment or conveyance, regardless of the other. Hence the right to the use of water for irrigation from an artificial canal for conveying it, cannot be regarded as *appurtenant* to the land, technically, nor at common law."

1. Frink v. Branch, 16 Conn. 260; Blake v. Clark, 6 Me. 436; Baker v. Bessey, 73 Me. 472, 40 Am. Rep. 377; Wetmore v. White, 2 Cal. Cas. (N. Y.) 87, 2 Am. Dec. 323; Elliott v. Sallee, 14 Ohio St. 17; Morgan v. Mason, 20 Ohio 402, 55 Am. Dec. 464; Blaine v. Chambers, 1 S. & R. (Pa.) 169; Pickering v. Stapler, 5 S. & R. (Pa.) 107, 9 Am. Dec. 336; Strickler v. Todd, 10 S. & R. (Pa.) 69. See also the title **MILLS**.

By the Grant of a Mill "with the *Appurtenances*," the dam and all the privileges of flowing which are essential to the enjoyment of the mill and head of water pass, and this is true without the word *appurtenances*, because the incident goes with the principal thing—a principle said to be especially applicable to water privileges in grants of mills and factories dependent on a flow of water for motive power. Jackson v. Trullinger, 9 Oregon 393.

A Water Right Granted in Gross does not become technically *appurtenant* to land, and a mill upon and for which it is subsequently used by the grantee thereof; but where such water power is taken and applied to run a mill belonging to the owner of the power, and afterwards, while the water power is so being used, the owner conveys the premises by metes and bounds without mentioning the water right, the right may pass therewith as parcel thereof, if such appears to have been the intention of the parties. Bank of British North America v. Miller, 7 Sawy. (U. S.) 163.

Actual Use by Grantor.—In Simmons v. Cloonan, 81 N. Y. 565, a water power was held to pass as an *appurtenance* to a mill; and it was also held that it was not necessary that there should have been actual use by the

Popular Construction.—But while technically corporeal property cannot be appurtenant to corporeal things, yet the term is frequently applied to corporeal subjects. Thus the expressions “appurtenances of a ship,” the “appurtenances of a railroad,” and the like, are of frequent occurrence; and land itself, it has been held, might pass under the term “appurtenances,” where the intention of the grantor was plain.¹

grantor of the incidents or *appurtenances* which passed by his deed. *Distinguishing* Nicholas v. Chamberlain, Cro. Jac. 121. See also Voorhees v. Burchard, 55 N. Y. 98.

Raceway.—So by the sale of a mill, the water of the race will pass, though the land through which the race is cut and the water passes to the mill is not included in the land sold. Wetmore v. White, 2 Cai. Cas. (N. Y.) 87, 2 Am. Dec. 323.

Where a grantor conveyed by deed a tract of land described by metes and bounds, with a mill upon the same, and at the time of the conveyance there was a raceway to conduct the water from the mill, running along the side of the natural stream, beyond the bounds of the land granted, into other land of the grantor, and there discharging the water into the natural stream, and this raceway had been used with the mill several years, and was necessary to the convenient use of the mill, it was held that the right to have the water flow off uninterruptedly through the whole extent of the raceway passed as *appurtenant* to the mill. New Ipswich W. L. Factory v. Batchelder, 3 N. H. 190, 14 Am. Dec. 346.

Separate Grant.—The defendant conveyed to the plaintiff a piece of land by metes and bounds, bounded on one side by Warner river, with the sawmill, clothing mill, and carding machines therein, “with a privilege of flowage, use of water, and repairing of dam,” with all privileges and *appurtenances*, etc. It was held that this was only an enumeration of the rights that would pass as incident to the land or mills, and not a separate grant of any rights or privileges disconnected from those before granted. Seavey v. Jones, 43 N. H. 441.

A Right to Raise the Dam has been held to pass as an *appurtenance* to a factory. Smith v. Moodus Water Power Co., 35 Conn. 401.

Access.—In Leonard v. White, 7 Mass. 6, 5 Am. Dec. 19, it was held that by the grant of a gristmill with *appurtenances*, the soil of the way immemorially used for the purpose of access to the mill did not pass, although it might be considered as a grant of the easement for the accommodation of the mill. See also Harris v. Elliott, 10 Pet. (U. S.) 54.

The owner of certain premises upon which was a sawmill, conveyed them by metes and bounds, with *appurtenances*, describing them as his mill property. Between the premises conveyed and the highway was a piece of land, for many years used as a way to the mill and as a millyard for storing logs. There was no other access to the mill from the highway, and the use of the land was necessary to the mill for storage. It was held that an easement in said land for access and storage passed by the deed. Voorhees v. Burchard, 55 N. Y. 98.

Mill Chains, Dogs, etc.—By the conveyance

of a sawmill with the *appurtenances*, the mill chain, dogs, and bars, being in their appropriate places at the time of the conveyance, were held to have passed. Farrar v. Stackpole, 6 Me. 154, 19 Am. Dec. 201.

Land.—A conveyance with a description as follows, viz.: “A certain tenement being one-half of a cornmill, situated in Washington, in lot No. 1, with all the privileges and *appurtenances*,” conveys not only the mill, but the land on which it is situated, together with such portion of the water privilege as is essential to the use of the mill. Gibson v. Brockway, 8 N. H. 465, 31 Am. Rep. 200.

In Whitney v. Olney, 3 Mason (U. S.) 280, it was held that a devise of a mill with *appurtenances* conveyed not only the buildings, but the land under and adjoining which was necessary to the use and was actually used with it. The court said: “It is true that land cannot strictly be *appurtenant* to land, so as to pass under the term *appurtenances*, but where the intention is clearly expressed that land should pass under that name, the law will give effect to the grant, notwithstanding the misnomer.” See also Smith v. Moodus Water Power Co., 35 Conn. 401; Frink v. Branch, 16 Conn. 260.

Land under the mill and adjacent thereto, necessary to its use, passed under a grant of a mill and its *appurtenances*. Forbush v. Lombard, 13 Met. (Mass.) 114; Blake v. Clark, 6 Me. 436.

1. “The word *appurtenant* has no inflexible meaning, but must be construed in connection with the nature and subject of the principal thing granted.” Missouri Pac. R. Co. v. Maffitt, 94 Mo. 60.

In the Sense of “Usually Let or Occupied with” the Land.—*Appurtenant* may be taken in the sense of “usually let or occupied with” the land, and may thus include what is not strictly *appurtenant*. Hall v. Benner, 1 P. & W. (Pa.) 402, 21 Am. Dec. 394; James v. Plant, 4 Ad. & El. 749, 31 E. C. L. 170. See also Bayley v. Great Western R. Co., 26 Ch. Div. 434.

Land. (See *infra*, MILLS.)—While, within the strictly technical meaning of *appurtenances*, land cannot pass as *appurtenant* to land, still if it is the intention of the grantor that land should pass by these words, it will pass. Hill v. West, 4 Yeates (Pa.) 153.

Same—Escape.—An inclosed yard, the sole use of which is in connection with a house of correction, is “adjoining or *appurtenant* thereto” within the meaning of the Gen. Stat. of Massachusetts, c. 178, § 6; and a prisoner in the house of correction, escaping from such a yard, is liable to punishment under the Mass. Gen. Stat., c. 178, § 46. The court said: “The word *appurtenant* is not used in a technical sense in the statute, for land cannot be

Unity of Title.—A way used by the owner of two tenements, over one tenement, for access to the other, is not in law “appurtenant” to the *quasi-*

appurtenant to land, strictly speaking.” *Com. v. Curley*, 101 Mass. 24.

Same—Curtilage.—A deed of a certain described lot of land, “together with all the dwelling house and building, with the *appurtenances*, situate thereon or thereto belonging; to have and to hold the above granted premises, with the privileges and *appurtenances* thereto belonging,” includes a small lot of land adjoining the granted premises, which is habitually used with the dwelling house, and is reasonably necessary to be held in connection with it. The court said: “We must apply to this deed the well-established rule of construction stated in *Salisbury v. Andrews*, 19 Pick. (Mass.) 253, that every word shall be presumed to have been used for some purpose, and shall have some force and effect if it can. According to the strict technical signification of the word, land cannot be *appurtenant* to a house. But where a house is conveyed with its *appurtenances*, the word must refer to land if it have any meaning, and the grantor must have used it to indicate land. The older authorities on this subject are collected in *Smith v. Martin*, 2 Saund. 400 (note), and they hold that at least the garden, curtilage, and close adjoining the house will pass. Strictly, they pass as parcel of the house. The modern authorities are at least no more strict in their definitions of the word *appurtenances* than the more ancient ones.” *Ammidown v. Ball*, 8 Allen (Mass.) 293.

In *Blackborn v. Edgley*, 1 P. Wms. 600, it is said that by the devise of a house with *appurtenances*, only the garden and orchard will pass with the house, but the devise of the house with the lands appertaining will pass the lands usually occupied therewith. See also *Hill v. Grange*, Plowd. 164; *Sparks v. Hess*, 15 Cal. 186.

Same—House and Its Appurtenances.—In *Hawkins v. Wilson*, 1 W. Va. 117, it was held that the description, in a summons of unlawful detainer, of premises, as “a certain house and *appurtenances*,” imports land within the meaning of c. 134 of the *West Virginia Code* of 1860, to the extent of the land on which the house stands and the garden attached to it, but no further.

Same—Wills.—In a will, to give effect to the testator's intention, land has been held to pass under the word *appurtenances*. *Otis v. Smith*, 9 Pick. (Mass.) 293.

Bridge with Appurtenances.—These words have been held to carry the land upon which the bridge rests. *Sparks v. Hess*, 15 Cal. 186. *Compare St. Louis Bridge Co. v. Curtis*, 103 Ill. 410.

Flats and a Wall.—Flats may pass as *appurtenant* to a wall, if there are words showing an intent that they should pass, notwithstanding the maxim that land cannot pass as *appurtenant* to land. *Doane v. Broad Street Assoc.*, 6 Mass. 332.

Mechanic's Lien. (See also the title *MECHANICS' LIENS*.)—In *Barclay's Appeal*, 13 Pa. St. 496, where a claim was for work in

the erection of a building and *appurtenances*, the court held the claim bad and said: “An *appurtenance* may be a yard, an alley, a cistern, a conduit pipe, an ice house, a smoke-house, a stable, or other outhouse, distinct from the principal building mentioned in this written claim, and consequently not within the purview of the lien laws.”

In *Hoetz v. Patterson*, 5 W. & S. (Pa.) 537, a lien was claimed for erecting a furnace, casting house, stables, and houses necessarily *appurtenant* thereto, and no objection on that ground was made. See also *Werth v. Werth*, 2 Rawle (Pa.) 152; *Burt v. Kurtz*, 5 Rawle (Pa.) 246; *Lauman's Appeal*, 8 Pa. St. 473; *Parrish's Appeal*, 83 Pa. St. 123.

Same—Sidewalks.—Within a mechanic's lien law, the term *appurtenances* has been held to include a yard and sidewalk. *McDermott v. Palmer*, 8 N. Y. 387.

In *Kenney v. Apgar*, 93 N. Y. 539, a sidewalk was held an *appurtenance* within the mechanic's lien law. In that case, an attempt was made to distinguish the case of *Moran v. Chase*, 52 N. Y. 346, on the ground that in the case at bar the owner did not have the fee in the street. The court said: “We are of opinion that the case of *Moran v. Chase*, 52 N. Y. 346, decides this question adversely to the appellants; for although it did not appear in that case affirmatively that the party against whom the lien was claimed did not own to the centre of the street, the decision was not placed upon the legal presumption of such ownership, but upon the broader ground that the word *appurtenances* covered the making of a sidewalk in front of the premises upon which the building was erected.”

Same—Different Buildings.—In *McDonald v. Minneapolis Lumber Co.*, 28 Minn. 262, two properties were held not to be *appurtenant* to each other within a mechanic's lien law, from the fact that they were used in different branches of the same business, which might be carried on separately, and derived their steam power from a common source.

In *Carpenter v. Leonard*, 5 Minn. 155, it is said: “What are *appurtenances* must, in many cases at least, be a question of fact. Webster gives as the first meaning of *appurtenance*, ‘that which belongs to something else; an adjunct; an appendage; as, small buildings are the *appurtenances* of a mansion.’ The referee has found as a matter of fact that these buildings on the opposite side of the street from the main building ‘were constructed and designed to be used in connection with, and as *appurtenant* to, said hotel and boarding house, and for the better and more convenient conducting of the business thereof,’ and that ‘all the work and labor was for the benefit and improvement of her said separate estate, and her said separate estate was thereby improved and benefited and enhanced in value.’”

Same—Windmill.—In *Phelps, etc., Windmill Co. v. Shay*, 32 Neb. 19, a windmill with tank,

dominant tenement, and, therefore, will not pass with a grant of that tenement

pump, etc., was held an *appurtenance* within the mechanic's lien law of *Nebraska*.

Same—Vault.—In *Parmelee v. Hambleton*, 19 Ill. 615, a vault under a pavement was held not an *appurtenance* to a building within the mechanic's lien law.

Appurtenant to a Saloon—Gambling.—An indictment charged a game of cards to have been played in a place *appurtenant* to a house for the retail of liquors. The proof showed that the game was played in a part of the house itself. This was held a fatal variance. The court said: "But we are of opinion that the evidence does not support the allegation that the premises were *appurtenances* to a public place. The room in which the playing was done was not an *appurtenance*, but was a part of the liquor saloon itself (*Stebbins v. State*, 22 Tex. App. 32). An *appurtenant* is not a portion of the principal thing; it is something belonging to, pertaining to, something else which is its principal. 'The thing *appurtenant* must be of an inferior nature to the thing to which it is *appurtenant*.'") 1 Bouv. Law Dict., *Appurtenant*; 2 Blackst. Comm. 191." *Ballew v. State*, 26 Tex. App. 483.

Stable and Dwelling House.—A stable, to be *appurtenant* to a dwelling house, must be used with it, so that the two buildings will constitute but one tenement or messuage. *State v. Kelleher*, 81 Me. 346.

Appurtenances of a Ship.—Whatever is on board a ship for the object of the voyage and adventure on which she is engaged, belonging to the owner, constitutes a part of the ship and her *appurtenances* within the meaning of the 53 Geo. III., c. 159, and the owner is liable to the extent of the value thereof for damage done to another vessel in the manner described by that act. *Gale v. Laurie*, 5 B. & C. 156, 11 E. C. L. 187.

To the same effect, *The Dundee*, 1 Hagg. Adm. 121. In that case boats, fishing tackle, harpoons, lines, etc., were held *appurtenances*. And in *The Schooner Witch Queen*, 3 Sawy. (U. S.) 203, the court, after citing *The Dundee*, 1 Hagg. Adm. 121, and *Gale v. Laurie*, 5 B. & C. 156, 11 E. C. L. 187, held that a diving bell and air pump were part of a ship and *appurtenances*.

A piano would not pass in a mortgage of a ship as an *appurtenance*. *St. John v. Bullivant*, 45 U. C. Q. B. 614.

Same—Sale of Dredge Boat.—A contract for the sale of a dredge boat "and its *appurtenances*" does not include a pump placed on the boat by a third person with the owner's permission. The court said: "An *appurtenance* is a 'thing used with, and related to, or dependent upon, another thing more worthy, and agreeing in its nature and quality with the thing whereunto it is appendant or *appurtenant*;' a thing belonging to another thing as principal, and which passes as incident to the thing." 1 AM. AND ENG. ENCYC. OF LAW 641. An *appurtenance* to a dredge must be something incidental to and needful in the work of dredging. With such work plaintiff's suction pump had nothing whatever to

do, and the actual effect of putting it on the dredge 'Big Jim' was to prevent its use for dredging purposes during the time they were connected. Mr. Parsons, in his work on Maritime Laws, after considering a number of cases in which had been discussed what constituted an *appurtenance* to a ship, said: 'It would seem to be deducible * * * that nothing is to be considered an *appurtenance* of a ship, unless requisite to its proper use, although connected with it at the time.' Pars. Mar. Law, p. 72, note." *Gullman v. Sharp*, 81 Hun (N. Y.) 462. See also *Bloom v. West*, 3 Colo. App. 217.

Same—Fishing Stores.—Fishing stores have been held among the *appurtenances* of a ship. *The Dundee*, 1 Hagg. Adm. 121; *Gale v. Laurie*, 5 B. & C. 156, 11 E. C. L. 187; *The Ontario*, 2 Lowell (U. S.) 51.

Same—A chronometer was held to pass by the assignment of a ship, her tackle, and *appurtenances*. *Langton v. Horton*, 6 Jur. 910. Compare *Richardson v. Clark*, 15 Me. 421.

As to Ships' Stores, see *Swift v. Brownell*, 1 Holmes (U. S.) 467.

Same—Exclusive Use.—*Appurtenances* of a ship must be such things as are appropriated to her exclusively, and do not include such things as she uses indiscriminately with other ships. *Ex p. Gould*, 2 Morr. 137. *Stroud's Jud. Dict.*

Railroads.—One entire railroad will not pass by the word *appurtenance* to another railroad, any more than one tract of land would pass by *appurtenant* to another. *Philadelphia v. Philadelphia*, etc., R. Co. 58 Pa. St. 253.

In the *Ordinary v. Central R., etc., Co.*, 40 Ga. 655, where the charters of certain railroads provided that they and the *appurtenances* of the same should not be subject to taxation more than a certain per cent. of their annual income, the word *appurtenances* was thus defined: "While we should not give too narrow a construction to the word *appurtenances*, it should receive a reasonable construction. The term embraces all the necessary depots, shops, and other buildings of the company, which are proper for the successful management of the road, together with such quantity of land as may be covered by, or actually necessary for, such use, but no more."

Same—Chairs.—A railroad mortgage covered the railroad, its superstructure, track, and all other *appurtenances*, made or to be made. It was held that this did not include certain railroad chairs afterwards acquired by the company, but never used in the construction of the road. *Farmer's L. & T. Co. v. Commercial Bank*, 11 Wis. 207.

Same—Branches.—A statute gave five years' additional time for the completion of a railroad with one or more tracks, siding, depots, and *appurtenances*. It was held that the word *appurtenances* did not include branches, and the limitation of the act did not apply to the construction of branches. *Pittsburgh, etc., R. Co. v. Pittsburgh, etc., R. Co.*, 159 Pa. St. 331.

Kettle.—It was decided that by a devise of

under the general word "appurtenances."¹

a silver teakettle and lamp with its *appurtenances*, nothing passes but the kettle, lamp, and frame, and not, as the devisee claimed, the silver canister, teapot and lamp, milkpot, spoons, strainer, and tongs. *Hunt v. Berkeley*, Mosely Ch. Rep. 47.

1. See also the titles EASEMENTS; PRIVATE WAYS. (*Compare supra*, this title, *Water*.) *Barlow v. Rhodes*, 1 Crompt. & M. 439; *Worthington v. Gimson*, 2 El. & El. 626, 105 E. C. L. 626; *Polden v. Bastard*, 4 B. & S. 264, 116 E. C. L. 264, L. R. 1 Q. B. 156; *Pheysey v. Vicary*, 16 M. & W. 484; *Harris v. Smith*, 40 U. C. Q. B. 61; *Oliver v. Hook*, 47 Md. 301; *Gayetty v. Bethune*, 14 Mass. 49, 7 Am. Dec. 188; *Grant v. Chase*, 17 Mass. 447; *Bonelli v. Blakemore* (Miss.), 39 Alb. L. J. 401; *Parsons v. Johnson*, 68 N. Y. 62, 23 Am. Rep. 149; *Kenyon v. Nichols*, 1 R. I. 411. *Compare Pyer v. Carter*, 1 H. & N. 916; *Plant v. James*, 5 B. & Ad. 791, 27 E. C. L. 191.

A contract to sell land with the *appurtenances* does not pass a right to a way to the land sold which the vendor had used over adjoining land of his own. The court said: "The first question then is, Was the way into Lonsdale road, or was the way into Portabello road, *appurtenant* or appendant to Buckingham Mews, the property contracted for? In my opinion, neither of the ways was either *appurtenant* or appendant. The common words 'with all ways thereunto appertaining,' strictly and properly speaking, never carry a right of way over another tenement of the grantor; and for this simple reason: When a man who is owner of two fields walks over one to get to the other, that walking is attributable to the ownership of the land over which he is walking, and not necessarily to the ownership of the land to which he is walking. If authority is necessary, the two cases of *Harding v. Wilson*, 2 B. & C. 96, 9 E. C. L. 39, and *Barlow v. Rhodes*, 1 Crompt. & M. 439, have decided that these words, strictly speaking, do not carry a right of way over the grantor's own land. Therefore, in my judgment, the right of way claimed cannot be claimed as *appurtenant* or appendant to the property contracted for." *Bolton v. Bolton*, 11 Ch. Div. 968.

Appurtenance in One's Own Soil.—In *Stuyvesant v. Woodruff*, 21 N. J. L. 141, it was held that when a man sells a part of his own land, together with all the rights, ways, privileges, and *appurtenances*, the grantee thereby acquires no right (except by necessity) of passing over the rest of the grantor's lands, where he used himself to pass. The court said: "It is a mistaken idea that this right of passing over the land in question, passed by the word *appurtenances* in the deed to Mr. Fox. Parke, Justice, in *Plant v. James* (2 N. & M. 519), says that the word *appurtenances* means *prima facie* an easement, or incorporeal hereditament *in alieno solo*. And such is the language of all the books; a man can have nothing in his own soil that is *appurtenant* to it; for *cujus est solum, ejus est usque ad cælum*. The absolute and unqualified ownership of the

soil includes and extinguishes all incidental and minor rights; and therefore if a man owns a manor or farm with an easement, or right of way over another man's close, as *appurtenant* to it, for the purpose of going to a mill, or to church, or to a public road, or for any other purpose, and afterwards, by purchase or descent, becomes the owner in fee of the close over which the right of way is, the easement is immediately extinguished, and becomes merged in the paramount title to the soil; and that, too, so completely that if the owner should afterwards sell his messuage to which that way had been *appurtenant*, with the usual words, 'all the ways, privileges, and *appurtenances*,' it would not revive and carry to his grantee the old right of way over the other close."

In *Barker v. Clark*, 4 N. H. 382, 17 Am. Dec. 428, the court said: "This question is believed to be well settled. There is no doubt that when one man has a right of way through the close of another, which right of way is *appurtenant* to his land, a grant of his land with its *appurtenances* will pass the right of way. But a man cannot have a right of way through his own land, independent of his right to the land. Moses Clark may have had a way through the *locus in quo*, but his right to it was not an easement. There was no existing easement. The question then is, whether, by a grant of two lots with their *appurtenances*, a new easement in a third lot can be created? It seems to be well settled that by the word *appurtenances*, existing easements alone can pass. *Whalley v. Thompson*, 1 B. & P. 371; *Morris v. Edgington*, 3 Taunt. 24; *Clements v. Lambert*, 1 Taunt. 206; *Buckley v. Coles*, 5 Taunt. 311; *Surrey v. Piggot*, Latch. 153; *Kooystra v. Lucas*, 5 B. & Ald. 830, 7 E. C. L. 274; *Bradshaw v. Eyr*, Cro. Eliz. 570; *Worledg v. Kingswel*, Cro. Eliz. 794; *Saundys v. Oliff*, Moor 467."

A way used by the owner of two tenements over one, for access to the other, is not in law *appurtenant* to the dominant tenement, so as to pass with a grant of it under the word *appurtenances*, unless the deed shows an intention to extend the meaning of that word, and to embrace the way, or the grant is of all ways "used and enjoyed," or words are used showing an intention to include existing ways, in which case a defined existing way will pass. *Harris v. Smith*, 40 U. C. Q. B. 34.

Easement Which has Become Extinct.—In *Plant v. James*, 2 N. & M. 517, Parke, J., says: "Nothing is more clear than that under the word *appurtenances*, according to its legal sense, an easement which has become extinct by reason of a unity of ownership, does not pass." *Citing Grymes v. Peacock*, 1 Bulst. 17, 2 F. Moore 462; *Whalley v. Thompson*, 1 B. & P. 371; *Clements v. Lambert*, 1 Taunt. 206.

Where the Right Passes.—In *Thomas v. Owen*, 20 Q. B. Div. 231, Fry, L. J., said: "But it was contended before us that the absence in the lease of 1878 of any other general words than the word *appurtenances* made an important

APT TIME. (See specific titles in ENCYC. OF PLEADING AND PRACTICE, such as EXCEPTIONS; TIME TO PLEAD, etc.)—The question of what constitutes apt time sometimes depends upon lapse of time; as, when a thing is required to be done at the first term, or within a given time, it cannot be done afterwards. But it more usually refers to the order of proceeding, as fit or suitable time.¹

ARBITRARILY.—This term, as employed in a lease with reference to the withholding of the lessor's consent to an assignment by the lessee, seems to mean "without fair, solid, and substantial cause, and without reason given," and not to be applicable where the assent is refused "upon any fair and reasonable ground," and upon advice, even without reasons given therefor.²

difference, and distinguished this case from the earlier authorities to which we have referred. No doubt the word *appurtenances* is not apt for the creation of a new right, and the word *appurtenant* is not apt to describe a right which had never previously existed; and, therefore, the mere grant of all *appurtenances*, or of all ways *appurtenant* to the principal subject of the grant, has been held in many cases not to create a new right of way where the right was not preëxisting at the date of the grant. But from as long ago as the fourth year of Philip and Mary (Hill v. Grange, Plowd. 170), the word *appurtenances* has easily admitted of a secondary meaning, and as equivalent in that case to 'usually occupied.' Here at the date of the lease of 1878, Lon Car Glas was not in the occupation of the lessor, but in that of the defendant, and the defendant had, as we have held, acquired an estate in it, as against which the right of way was reserved, and reserved for the benefit of the land and house of the plaintiff, and under these circumstances we think that the right of way did pass under the word *appurtenances*. This conclusion is, we think, aided by sufficient authority. For which purpose it will suffice to refer to the cases of Nicholas v. Chamberlain, Cro. Jac. 121; Hall v. Lund, 1 H. & C. 676; and Ewart v. Cochran, 4 Macq. 117."

Mistake—Remedy in Equity.—The right of way through a lane had become extinguished by the purchase of the servient estate by the owner of the dominant estate. He afterwards sold the dominant estate, and conveyed it by a warranty deed that granted the land with its "privileges and *appurtenances*," but did not in express terms grant the right of way. Both parties, however, were ignorant of the legal principle under which the right of way had become extinguished, and both supposed that it still existed, and the grantor declared at the time that it passed by the deed under the clause with regard to *appurtenances*. The consideration paid by the grantee covered a right of way, and he would not have paid it for the land alone. It was held that a court of equity would correct the mistake in the deed. *Blakeman v. Blakeman*, 39 Conn. 320.

1. *Pugh v. York*, 74 N. Car. 383. In this case, the defendant filed a petition for a *recor-*

dari to remove a case from a justice's court to the superior court, and, before putting it on the trial docket, obtained his discharge in bankruptcy, which he pleaded two years later, when he moved to have the case put upon the trial docket. The motion having been refused, as the plea was not offered in *apt time*, it was held error, as no time was prescribed within which a discharge in bankruptcy was to be pleaded, and, if it were done in the proper order, it made no difference whether the time was long or short.

Objections to Remarks Made by the Judge.—An objection to remarks made by the judge during the trial must be in *apt time*. Such an objection made after verdict is not in *apt time*. *State v. Brown*, 100 N. Car. 519.

2. *Treloar v. Bigge*, L. R. 9 Exch. 151. The point directly decided in this case was that the words "such consent not being *arbitrarily* withheld," contained in the lessee's covenant not to assign without consent, did not amount to an absolute covenant on the part of the lessor not to withhold his consent *arbitrarily*, but only prevented the lessee's covenant operating in any case of *arbitrary* refusal on the part of the lessor.

Charge to a Jury.—In *State v. Sutfin*, 22 W. Va. 778, the jury came into court, and asked whether a juror had the right to disbelieve a witness whose character for truth had not been impeached. The court replied that the jury was the sole judge of the evidence, and might consider the demeanor of a witness on the stand, contradictory statements, etc., but that it would be a disregard of a juror's duty to *arbitrarily* disregard the evidence of a witness. The appellate court said: "The jury could not have been misled by being told that they ought not *arbitrarily* to disregard the testimony of a witness. They could not have misunderstood the court, after what it had just said, in the use of the word *arbitrarily*. They doubtless understood it to mean, that it would be a neglect of a juror's duty to disregard the evidence of a witness without any reason therefor. If there was no reason for disbelieving the witness, of course the juror could not help believing his testimony, and if, under these circumstances, he disregarded his testimony, of course he acted *arbitrarily*, and was not properly discharging his duty as a juror."

ARBITRATION AND AWARD.

By J. D. KENNY.

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CROSS-REFERENCES.

For matters of *PROCEDURE*, see the following titles in the *ENCYCLOPEDIA OF PLEADING AND PRACTICE*: *APPEALS*, vol. 2, p. 142; *AWARDS*, vol. 3, p. 126; *COSTS*; *EMINENT DOMAIN*; *REFERENCES*.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ACCORD AND SATISFACTION*, vol. 1, p. 408; *ACCOUNTS*, vol. 1, p. 433; *AGENCY*, vol. 1, p. 930; *ATTORNEY AND CLIENT*; *BENEFICIAL OR BENEVOLENT ASSOCIATIONS*; *BOARDS OF TRADE*; *BUILDING AND LOAN ASSOCIATIONS*; *BY-LAWS*; *CONTRACTS*; *DAMAGES*; *EMINENT DOMAIN*; *FIRE INSURANCE*; *MARINE INSURANCE*; *OFFICERS AND AGENTS (OF PRIVATE CORPORATIONS)*; *PARTNERSHIP*; *REFEREES AND REFERENCES*; *STOCK EXCHANGE*.

I. THE SUBMISSION—1. Defined.—Submission is the technical designation of that contract by which parties agree to refer matters which are in dispute, difference, or doubt between them, to be finally decided by the award of judges named by the parties, and called arbitrators.¹

2. Form of Submission at Common Law—*a*. GENERAL RULE—No Particular Form Necessary.—At the common law, arbitration was altogether a voluntary matter with the parties to the dispute, and it was not necessary that the submission should be in any special form of words.² It was sufficient if it expressed the intention of the parties to submit to and abide by the award.³

1. Morse Arbitration and Award 36.

The act by which parties may refer any matter in dispute between them to the private decision of another party—whether one person or more—is called a submission; the parties to whom the reference is made, an arbitrator or arbitrators. Tomlins. Law Dict., tit. Award.

The agreement conferring on the arbitrator his binding authority is termed the submission. Russell on Awards (6th ed.) 40; Bac. Abr., Arb., B. and D.

Arbitration Is the Investigation and Determination of a matter or matters of difference between contending parties, by one or more unofficial persons, chosen by the parties and called arbitrators or referees. Bouvier Law Dict.; Worcester's Dict.; 3 Black. Com. 16. Burchell v. Marsh, 17 How. (U. S.) 344.

An Arbitration Is Not a Suit in Court within the meaning of *Alabama* Act Feb. 20, 1866, which was made to regulate judicial proceedings. It is a proceeding before triers chosen by the parties themselves. Crook v. Chambers, 40 Ala. 239.

A Submission to Arbitration Is a Contract in the proceedings to execute which parties shall be held to the strictest good faith. Driggs v. Morgan, 2 La. Ann. 151; Canty v. Beal, 17 La. 285; Davis v. Leeds, 7 La. 477; Whitcher v. Whitcher, 49 N. H. 176.

Under the English Arbitration Act of 1889 (52 & 53 Vict., c. 49, § 27), a submission is defined: "Unless a contrary intention appears, submission means a written agreement to submit present or future differences to arbitration whether an arbitration is named therein or not." See *Caerleon Tinplate Co. v. Hughes*, 60 L. J. Q. B. 640; *Baker v. Yorkshire F. Ins. Co.*, 92 L. T. 118.

A Submission Is a Covenant by which persons who have a lawsuit or difference with one another, name arbitrators to decide the matter, and bind themselves, reciprocally, to perform what shall be arbitrated. McClendon v. Kemp, 18 La. Ann. 162 (syllabus).

Where the Lessor Agreed to Purchase of the Lessee, at the end of the term, the buildings erected by the lessee, the price to be fixed by appraisers mutually selected by them, it was held that it was not an agreement for an arbitration, and that the valuers were not subject to the rules which govern arbitrations. *California Annual Conference v. Seitz*, 74 Cal. 287.

2. Common-Law Rule as to Form of Submission.—Bac. Abr., Arb., B; Russell on Awards (6th ed.) 40. See *Jebb v. McKiernan*, M. & M. 340, 22 E. C. L. 330; *Elvin v. Drummond*, 1 M. & P. 88, 4 Bing. 278, 13 E. C. L. 433;

Morse Arb. and Award, 50; *Smith v. Nelson*, 59 L. J. Q. B. 533; *Tancred v. Scotland Steel Co.*, L. R. 15 App. Cas. 125; *Ehrman v. Stanfield*, 80 Ala. 118; *Phelps v. Dolan*, 75 Ill. 90; *Kimball v. Walker*, 30 Ill. 482; *Titus v. Scantling*, 4 Blackf. (Ind.) 89; *Peabody v. Rice*, 113 Mass. 31; *Wilson v. Getty*, 57 Pa. St. 266. See also *New York Lumber, etc., Co. v. Schneider*, 15 Daly (N. Y.) 15; *Sawyer v. McAdie*, 70 Mich. 386; *Winne v. Elderkin*, 2 Pin. (Wis.) 248, 52 Am. Dec. 159.

A Submission to a Court of Equity, of a dispute which related solely to the title to personal property, and an agreement to abide the result, constitute a good common-law arbitration, and the parties are bound by it. *Sawyer v. McAdie*, 70 Mich. 386.

Where a Cause Pending was submitted to the arbitration of two persons, by written agreement between the parties and by order of court, the agreement and order providing that differences between the "arbitrators" should be decided by the court, and no exceptions were taken at the hearing, and they called their report an "award," it was held that this must be regarded as a common-law arbitration, not a reference under the code. *Moore v. Barnett*, 17 Ind. 349. This case has been questioned in *Western Union Tel. Co. v. Trissal*, 98 Ind. 570.

3. Form Sufficient if Intention to Submit and Abide by Award Appeared.—*Brady v. Brooklyn*, 1 Barb. (N. Y.) 584; *Wilson v. Getty*, 57 Pa. St. 266; *McManus v. McCulloch*, 6 Watts (Pa.) 357; *Kimball v. Walker*, 30 Ill. 482; *Copeland v. Hall*, 29 Me. 93; *Houghton v. Houghton*, 37 Me. 72.

But it has also been held that even the intention to abide by the award need not be expressed in words. The law will imply such intention from the submission. *Valentine v. Valentine*, 2 Barb. Ch. (N. Y.) 430; *Evans v. McKinsey*, Litt. Sel. Cas. (Ky.) 262; *Stewart v. Cass*, 16 Vt. 663, 42 Am. Dec. 534; *Wilson v. Getty*, 57 Pa. St. 266; *Whitcher v. Whitcher*, 49 N. H. 176. See also *Baisloe v. Baily*, 2 Ld. Raym. 1039, 6 Mod. 221; *Knox v. Symmonds*, 3 Bro. C. C. 358; *Squire v. Grevett*, 2 Ld. Raym. 961; *Gordon v. Tucker*, 6 Me. 247.

Submission to Arbitration and Not Simple Order of Reference.—An entry is made in two cases, one a common-law suit and the other a chancery cause, in these words: "This day, by consent and agreement of parties, the two above causes are referred to Reed, one of the commissioners of this court, who is hereby directed to make, audit, settle and state, and return to this court at the next term, an account between the plaintiff and C. of all the matters contained in said suits, and said

Effect of Statutes.—The common-law method has not, as a rule, been abrogated by the various local statutes which regulate submissions to arbitration; it is left optional with the parties to adopt either the common-law or the statutory method; and if the proceedings comply with the requirements of the common law, although not with the statute, the award will be enforced as a common-law award.¹

commissioner is to hear the parties and any proper evidence offered, and to take the evidence in writing, and to return the same with his report, and said commissioner is directed to give the parties interested ten days' notice of the time and place of executing this order, and such report shall be entered up as the judgment of this court." It was held, this is a submission to arbitration, not a simple order of reference; and on the report of said commissioner being returned to the court, it should be treated as though it was an award, not as an ordinary report of a commissioner in chancery subject to such exceptions as would lie to such a report ordinarily. *Duff v. Core*, 27 W. Va. 232.

Both Parties must be Bound.—But neither party to an agreement to arbitration is bound by such agreement, unless both are bound. *Nunnely v. Southern Iron Co.*, 94 Tenn. 397; *Yeamans v. Yeamans*, 99 Mass. 585.

Land Conveyed pending Reference.—Grantee without Notice.—A sold real estate to B without disclosing the fact that he and his neighbor had submitted a dispute about the boundary line to arbitration. It was held that B was not a party to the submission, and not bound by a subsequent award. *Emery v. Fowler*, 38 Me. 99.

Submission Secured by Misrepresentation.—A submission to arbitration which is secured by misrepresentation as to the obligation by an uncertain policy of insurance, is not rendered void by such misrepresentation. It will bar a suit upon the original cause of action. *Indiana Ins. Co. v. Brehm*, 88 Ind. 578.

Usurious Contract.—An agreement which stipulates that the arbitrator, in calculating whatever may be due on a matured promissory note calling for interest at ten per cent. shall compute interest at that rate, is not an usurious contract, and an award rendered in pursuance of such agreement is valid and binding upon the parties. *Rice v. Hassenpflug*, 45 Ohio St. 377.

1. Effect of Statutes.—United States.—*Torrence v. Amsden*, 3 McLean (U. S.) 509.

Alabama.—*Martin v. Chapman*, 1 Ala. 278; *Lamar v. Nicholson*, 7 Port. (Ala.) 158; *Byrd v. Odem*, 9 Ala. 755; *Willingham v. Harrell*, 36 Ala. 583; *Ehrman v. Stanfield*, 80 Ala. 118.

Arkansas.—*Wilkes v. Cotter*, 28 Ark. 519.

Georgia.—*Crane v. Barry*, 47 Ga. 476.

Illinois.—*Eisenmeyer v. Sauter*, 77 Ill. 515; *Low v. Nolte*, 16 Ill. 475.

Indiana.—*Titus v. Scantling*, 4 Blackf. (Ind.) 89; *Carson v. Earlywine*, 14 Ind. 256; *Estep v. Larsh*, 16 Ind. 82; *Miller v. Goodwine*, 29 Ind. 46; *Smith v. Kirkpatrick*, 58 Ind. 254; *Coffin v. Woody*, 5 Blackf. (Ind.) 423; *Dickerson v. Tyner*, 4 Blackf. (Ind.) 253; *Kelley v. Adams*, 120 Ind. 340.

Iowa.—*King v. Hampton*, 4 Greene (Iowa)

401; *Conger v. Dean*, 3 Iowa 463, 66 Am. Dec. 93; *Fink v. Fink*, 8 Iowa 313; *Love v. Burns*, 35 Iowa 150; *Foust v. Hastings*, 66 Iowa 522.

Kentucky.—*Thomasson v. Risk*, 11 Bush (Ky.) 619; *Evans v. M'Kinsey*, Litt. Sel. Cas. (Ky.) 262; *Logsdon v. Roberts*, 3 T. B. Mon. (Ky.) 255; *Overly v. Overly*, 1 Metc. (Ky.) 117; *Royce v. McCall*, 5 Bush (Ky.) 697.

Maine.—*Norton v. Savage*, 10 Me. 457; *Tyler v. Dyer*, 13 Me. 41.

Massachusetts.—*Carpenter v. Edwards*, 10 Met. (Mass.) 200.

Michigan.—*Galloway v. Gibson*, 51 Mich. 135.

Mississippi.—*McMullen v. Mayo*, 8 Smed. & M. (Miss.) 298.

Nebraska.—*Tynan v. Tate*, 3 Neb. 388.

New York.—*Cutter v. Cutter*, 48 N. Y. Super. Ct. 470; *Wood v. Tunnicliff*, 74 N. Y. 38; *Howard v. Sexton*, 4 N. Y. 157; *Diedrick v. Richley*, 2 Hill (N. Y.) 271; *Giles Lith., etc., Co. v. Recamier Mfg. Co.*, 14 Daly (N. Y.) 475; *Burnside v. Whitney*, 21 N. Y. 148; *Cope v. Gilbert*, 4 Den. (N. Y.) 347; *Ressequie v. Brownson*, 4 Barb. (N. Y.) 541; *New York Lumber, etc., Co. v. Schnieder*, 119 N. Y. 475; *Keep v. Goodrich*, 12 Johns. (N. Y.) 397; *Crofoot v. Allen*, 2 Wend. (N. Y.) 495; *Farrington v. Hamblin*, 12 Wend. (N. Y.) 212; *Wells v. Lane*, 15 Wend. (N. Y.) 99; *Browning v. Wheeler*, 24 Wend. (N. Y.) 258, 35 Am. Dec. 617. See also *Miller v. Vaughan*, 1 Johns. (N. Y.) 315; *Stevenson v. Beecker*, 1 Johns. (N. Y.) 492.

North Carolina.—*Lusk v. Clayton*, 70 N. Car. 184.

Ohio.—*Brown v. Kincaid*, *Wright (Ohio)* 37.

Pennsylvania.—*Erie v. Tracy*, 2 Grant's Cas. (Pa.) 20; *Richardson v. Cassily*, 3 Watts (Pa.) 320; *Pettit v. Wingate*, 25 Pa. St. 74; *Watson v. Wetter*, 91 Pa. St. 385; *Danziger v. Williams*, 91 Pa. St. 234; *Schneider v. New York, etc., Gas, etc., Co.*, 98 Pa. St. 470.

Tennessee.—*Halliburton v. Flowers*, 12 Heisk. (Tenn.) 25.

Wisconsin.—*Allen v. Chase*, 3 Wis. 249; *Winne v. Elderkin*, 1 Chand. (Wis.) 219, 52 Am. Dec. 159; *Pierce v. Kirby*, 21 Wis. 125; *Winne v. Elderkin*, 2 Pin. (Wis.) 248, 52 Am. Dec. 159.

See *Parnell v. King*, 1 Rice (S. Car.) 376; *Peachy v. Ritchie*, 4 Cal. 205; *Myers v. Eastwood*, 60 Tex. 107. And compare *Bulson v. Lohnes*, 29 N. Y. 291; *Deerfield v. Arms*, 20 Pick. (Mass.) 480, 32 Am. Dec. 228.

Where two persons, who claimed each for himself the exclusive right to purchase a lot of land which was about to be offered for sale, entered into an agreement by which the lot should be bid in by the public bidder in trust for them, each of them agreeing to furnish half the money, and the lands to be conveyed

But where it is the evident intention of the parties that the submission should be a statutory one, then the proceedings must be judged by the statute, and if they do not comply with its requirements they cannot be sustained even as a common-law arbitration.¹

b. ORAL SUBMISSION—Rule Stated.—An oral agreement to submit is good at common law, and such submissions have sometimes been held valid notwithstanding statutory provisions that submissions made in a pending suit should be in writing.²

according to the award of five disinterested persons, it was held that the contract could not be construed to mean that the five citizens should simply divide the lands between them in proportion to their contributions of purchase-money, but intended that they should decide which was entitled to a conveyance of the whole lot, and that although part of the agreement to submit might not amount to a valid submission under the statutes, yet it was good as a declaration of the trust upon which the public bidder received the money and made the purchase, against whom no suit would lie until a violation of the trust was shown. *Irvine v. Marshall*, 7 Minn. 286.

Attorney and Client.—Where a client and his attorney enter into an agreement to submit the amount of the latter's compensation to the determination of a person, upon a sworn itemized and explanatory statement of the services rendered and the expenses incurred and of the moneys received, the arbitrator only to allow such sum as he deems proper and necessary in preparing the defense in the suit in which such services were rendered, this agreement was held to constitute a common-law arbitration, which is still recognized and enforced by the courts of New York. *Box v. Costello*, 6 Misc. Rep. (Buffalo Super. Ct.) 415.

In Some Cases the Submission will Not be Upheld, either as a common-law or a statutory one. Thus, where by the requirements of the statutes submissions must be in writing if made under such statutes, and a parol submission was made to three arbitrators, two only of whom made the award, it was held that the award was void, both at common law and under the statute. *Cope v. Gilbert*, 4 Den. (N. Y.) 347. See *Green v. Miller*, 6 Johns. (N. Y.) 39, 5 Am. Dec. 184.

When Aid of Court to Enforce Award Not Sought.—Where parties to a submission to arbitration intend to ask the aid of the court to enforce the award, the submission must be made in the manner provided by statute, but if they do not wish to ask such aid, they may make a submission by which they will be bound without complying with the provisions of the Code. *Conger v. Dean*, 3 Iowa 463, 66 Am. Dec. 93.

Where a Matter in Dispute is Submitted to Arbitration pending Action, the award should be given effect as a common-law award, although it is insufficient to authorize entry thereon of a final judgment under the statute. *Dockery v. Randolph* (Tex. Civ. App. 1895), 30 S. W. Rep. 270.

Two of the Arbitrators Counsel for Some of the Parties to the Agreement.—In *Salinas v. Stillman*, 66 Fed. Rep. 677, it was held that an

agreement to submit to arbitration is not rendered invalid because two of the arbitrators were counsel for certain parties to the agreement, where all the parties were aware of their employment and interest. It was also held that an agreement to submit to arbitration was not rendered invalid because it did not comply *in toto* with the Tex. Revised Statutes, in view of the provision contained in such statutes that "nothing therein shall be construed as affecting the right of parties to arbitrate their differences in such other manner as they may think proper."

Where No Action is Pending, an agreement to submit all matters in dispute between the parties to named arbitrators, which agreement is written down by a justice in his docket, is a common-law submission to arbitration, and not an arbitration under Pa. Act 1810, which provides for reference to arbitration of actions pending before a justice when one of the parties refuses to submit to the justice's determination, and the plaintiff's claim exceeds a certain amount. *Climenson v. Climenson*, 163 Pa. St. 451.

Where the Parties to a Pending Action agree to submit the matter in dispute to arbitration, the submission being neither a statutory one nor made by rule of court or by judges' order, and not providing that it may be made a rule of court, it is a common-law submission which may be revoked at any time before the award under it is made. *Minneapolis, etc., R. Co. v. Cooper* (Minn. 1894), 61 N. W. Rep. 143.

Authority of the Court under a Common-Law Submission.—Under a submission out of court the court has no power to order a commission to issue for the examination of witnesses abroad. *In re Shaw and Ronaldson* (1892), 1 Q. B. 91.

1. Intention of Parties that Submission should Be under Statute.—*Erie Tel., etc., Co. v. Bent*, 39 Fed. Rep. 409; *Williams v. Walton*, 9 Cal. 142; *Deerfield v. Arms*, 20 Pick. (Mass.) 480, 32 Am. Dec. 228; *Holdridge v. Stowell*, 39 Minn. 360; *Winne v. Elderkin*, 1 Chand. (Wis.) 219, 52 Am. Dec. 159; *Allen v. Chase*, 3 Wis. 249; *Pierce v. Kirby*, 21 Wis. 125. See *Drew v. Canady*, 1 Mass. 158.

2. Oral Submissions—Alabama.—*Martin v. Chapman*, 1 Ala. 278; *Byrd v. Odem*, 9 Ala. 755; *Ehrman v. Stanfield*, 80 Ala. 118.

Illinois.—*Smith v. Douglass*, 16 Ill. 34; *Phelps v. Dolan*, 75 Ill. 90.

Indiana.—*Dilks v. Hammond*, 86 Ind. 563; *Carson v. Earlywine*, 14 Ind. 256; *Titus v. Scantling*, 4 Blackf. (Ind.) 89.

Kentucky.—*Logsdon v. Roberts*, 3 T. B. Mon. (Ky.) 255; *Evans v. M'Kinsey*, Litt. Sel. Cas. (Ky.) 262; *Stark v. Cannady*, 3 Litt. (Ky.) 399, 14 Am. Dec. 76.

Submission in Writing Added to by Parol.—And it has been held that submissions

Maine.—Philbrick *v.* Preble, 18 Me. 255, 36 Am. Dec. 718.

Massachusetts.—Peabody *v.* Rice, 113 Mass. 31.

Michigan.—Cady *v.* Walker, 62 Mich. 157, 4 Am. St. Rep. 834.

Mississippi.—McMullen *v.* Mayo, 8 Smed. & M. (Miss.) 298.

New Hampshire.—Jessiman *v.* Haverhill, etc., Iron Manufactory, 1 N. H. 68.

New York.—Valentine *v.* Valentine, 2 Barb. Ch. (N. Y.) 430.

Pennsylvania.—Hust *v.* Kohler, 10 Lanc. L. Rev. (Pa.) 140.

Wisconsin.—Winne *v.* Elderkin, 1 Chand. (Wis.) 219, 52 Am. Dec. 159.

Compare French *v.* New, 28 N. Y. 147, reversing 20 Barb. (N. Y.) 481.

Submission of Question of Boundary.—A submission to settle a question about a boundary line, where nothing passes, need not be in writing. Stewart *v.* Cass, 16 Vt. 663, 42 Am. Dec. 534; Bowen *v.* Cooper, 7 Watts (Pa.) 311.

Submission of Question of Rent.—An oral submission in a dispute about rent due for past occupancy, under an oral agreement to pay rent, will be valid. It does not concern an interest in real estate. Peabody *v.* Rice, 113 Mass. 31.

Submission of Question as to Payment of Note under Seal.—Where the question was whether a note under seal had been paid or not, which therefore could wholly be proved by parol evidence, a verbal submission was held to be good. Shockey *v.* Glasford, 6 Dana (Ky.) 9.

An Award Regarding a Claim for Dower, rendered under a verbal submission, has been upheld. Green *v.* Ford, 17 Ark. 586.

Waiver of Informalities.—Where an award has been rendered upon a submission which was in form not in accordance with the requirements of the subject-matter, an actual execution and fulfilment of the award, or acquiescence in the result, will make the award valid and binding. Sawyer *v.* Fellows, 6 N. H. 107, 25 Am. Dec. 452; Gray *v.* Berry, 9 N. H. 473; Orr *v.* Hadley, 36 N. H. 575; Eaton *v.* Rice, 8 N. H. 378; Furber *v.* Chamberlain, 29 N. H. 405; Gove *v.* Richardson, 4 Me. 327; Byam *v.* Robbins, 6 Allen (Mass.) 63.

Award as Evidence.—And even if the award for the same reason should be void as between the parties it may yet be received as evidence at a trial of the same question before a jury. Byam *v.* Robbins, 6 Allen (Mass.) 63; Whitney *v.* Holmes, 15 Mass. 152; Boston, etc., R. Corp. *v.* Sparhawk, 5 Met. (Mass.) 476. See Shockey *v.* Glasford, 6 Dana (Ky.) 9.

In New York an Oral Submission of a Cause Pending in Court has been held good, notwithstanding a requirement of the statute that all agreements made in a pending suit shall be in writing. Wells *v.* Lane, 15 Wend. (N. Y.) 99. See Bulsom *v.* Lampman, 1 Kan. 324. *Compare* Smith *v.* Polack, 2 Cal. 92, where it was held that under the *California* statute the consent of a party to an order of reference must be in writing or entered on the minutes.

In Louisiana Parol Agreements Are Void under the Code. Raguet *v.* Carmouche, 5 La. Ann. 133; McClendon *v.* Kemp, 18 La. Ann. 162.

A Suit in Equity may be Referred to Arbitration without obtaining a special order of the court for such purpose. And after judgment has been entered on the award made thereunder, it is too late to object that the agreement to submit was not in writing or signed by the parties, and that no certificate of previous undetermined costs against the defendant had been obtained from the clerk and filed, upon which alone judgment could be founded. Boog *v.* Bayley, R. M. Charlt. (Ga.) 190.

Where an Oral Submission to Arbitration can be Fully Proved, it governs as to what was submitted, and a recital in the written award cannot change it. Hathaway *v.* Hagan, 59 Vt. 75. See Davis *v.* Vass, 15 East 97; Price *v.* Popkin, 10 Ad. & El. 139, 37 E. C. L. 74; Buccleuch *v.* Metropolitan Board of Works, L. R. 5 Exch. 221; Blackwell *v.* Goss, 116 Mass. 394.

Where Parties Appear Voluntarily and Testify themselves and produce witnesses in support of their respective claims, an oral submission by them of matters in dispute will, if conducted fairly, be sustained after the making of the award, although neither the witnesses nor the arbitrators were sworn, if no objection was made to them for that reason. Greer *v.* Canfield, 38 Neb. 169. See Faggard *v.* Williamson, 4 Tex. Civ. App. 337; Wentz *v.* Bealor, 14 Pa. Co. Ct. Rep. 337.

Agreement must be Clearly Proved.—Where parties have entered into an oral agreement to submit a dispute to arbitration, and such agreement is followed by a valid award, it will be binding upon the parties to the agreement if it is clearly proved, but not otherwise. Koon *v.* Hollingsworth, 97 Ill. 52.

Submission to Oath of Third Party.—In Delesline *v.* Greenland, 1 Bay (S. Car.) 458, it was held that where an agreement was entered into to submit a disputed matter to the oath of a third person, and the oath was made accordingly, the agreement was binding.

Damages Growing out of Contract Affecting Realty.—The submission to a common-law arbitration need not be by deed where the matter to be determined is the amount of damages, although growing out of a contract affecting real estate; nor is it necessary that the award should be attested by witnesses, or that copies of the award should be furnished to the parties. Carson *v.* Earlywine, 14 Ind. 256.

Presumption.—In Bulsom *v.* Lampman, 1 Kan. 324, it was held that when an oral submission was made of a pending cause it would be presumed that the issues made by the pleadings had been submitted, where no terms of submission appeared of record.

Subject-matter of Dispute Transferable at Common Law without Writing.—Whenever the object of the dispute can be transferred by the common law without writing, an oral submission and award has all the effect of a written one. Evans *v.* M'Kinsey, Litt. Sel. Cas. (Ky.) 262.

which are originally in writing may be added to or altered by parol.¹

But a Parol Submission Is Objectionable because it cannot be made a rule of court so as to enable the award to be enforced by attachment, and such submissions are open to the liability of being void under the statute of frauds.²

In the Case of an Oral Submission it must be shown that the parties mutually and concurrently agreed to abide by it; and the jury must determine whether the parties, by the words used, meant and intended so to agree.³

c. BY WRITING NOT UNDER SEAL.—Where a written instrument is necessary to convey or pass the title to the subject-matter of the dispute, a written submission is necessary.⁴ And the submission must also be in writing where

Price of Land and Not the Title in Dispute.—The submission and award need not be by deed where the question submitted to the arbitrators is the price, not the title to the land. *Davy v. Faw*, 7 Cranch (U. S.) 172. See *Weston v. Stuart*, 11 Me. 326.

Dispute as to Real Property.—In *Fort v. Allen*, 110 N. Car. 183, it was held that an oral agreement to submit to arbitration a dispute as to real property cannot be enforced by a court of equity.

Where No Dispute Exists as to the price or value of the services rendered by an attorney, a mere verbal reference to a third person to determine their value is not conclusive upon the parties. *Atkinson v. Dailey*, 107 Ind. 117.

It Is Necessary to Prove in a Parol Submission to arbitration not only that both parties promised to abide by the award, but that the promises were concurrent and mutual, otherwise such promise is a *nudum pactum*, and an action for breach of the agreement to abide by the award cannot be maintained unless it appears that the defendant has revoked the submission. When the submission is not binding for want of mutuality no action will lie upon the agreement. *Ingraham v. Whitmore*, 75 Ill. 24. See *Keep v. Goodrich*, 12 Johns. (N. Y.) 397; *Kingston v. Phelps*, Peake N. P. 227.

1. Submission Originally in Writing, Added to by Parol.—Russell on Awards, pt. 1, c. iii, § 2, p. 50; — *v. Mills*, 17 Ves. Jr. 419; *Thames Iron Works, etc., Co. v. Reg.*, 20 L. T. 318; *Ashworth v. Heathcote*, 6 Bing. 596, 19 E. C. L. 173; *Graham v. Graham*, 9 Pa. St. 254, 49 Am. Dec. 557.

As to altering the submission, see *infra*, *Amending or Altering the Submission*.

Parol Agreement Contemporaneous with Written Submission.—But a written submission cannot be enlarged by a parol agreement made contemporaneously, because the written instrument will be held to include the whole intention of the parties. *Palmer v. Green*, 6 Conn. 14.

2. A Parol Submission cannot be Made a Rule of Court so as to give the court jurisdiction, and consequently awards made on them cannot be enforced by attachment. *Ansell v. Evans*, 7 T. R. 1; — *v. Mills*, 17 Ves. Jr. 419. See further *Curtis v. Bligh*, 3 Jur. 1152; *Tomes v. Hawkes*, 10 Ad. & El. 32, 37 E. C. L. 28.

Except where an instrument in writing is required to pass the title to the thing in dispute, an oral submission to arbitration and an oral award are valid. But such oral submission cannot be made a rule of court, nor can judgment be entered upon the award, but the

award thus made may be enforced by action, or it may be set up by way of defense. *Smith v. Douglass*, 16 Ill. 34.

Statute of Frauds.—Where, upon a parol submission of a question as to whether a tenant was bound to quit at once or had a continuing interest in land, an award was made, it was held void under the statute of frauds. *Rainforth v. Hamer*, 25 L. T. 247.

And where a written award was made under a parol submission, and the provisions of the award would have been void under the statute of frauds if they had been agreed to verbally by the parties, it was held that the award could not be enforced because the written award and the oral submission formed but one parol contract. *Walters v. Morgan*, 2 Cox 369. See *Philbrick v. Preble*, 18 Me. 255, 36 Am. Dec. 718; *McMullen v. Mayo*, 8 Smed. & M. (Miss.) 298; *French v. New*, 28 N. Y. 147, *reversing* 20 Barb. (N. Y.) 481.

3. Parties must have Agreed to Abide by Award.—*Houghton v. Houghton*, 37 Me. 72; *Copeland v. Hall*, 29 Me. 93. But see *Valentine v. Valentine*, 2 Barb. Ch. (N. Y.) 430; *Evans v. M'Kinsey*, Litt. Sel. Cas. (Ky.) 262.

It will Most Usually be Presumed, in the case of an oral agreement, that the parties intended to abide by the decision of the arbitrators. *Stewart v. Cass*, 16 Vt. 663, 42 Am. Dec. 534; *McManus v. McCullouch*, 6 Watts (Pa.) 357; *Wilson v. Getty*, 57 Pa. St. 266.

4. Submission by Writing Not under Seal.—*French v. New*, 2 Abb. App. Dec. (N. Y.) 209, 28 N. Y. 147; *Smith v. Douglass*, 16 Ill. 34; *Logsdon v. Roberts*, 3 T. B. Mon. (Ky.) 255; *Evans v. M'Kinsey*, Litt. Sel. Cas. (Ky.) 262; *Kydd on Awards* 51, 52; *Fort v. Allen*, 110 N. Car. 183.

Title to Land.—An oral submission of a question involving the title to land will render an award void which is made thereunder, independent of the statute of frauds. The title to real property can be transferred, released or barred only by deed. *Miller v. Graham*, 1 Brev. (S. Car.) 448.

But only where the "title" to real estate is affected is the submission required to be under seal. All other questions relating to real estate may be submitted without a seal. *Jackson v. Gager*, 5 Cow. (N. Y.) 383; *Mitchell v. Bush*, 7 Cow. (N. Y.) 185; *Palmer v. Davis*, 28 N. Y. 242; *French v. Richardson*, 5 Cush. (Mass.) 450; *Snodgrass v. Smith*, 13 Ind. 393; *Frye v. Burg Canal v. Frye*, 5 Me. 38; *Stark v. Canady*, 3 Litt. (Ky.) 399, 14 Am. Dec. 76. Compare *Copeland v. Wading River Reservoir Co.*, 105 Mass. 397.

it embodies undertakings about which the parties can bind themselves only by writing.¹ It is not necessary that such writing should be under seal.²

d. BY WRITING UNDER SEAL.—The parties may submit the matter in dispute by indenture containing mutual covenants to stand by the award.³

A Submission by Deed Cannot be Altered by Parol, or by written agreement, although such agreement may be indorsed upon it.⁴

Where Effect of Sealed Instrument Is the Matter in Dispute.—Where the dispute is as to the effect or validity of an instrument under seal, it has been held that the submission must also be by writing under seal.⁵

In *Crissman v. Crissmann*, 5 Ired. (N. Car.) 498, it was held that a submission to arbitration respecting the title of land, although made in accordance with a recommendation of the testator, who devised it, cannot be by parol, but must be by deed in writing between the parties to such submission.

The question in *French v. New*, 20 Barb. (N. Y.) 481, was, could the parties after having required the award to be in writing waive that requirement by parol and receive a verbal award which would be binding on both, and it was held that they could. But this ruling was reversed in *French v. New*, 2 Abb. App. Dec. 209, 28 N. Y. 147, where the court held that, after a sealed submission to arbitration requiring a written award has been made, a verbal agreement entered into by the parties to accept a verbal award changes the submission to a verbal one, and if the matters are such as cannot be determined by a parol arbitration the award is void.

Without a submission, there can be no valid award, and in order to invest a court with power to enter judgment on an award which affects the title to real estate, the submission must either be made a rule of court, or must recite the act under which it is made. The recital of the submission in the award itself is no proof of the existence of such submission. *Stokely v. Robinson*, 34 Pa. St. 315.

Where a dispute in regard to lands is submitted to arbitration by oral agreement, such submission is void. *Stark v. Cannady*, 3 Litt. (Ky.) 399, 14 Am. Dec. 76.

Estoppel.—Although title to real estate cannot be transferred by an award made under an oral submission, yet one of the parties to such an award may be estopped by his own agreement to dispute the other's title. *Shelton v. Alcox*, 11 Conn. 240; *Cox v. Jagger*, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522; *Whitney v. Holmes*, 15 Mass. 152; *Shepard v. Ryers*, 15 Johns. (N. Y.) 497.

Partition of Lands.—In *Gratz v. Gratz*, 4 Rawle (Pa.) 411, it was held that a written submission of all matters in variance between the parties, authorizes the arbitrators to award a partition of lands, and to direct in what manner the partition shall be made, if the partition was one of the matters in dispute at the time of the submission, but otherwise not, but that the arbitrators would not be authorized to make such partition by an oral submission, nor can the arbitrators under such a submission award a partition to be made so as to pass the interest of each party to the other in their respective shares.

1. *Valentine v. Valentine*, 2 Barb. Ch. (N. Y.) 430.

In *Shippen v. Bush*, 1 Dall. (Pa.) 251, it was held that agreements to refer must be in writing. See *Herman v. Freeman*, 8 S. & R. (Pa.) 9.

A submission at common law need not be in writing except where the dispute related to land or some matter in respect of which it was incompetent for parties to make a valid and binding agreement by parol. Where the submission is oral, without any stipulation that the award shall be in writing, an oral award is valid at common law. *Valentine v. Valentine*, 2 Barb. Ch. (N. Y.) 430.

2. *Russell on Awards* (7th ed.) 53; 52 & 53 Vict., c. 49, § 27.

As to the Technical Requirements of Such Submissions in England, see *Lloyd v. Mansell*, 19 L. J. Q. B. 192; *Taylor v. Parry*, 1 M. & G. 604, 39 E. C. L. 569; *Goodson v. Forbes*, 1 Marsh. 525, 6 Taunt. 171; *Stephens v. Lowe*, 9 Bing. 32, 23 E. C. L. 254; *Evans v. Thomson*, 5 East 189; *In re Tunno and Bird*, 5 B. & Ad. 488, 27 E. C. L. 107; *Creig v. Talbot*, 2 B. & C. 179, 9 E. C. L. 56; 33 & 34 Vict., c. 97. See further *Hales v. Stevenson*, 1 W. R. 33.

Where a Question of Boundary has been Submitted to arbitration, the absence of a seal to the agreement is immaterial. *Stewart v. Cass*, 16 Vt. 663, 42 Am. Dec. 534.

3. *Bac. Abr.*, Arb., B.; *Russell on Awards* (6th ed.) 53; *Spooner v. Payne*, 16 L. J. C. P. 225.

Only One of the Parties Executing under Seal.

—It seems to be no objection to the validity of the submission that one party is bound by deed and the other by agreement not under seal, as on a submission by a private individual and a corporation which the former signs, but to which the seal of the latter is affixed. *Russell on Arb.* 53; *Tomlin v. Fordwich*, 6 N. & M. 594.

Evidence Not Admissible to Vary Written Submission.—Where a submission is in writing evidence varying its terms is, however, inadmissible. *Efner v. Shaw*, 2 Wend. (N. Y.) 567; *McNear v. Bailey*, 18 Me. 251.

As where a written submission is general, and embraces "every demand and cause in action in law and equity," parol evidence is not admissible to limit the extent of the submission, and to show that it was confined to matters actually in dispute. *DeLong v. Stanton*, 9 Johns. (N. Y.) 38.

4. *In re Morphet*, 2 D. & L. 967.

So oral evidence cannot be received to vary the terms of a written submission. *Efner v. Shaw*, 2 Wend. (N. Y.) 567; *Dater v. Wellington*, 1 Hill (N. Y.) 319; *DeLong v. Stanton*, 9 Johns. (N. Y.) 38.

5. *Logsdon v. Roberts*, 3 T. B. Mon. (Ky.) 255.

e. BY BOND.—The parties may also submit the matter to arbitration by mutual bonds, given each to the other in a certain penal sum, on condition that they shall be void on performance of the arbitrators' award.¹

1. Submission by Bond.—Russell on Awards 52.

Amount Not Limited by Penalty Named in Bond.—The penalty in the bond does not limit the amount the arbitrator may award, although if he exceeds that limit no larger sum than the penalty can be recovered on the bond. Russell on Awards 52. See *Marshall v. Reed*, 48 N. H. 36; *Washburne v. Lufkin*, 4 Minn. 466; *Browes v. Bruce*, Watson on Awards (3d ed.) 4, note (3); *Ex p. Wallis*, 7 Cow. (N. Y.) 522.

Who may Give the Bond—And to Whom It may be Given.—Such bonds may be given by other persons than the parties themselves, and they may be given to a third person, or even to the arbitrator himself, although the danger was pointed out that he might make an unreasonable award in order to entitle himself to the penalty. *Owby v. Gibbons*, Comb. 100.

Three bonds given by different parties to a dispute constitute but one submission. *Hayes v. Hayes*, Cro. Car. 433.

And two bonds will be effective to submit to arbitration the affairs of a firm composed of several persons. *Winter v. White*, 1 Brod. & B. 350, 5 E. C. L. 112.

Alteration of Conditions.—The parties may also alter the terms of the condition by instrument under seal without affecting the bond. *Creig v. Talbot*, 2 B. & C. 179, 9 E. C. L. 56.

See further, as to the effect and requirements of arbitration bonds, *Cooth v. Jackson*, 6 Ves. Jr. 12; *In re Wansborough v. Dyer*, 2 Chit. Rep. 40, 18 E. C. L. 242.

Bond for Performance of Award Not Valid Substitute for Statutory Written Agreement.—A bond to secure the performance of an award referring to, but not containing, an agreement to submit, will not take the place of the required written submission. *Boots v. Canine*, 94 Ind. 408.

Bond Irregularly Drawn.—Although a bond which was executed to secure an award of arbitrators has been irregularly drawn, if it clearly shows the character in which the parties signed, and their respective liabilities, it is valid. *Bryan v. Jeffreys*, 104 N. Car. 242; *Osborne v. Calvert*, 83 N. Car. 365, *distinguished*.

Indorsement on Bond of Extension of Time of Making Award.—Where a bond is given to perform an award, an indorsement thereon, extending the time of making the award, is valid and binding, and becomes part of the bond itself, if the bond be again delivered by the obligor to the obligee. *Bryer v. Stewart*, 2 Hayw. (N. Car.) 111. See *Shermer v. Beale*, 1 Wash. (Va.) 11; *M'Kee v. Hicks*, 2 Dev. (N. Car.) 379; *Davenport v. Sleight*, 2 Dev. & B. (N. Car.) 381, 3 Am. Dec. 420; *Gordon v. Frazier*, 2 Wash. (Va.) 130; *Stone v. Doe*, 5 Leigh (Va.) 422.

Where an indorsement upon an arbitration bond extending the time of making the award is signed only by the party against whom the award is made, it is not sufficient to

enable the other party to maintain a suit upon the bond for the nonperformance of an award which was made subsequent to the date specified in the bond. *Peters v. Johnson*, 3 Har. & J. (Md.) 291; *Freeman v. Adams*, 9 Johns. (N. Y.) 115; *Price v. Kyle*, 9 Gratt. (Va.) 247; *Creig v. Talbot*, 2 B. & C. 179, 9 E. C. L. 56; *Palmer v. Green*, 6 Conn. 14; *Little v. Holland*, 3 T. R. 590; *Brown v. Goodman*, 3 T. R. 592, note b.

Arbitration Bond Staying "All Further Proceedings in Said Suit of Law."—Where the parties to a suit in a justice's court, after an appeal from the justice's judgment, entered into arbitration bonds staying "all further proceedings in said suit of law," it was held that no suit could be brought on the appeal or original judgment, although the arbitrators could not agree upon a decision within the time limited by the terms of the submission. *Van Slyke v. Lettice*, 6 Hill (N. Y.) 610. See *Matter of Williams*, 4 Den. (N. Y.) 194; *Miller v. Van Auker*, 1 Wend. (N. Y.) 516.

Obligor Preventing Award—Condition of Bond Broken.—In *Quinby v. Melvin*, 28 N. H. 250, it was held that the condition of an arbitration bond was broken if the obligor hinders the arbitrators from making their award, or if he prevents any of them from acting with the others. And where, by the terms of the submission, several matters were submitted to the arbitrators, the condition of the arbitration bond was held to be broken if the obligor prevented an award being made upon any one of them.

Delivery of Bond without Party's Assent.—In *Tyler v. Dyer*, 13 Me. 41, where a bond was signed by both parties and left in the hands of a third person, with directions not to give it up without the consent of both, it was held that an action might be maintained on it without such assent to its delivery.

Succession of Awards—Final Balance Not Struck.—Where parties submit a matter in dispute to arbitration and enter into bonds to perform the award, the award will not be rendered invalid because the arbitrators state their decision upon each claim in detail, without striking any final balance upon the whole account. *Kendrick v. Tarbell*, 26 Vt. 416.

Certain Conditions in Arbitration Bonds Construed.—In *Shaw v. Hatch*, 6 N. H. 162, where an arbitration bond contained a clause that "the parties shall abide by the award of the arbitrators," it was held that this did not mean that they should acquiesce in the award when made, but only that they should await the award without revoking the agreement to submit. See *Marsh v. Bulteel*, 5 B. & Ald. 507, 7 E. C. L. 175.

Where the condition of the arbitration bond was "that if the above bound A and B shall jointly and severally submit, and so forth, and shall well and fully perform the award," it was held that the effect of the condition was to render the parties mutual sureties, and that

f. WRITTEN SUBMISSION SUPERSEDES ORAL.—Where an oral submission has been made, or a submission to two arbitrators, a subsequent or a simultaneous submission in writing and to three arbitrators will supersede the parol submission.¹

Oral Declaration of Arbitrators.—But the terms of a written award cannot be controlled by the oral declaration of the arbitrators made to the parties at the time of the publication of such award.²

3. Submissions under the Statutes.—*a. GENERAL RULE.*—Most states have enacted statutes prescribing certain formal methods for submitting questions to arbitration and for enforcing awards made thereon by special proceedings in court.³

each was liable for the performance of the whole award. *Greenwood Assoc. v. Sullivan*, 1 Strobb. (S. Car.) 450.

Where one of the parties to a submission executed an arbitration bond, and the arbitrators disagreed, and the party thereupon indorsed upon the bond an agreement under his hand and seal that the arbitrators should choose an umpire, binding himself to abide by his award, it was held that this indorsement was a part of the bond itself, upon which, as a whole, an action of debt might be brought. *Price v. Kyle*, 9 Gratt. (Va.) 247. See *Penman v. Gardner*, 1 Brev. (S. Car.) 498; *Brown v. Copp*, 5 N. H. 346; and cases above in this note.

Where a Submission is Made without Order of Court by a Bond, it is not within the statutory provisions requiring submissions to arbitration, and consequently must be tested by common-law rule. *Shackelford v. Purket*, 2 A. K. Marsh. (Ky.) 435, 12 Am. Dec. 422.

Amount of Recovery on Bond.—In *Blaisdell v. Blaisdell*, 14 N. H. 78, in an action of debt on an arbitration bond, containing a penalty, it was held that the plaintiff was not entitled to recover the penalty, but only so much as was due in equity and good conscience.

Scope of Arbitration Bond.—Where an arbitration bond recited that the obligor guaranteed that the parties of the second part in the agreement to submit to arbitration would "abide by the award to be made by the arbitrator," it was held that the obligor was held liable for the payment of the award against such parties, to the extent of the sum named in the bond, and that the latter was not simply a guarantee that they would not withdraw from the arbitration. *Pass v. Critcher*, 112 N. Car. 405.

In *Ex p. Wallis*, 7 Cow. (N. Y.) 522, it was held that the powers of the arbitrators were not so limited by the penalty of an arbitration bond that they could not award a larger sum. It was further held that an action of debt may be brought upon an award of money without regard to the penalty of the bond, the penalty of the bond being for the purpose of enforcing payment of damages for a revocation of the submission, in which case the action must be brought directly upon the bond itself.

See, where an indorsement on the submission not signed by any body was held not to affect the agreement, *Enright v. Montauk F. Ins. Co.* (Supreme Ct.), 15 N. Y. Supp. 893.

1. Simultaneous Submissions.—*Symonds v.*

Mayo, 10 Cush. (Mass.) 39; *Freeman v. Beadle*, 2 Root (Conn.) 492; *Loring v. Alden*, 3 Met. (Mass.) 576. See *Palmer v. Green*, 6 Conn. 14.

Where an agreement for an amicable action was embodied in the same paper with a submission to reference and a request to the prothonotary to grant an order accordingly, the several agreements will be taken in their appropriate order. The case will be entered and then the reference made. *Massey v. Thomas*, 6 Binn. (Pa.) 333.

2. Clark v. Burt, 4 Cush. (Mass.) 396.

3. England.—9 & 10 Will. III., c. 15; 5 Geo. IV., c. 96; 7 Will. IV., 1 Vict., c. 67, §§ 1-3; 35 & 36 Vict., c. 46; 38 & 39 Vict., c. 36; 45 & 46 Vict., c. 54; 41 Vict., c. 16, § 6; 51 & 52 Vict., c. 41, 43; 3 & 4 Will. IV., c. 42, §§ 39-41; 53 & 54 Vict., c. 70; 8 & 9 Vict., c. 16, §§ 128-134; 32 & 33 Vict., c. 18, § 1; 1 & 2 Vict., c. 98, §§ 16-18; 37 & 38 Vict., c. 40, §§ 3-7; 17 & 18 Vict., c. 125, §§ 3-17 (the Common Law Procedure Act); 36 & 37 Vict., c. 66, §§ 56-59, 83; 38 & 39 Vict., c. 77 (the Judicature Acts); 38 & 39 Vict., c. 17, § 25; 38 & 39 Vict., c. 55, §§ 179, 180; 45 & 46 Vict., c. 50; and 52 & 53 Vict., c. 49 (the Arbitration Act 1889), are the principal English statutes relating to arbitration; and for those of the various states see the statutes of those states generally.

For application of the provisions of the 17 & 18 Vict., c. 125, § 11, see *Blyth v. Lafone*, 1 El. & El. 435, 102 E. C. L. 435, 5 Jur. N. S. 364; *Randell v. Thompson*, 1 Q. B. Div. 748, reversing 24 W. R. 837; *Mason v. Haddan*, 6 C. B. N. S. 526, 95 E. C. L. 526; *Randegger v. Holmes*, L. R. 1 C. P. 679; *Hattersley v. Hatton*, 3 F. & F. 116; *Busstros v. Lenders*, L. R. 6 C. P. 259; *Willesford v. Watson*, 20 W. R. 32.

Michigan.—See provisions for submission to arbitration, and as to constitutional questions arising under the Mich. Act. 1885, *Gratwick, etc., Lumber Co. v. Lewis*, 66 Mich. 533.

California.—In California, the subject-matter of an action for the recovery of mining ground on public land, is looked upon as "a question of title to real property in fee," and, therefore, cannot be submitted to arbitration under section 380 of the Practice Act; and if such a question be submitted to arbitration, an award and judgment thereon will be vacated and set aside on motion. *Spencer v. Winselman*, 42 Cal. 479.

Indiana.—There is no provision in 2 Ind.

Strict Compliance with Statute Necessary.—In a statutory arbitration the provisions of the statute must be complied with strictly, in order that a court may be authorized to enter judgment on the award.¹

Rev. Stat., 1852, 227, for the submission to arbitration of a cause pending in court. *Daggy v. Cronnelly*, 20 Ind. 474; *Francis v. Ames*, 14 Ind. 251.

The Indiana statutes relating to arbitrations do not authorize a submission to arbitration to be made a rule of court, in a court of a justice of the peace, nor do they empower a justice to render judgment upon an award. *Richards v. Reed*, 39 Ind. 330.

Kentucky.—In *Harding v. Wallace*, 8 B. Mon. (Ky.) 536, it was held that an order of reference not requiring the award to be returned to the next term of the court, and not having been set aside, remained in full force. See *Wrigglesworth v. Morton*, 2 Bibb (Ky.) 160.

Massachusetts.—In Massachusetts, the jurisdiction of arbitrators arises altogether from statute. *Osborn v. Fall River*, 140 Mass. 508; *Henderson v. Adams*, 5 Cush. (Mass.) 610.

In *Carpenter v. Spencer*, 2 Gray (Mass.) 407, it was held that a claim under Mass. Rev. Stat., c. 116, for damages occasioned by the flowing of land, could not be submitted to arbitration by an agreement made before a justice of the peace under Mass. Rev. Stat., c. 114; and that a judgment of the Court of Common Pleas against the owner of a mill dam, entered on an award under such submission, was not binding upon the subsequent owner of the dam. See *Henderson v. Adams*, 5 Cush. (Mass.) 610.

Nebraska.—The Code Civ. Pro. of this state, §§ 991-995, provides that where a submission has been made voluntarily, the award is binding upon the parties unless corruption, fraud, or undue influence be proved, but the provisions of these sections do not apply to Neb. Comp. Stat., 1893, c. 2, art. 3, which provides that upon the refusal of the owner of trespassing stock to pay damages and to appoint an arbitrator to represent his interest, his stock shall be sold, because the latter arbitration is not voluntarily made. *Holub v. Mitchell*, 42 Neb. 389.

New York.—Where an application is made for an injunction to restrain proceedings before arbitrators appointed under a submission entered into under a foreign statute between two foreign corporations, on the alleged ground that they were not legally appointed, such application will be refused because the New York Court has no jurisdiction over the proceedings. *Direct U. S. Cable Co. v. Dominion Tel. Co.*, 22 Hun (N. Y.) 568, reversed by the Court of Appeals in 84 N. Y. 153, on the ground that the plaintiff, though a foreign corporation, could invoke the jurisdiction of the courts, and the individual defendants were residents of the state.

Where an appraisal is made by arbitrators in pursuance of the conditions of a policy of insurance, it is not subject to the requirements of the N. Y. Code Civ. Pro., § 2307, relating to arbitrations made under that code. *Enright v. Montauk F. Ins. Co.* (Supreme Ct.), 40 N. Y. St. Rep. 642, 15 N. Y. Supp. 893.

Pennsylvania.—Under the Pennsylvania Arbitration Act of 1836, a reference may be made to a single arbitrator. *Reading Industrial Mfg. Co. v. Gracoff*, 64 Pa. St. 395.

In *Large v. Passmore*, 5 S. & R. (Pa.) 51, where judgment had been entered on a bond by warrant of attorney, and the parties to the suit agreed to submit all matters in dispute to three persons whose award was to be final, it was held that this was to be deemed a reference under the Pennsylvania Act of 1705, and not a common-law arbitration, although the submission was not made directly a rule of court.

See further, as to statutory submissions in Pennsylvania, *Massey v. Thomas*, 6 Binn. (Pa.) 334; *Shoemaker v. Meyer*, 4 S. & R. (Pa.) 452; *Nicholas v. Wolfersberger*, 5 S. & R. (Pa.) 167; *Wilson v. Brown*, 82 Pa. St. 437.

Georgia.—In *Barksdale v. Greene*, 29 Ga. 418, it was held that any matters appertaining to a cause may be introduced by amendment and submitted to arbitration under the Georgia statute of 1799.

1. *Alabama.*—*Dudley v. Farris*, 79 Ala. 187; *Willingham v. Harrell*, 36 Ala. 583.

California.—*Smith v. Polack*, 2 Cal. 92.

Georgia.—*Jones v. Payne*, 41 Ga. 23; *Crane v. Barry*, 47 Ga. 476; *Price v. Byne*, 57 Ga. 176; *Halloran v. Bray*, 29 Ga. 422. See *Davis v. Maxwell*, 27 Ga. 368; *Phipps v. Tompkins*, 50 Ga. 641.

Illinois.—*Moody v. Nelson*, 60 Ill. 229; *Martine v. Harvey*, 12 Ill. App. 587; *Forman Lumber Co. v. Ragsdale*, 12 Ill. App. 441.

Indiana.—*Francis v. Ames*, 14 Ind. 251; *Boots v. Canine*, 58 Ind. 450; *Healy v. Isaacs*, 73 Ind. 226.

Iowa.—*Love v. Burns*, 35 Iowa 150; *Foust v. Hastings*, 66 Iowa 522; *Thompson v. Blanchard*, 2 Iowa 44; *Woodward v. Atwater*, 3 Iowa 61.

Maine.—*Sargent v. Hampden*, 29 Me. 70; *Houghton v. Houghton*, 37 Me. 72; *Gerry v. Eppes*, 62 Me. 49.

Massachusetts.—*Abbott v. Dexter*, 6 Cush. (Mass.) 108; *Wright v. Raddin*, 100 Mass. 319; *Monosiet v. Post*, 4 Mass. 532. See also *Skillings v. Coolidge*, 14 Mass. 43.

Michigan.—*McGunn v. Hanlin*, 29 Mich. 476.

New Hampshire.—See *Smith v. Kimball*, 1 N. H. 72.

Pennsylvania.—*Painter v. Kistler*, 59 Pa. St. 331; *Cotton v. Babcock*, 64 Pa. St. 462. See *Buckman v. Davis*, 28 Pa. St. 211; *McAdams v. Stilwell*, 13 Pa. St. 90; *Coleman v. Lukens*, 4 Whart. (Pa.) 347.

Vermont.—*Barnett v. Peck*, 6 Vt. 456.

Sealed Submission.—Where a statute requires a submission to be under seal, a seal must be attached by one who has authority to attach it, otherwise the court cannot enter judgment on the award. *Hamilton v. Hamilton*, 27 Ill. 158; *Burnett v. Gould*, 27 Hun (N. Y.) 366; *Madison Ins. Co. v. Griffin*, 3 Ind. 277.

When Writing Required.—Or when required

But the Technicality of Pleading is Not Requisite even in statutory sub-

to be in writing, a verbal submission will be void. *McClendon v. Kemp*, 18 La. Ann. 162; *Raguet v. Carmouche*, 5 La. Ann. 133; *Boots v. Canine*, 58 Ind. 450.

When Acknowledgment Required.—Where the statute requires the instrument to be acknowledged, the statute must be followed. *Fink v. Fink*, 8 Iowa 313; *Abbott v. Dexter*, 6 Cush. (Mass.) 108; *Heath v. Tenney*, 3 Gray (Mass.) 380; *Franklin Mfg. Co. v. Pratt*, 101 Mass. 359; *Gibson v. Burrows*, 41 Mich. 713; *Davis v. Berger*, 54 Mich. 652; *Barney v. Flower*, 27 Minn. 403. See the title **ACKNOWLEDGMENTS**, vol. 1, p. 483.

Specification of Demands.—So where it is required that a specification of demand be attached under the hand of the party making it, the statute must likewise be followed. *Bulard v. Coolidge*, 3 Mass. 324; *Pierce v. Pierce*, 30 Me. 113; *Smith v. Kimball*, 1 N. H. 72; *Mansfield v. Doughty*, 3 Mass. 398. A writ issued out and indorsed by the plaintiff, and annexed to the submission, is a sufficient statement of the demand submitted. *Inman v. Wheeler*, 1 Pick. (Mass.) 504. The statute is complied with and the subscription sufficient if the party makes the demand in his own handwriting, thus, "A B demands, etc.," or where it is signed by one partner for the firm. *Skilling v. Coolidge*, 14 Mass. 43; *Southard v. Steele*, 3 T. B. Mon. (Ky.) 435; *Wilcox v. Singletary*, *Wright* (Ohio) 420.

Certain Number of Arbitrators Required.—Where the statute requires three arbitrators, submission to one is void. *Bowes v. French*, 11 Me. 182; *Monosiet v. Post*, 4 Mass. 532. See *Reading Industrial Mfg. Co. v. Graeff*, 64 Pa. St. 395. But see *Forshey v. Galveston*, etc., R. Co., 16 Tex. 516.

Sealed Award.—Where the statute contained a requirement that the arbitrators should seal their award, this was held to be merely directory and their failure to do so would not render it invalid. *Price v. Kirby*, 1 Ala. 184.

Authority of Agent.—And in *White v. Fox*, 29 Conn. 570, it was held that where the submission was signed under seal by an agent, although the statute did not require a seal, it was not necessary that the agent should be authorized to make the submission by instrument under seal. See the title **AGENCY**, vol. 1, p. 930.

Waiver of Right of Appeal.—Although the parties to a statutory submission waive the right of appeal given by the statute, where the submission expressly declares that it is intended to be a statutory one, it will be upheld, for the parties have a right to waive such right without losing the other privileges of the statute. *Wynn v. Bellas*, 34 Pa. St. 160.

So They may Waive the Arbitrators' Oath.—*Howard v. Sexton*, 1 Den. (N. Y.) 440; *Hill v. Taylor*, 15 Wis. 190.

A Submission which Conforms to the Statute and contains a provision that it shall be made a rule of court is a statutory submission. *Estep v. Larsh*, 16 Ind. 82.

But where a Submission Professes to be Statutory, but contains stipulations which are

specifically contradictory of the provisions of the statute, it will not be sustained as a statutory submission. *South Carolina R. Co. v. Moore*, 28 Ga. 398, 73 Am. Dec. 778.

Bond for Performance of Award as Substitute for Statutory Written Submission.—Where a written submission to arbitration is required by statute, a bond to secure the performance of an award referring to, but not containing, an agreement to submit, will not take its place so as to fulfil the requirements of the law. The submission must be in writing, by which the parties shall agree that it shall be made a rule of a court of record therein designated. *Boots v. Canine*, 94 Ind. 408.

Names of Arbitrators Omitted from Agreement.—Where the names of the arbitrators are not set out in an agreement for a statutory arbitration at the time it is acknowledged, the agreement is void, as their names cannot be inserted therein afterwards. *Northwestern Guaranty Loan Co. v. Channell*, 53 Minn. 269.

A statutory submission to arbitration in *Minnesota* is invalid unless the agreement to submit names all the arbitrators. *Holridge v. Stowell*, 39 Minn. 360.

Written Statement of Matter in Dispute.—*Alabama Code*, § 3223, requires a written statement of the matter in dispute on a reference to arbitrators when no suit is pending, but it is not required when the arbitration is had on an order of reference in a suit pending, because the pleadings show the matter in dispute with sufficient certainty. *Snodgrass v. Armbruster*, 90 Ala. 493.

Members of Partnership must Appear.—Where a submission to arbitration has been agreed to under the provision of *Massachusetts Revised Statutes*, c. 114, to which a partnership is one party, it must show who the members of the firm are. If such is not shown in the submission or award, the court to which the award is returned cannot hear or determine the question. *Wesson v. Newton*, 10 Cush. (Mass.) 114.

Stipulation Authorizing Clerk to Enter Submission.—There must be a stipulation of the parties to the agreement, authorizing the clerk to enter the submission, and there must be an actual entry made by the clerk, according to such stipulation, in order to give the courts jurisdiction over the subject-matter or the parties. *Pieratt v. Kennedy*, 43 Cal. 393. See *Ryan v. Dougherty*, 30 Cal. 218.

Number of Arbitrators and Method of Selection.—An agreement for a submission which does not provide for the number of arbitrators or for the mode of their selection is invalid. *Greiss v. State Invest., etc., Co.*, 98 Cal. 241. See *Case v. Manufacturers' F. & M. Ins. Co.*, 82 Cal. 263.

Partners—Submission Signed by Both, but Acknowledged by One Only.—Where, under *Massachusetts Rev. Stat.*, c. 114, a submission to arbitration has been entered into before a justice of the peace, by two partners on the one part, and is signed by both, but acknowledged by one of them only, the arbitrator has no jurisdiction, and an award made under such

missions as a general rule.¹

Waiver of Strict Compliance.—And the parties may waive a strict compliance with the statutory requirements.²

b. COMPULSORY ARBITRATION.—In *England*, there are special enactments which enforce arbitration in certain cases,³ and in some of the states of the

submission cannot be enforced against either of them. *Abbott v. Dexter*, 6 Cush. (Mass.) 108.

Submission must be Agreed to by the Parties.—A submission to arbitration made under the *New York Code*, § 1279, must be agreed to by the parties to be affected by the judgment, and the facts agreed upon must be such as will enable the court to render a proper judgment. *Dickinson v. Dickey*, 76 N. Y. 602.

Where Parties to an Action Entered into an Agreement out of Court to submit the matters in dispute in such action to arbitration, and "in all manner of actions, claims and demands whatsoever held by and between the parties to the agreement," it is not a reference under *North Carolina Code*, § 420, which authorizes the reference of "the issue in the action, whether of fact, or of law, or of both," and is not enforceable in such action. *Jackson v. McLean*, 96 N. Car. 474. See *Scammon v. Denio*, 72 Cal. 393; *Herman v. Lyons*, 10 Hun (N. Y.) 111; *Pomeroy v. Hulin*, 7 How. Pr. (N. Y. Supreme Ct.) 161; *Simpson v. Mc-Bee*, 3 Dev. (N. Car.) 532; *Moore v. Austin*, 85 N. Car. 179; *Metcalf v. Guthrie*, 94 N. Car. 447.

California—Submission Filed with Clerk of Court.—In order to constitute a statutory submission under *California Statutes*, 1851, 1852, c. 4, §§ 38, 382, 385, so as to give the award the effect of a judgment, the submission must be filed in pursuance of the provisions of the statute with the clerk of the court, and motion must be made for judgment upon the award. *Ryan v. Dougherty*, 30 Cal. 218; *Heslep v. San Francisco*, 4 Cal. 1.

Where a Question Involving the Title to Real Estate is submitted to arbitration, but the submission is not executed according to the provisions of *Connecticut Rev. Stat.*, tit. 29, § 21, the award cannot pass the title. *Parmelee v. Allen*, 32 Conn. 115.

Election between Common-law and Statutory Arbitration.—Where a submission professes to be a statutory one it must follow strictly the requirements of the statute, unless they are expressly waived by agreement of the parties. And although the parties to the submission may elect between a common-law and a statutory arbitration, or a reference under a rule of court, yet having once made their election by beginning under one, they must pursue that one to the end. *Francis v. Ames*, 14 Ind. 251. See *Conrad v. Johnson*, 20 Ind. 421; *Snodgrass v. Smith*, 13 Ind. 393.

1. *Tuskaloosa Bridge Co. v. Jemison*, 33 Ala. 476; *King v. Jemison*, 33 Ala. 499; *Payne v. Crawford*, 97 Ala. 604; *McKnight v. McCullough*, 21 Iowa 111; *Jones v. Hacker*, 5 Mass. 264; *Eaton v. Hall*, 5 Met. (Mass.) 287; *Hill v. Page*, 1 N. H. 190; *Hayes v. Bennett*, 2 N. H. 422; *Rogers v. Tatum*, 25 N. J. L. 281; *Summerville v. Painter*, 44 Pa. St. 110; *Barnett v. Peck*, 6 Vt. 456; *Hill v. Taylor*, 15 Wis. 190.

2. *Francis v. Ames*, 14 Ind. 251.

The Statutory Requirement that Parties should be Sworn may be waived by the parties to the submission. *Cochran v. Bartle*, 91 Mo. 636. See *Tucker v. Allen*, 47 Mo. 491; *Howard v. Sexton*, 1 Den. (N. Y.) 440; *Newcomb v. Wood*, 97 U. S. 581.

3. **English Statutes Enforcing Arbitration.**—17 & 18 Vict., c. 125, §§ 3, 4, 6, 8, 9; 52 & 53 Vict., c. 49, §§ 13, 14. See the following cases which illustrate the circumstances under which the power may be exercised: *Robson v. Lees*, 6 H. & N. 258; *Kendil v. Merrett*, 18 C. B. 173, 86 E. C. L. 173; *Angell v. Felgate*, 7 H. & N. 396; *Browne v. Emerson*, 17 C. B. 361, 84 E. C. L. 361; *Cummins v. Birkett*, 3 H. & N. 136; *Pellatt v. Markwick*, 3 C. B. N. S. 760, 91 E. C. L. 760; *Pell v. Addison*, 2 F. & F. 291; *Chapman v. Van Toll*, 8 El. & Bl. 396, 92 E. C. L. 396; *Goodred v. Seale*, 2 F. & F. 382; *Lury v. Pearson*, 1 C. B. N. S. 639, 87 E. C. L. 639; *Imhof v. Sutton*, L. R. 2 C. P. 406; *Purdie v. Furness*, 4 F. & F. 942; *Jeffries v. Lovell*, 19 W. R. 408; *Morgan v. Ainslie*, 28 L. T. 120; *Hoch v. Boor*, 49 L. J. C. P. 665. See *London, etc., F. Ins. Co. v. British-American Assoc.*, 54 L. J. Q. B. Div. 302; *Darlington Wagon Co. v. Harding, etc., Pier, etc., Co.* (1891), 1 Q. B. 249; *Weed v. Ward*, 40 Ch. Div. 555; *Palmer v. Hardwick*, 63 L. T. 302; *In re Taylor*, 44 Ch. Div. 128; *Hayward v. Mutual Reserve Assoc.* (1891), 2 Q. B. 236; *Munday v. Norton* (1892), 1 Q. B. 403; *Russell v. Harris*, 65 L. T. 752; *Hurlbatt v. Barnett* (1893), 1 Q. B. 77.

Where part only of the issues are questions of account, it has been held that all might be referred. *Ward v. Pilley*, 5 Q. B. Div. 427. See *Goodwin v. Budden*, 42 L. T. 536, which comments on the case of *Clow v. Harper*, 3 Exch. Div. 198, where an order of reference was set aside on the ground that such order took away the defendant's right of having the question of his liability under a covenant to repair decided by a jury.

See further *Gibbs v. Knightly*, 26 L. J. Exch. 204, 2 H. & N. 34; *Birmingham, etc., Gas Co. v. Ratcliff*, L. R. 6 Exch. 224, 40 L. J. Exch. 136; *Edwards v. Edwards*, 28 L. J. C. P. 25, 5 C. B. N. S. 536, 94 E. C. L. 536.

The judicature acts, 1873 and 1875, give no power to refer actions to referees. *Longman v. East*, 26 W. R. 183. See *Robson v. Lees*, 6 H. & N. 258.

As to the jurisdiction exercised by the court of chancery before the passing of the judicature acts of staying proceedings at law, notwithstanding a pending reference to arbitration, on the ground that equity would more satisfactorily determine the matter in dispute than an arbitration by order of court, see *Croskey v. European, etc., Steam Shipping Co.*, 6 Jur. N. S. 1190, 1 John. & H. 108.

See, where an attempt to compel a submission

Union, as in *Pennsylvania*, arbitration has been made compulsory on one party if the other elects to settle the matter by arbitration.¹ But on the other hand it has been held that a law which compelled a person to submit a question to arbitration against his will was unconstitutional.²

c. DEFECTIVE STATUTORY SUBMISSIONS.—Notwithstanding the strictness of the general rule in many states, the courts will uphold defective statutory submissions in order to give effect to the obvious intent of the parties,³ and

was refused, *Hamilton v. Merchants Marine Ins. Co.*, 58 L. J. Q. B. 544.

For Compulsory References in Canada, see *Hutchison v. Sideaways*, 14 U. C. Q. B. 472; *Wells v. Gzowski*, 14 U. C. Q. B. 553; *Evans v. Jackson*, 3 U. C. L. J. 88; *Barton v. Hubertus*, 16 U. C. C. P. 440; *Blanchard v. Snider*, 28 U. C. Q. B. 210.

1. Compulsory Arbitration under Statute.—*Pennsylvania*.—See *Cutler v. Richley*, 151 Pa. St. 195, 30 W. N. C. (Pa.) 561, which says that the *Pennsylvania Local Act of 1870* is not part of the compulsory arbitration procedure under the *Pennsylvania Act of 1836*.

The *Pennsylvania Act of June 16, 1836*, relating to arbitrations, supersedes the *Pennsylvania Act of March 21, 1806*, relating to the same subject. *Steele v. Lineberger*, 59 Pa. St. 308.

There is no rule for compulsory arbitration in Philadelphia: the compulsory act of 1836 was repealed as to Philadelphia by the Act of May 1, 1861. Where a rule was granted for compulsory arbitration upon an affidavit that plaintiff had agreed to erect a house for the defendant, and that the defendant had broken the contract and caused plaintiff to desist, and that the contract provided for arbitration, it was held that such rule would be discharged in Philadelphia where there were no further proceedings. *Wintz v. Fiscio*, 33 W. N. C. (Pa.) 220.

Where the rule for compulsory arbitration has been duly served and the arbitrators have been appointed, the proceedings are out of court and need not be reduced to writing. Service may be upon the attorney of the opposite party, but if he has an agent or attorney it may be by certified copy as in case of ordinary summons. *Wilcox v. Payne*, 88 Pa. St. 154.

In *Erie v. Tracy*, 2 Grant's Cas. (Pa.) 20, it was held that the *Pennsylvania Compulsory Arbitration Law* applies only in actions pending at the time the rule was entered, or the reference agreed upon, and that an appeal, as intended by the statute, can be taken in no other case.

New York.—In *Barnes v. West*, 16 Hun (N. Y.) 68, it was held that under the New York Code, § 1013, a compulsory reference could in no case be ordered unless the trial would require the examination of an account. See, where compulsory reference was not permitted, *Morrison v. Van Benthuyzen*, 103 N. Y. 675.

Colorado.—The constitution of this state, art. 18, § 3, makes it the duty of the general assembly to pass laws for submitting questions in dispute to arbitration by mutual consent of the parties, but such provision does not contem-

plate or admit of a law providing for compulsory submissions of disputes to arbitration. *In re Bill Relating to Arbitration*, 9 Colo. 629.

Ohio.—The Revised Statutes of this state, § 3388, as amended by Act April 4, 1890, which provides for the consolidation of railroad companies, and the submission of disputes between the stockholders and the company to arbitration by three disinterested persons, to be appointed "upon the motion of either of the parties," does not require that the submission should be with the consent of both. Nor is the right given to a stockholder to have the value of the stock determined by arbitration, on the consolidation of one company with another, forfeited by the failure on his part to make a demand for such arbitration until after the consolidation is effected, because it is the duty of the company to have the value ascertained, in case of failure to agree before the consolidation takes place. *Pittsburgh, etc., R. Co. v. Garrett*, 50 Ohio St. 405.

2. Compulsory Arbitration Held Unconstitutional.—In *People v. Haws*, 15 Abb. Pr. (N. Y. Supreme Ct.) 115, 24 How. Pr. (N. Y.) 148, 37 Barb. (N. Y.) 440, it was held that a law which compelled a person without his consent to submit a claim, which should properly have been the subject of an action, to arbitration, was contrary to the constitutional provision which secured him a right to a trial according to the course of the common-law. See *Morrison v. Van Benthuyzen*, 103 N. Y. 675.

In *Cutler v. Richley*, 151 Pa. St. 195, it was held that the *Pennsylvania Local Act of April 6, 1870*, which provided for a special voluntary submission before an arbitrator learned in the law, without right of appeal, was constitutional; but the supplemental act of March, 1873, which substituted a compulsory mode of procedure for the voluntary mode, was unconstitutional.

3. When Defective Statutory Submissions Upheld—Intention of Parties.—*Alabama*.—*Tuscaloosa Bridge Co. v. Jemison*, 33 Ala. 476.

Connecticut.—*White v. Fox*, 29 Conn. 570.

Kansas.—*Bulson v. Lampman*, 1 Kan. 324.

Maine.—*Harmon v. Jennings*, 22 Me. 240; *Kendall v. Bates*, 35 Me. 357; *Houghton v. Houghton*, 37 Me. 72; *Wood v. Holden*, 45 Me. 374.

Massachusetts.—*Inman v. Wheeler*, 1 Pick. (Mass.) 504; *Skillings v. Coolidge*, 14 Mass. 43; *Humphry v. Strong*, 14 Mass. 262; *Wright v. Raddin*, 100 Mass. 319.

Michigan.—*Clement v. Comstock*, 2 Mich. 359; *Callanan v. Port Huron, etc., R. Co.*, 61 Mich. 19.

New York.—*Howard v. Sexton*, 1 Den. (N. Y.) 440.

the presumption is always in favor of the regularity and validity of a submission which purports to be a statutory one.¹

d. SUBMISSIONS BY RULE OF COURT.—The Distinction is Not Very Clearly Drawn, as a rule, between submissions under the statutes, and submissions by rule of court; both are statutory proceedings, the difference being that the former is the voluntary private undertaking of the parties.²

General Submission Made a Rule of Court.—The court is not authorized to make a general submission a rule of court merely because there is a suit pending between the parties; there must be a specific stipulation to that effect in the submission.³

Pennsylvania.—*Bemus v. Quiggle*, 7 Watts (Pa.) 363; *Massey v. Thomas*, 6 Binn. (Pa.) 333; *Harris v. Hayes*, 6 Binn. (Pa.) 422; *Oklison v. Flickinger*, 1 W. & S. (Pa.) 257; *Kimmel v. Shank*, 1 S. & R. (Pa.) 24; *Large v. Passmore*, 5 S. & R. (Pa.) 51; *McAdams v. Stilwell*, 13 Pa. St. 90; *Wynn v. Bellas*, 34 Pa. St. 160.

Tennessee.—*Halliburton v. Flowers*, 12 Heisk. (Tenn.) 25.

Vermont.—*Barnett v. Peck*, 6 Vt. 456.

Wisconsin.—*Hill v. Taylor*, 15 Wis. 190.

In *McAdams v. Stilwell*, 13 Pa. St. 90, although the submission did not specifically stipulate that it should be made a rule of court, yet judgment was entered on the award on the ground that it was the intention of the parties that it should be made a rule of court.

In *Clement v. Comstock*, 2 Mich. 359, it was held that the courts would seek to construe the submission as a common-law or a statutory one, according to the apparent intent of the parties; and although it resembled a statutory submission, yet if it was evidently not intended to be such it would be sustained as a common-law submission.

Submission Materially Inconsistent with Statute.—Where the submission professes to be in accordance with the statute, but is clearly inconsistent therewith in a material point, it will be considered that it has not been the intention of the parties to be ruled by the statute. *South Carolina R. Co. v. Moore*, 28 Ga. 398, 73 Am. Dec. 778.

Statutory Submission Intended—Defective—Upheld as Common-Law Submission.—Sometimes the courts have held that submissions were good at common law where they were wanting in the strict legal requirements, although it was the obvious intention of the parties that they should be statutory submissions. *Tyler v. Dyer*, 13 Me. 41; *Fink v. Fink*, 8 Iowa 313; *Benjamin v. Benjamin*, 5 W. & S. (Pa.) 562; *Akely v. Akely*, 17 How. Pr. (N. Y. Supreme Ct.) 21. But see *Williams v. Walton*, 9 Cal. 142.

Defective Statutory Submissions have, on the Other Hand, sometimes not been upheld as good common-law submissions, the courts holding that the parties should be left to their election, *Allen v. Chase*, 3 Wis. 249; or refusing to substitute another and a different contract from that into which the parties had entered, *Deerfield v. Arms*, 20 Pick. (Mass.) 480, 32 Am. Dec. 228.

In *Harris v. Hayes*, 6 Binn. (Pa.) 422, it was held that it must be clearly shown to the court that arbitration proceedings were

entered into under the Act of 1806, or it will not reverse the proceeding for noncompliance with the provisions of that act.

1. Presumption of Regularity and Validity of Submission.—*Morse on Arb. and Award* 48. In *Wright v. Raddin*, 100 Mass. 319, where one of the parties acknowledged the submission by attorney, although there was no averment that it was signed before the magistrate, it was held not to be defective under *Massachusetts Gen. Stat. c. 147, § 2*.

2. Morse on Arb. and Award 49.

As to the Distinction between Arbitration and Reference in California, where no statute existed, see *Gunter v. Sanchez*, 1 Cal. 45.

A Submission under an Order of Court Made in an Action Pending, may, by agreement, include other matters in the controversy which are not embraced in the action. *Berkshire Woollen Co. v. Day*, 12 Cush. (Mass.) 128.

Origin of Practice.—The practice of making a submission a rule of court arose in England in the time of Charles II., and was adopted for the purpose of making any misconduct under the submission, or any refusal to act on the award, a contempt of court, and to give the court jurisdiction over the award and the parties to the submission. It was first confined to references of suits in court, and afterwards extended to agreements to submit made out of court. *Russell on Awards* (6th ed.) 583-595; *Buccleuch v. Metropolitan Board of Works*, L. R. 5 Exch. 230; 9 & 10 Will. III., c. 15. See *Harrison v. Grundy*, 2 Stra. 1178; *Bennett v. Watson*, 29 L. J. Exch. 357; *Talbot v. Fisher*, 2 C. B. N. S. 471, 89 E. C. L. 471. See next note following save one.

3. Reference by Rule of Court.—*Fox v. Ealer*, 2 Miles (Pa.) 169. See *Zapp v. Miller*, 109 N. Y. 51; *Martin v. Hodges*, 45 Hun (N. Y.) 38; *Willard v. Doran, etc., Co.*, 48 Hun (N. Y.) 402; *Bennett v. Pittman*, 48 Hun (N. Y.) 612; *Robinson v. New York, etc., R. Co.*, 55 N. Y. Super. Ct. 152; *Boulard v. Carpin*, 27 S. Car. 235; *Turner v. Nachtsheim*, 71 Wis. 16; *Littlejohn v. Regents*, 71 Wis. 437; *Kent v. Highleyman*, 28 Mo. App. 614; *Terpening v. Holton*, 9 Colo. 306; *McLeod v. Pye*, 21 New Bruns. 213.

Under the *Indiana Stat.* 1894, §§ 842, 867, an agreement to submit to arbitration must be in writing, and must provide that the submission shall be made a rule of some court of record designated in the agreement. *Fargo v. Reighard* (Ind. App. 1895), 39 N. E. Rep. 888.

In *Hazen v. Addis*, 14 N. J. L. 333, it was held that, upon an affidavit made before a

At What Time may be Made.—But the submission may be made a rule of court as well after as before the award is made.¹

English Statutes.—In *England* there are special enactments providing for the making of a submission a rule of court, and it has been even said that there it is a matter of course for a judge to grant an order of court, referring a cause, upon the written consent of the attorneys of both parties.² The submission must be made a rule of court before the court has jurisdiction to set aside or enforce the award.³ However, a parol submission cannot be made a rule of

commissioner of the Supreme Court and on proof that the parties made and signed the submission, the court will order the agreement to submit to be entered of record, and a rule that the parties shall submit thereto and be concluded by the arbitrators' award.

Where No Action is Pending, a reference by rule of court can only be made by agreement filed or by record entry; otherwise there can be no judgment rendered upon the award. *Carson v. Carson*, 1 Metc. (Ky.) 434.

Except where a suit is actually pending, the courts in *North Carolina* have no authority to order a submission to arbitration to be made a rule of court, even by consent of the parties. *Alexander v. Burton*, 1 Dev. & B. Eq. (N. Car.) 469.

Consent of Parties that Submission be Made Rule of Court Implied.—But in *McAdams v. Stilwell*, 13 Pa. St. 90, it was held that both since and before the *Pennsylvania* Act of 1836, where a suit pending in court is referred to arbitrators, the consent of the parties to such suit that the submission be made a rule of court will be implied, if there be no contradictory provision in the terms of the agreement.

A submission under the *Pennsylvania* statute of 1836 implies that such submission is to be made a rule of court under the provisions of the statute. *Ford v. Keen*, 13 Pa. St. 179.

Stipulation that Reference should Not be Made Rule of Court.—Parties to a written submission may, if they wish that the courts shall have no cognizance over the arbitration, express their intention that the reference shall not be made a rule of court, by proper words in the written submission itself. The courts in such a case have no jurisdiction over the submission, or over the proceedings before the arbitration, or over the award. The submission being viewed as a simple contract, the parties are not before the court in any way. Russell on Awards 52; 17 & 18 Vict., c. 125, § 17.

No Matter How Gross the Corruption or Misconduct of the Arbitrator, awards made on such submissions cannot be set aside at law. *Veale v. Warner*, 1 Saund. 327c.

The Only Remedy is by bill in equity. *Greenhill v. Church*, 3 Rep. in Ch. 89, p. 49; 2 Vern. 100, pl. 95; *Cavendish v. Wood*, 1 Cas. in Ch. 279. The awards under such submissions cannot be enforced by attachment. The only remedy is by action at law as on a contract, or sometimes by bill in equity. *Blundell v. Brettargh*, 17 Ves. Jr. 232; *Bishop v. Bishop*, 1 Rep. in Ch. 75; *Bendick v. Thatcher*, Noy 141; *Vin. Abr. Arb. Ha. i.*

1. Submission may be Made Rule of Court after as Well as before Award.—*Ex p. Vasques*, 5 Cow. (N. Y.) 29.

In *California Academy of Sciences v. Fletcher*, 99 Cal. 207, where a stipulation was entered into to make a submission an order of court, under *California* Code Civ. Pro., § 1282, which provides that when the submission has been filed the clerk shall "thereupon" note it in his register of actions; but upon the submission being filed the clerk did not complete the entry until some weeks later, and until the award had been made and filed; it was held that the entry was regular enough to support the judgment, as the word "thereupon" in the code was less strict than "immediate," and as the submission itself stipulated that it might be entered "at any time."

2. English Statutes.—Morse on Arb. and Award 49; Russell on Awards (6th ed.) 75; *Archer v. Hall*, 4 Bing. 464; *Rigby v. Okell*, 7 B. & C. 57, 14 E. C. L. 13; 9 & 10 Will. III., c. 15; 17 & 18 Vict., c. 125, § 17. Before the statute 9 & 10 Will. III., c. 15, parties to a dispute could not bring themselves into court by agreement and create a jurisdiction to issue process of contempt. *Nichols v. Chalie*, 14 Ves. Jr. 265; *Lyall v. Lamb*, 4 B. & Ad. 468, 24 E. C. L. 106; *Steers v. Harrop*, 1 Bing. 133, 8 E. C. L. 439, 7 Moore 466.

Purpose of Statutes.—The statute was passed in order to give the parties the process of contempt for enforcing the award and to make awards final unless complaint was made within a limited time. Russell on Awards (6th ed.) 55; *Davis v. Getty*, 1 Sim. & S. 411. See *Bhear v. Harradine*, 7 Exch. 269; *Auriol v. Smith*, 1 T. & R. 126; *Allardes v. Campbell*, 1 T. & R. 133, note; *Pedley v. Goddard*, 7 T. R. 73; *Dawson v. Sadler*, 1 Sim. & S. 537.

The Jurisdiction of the Courts of Equity to Set Aside the Award is entirely taken away by the statute and transferred to the court of which the submission has been made a rule. *Nichols v. Roe*, 3 Myl. & K. 431, reversing *Nichols v. Roe*, 5 Sim. 156; *Nichols v. Chalie*, 14 Ves. Jr. 265; *Gwinett v. Bannister*, 14 Ves. Jr. 530; *Cooke v. Cooke*, L. R. 4 Eq. 77; *Heming v. Swinnerton*, 1 Coop. 386; *In re Lomax's Arbitration*, 42 L. T. 391. See further, *Pownall v. King*, 6 Ves. Jr. 10; *Webster v. Bishop*, 2 Vern. 444; *In re Joseph*, 1 Russ. & M. 496; *Smith v. Lymes*, 5 Madd. 74; *Heming v. Swinnerton*, 10 Jur. 907.

The Only Method of Enforcing the Award is by attachment. *Webster v. Bishop*, Prec. Ch. 223.

3. Davis v. Getty, 1 Sim. & S. 411; *Harvey v. Shelton*, 7 Beav. 455; Russell on Awards (6th ed.) 57.

Where Parties Enter into a Private Agreement which is not made a rule of court, to submit a dispute to arbitration, the agreement

court under the statute of Will. III.¹ Nor are criminal proceedings within the statute,² though they are embraced within the words of the Common-law Procedure Act of 1854.³

4. What is a Proper Basis for a Submission—*a*. MUST BE MATTER OF DOUBT.—A submission to arbitration may be made, although no legal cause of action exists in favor of either party,⁴ and although there is no suit pending between them.⁵ It is enough if there is a difference of opinion between the parties in regard to any matter in which they are both interested. It is not necessary that there should be a controversy, a simple matter of doubt may be submitted.⁶

containing a provision that the arbitrators shall report their award to the court, "to be confirmed and made the judgment of the said court," such provision is valid and gives the court jurisdiction. *McCall v. McCall*, 36 S. Car. 80.

1. Parol Submission.—*v. Mills*, 17 Ves. Jr. 419; *Ansell v. Evans*, 7 T. R. 1. For other instances in which submissions were made rules of court under the act, see *Little v. Newton*, 1 M. & G. 977, note (a), 39 E. C. L. 731; *Bhear v. Harradine*, 7 Exch. 269; *Harlow v. Winstanley*, 19 L. J. Q. B. 430; *Nichols v. Chalie*, 14 Ves. Jr. 265; *Wimpenny v. Bates*, 2 Tyr. 466, 2 C. & J. 379; *Milstead v. Cranfield*, 9 D. P. C. 124; *Rushworth v. Barron*, 3 D. P. C. 317; *Reynolds v. Askew*, 5 D. P. C. 682; *Heming v. Swinnerton*, 1 Coop. 386. And where not, see *Soilleux v. Herbst*, 2 B. & P. 444; *In re Lee v. Hemingway*, 3 N. & M. 860, 28 E. C. L. 423, 15 Q. B. 305, note, 69 E. C. L. 305. And see further, where it was held that the authority to make a submission of a cause and all matters a rule of court is derived from the common-law power of the courts, and not from the statute, *Reg. v. Hardey*, 14 Q. B. 529, 68 E. C. L. 529; *Lonsdale v. Littledale*, 2 Ves. Jr. 451; *Lucas v. Wilson*, 2 Burr. 701; *Anderson v. Coxeter*, 1 Stra. 301; *Hayward v. Phillips*, 6 Ad. & El. 119, 33 E. C. L. 21; *Allenby v. Proudlock*, 4 D. P. C. 54, 4 Ad. & El. 326, 31 E. C. L. 78.

2. Criminal Proceedings.—*Watson v. McCullum*, 8 T. R. 520; *Rex v. Bardell*, 5 Ad. & El. 619, 31 E. C. L. 403, 5 Dowl. 238.

As to What is a Sufficient Clause under the Act to authorize the court to make the submission a rule of court, see *Carter v. Mansbridge*, *Barnes* 55; *Baily v. Cheeseley*, 1 Salk. 72, 1 Ld. Raym. 674; *Soilleux v. Herbst*, 2 B. & P. 444; *In re Lomax's Arbitration*, 42 L. T. 391; *Wimpenny v. Bates*, 2 Tyr. 466, 2 C. & J. 379; *Dawson v. Sadler*, 1 Sim. & S. 537.

Sometimes the Consent Clause is to the Effect that the award, not the submission, shall be made a rule of court. This was held in the earlier cases to give the court no authority. *Harrison v. Grundy*, 2 Stra. 1178; *Anonymous*, 2 Barnard 163. In later cases, such a submission was held to be within the statute. *In re Story*, 7 Ad. & El. 602, 34 E. C. L. 171; *Soilleux v. Herbst*, 2 B. & P. 444; *Pedley v. Westmacot*, 3 East 603; *Powell v. Phillips*, cited in *Pedley v. Westmacot*, 3 East 603. But subsequently it has been held that where the word "award" has been used by mistake for "submission" the statute will apply, but where it was the intention of the parties that the award itself should be made a rule of court the statute

will not apply. *In re Woodcroft*, 9 D. P. C. 538.

See, where an agreement to enlarge the time indorsed on the submission incorporates the original consent and may be made a rule of court, with reference to the extended time instead of the time originally limited, *Creig v. Talbot*, 2 B. & C. 179, 9 E. C. L. 56; *Evans v. Thomson*, 5 East 189; *In re Tunno and Bird*, 5 B. & Ad. 488, 27 E. C. L. 107; *Jenkins v. Law*, 8 T. R. 87, *overruled*.

3. English Common-law Procedure Act.—17 & 18 Vict., c. 125, § 17; *Russell on Awards* 59. In *Wadsworth v. Smith*, L. R. 6 Q. B. 332, it was held that a stipulation in a building contract against an appeal from the decision of the architect rendered a submission of the matter in dispute incapable of being made a rule of court, under the Common-law Procedure Act, § 17, such stipulation being construed as showing that the parties did not intend that the submission should be made a rule of court.

See further, as to the effect of the Common-law Procedure Act of 1854, *In re Anglo-Australian Bank*, 10 L. T. N. S. 369; *Fitzwilliam v. Dawes*, 4 L. T. N. S. 508; *Mills v. Bayley*, 2 H. & C. 36, 11 W. R. 598.

A submission under the Lands Clauses Consolidation Acts has been held to be a submission by consent. *Ex p. Harper*, L. R. 18 Eq. 539; *Rhodes v. Airedale Drainage Com'rs*, 1 C. P. Div. 402.

4. Legal Cause of Action Unnecessary.—*Mayo v. Gardner*, 4 Jones (N. Car.) 359; *Findly v. Ray*, 5 Jones (N. Car.) 125; *O'Keson v. Barclay*, 2 P. & W. (Pa.) 531; *Ex p. Lucy*, 21 Eng. L. & Eq. 199.

The court will not exercise its jurisdiction to restrain a party from submitting a dispute to arbitration at the instance of one of the parties to the agreement to submit, where it appears that the result of the arbitration will be futile, and that no injury will be done to the party objecting to the submission. *Farrar v. Cooper*, 44 Ch. Div. 323.

5. No Suit Pending.—*Titus v. Scantling*, 4 Blackf. (Ind.) 89. See *Lucas v. Wilson*, 2 Burr. 701. But an award is not binding on a party not accepting it where there is no evidence of a previous dispute between the parties concerning the matters submitted. *Cochran v. Knox*, 13 S. Car. 496.

6. Bona Fide Difference of Opinion—Sufficient Basis.—*Brown v. Wheeler*, 17 Conn. 345, 44 Am. Dec. 550; *Ranney v. Edwards*, 17 Conn. 309.

In *Findly v. Ray*, 5 Jones (N. Car.) 125, it was held that, although there is no legal cause-

b. MINISTERIAL ACTS NOT A BASIS.—According to some authorities, purely ministerial acts, such as appraisals, valuations, calculations, or measurements are not so inherently doubtful as to constitute a proper subject for a submission. Consequently, as some exercise of the judicial faculty is necessary, when parties employ engineers, accountants, or other experts to determine the matter by measurement or calculation, their finding is not generally looked upon as an award.¹ On the other hand, in many cases the decisions of persons

of action, still a reference to arbitration will be binding on the parties thereto if there is a *bona fide* difference between them as to their rights.

But where the terms of the contract fixed a certain amount of money, as well as the time when it should be paid, it was held that an agreement to settle disputes by arbitration could not apply to a controversy arising out of the nonpayment of such certain sum. *Sutro Tunnel Co. v. Segregated Belcher Min. Co.*, 19 Nev. 121; *Old Saucelito Land, etc., Co. v. Commercial Union Assur. Co.*, 66 Cal. 255, *distinguished*.

So where the arbitrators are confined in their findings by the terms of the submission to a deed which clearly states the course of a certain boundary line, their decision is of no effect. *Coughran v. Alderete* (Tex. Civ. App. 1894), 26 S. W. Rep. 109.

1. Mere Ministerial Acts, Such as Calculations, Valuations, and Measurements—England.—*Carr v. Smith*, 5 Q. B. 128, 48 E. C. L. 128; *Goodyear v. Simpson*, 15 M. & W. 16; *In re Lee v. Hemingway*, 3 N. & M. 860, 28 E. C. L. 423; *Collins v. Collins*, 26 Beav. 306.

United States.—*Kelly v. Crawford*, 5 Wall. (U. S.) 785.

Illinois.—*McAuley v. Carter*, 22 Ill. 53; *Packard v. Van Schoick*, 58 Ill. 79; *Korf v. Lull*, 70 Ill. 420; *Norton v. Gale*, 95 Ill. 533, 35 Am. Rep. 173.

Maine.—*Mason v. Bridge*, 14 Me. 468, 31 Am. Dec. 66; *Oakes v. Moore*, 24 Me. 214, 41 Am. Dec. 379; *McKinney v. Page*, 32 Me. 513.

Massachusetts.—*Palmer v. Clark*, 106 Mass. 389; *Thayer v. Bacon*, 3 Allen (Mass.) 163, 80 Am. Dec. 59.

Mississippi.—*Atkinson v. Whitney*, 67 Miss. 655.

Missouri.—*Garred v. Macey*, 10 Mo. 161; *Curry v. Lackey*, 35 Mo. 394.

New Hampshire.—*Rochester v. Whitehouse*, 15 N. H. 468; *Hale v. Handy*, 26 N. H. 206.

New York.—*Davis v. Townsend*, 10 Barb. (N. Y.) 333; *Garr v. Gomez*, 9 Wend. (N. Y.) 649; *Terry v. Chandler*, 16 N. Y. 354, 69 Am. Dec. 707; *Vosburgh v. Teator*, 32 N. Y. 561.

Pennsylvania.—*Green, etc., Streets Pass. R. Co. v. Moore*, 64 Pa. St. 90.

Virginia.—*Condon v. South Side R. Co.*, 14 Gratt. (Va.) 302; *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. (Va.) 447.

Appraisals.—Where, in a written lease, there is an agreement for a renewal and to pay as rent for such renewal term a certain percentage upon the cash value of the premises to be determined by appraisers, it does not constitute a submission to arbitration. The appraisal will

be conclusive unless fraudulent, and the parties are not entitled to a notice of hearing. *Norton v. Gale*, 95 Ill. 533, 35 Am. Rep. 173.

Where parties have entered into a written agreement to surrender a leasehold at a certain time, for such sum as appraisers chosen for that purpose might determine it to be worth, it was held that this agreement was not technically a submission to arbitration within the meaning of the statute; that it was a contract for sale at a price to be fixed by a third person, and that suit was properly brought upon the contract of sale for the price so claimed and not upon the appraisement itself. *Leonard v. Cox*, 64 Mo. 32.

Where a contract contains a provision for the purchase of property at a valuation to be determined by the appraisement of third parties, it does not constitute an agreement for submission to arbitration, and the persons making the valuation are not subject to the rules governing arbitration. They may make their decision without being sworn, without giving notice to the parties affected, and without giving them an opportunity of being heard, unless such notice and hearing are required by express provisions of the contract or by reasonable implication. *California Annual Conference v. Seitz*, 74 Cal. 287.

Running Boundary Lines.—The proprietors of adjoining land entered into an agreement reciting that they were desirous of having their boundary line determined, and agreeing to employ a surveyor to run lines, and put up stakes to designate and mark each lot, each proprietor to pay the expenses proportionally. It was held that such agreement did not constitute a submission to arbitration so as to make lines run thereunder conclusive. *Thayer v. Bacon*, 3 Allen (Mass.) 163, 80 Am. Dec. 59.

Condition of Machinery Submitted to Opinion of Expert.—Where parties to an action for the amount due upon the purchase price of heating apparatus, which is claimed to be defective, enter into an agreement that it shall be decided by an expert, and made satisfactory to him, and when satisfactory, that the purchase price shall be paid, this is not a submission to arbitration of the matters in issue; more particularly where an independent suggestion outside of the terms of the stipulation was made by such expert and acquiesced in by the parties, and they afterwards consented to a reference of the issues. *Birdsall Co. v. Ayres* (Supreme Ct.), 50 N. Y. St. Rep. 242, 21 N. Y. Supp. 898.

Municipal Ordinance Fixing Terms for Use of Railroad Track.—Where the common council of a city reserved the right to settle the amount of the contribution to be made by each of two companies, jointly entitled by ordinance to the

appointed under such submissions have been held to be, either actually or in effect, awards.¹

use of a horse railroad, such determination is not an arbitration, and if it were, the approval of such action of the common council by the mayor would not make the determination void. *Jersey City, etc., R. Co. v. Jersey City, etc., Horse R. Co.*, 20 N. J. Eq. 61.

Calculation of Interest.—The administrator of an estate and the holder of a note against the deceased chose two persons to calculate the interest and to determine the amount. It was held that the persons so chosen were not arbitrators, and that their finding, being based on a misunderstanding of the legal effect of the note, might be set aside. *Grimes v. Blake*, 16 Ind. 160.

Reference by Congress of Mail Contractor's Claim to Postmaster-General.—So, where Congress referred the claims of a mail contractor to the postmaster-general, it was held not to be an arbitration, and that no action could be maintained on the determination where Congress repealed the referring act after the decision was made but before it was confirmed. *Chorpenning's Case*, 11 Ct. of Cl. 625.

Difference in Value between Two Slaves.—Where it was left to a third person to determine the difference in value between two slaves, who were exchanged, it was held that such a person was not an arbitrator so as to require an oath on his part before he could render his decision, there being no dispute between the parties. *Curry v. Lackey*, 35 Mo. 389.

A Landlord and Tenant entered into an agreement that the improvements made by the tenant during the term of his lease should be taken by the landlord, who was to pay for them such sum as might be determined by appraisers mutually chosen. It was held that this agreement was not a submission to arbitration, and that no notice to the parties was necessary before the appraisal, unless the agreement so provided. *Pearson v. Sander-son*, 28 Ill. App. 571, *Affirmed* in 128 Ill. 88.

Stipulation between Counsel.—Where, upon the trial of a case, the parties thereto entered into a stipulation by their counsel that the only issue to be tried and determined was whether or not a certain certificate was made in accordance with the government certificate, and that no objection would be made to the complaint or the jurisdiction of the court, and that judgment might be rendered by the court in favor of the party it should find entitled thereon, such stipulation was held not to constitute a submission to the arbitration of the judge; it had the effect only of limiting the issues to be tried. *Randall v. Burk Tp.*, 4 S. Dak. 337. See *Gwynn v. O'Hern*, 72 Pa. St. 29; *Hughes v. Peaslee*, 50 Pa. St. 257; *Walworth County Bank v. Farmers' L. & T. Co.*, 22 Wis. 231.

So, where there was No Distinct Submission, a verbal agreement between the parties to an action that their respective counsel should settle the differences between them was held not to constitute the counsel's decision an award. *Weichardt v. Hook*, 83 Pa. St. 434.

Award of Board of Trade Reversing Award of Special Committee.—And where an award was

made by the committee of appeals of the board of trade, reversing an award of the arbitration committee of such board, it was held that it did not determine the rights of the parties, but left them as they stood before the arbitration. *Redinond v. Bedford*, 40 Ill. 267.

Where a Contract for the Sale of Goods contained a stipulation that if the value of such goods could not be agreed on it should be assessed by three merchants, it was held that this stipulation was not an agreement for arbitration, but a sale, with the collateral agreement to render certain the value of the consideration, and that so construed it was valid and binding upon the parties. *Willington v. Veal*, 74 Ga. 755.

Ineffectual Attempt to Confer Authority upon Arbitrator.—Where, by the consent of the parties, an ineffectual attempt was made to confer upon an arbitrator authority to decide claims against an estate in a statutory proceeding in which he could not exercise jurisdiction, it was held that it had not the effect of converting the proceeding into an arbitration unless the intention to do so was clearly manifest. *Hovey v. Hovey*, 46 Hun (N. Y.) 71. See also *Kelly v. Adams*, 120 Ind. 340; *Johnson v. Parmely*, 17 Johns. (N. Y.) 129; *Camp v. Root*, 18 Johns. (N. Y.) 22; *Diedrick v. Richley*, 2 Hill (N. Y.) 271, *distinguished*.

Agreement to Waive Jury and Submit Question of Damages to the Court.—A stipulation entered into between the parties to an action for damages to property, to waive a jury, and that a designated judge shall determine the damages sustained, and that judgment shall be rendered for one-half of the damages as found by the judge, does not constitute such stipulation a submission to arbitration so as to cut off the right of appeal. *Brown v. Galesburg Pressed Brick, etc., Co.*, 132 Ill. 648.

1. *McAvoy v. Long*, 13 Ill. 147; *Illinois, etc., Canal v. Lynch*, 10 Ill. 521; *McAuley v. Carter*, 22 Ill. 53; *Korf v. Lull*, 70 Ill. 420; *Mason v. Bridge*, 14 Me. 468, 31 Am. Dec. 66; *Robbins v. Clark*, 129 Mass. 145. See *Leeds v. Burrows*, 12 East 1; *Palmer v. Clark*, 106 Mass. 389; *Flint v. Gibson*, 106 Mass. 391.

In *Collins v. Collins*, 26 Beav. 306, the Master of the Rolls said: "It appears to me that the case of *Leeds v. Burrows* (12 East 1) draws the proper and fit distinction between an arbitration in the proper sense of the term, and an appraisal or valuation, for valuation undoubtedly precludes differences in the proper sense of the term; it prevents differences, and does not settle any which have arisen."

Valuation of Improvements Made by Lessee.—By covenant in a lease for twenty-one years, it was agreed between the parties thereto that the improvements made by the lessee should be paid for by the lessor at the expiration of the term of the lease, according to the estimate of two persons chosen by the parties, who were, in case of their disagreement, to choose a third. It was held that this agreement was to be governed by the same rules as an ordinary submission to arbitration, and that

c. THERE MUST BE AN INTENTION TO BE BOUND.—The parties to the submission must clearly intend to be bound by the decision of the person called in, in order to constitute him an arbitrator.¹ Even then a mere valuer

the arbitrators chosen by the parties might nominate an umpire if they could not agree. *Van Cortlandt v. Underhill*, 17 Johns. (N. Y.) 405. See also *Graf v. Friedlander*, 33 La. Ann. 188.

Article Approved as Satisfactory by Third Party.—Where an agreement was entered into between two parties, that if an article furnished by one of them to the other should be approved as satisfactory by a third person his judgment should be conclusive, it was held that his decision would be binding upon the parties in the absence of fraud. *Baltimore, etc., R. Co. v. Brydon*, 65 Md. 223.

Reference of Law and Facts to the Court.—Where it was agreed between the parties to a suit, after evidence had been finished before a jury, that the court should take the evidence and after hearing counsel "shall determine all questions of law and fact, and the verdict shall then be entered as the verdict of the jury now impaneled, and the court to file an opinion and the evidence in the case," and the court did file an opinion finding the facts and the amount to be paid to the defendant, it was held that this reference of the facts and the law to the judge was in effect a submission to arbitration. *Gwynn v. O'Hern*, 72 Pa. St. 29.

A Note Contained a Stipulation that a certain sum should be paid, on the demand of a named person, as compensation for defects in goods sold, if, after three years use, they should dissatisfy him, the payment to rest solely upon his decision. It was held to be in effect a submission to the unconditional arbitration of the person named, and that his judgment was conclusive in the absence of fraud. *Tennessee Mfg. Co. v. Haines*, 16 R. I. 204. See *Cutler v. Wall*, 9 R. I. 264; *Walter A. Wood Reaping, etc., Mach. Co. v. Smith*, 50 Mich. 565; *McClure v. Briggs*, 58 Vt. 82, 56 Am. Rep. 557; *Singerly v. Thayer*, 108 Pa. St. 291.

Reference to Counsel without Naming Him or Specifying Time.—The parties to a dispute entered into an agreement to submit their differences to the arbitration of counsel, but no particular counsel was named, and no time was stated when the matter in controversy should be submitted. One of the parties agreed to pay according to the decision of counsel, and, in case no decision should be made, it was agreed that the other party should file a bill in equity, and that the first party would confirm such decree. It was held that this was an agreement to submit the matter to arbitration. *Percival v. Herbemont*, 1 McMull. (S. Car.) 59.

Agreement for Arbitration and Not Stipulation for Appraisal.—One of the stipulations in a contract was that, "if a satisfactory price cannot be agreed on between the parties, each shall select an arbitrator, and these shall select a third, who shall fix the price of the crusher plants, and whose decision shall be final." It was held that this was a submission to arbitration, and not a stipulation for an appraisal.

Missouri, etc., R. Co. v. Elliott, 56 Fed. Rep. 772. See *Robinson v. Templar Lodge*, 97 Cal. 62. And see further *Monongahela Nav. Co. v. Fenlon*, 4 W. & S. (Pa.) 205; *Faunce v. Burke*, 16 Pa. St. 469, 55 Am. Dec. 519; *Snodgrass v. Gavit*, 28 Pa. St. 224; *Mason v. Bridge*, 14 Me. 468, 31 Am. Dec. 66; *Oakes v. Moore*, 24 Me. 214, 41 Am. Dec. 379; *Garr v. Gomez*, 9 Wend. (N. Y.) 649; *Rochester v. Whitehouse*, 15 N. H. 468. Compare *Smith v. Boston, etc., R. Co.*, 36 N. H. 458; *Efner v. Shaw*, 2 Wend. (N. Y.) 567; *Van Cortlandt v. Underhill*, 17 Johns. (N. Y.) 405, 2 Johns. Ch. (N. Y.) 339; *Leonard v. House*, 15 Ga. 473; *Lauman v. Young*, 31 Pa. St. 306; *Peters v. Newkirk*, 6 Cow. (N. Y.) 103; *McMahon v. New York, etc., R. Co.*, 20 N. Y. 463; *Thomas v. West Jersey R. Co.*, 24 N. J. Eq. 468.

Submission to Appellate Tribunal of Secret Society.—A voluntary submission to appellate tribunals established by the order of Odd Fellows, made by a member of a subordinate lodge, is in the nature of a submission to arbitration, and the decision thereon is in the nature of an award and binding upon him where no misconduct or fraud is proved on the part of the appellate tribunal. *Robinson v. Templar Lodge*, 97 Cal. 62.

To Committee of Unincorporated Society.—Where the constitution of an unincorporated association provided that it should be the duty of the committee to take cognizance of, and exercise jurisdiction over, all claims and disputes between members, and that the decision of such committee should be final, it was held that, assuming that this admitted that the members assented to the constitution in such a manner as to establish a valid contract between them, all that could be claimed for such article was that it would have the same force and effect as an agreement to submit, and that such agreement was revocable. *Heath v. New York Gold Exchange*, 7 Abb. Pr. N. S. (N. Y. C. Pl.) 251.

To Committee of Board of Trade.—The terms of a submission referring a dispute to certain persons contained no reference to any official capacity of the arbitrators; but it was made as a fact to a committee of a board of trade, and, although the proceedings of such persons were not in accordance with the constitution and by-laws of such board, yet it was held that this was no objection to the validity of the award. *Stewart v. Waldron*, 41 Me. 486.

Submission by Church Members.—Where members of the same church agreed that their pastor should appoint three arbitrators, who were also members of the same church, to settle a dispute between them, and the arbitrators were so chosen, both parties being present and agreeing to abide by their award, it was held that the arbitration was not a "church matter," but that it was a binding award. *Jones v. Binns*, 27 Miss. 373.

1. Russell on Awards (6th ed.) 40; *Carr v. Smith*, 5 Q. B. 128, 48 E. C. L. 128.

is often not an arbitrator, unless a controversy existed between the parties on the matter prior to submitting it to his decision.¹

d. APPEALS TO THE RECOLLECTION.—An appeal to the recollection of a third person about past events is not a submission to arbitration.²

5. What may be Submitted.—*a. GENERAL RULE.*—Civil but Not Illegal or Criminal Matters.—All matters of a civil character which are in dispute, difference, or doubt between the parties, may be submitted by them to arbitration;³ but

Agreement to Abide by Award Implied.—A written agreement to submit need not necessarily contain a special agreement by the parties to abide by the arbitrator's award. If the parties agreed to submit, and do submit, their disputes to arbitration, and an award is made in accordance with such submission, the law will imply that there is an agreement to abide by such award. *Stewart v. Cass*, 16 Vt. 663, 42 Am. Dec. 534.

1. Leeds v. Burrows, 12 East 1; *Freeman v. Jeffries*, L. R. 4 Exch. 189; *In re Lee*, 3 N. & M. 860, 28 E. C. L. 423; *Scott v. Liverpool Corp.*, 28 L. J. Ch. 236; *Jenkins v. Betham*, 24 L. J. C. P. 94; *Turner v. Goulden*, L. R. 9 C. P. 57; *Collins v. Collins*, 28 L. J. Ch. 184, 26 Beav. 306.

Decision Not Settling Disputes but Preventing Them from Arising.—It has been held that a decision which does not settle disputes, but merely prevents them from arising, is not properly an award. *Bos v. Helsham*, L. R. 2 Exch. 72.

Building Contract.—In *Wadsworth v. Smith*, L. R. 6 Q. B. 332, it was held that a stipulation in a building contract which authorized disputes arising thereunder, in regard to defaults by the builder, to be decided by the architect, whose decision was to be final, was not a submission to arbitration within § 17 of the Common Law Procedure Act of 1854.

See further, *Ellis v. Hopper*, 28 L. J. Exch. 1; *Parr v. Winteringham*, 28 L. J. Q. B. 123; *Bexley Local Board v. West Kent Main Sewerage Board*, 51 L. J. Q. B. 456; *Graham v. Glover*, 25 L. J. Q. B. 10, 5 El. & Bl. 591, 85 E. C. L. 591.

Intention.—But where the terms of the submission are broad enough to include a judicial inquiry, and it is the intention of the parties to have the matter in dispute finally determined upon the evidence produced before the arbitrator, it will be deemed an arbitration, although its object is to determine the value of certain property or the amount of compensation to be paid. *In re Hopper*, 8 B. & S. 100, 36 L. J. Q. B. 97, L. R. 2 Q. B. 367; *Jebb v. McKiernan*, M. & M. 340, 22 E. C. L. 330, *distinguishing* *Leeds v. Burrows*, 12 East 1, note; *Oakes v. Moore*, 24 Me. 214, 41 Am. Dec. 379; *Branscombe v. Rowcliffe*, 6 C. B. 523, 60 E. C. L. 523; *Elvin v. Drummond*, 1 M. & P. 88, 4 Bing. 278, 13 E. C. L. 433.

2. When an Appeal is Made to the Recollection of a Third Person about past events, although the decision may be binding on those who make such appeal, it is not a submission to the award of an arbitrator. *Williams v. Wood*, 1 Dev. (N. Car.) 82; *Delesline v. Greenland*, 1 Bay (S. Car.) 458.

3. Matters of a Civil Nature.—Bac. Abr., Arb.,

A.; *Blake's Case*, 6 Coke 43; *Baker v. Townshend*, 1 Moore 120, *Morse on Arb.* 36, 53; *Finley v. Funk*, 35 Kan. 668; *Davenport v. Fulkerson*, 70 Mo. 417; *Stanwood v. Mitchell*, 59 Me. 121; *Linch v. Dacy*, 1 Keb. 848; *Hewitt v. Hewitt*, 1 Q. B. 110, 41 E. C. L. 460; *Wilkinson v. Page*, 1 Hare 276; *Waters v. Taylor*, 15 Ves. Jr. 10; *Round v. Hatton*, 2 Dowl. N. S. 446; *Allen v. Milner*, 2 C. & J. 47; *Prosser v. Goringe*, 3 Taunt. 426.

Pennsylvania Statutes.—All civil disputes are included within the words of the Pennsylvania statute of 1810, yet only those actions in which the judgment is for a specified thing or definite sum of money seems to have been within the intention of the legislature. An award merely that the defendant do account is bad. *Jones v. Stratton*, 4 S. & R. (Pa.) 76.

In *Primer v. Kuhn*, 1 Dall. (Pa.) 452, it was held that the construction of the clause of the Pennsylvania Defalcation Act of 1725, which provides that parties having accounts to produce against each other may refer them, etc., has extended the right and benefit of such reference to every other cause of action.

Damages for a Right of Flowage are a proper subject of statutory arbitration. Where the award agrees with the express terms of the submission, it is binding upon the parties. *Fitch v. Constantine Hydraulic Co.*, 44 Mich. 74. See *Harlow v. Marquette*, etc., R. Co., 41 Mich. 336.

Party Wall.—Where an agreement has been entered into for determining by arbitration the expense of building a party wall, it becomes binding upon the purchaser who joins in such arbitration. *Bedell v. Kennedy*, 109 N. Y. 153.

Nuisances.—Under *Iowa Code*, § 3416, which permits the submission to arbitration of "all controversies which might be the subject of civil action," it was held that the question whether a certain place was or was not kept as a nuisance, and whether or not it should be abated, might be submitted to arbitration. *Richards v. Holt*, 61 Iowa 529. See *Fallows v. Taylor*, 7 T. R. 471; *Dobson v. Groves*, 6 Q. B. 637, 51 E. C. L. 637; *Rex v. Moate*, 3 B. & Ad. 237, 23 E. C. L. 60; *Reg. v. Gore*, 8 D. P. C. 102; *Doddington v. Bailward*, 7 D. P. C. 640.

Partnership Matters.—It seems that where there is a submission by deed of all difficulties arising out of a partnership, the arbitrators may include payments made by one of the parties on account of the joint liabilities after the date of the submission. *Graham v. Graham*, 9 Pa. St. 254, 49 Am. Dec. 557.

In *Stanwood v. Mitchell*, 59 Me. 121, it was held that a claim by one partner against another, for a share of the profits, was the subject of a personal action and properly referable

matters of an illegal nature, or criminal proceedings instituted against one party at the instigation of the other, cannot be submitted, unless the criminal offense is of a personal character in which the injured person has a remedy by action as well as by indictment.¹

to arbitration under the *Maine Rev. Stat.*, c. 108, § 1.

Debts.—Debts which are termed certain, such as debts on bonds, arrears of rent under a lease, have been held not to be subject to arbitration, though they may be when joined with other matters which are uncertain. *Rolle Abr.*, Arb., R. 1, 2, 4; *Bac. Abr.*, Arb., A.; *Com. Dig.*, Arb., D. 3. See *Luddington v. White*, *Styles* 350, *Rolle Abr.*, Arb., R. 3, 5, 6; *Lumley v. Hutton*, *Rolle Abr.*, Arb., p. 1; *Sower v. Bradfield*, *Cro. Eliz.* 422; *Morris v. Creach*, 1 *Lev.* 292; *Coxall v. Sharpe*, 1 *Keb.* 937; *Blake's Case*, 6 *Coke* 44; *Gould's L.* 91, 92.

This principle has, however, long since been considered of no value. *Russell on Arb.* 4; *Godfrey v. Godfrey*, 2 *Mod.* 303.

One Item.—An item in a long account which is in dispute, or on which an action has been brought, may be picked out to be submitted by itself to the decision of an arbitrator. *McBride v. Hagan*, 1 *Wend. (N. Y.)* 326.

Penalty.—Where, under the statute, an action may be brought for a penalty by any one who may sue for it, until such action has been brought no one has such an interest in it as can be made the subject of arbitration. *Middleton v. Wilmington, etc.*, R. Co., 95 *N. Car.* 167.

Where a Lease of a Railway provided that differences between the parties "in relation to the construction of this agreement, or otherwise in reference to the rights of the parties under this lease," should be referred to arbitration, it was held that the damages alleged by the lessees to have been suffered by them in consequence of the false representations of the lessors to induce them to take the lease, were not a proper subject of arbitration. *Cincinnati v. Cincinnati S. R. Co.*, 6 *Ohio Cir. Ct. Rep.* 247. See *Brown v. Decker*, 142 *Pa. St.* 640; *Williams v. Shields*, 16 *Daly (N. Y.)* 178.

1. Illegal Matters.—*Russell on Awards* (6th ed.) 5; *Steers v. Lashley*, 6 *T. R.* 61; *Wohlenberg v. Lageman*, 6 *Taunt.* 251; *Aubert v. Maze*, 2 *B. & P.* 371; *Miller v. Robe*, 3 *Taunt.* 461; *Harrington v. Brown*, 9 *Allen (Mass.)* 579; *Partridge v. Hood*, 120 *Mass.* 403, 21 *Am. Rep.* 524. See *People v. Bishop*, 5 *Wend. (N. Y.)* 111; *Shaw v. Reed*, 30 *Me.* 105; *Shaw v. Spooner*, 9 *N. H.* 107, 32 *Am. Dec.* 348; *Hinds v. Chamberlin*, 6 *N. H.* 225; *Cameron v. McFarland*, 2 *Law Repos. (N. Car.)* 415; *Noble v. Peebles*, 13 *S. & R. (Pa.)* 319.

Where the Matters Submitted Are Clearly Illegal in their character, or such as cannot properly be the subject of a submission, the award itself is void, and no proceedings can be taken on it. *Steers v. Lashley*, 6 *T. R.* 61; *Thorpe v. Cole*, 4 *Dowl.* 457, 2 *C. M. & R.* 367; on error, 1 *M. & W.* 531.

An Award on an Illegal Contract is void. So held where a claim of a pension agent, who had charged more than the statute allowed,

was submitted. *Hall v. Kimmer*, 61 *Mich.* 269, 1 *Am. St. Rep.* 575.

The courts will, however, not open matters which have been closed by a general award, apparently good, on the ground of an illegal item in the account. *Morse on Arb.* 53; *Wohlenberg v. Lageman*, 6 *Taunt.* 251; *Miller v. Robe*, 3 *Taunt.* 461; *Aubert v. Maze*, 2 *B. & P.* 371; *Watts v. Brooks*, 3 *Ves. Jr.* 612.

In Criminal Matters.—In criminal matters, where a party has a remedy by action as well as by indictment, nothing can deter such party from referring the adjustment of the reparation he is entitled to, to arbitration, although a criminal prosecution may have been commenced. *Noble v. Peebles*, 13 *S. & R. (Pa.)* 319.

And it is in the discretion of the court to decide whether a personal satisfaction thus obtained will authorize a stay of the criminal proceedings. *Partridge v. Hood*, 120 *Mass.* 403, 21 *Am. Rep.* 524; *Com. v. Dowdican's Bail*, 115 *Mass.* 133; *State v. Hunter*, 14 *La. Ann.* 71.

In England the Old Rule that Criminal Matters Are Not Arbitrable applies universally in cases of felony. *Bac. Abr.*, Arb., A.; *Russell on Awards* (6th ed.) 10. See *Mason v. Watkins*, 2 *Vent.* 109; *Jones' Case*, 1 *Leon* 203; *Johnson v. Ogilby*, 3 *P. Wms.* 277; *Drage v. Ibberson*, 2 *Esp.* 643; *Nerot v. Wallace*, 3 *T. R.* 17; *Pool v. Bonsfield*, 1 *Campb.* 55; *Kirwan v. Goodman*, 9 *D. P. C.* 330; *Blake's Case*, 6 *Coke* 43b.

Offenses which Are of a Public Nature cannot be made the subject of arbitration. *Keir v. Leeman*, 6 *Q. B.* 308, 51 *E. C. L.* 308, 8 *Jur.* 824; *Edgecombe v. Rodd*, 5 *East* 294. An indictment for perjury cannot be referred. *Reg. v. Hardey*, 14 *Q. B.* 529, 68 *E. C. L.* 529; *Collins v. Blanter*, 2 *Wils.* 341.

See further, *Reg. v. Blakemore*, 14 *Q. B.* 544, 68 *E. C. L.* 544, *reversing Rex v. Cotesbatch*, 2 *D. & R.* 265, 16 *E. C. L.* 85; and see *Rex v. Cotton*, 3 *Campb.* 444.

But an Agreement to Settle a Misdemeanor has been held valid. *Drage v. Ibberson*, 2 *Esp.* 643; *Johnson v. Ogilby*, 3 *P. Wms.* 277; *Blanchard v. Lilley*, 9 *East* 497.

And where the Criminal Offense is of a Personal Character, in which the injured person has a remedy by action, as well as by indictment, a reference of the question of reparation to arbitration is proper, although a criminal prosecution may have been commenced. *Baker v. Townshend*, 1 *Moore* 120, 7 *Taunt.* 422, 2 *E. C. L.* 422. See further, *Rex v. Bardell*, 5 *Ad. & El.* 619, 31 *E. C. L.* 403, 1 *Chitty's Stat.* 33, note (b); *Elworthy v. Bird*, 2 *Sim. & S.* 372, 2 *Bing.* 258, 9 *E. C. L.* 404, 9 *Moore* 430; *Blake's Case*, 6 *Coke* 43, 4 *Black Comm.* (15th ed.) 363; *R. v. Coombs*, *Kyd on Awards* 64; *R. v. Rant*, *Kyd on Awards* 64; *Horton v. Benson*, *Freem.* 204; *Fallows v. Taylor*, *Peake's Add. Cas.* 155, 7 *T. R.* 471; *Edgecombe v. Rodd*, 5 *East* 294.

6. MATTERS REGARDING REAL ESTATE.—Formerly, the submission of questions affecting the title to real property was looked upon with jealousy,¹ but now, for the most part, all matters in regard to real estate, including questions of title,² may be the subject of arbitration.³

Compromises after Conviction for Misdemeanor have sometimes been sustained as legal. *Beeley v. Wingfield*, 11 East 46; *Kirk v. Strickwood*, 4 B. & Ad. 421, 24 E. C. L. 91; *Goodal v. Lowndes*, 8 Justice of the Peace 771, Nov. 23, 1844 Q. B.

See further, *Rex v. Harding*, 2 Salk. 477; *Baker v. Townshend*, 7 Taunt. 422, 1 Moore 120.

Consent of Court.—It appears that in such criminal cases, as a submission to arbitration is legal the consent of the court in which the indictment is pending must first be obtained, although it has not been so expressly decided. *Russell on Awards* (6th ed.) 10–14. See *R. v. Rant*, Kyd on Awards 64; *R. v. Coombs*, Kyd on Awards 64; *Reg. v. Hardey*, 14 Q. B. 529, 68 E. C. L. 529; *Rex v. Bardell*, 5 Ad. & El. 619, 31 E. C. L. 403, 5 Dowl. 238.

Costs in Criminal Prosecution.—In *Harrington v. Brown*, 9 Allen (Mass.) 579, it was held that the arbitrators had no power to award in regard to the costs of a criminal prosecution instituted by one party against the other, although growing out of the matter in dispute, but that the payment of the principal sum awarded would be enforced, although they had exceeded their authority in this respect.

1. Questions Affecting Real Estate.—*Russell on Awards* (6th ed.) 4; *Rolle Abr.*, Arb., B. 14, E. 2; *Com. Dig.*, Arb., D. 3; 3 Black Comm. (15th ed.) 15.

Later, the rule of law came to be that where the parties might, by their own act, have transferred real property, or exercised any act of ownership with respect to it, they might refer any dispute concerning it to the decision of a third person, who could order the same acts to be done which the parties themselves might do by their own agreement. *Knight v. Burton*, 6 Mod. 231; *Trusloe v. Yewre*, Cro. Eliz. 223, 2 Dyer 183, note. See 2 *Petersdorff Abr.* 99, 100, note; *Doe v. Rosser*, 3 East 15; *Milnes v. Gery*, 14 Ves. Jr. 400; *Norton v. Mascall*, 2 Vern. 24; *Blundell v. Brettargh*, 17 Ves. Jr. 234; *Hall v. Hardy*, 3 P. Wms. 187; *McNeil v. Magee*, 5 Mason (U. S.) 244; *Bouck v. Wilber*, 4 Johns. Ch. (N. Y.) 405; *Jones v. Boston Mill Corp.*, 6 Pick. (Mass.) 148; *Shelton v. Alcox*, 11 Conn. 240; *Carey v. Wilcox*, 6 N. H. 177; *Page v. Foster*, 7 N. H. 392.

2. *Akely v. Akely*, 16 Vt. 450.

Where Questions of Title cannot be Submitted.—Arbitrators acting under the provisions of *Maine* Rev. Stat., c. 108, have no jurisdiction of a claim for the specific performance of a contract for the purchase of real estate, although such claim has been formally submitted to them by both parties. *Butler v. Mace*, 47 Me. 423. But a question in regard to land which does not involve the title may be submitted to arbitration under this statute. *Quinn v. Besse*, 64 Me. 366.

A submission under the *Maine* statute which authorizes submissions before a justice,

does not authorize a decision upon the title to real estate. *McNear v. Bailey*, 18 Me. 251; *Fryeburg Canal v. Frye*, 5 Me. 38.

A dispute as to the ownership of land which is claimed by two adjoining owners, and which is expressly conveyed to each in fee in his deed, cannot be submitted to the decision of arbitrators under *How. Stat. (Michigan)*, § 8475, which provides that a dispute about the boundaries of land may be submitted to arbitration, but not the claim of any person to an estate in fee in land. *Lang v. Salliotte*, 79 Mich. 505.

No submission can be made under the statute concerning arbitrations, 2 *New York Rev. Stat.* 541, § 2, of claims which involve the titles to land whether in fee or for life, but this means legal titles only, and does not include the claims of those who are equitably entitled to have the lands conveyed to them in fee. *Olcott v. Wood*, 15 Barb. (N. Y.) 644, affirmed in 14 N. Y. 32.

It is not lawful to submit to arbitration a question as to whether or not property belonging to a religious corporation shall be sold, and an award made under such a submission directing a sale is void, except on consent of court upon a proper application, as such corporations have no power to sell. *Wyatt v. Benson*, 23 Barb. (N. Y.) 327, 4 Abb. Pr. (N. Y.) 182.

The *Utah* Code of Civil Procedure, 1884, § 1125, provides that all disputes which are made the subject of a civil action, except those involving a question of title to real property in fee or for life, may be submitted to arbitration. Where a submission of "certain matters in controversy, in relation to the title to a certain piece of land," was made, it was held to be invalid. *Thygerson v. Whitbeck*, 5 Utah 406.

In *Hubbell v. Bissell*, 13 Gray (Mass.) 298, it was held that a question as to how much a lessor shall pay a lessee for the surrender of his lease at a future day, cannot be referred to arbitration by a submission entered into under a provision of the *Massachusetts* Rev. Stat., c. 114. See also cases in next note.

3. *England.*—*Downs v. Cooper*, 2 Q. B. 256, 42 E. C. L. 663; *Doe v. Rosser*, 3 East 15; *Wrightson v. Bywater*, 3 M. & W. 199; *Boodlee v. Davies*, 3 Ad. & El. 200, 30 E. C. L. 73; *Allenby v. Prondlock*, 4 D. P. C. 54; *Ross v. Clifton*, 9 D. P. C. 356.

United States.—*Chicago*, etc., R. Co. v. Stewart, 19 Fed. Rep. 5.

California.—*Blair v. Wallace*, 21 Cal. 317.

Kansas.—*Finley v. Funk*, 35 Kan. 668 (*Stigers v. Stigers*, 5 Kan. 652, referred to and disapproved).

Kentucky.—*Shackelford v. Purket*, 2 A. K. Marsh. (Ky.) 435, 12 Am. Dec. 422.

Maine.—*McNear v. Bailey*, 18 Me. 251; *Philbrick v. Preble*, 18 Me. 255, 36 Am. Dec. 718.

Massachusetts.—*Penniman v. Rodman*, 13 Met. (Mass.) 382; *Jones v. Boston Mill Corp.*,

A Specific Submission of Such Matters is Not Required.—A general submission will include questions relating to real estate as well as those in regard to personalty.¹

The Rule is that Questions Involving Title to Realty must be submitted by deed;² but such submissions are nicely construed, the courts, as a general rule, requiring that the precise point of title should be involved, otherwise

4 Pick. (Mass.) 507, 16 Am. Dec. 358; *Clark v. Burt*, 4 Cush. (Mass.) 396.

Michigan.—*Fitch v. Constantine Hydraulic Co.*, 44 Mich. 74.

Mississippi.—*McMullen v. Mayo*, 8 Smed. & M. (Miss.) 298.

New Hampshire.—*Carey v. Wilcox*, 6 N. H. 177; *Page v. Foster*, 7 N. H. 392.

New York.—*Wiles v. Peck*, 26 N. Y. 42; *Byers v. Van Deusen*, 5 Wend. (N. Y.) 268; *Munro v. Alaire*, 2 Cai. (N. Y.) 320; *People v. McGinnis*, 1 Park. Cr. Cas. (N. Y. Supreme Ct.) 387; *Cox v. Jagger*, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522; *Sellick v. Addams*, 15 Johns. (N. Y.) 197.

Pennsylvania.—*McCracken v. Clarke*, 31 Pa. St. 498; *Austin v. Snow*, 2 Dall. (Pa.) 157; *Davis v. Havard*, 15 S. & R. (Pa.) 165, 16 Am. Dec. 537.

Vermont.—*Akely v. Akely*, 16 Vt. 450.

A Question between Landlord and Tenant, in regard to waste, may be submitted. *Hunter v. Rice*, 15 East 100.

So also may a Partition of the lands of joint tenants, or of tenants in common, be submitted. *Knight v. Burton*, 6 Mod. 231; *Johnson v. Wilson*, Willes 248.

Question of Compensation for Right of Way.—In *Knoche v. Chicago, etc., R. Co.*, 34 Fed. Rep. 471, it was held that the amount of compensation to be paid for land taken for a railroad right of way was a proper subject for submission to arbitration.

Claim on Proceeds of Sale of Land.—In *Palmer v. Davis*, 28 N. Y. 242, where an agreement to submit recited that a certain person and his wife or one of them claimed an "interest" in a certain farm "or the proceeds thereof," and it did not appear that this was a claim in fee or for life to the farm, but the evidence showed that it was a claim for part of the proceeds of sales made of portions of the land, it was held that it was not a submission of the "claim of any person to any estate in fee or for life to real estate" within the exceptions of 2 *New York Rev. Stat.* 541, § 2, respecting arbitration.

Right to Mill and Lumber—Parol Submission and Award.—If the contract as to real estate made between the parties to an award is itself binding, a parol submission and award in regard to such real estate will be binding, but otherwise not. Consequently, where the "right to a mill and lumber" was submitted to arbitration by parol, and they made a parol award, the award was held invalid. *McMullen v. Mayo*, 8 Smed. & M. (Miss.) 298.

Local Statutes.—It is necessary to consult the local statutes for special provisions in regard to the submission to arbitration of questions involving the title to real estate, as in some jurisdictions such submissions are not allowed. See *Spencer v. Winselman*, 42 Cal. 479; *Lang v. Salliotte*, 79 Mich. 505; and note 2, p. 559.

Ejectments.—An ejectment suit may be submitted to arbitration. *McCracken v. Clarke*, 31 Pa. St. 498.

It has been the constant usage in *Pennsylvania* to refer actions of ejectment to the decision of arbitrators. *Austin v. Snow*, 2 Dall. (Pa.) 157; *Harvey v. Snow*, 1 Yeates Pa. 156; *Duer v. Boyd*, 1 S. & R. (Pa.) 203.

Where a pending ejectment suit was referred to arbitrators, it was held that the submission was valid and the award made thereunder enforceable by action instead of by an entry of judgment, although the submission was by parol and was made by the real plaintiff in interest only, while there were also nominal plaintiffs who did not join. *Griggs v. Seeley*, 8 Ind. 264.

In *Blanchard v. Murray*, 15 Vt. 548, it was held that an ejectment suit and a dispute in regard to the title to land might be submitted to arbitration.

Boundary.—So may questions about a boundary line be submitted. *Stout v. Woodward*, 71 N. Y. 590; *Ryder v. Dodge*, 14 N. Y. Wkly. Dig. 84; *Sellick v. Addams*, 15 Johns. (N. Y.) 197; *Robertson v. M'Niel*, 12 Wend. (N. Y.) 578; *Davis v. Havard*, 15 S. & R. (Pa.) 165, 16 Am. Dec. 537; *Taylor v. Parry*, 1 M. & G. 604, 39 E. C. L. 569; *Page v. Foster*, 7 N. H. 392; *Jones v. Boston Mill Corp.*, 6 Pick. (Mass.) 148, 4 Pick. (Mass.) 507; *Lang v. Salliotte*, 79 Mich. 505.

Where parties enter into an agreement to settle by arbitration the boundary line between their respective lands they are bound by an award made in pursuance of such a submission. *Jones v. Dewey*, 17 N. H. 596.

In *Aldrich v. Jessiman*, 8 N. H. 516, it was held that an award regarding the boundaries of land, in order to be binding, should be so distinct as to enable an officer to mark out its limits by metes and bounds and give possession of the premises.

Where a parol submission has been made of a dispute concerning a boundary line the award of the arbitrators, in pursuance of such submission, is conclusive on the parties. *Bowen v. Cooper*, 7 Watts (Pa.) 311.

In *Smith v. Bullock*, 16 Vt. 592, it was held that an award of arbitrators made in regard to the boundary line between adjoining lands, made upon an oral submission, has the same effect as a parol agreement between the parties themselves in reference to such boundary, and that the award was not conclusive unless acquiesced in for fourteen years.

1. Specific Submission Not Necessary—General Submission Sufficient.—*Munro v. Alaire*, 2 Cai. (N. Y.) 320; *Sellick v. Addams*, 15 Johns. (N. Y.) 197; *Byers v. Van Deusen*, 5 Wend. (N. Y.) 268; *McNear v. Bailey*, 18 Me. 251; *Penniman v. Rodman*, 13 Met. (Mass.) 382.

2. See *supra*, this title, *Oral Submission*.

submissions which are not under seal will be sustained.¹

c. QUESTIONS OF, AND ACTIONS AT, LAW.—Questions of Pure Law may be submitted to the decision of an arbitrator, either directly or incidentally.²

All Actions of Law and Suits in Equity may be submitted to arbitration.³

1. Situation of Land in Dispute—Not the Title.—Where the matter in dispute was the situation of a lot, not the title thereto, a submission by deed was not required. *Jackson v. Gager*, 5 Cow. (N. Y.) 383.

Question as to Damages.—So a submission by deed was not required where a question as to the amount of damages in a dispute in regard to real estate did not involve the title. *Carson v. Earlywine*, 14 Ind. 256; *Byrd v. Odem*, 9 Ala. 755.

Or where the Demand was for Flowage.—*Frye-burg Canal v. Frye*, 5 Me. 38.

Or for Damages for an Incumbrance.—*Snodgrass v. Smith*, 13 Ind. 393.

Or where the Price of Land Only is in Dispute.—*Davy v. Faw*, 7 Cranch (U. S.) 171.

See further, to the same effect, *French v. Richardson*, 5 Cush. (Mass.) 450; *Mitchell v. Bush*, 7 Cow. (N. Y.) 185; *Palmer v. Davis*, 28 N. Y. 242; *Weston v. Stuart*, 11 Me. 326.

2. Construction of Will.—An arbitrator may be called upon to determine the effect of a will. *Steff v. Andrews*, 2 Madd. 5.

Or to Construe an Act of Parliament.—*Price v. Hollis*, 1 M. & S. 105.

Or to Determine a Person's Liability on a Promissory Note.—*Wilkinson v. Page*, 1 Hare 276.

In an Action for the Penalty of a Contract under Seal, the amount equitably due may be determined by a referee. *Phoenix Mut. L. Ins. Co. v. Clark*, 59 N. H. 561.

3. Russell on Awards (6th ed.) 4.

Actions by Informers.—It is doubted in *England* whether actions upon penal statutes by common informers may be determined by arbitration. *Morse on Arb.* 54; *Russell on Awards* (6th ed.) 4; *Stat. 18 Eliz.*, c. 5.

Cross-actions.—As to the reference of cross-actions, see *Hart v. Trotter*, 4 Wend. (N. Y.) 198; *Codwise v. Hacker*, 2 Cal. (N. Y.) 251.

Suits in Divorce Courts.—Questions within the cognizance of the ecclesiastical courts have sometimes, in *England*, been submitted to arbitration. See *Bac. Abr.*, Arb., A; *Soilleux v. Herbst*, 2 B. & P. 444; *Bateman v. Ross*, 1 Dow 235; *Hooper v. Hooper*, 29 L. J. Mat. Cas. 59, 1 S. & T. 219.

Civil Proceedings at Quarter Sessions in England.—See *Russell on Awards* (6th ed.) 8; *R. v. Natland*, 3 Burr. S. C. 793; *R. v. J. J. Northampton*, 2 Bott., pl. 936, Cald. 30; *Rex v. Harding*, 2 Salk. 477; *Leicester Waterworks Co. v. Barrow-on-Soar Assessment Com.*, 4 Q. B. Div. 18; *Thorpe v. Cole*, 4 Dow. 457, 2 C. M. & R. 367, 1 M. & W. 531; *London, etc., R. Co. v. Bedford*, 17 Q. B. 978, 79 E. C. L. 978.

Rule in United States.—In *Newcomb v. Wood*, 97 U. S. 581, it is held that the power of the court, by consent of the parties, to appoint referees, and refer to them a pending cause, is incident to all judicial administration where the right exists to determine the facts,

as well as to pronounce what the law is. See the title *REFEREES AND REFERENCES*.

Ohio.—Any issues, whether of fact or of law, may be referred to referees, by 281 of the Code of Ohio.

Iowa.—Matters cognizable in a court of equity may, as well as those triable in a court of law, be submitted to arbitration under the term "civil actions," under the *Iowa Code of Procedure*, § 2098. Civil actions under the code include everything except cases under the criminal jurisdiction of the courts. *Tomlinson v. Hammond*, 8 Iowa 40.

In *Higgins v. Kinneady*, 20 Iowa 474, it was held that parties to a pending suit may submit to arbitration any and all matters involved in such suit by agreement and without order of court. See *Fink v. Fink*, 8 Iowa 313.

Maryland.—Where, in a case which has been referred to arbitration, the declaration presents a case cognizable in a court of law, it is not necessary, in order to support the jurisdiction of the court, that the matters in controversy which are submitted to and decided by the arbitrators should be properly subjects of common-law jurisdiction. *Caton v. MacTavish*, 10 Gill & J. (Md.) 192. See *State v. Jones*, 2 Gill (Md.) 49.

New Hampshire.—Gen. Laws, c. 251, § 1, authorize the submission to arbitration of "all controversies which may be the subject of a personal action." It was held that this provision did not render invalid a combined submission of subjects of real and personal actions. *Dorr v. Hill*, 62 N. H. 506.

New York.—It seems that an order of reference may be had in an action by an attorney for professional services. *Perry v. Rollins*, 56 How. Pr. (N. Y. Supreme Ct.) 242. See *Martin v. Windsor Hotel Co.*, 10 Hun (N. Y.) 304; *Flanders v. Odell*, 16 Abb. Pr. N. S. (N. Y. Supreme Ct.) 247.

Pennsylvania.—In *Henderson v. Walker*, 2 Grant's Cas. (Pa.) 36, it was held that parties to an action pending may refer it to arbitration under section 6 of the Pennsylvania Act of 1836, and include within the terms of the submission the subject of another action, whether such action be already brought or not. See *Remington v. Morris*, 2 Grant's Cas. (Pa.) 457. In *Pettit v. Wingate*, 25 Pa. St. 74, it was held that an action on the recognizance of bail for stay of execution may be referred to arbitrators under the provisions of the Pennsylvania Compulsory Arbitration Act.

In *Carpentier v. Delaware Ins. Co.*, 2 Binn. (Pa.) 264, it was held that suits pending in the Supreme Court might have been arbitrated under the Pennsylvania Arbitration Act of 1809, but the appeal must have been to the Common Pleas only.

In *Todd v. Rough*, 10 S. & R. (Pa.) 18, it was held that several distinct suits between the same parties may all be referred to the same persons, and that a rule may be taken in

When Submission may be Made.—And an action may be submitted at any time from the issuing of the writ¹ to the trial,² and even after the verdict.³

d. DOWER.—A claim of dower may be properly submitted to arbitration.⁴

e. MATTERS REFERRED BY STATUTE.—In *England*, in certain cases, where private persons cannot deal with their lands as they might wish because of the disability of some of the parties in interest to make contracts, or because of some public right affecting the property and preventing any alteration in it, the authority of Parliament is sometimes sought for the submission to arbitration of all the interests concerned, both public and private.⁵

6. Effect of Agreement to Submit—*a.* CASES PENDENTE LITE—(1) *General Rule—What Included.*—A case may be submitted to arbitration *pendente lite*, either by rule of court under the statutes, or by voluntary agreement of the parties. The submission in such a case includes all the questions of law and fact involved in the suit at the time of the submission, and all amendments which have been made, or could be allowed, so as to make the subject before

any one of the suits and an award made upon it separately from the others.

In *Stout v. Com.*, 2 Rawle (Pa.) 341, it was held that an action upon an arbitration bond may be submitted to arbitration.

In *Hill v. Crawford*, 8 S. & R. (Pa.) 477, it was held that a scire facias on the judgment upon an award might be submitted to arbitration.

In *Gordon v. Com.*, 10 Watts (Pa.) 443, it was held that an action upon an official bond of a sheriff might be referred to arbitration under the Pennsylvania Act of 1836, § 68.

Georgia.—A pending suit may be submitted under the Georgia Act of 1856. *Dulin v. Caldwell*, 29 Ga. 362.

Kentucky.—An order of submission of a controversy in a pending suit, when no suit is in fact pending, renders an award made under such an order void. *Galloway v. Hill*, 4 Bibb (Ky.) 475.

Actions which cannot be Submitted.—In *Lowrey v. Tracey*, 6 W. & S. (Pa.) 493, it was held that a judgment opened, and the defendant let into his defense on the merits, was not an action pending such as was subject to the provisions of the Compulsory Arbitration Act.

In *Taggart v. Fox*, 1 Grant's Cas. (Pa.) 190, it was held that a suit in equity commenced by bill, or a case where a judgment by default has been opened on terms, or an action on the bail bond, or a cause which has been brought to an issue in law by demurrer, cannot be submitted to arbitration. But see the following English cases: *Ching v. Ching*, 6 Ves. Jr. 282; *Mathews v. Davis*, 1 Dowl. N. S. 679; *Young v. Walter*, 9 Ves. Jr. 364.

A claim against a city for damages done to land by changing the grade of a street does not come within the provision of *Massachusetts* Pub. Stat., c. 188, providing for the submission to arbitration of all controversies which may be "the subject of a personal action at law or of a suit in equity." *Osborn v. Fall River*, 140 Mass. 508. See *Henderson v. Adams*, 5 Cush. (Mass.) 610.

An action for the recovery of mining ground on public land is, in *California*, "a question of title to real property in fee," and, therefore, cannot legally be submitted to arbitration under section 380 of the Cal. Prac. Act, and if

submitted, an award and judgment thereon will be set aside on motion. *Spencer v. Winselman*, 42 Cal. 483.

1. *Rogers v. Dallimore*, 6 Taunt. 111; *Wynne v. Edwards*, 1 D. & L. 976.

2. *Allenby v. Proudlock*, 4 D. P. C. 54.

3. *Thompson v. Jennings*, 10 Moore 110, 17 E. C. L. 137.

Judgments.—Whether a judgment has been properly obtained, whether it is erroneous or void, or whether it has been satisfied, may be submitted to the decision of an arbitrator. *Barry v. Grogan*, 16 W. R. 727.

4. *Question as to Dower.*—*Cox v. Jagger*, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522; *Green v. Ford*, 17 Ark. 586.

Owelry.—A wife's claim to owelry of partition may properly be submitted to arbitration by her husband. *Strawbridge v. Funstone*, 1 W. & S. (Pa.) 517.

5. *Russell on Awards* (6th ed.) 6.

The laying out of public roads, the inclosing of commons, the defining of boundaries, the allotment of lands, the commuting of titles, the determining compensation for rights of common, are frequently determined in this way by arbitration. See *Rex v. Nockolds*, 1 Ad. & El. 245, 28 E. C. L. 79; *Doe v. Saunder*, 5 Ad. & El. 664, 31 E. C. L. 404; *Johnson v. Hodgson*, 8 East 38; *Willoughby v. Willoughby*, 4 Q. B. 687, 45 E. C. L. 687.

Various statutes have enlarged the class of cases which may or must be determined in this way by arbitration. See 8 & 9 Vict., c. 18; 10 & 11 Vict., cc. 14, 17, 27, 38, 65; 9 & 10 Vict., cc. 16, 95; 13 & 14 Vict., c. 83; 22 & 23 Vict., c. 59; 21 & 22 Vict., c. 98; and others. See further, *Clarence R. Co. v. Great North of England, etc.*, R. Co., 13 M. & W. 706; *Llanelly R., etc., Co. v. London, etc., R. Co.*, L. R. 8 Ch. 948, L. R. 7 H. L. 550; *Knowles v. Holden*, 24 L. J. Exch. 223.

Under the English Arbitration Act, 1889, § 52 & 53 Vict., c. 49, § 14, there is special provision made for the reference by the court or a judge of matters involving a "prolonged examination of documents," a "scientific or local examination," or where the "question in dispute consists wholly or in part of matters of account."

the arbitrators as nearly as possible like the subject-matter of the suit without regard to form or to the technicalities of pleading.¹

Jury Trial Waived.—Where the parties submit a question to arbitration they thereby waive a jury trial, and all questions of fact arising in the inquiry.²

Failure of Arbitration by Fault of One of the Parties.—They are bound by the submission;³ but where the arbitration fails wholly because of the fault of one of

1. Submission of Cases Pending—What Matters Embraced—Kentucky.—*Newton v. West*, 3 Metc. (Ky.) 24.

Louisiana.—*Amet v. Boyer*, 36 La. Ann. 266.

Maine.—*Cushing v. Babcock*, 38 Me. 452.

Massachusetts.—*Coffin v. Cottle*, 4 Pick. (Mass.) 454; *Page v. Monks*, 5 Gray (Mass.) 492. See *Forseth v. Shaw*, 10 Mass. 253.

New York.—*Lee v. Tillotson*, 24 Wend. (N. Y.) 337, 35 Am. Dec. 624; *Renouil v. Harris*, 2 Sandf. (N. Y.) 641; *Price v. Brown*, 98 N. Y. 388.

Vermont.—*Eddy v. Sprague*, 10 Vt. 216; *Maxfield v. Scott*, 17 Vt. 634; *Davis v. Campbell*, 23 Vt. 236; *Briggs v. Oaks*, 26 Vt. 138; *Waterman v. Connecticut, etc.*, *Rivers R. Co.*, 30 Vt. 610, 73 Am. Dec. 326.

See *Lyndon Granite Co. v. Farrar*, 53 Vt. 587; *Bellony v. Flight*, 6 Taunt. 419; *Jones v. Blalock*, 31 Ala. 180.

Other Matters may be Included by Stipulation.—No new matter foreign to the case under submission may be added except when expressly included in the submission, but extra provisions may so be included if they are not in violation of the law. So, where the rule of court requires an award of the majority of the arbitrators, the submission may require a unanimous award. *Merrill v. Gold*, 1 Cush. (Mass.) 457; *Berkshire Woollen Co. v. Day*, 12 Cush. (Mass.) 128; *Anderson v. Farnham*, 34 Me. 161; *Harmon v. Jennings*, 22 Me. 240; *Henderson v. Walker*, 2 Grant's Cas. (Pa.) 36; *Bemus v. Quiggle*, 7 Watts (Pa.) 363; *Smith v. Kincaid*, 7 Humph. (Tenn.) 28; *Fitzgerald v. Fitzgerald*, Hard. (Ky.) 235; *Harrison v. Wortham*, 8 Leigh (Va.) 296.

A General Submission made pendente lite includes all matters in dispute at the time of the submission, not at the time of the initiation of the suit. *Woods v. Page*, 37 Vt. 252.

Where a Case is Cognizable at Common Law the power of the common-law courts is not taken away because matters not cognizable at common law were introduced before the arbitrators at the hearing. *Caton v. MacTavish*, 10 Gill & J. (Md.) 192.

Consent of Parties.—A submission is irregular and void, when it is made pending a suit, without the consent of all the parties whose interests might be affected by the award. *Gregory v. Boston Safe Deposit, etc., Co.*, 36 Fed. Rep. 408.

By-laws of New York Produce Exchange.—The fact that a suit is pending in the courts does not prevent a person from submitting the same cause to arbitration under the by-laws of the New York Produce Exchange. *Hurst v. New York Produce Exchange*, 100 N. Y. 605.

Where an Agreement in Pais, Made pending an Action, has been entered into to refer all

demands to arbitration, it will not authorize a judgment on the award, but the arbitrator's award may be used on the trial of the action to ascertain the damages to which the plaintiff is entitled. *Eaton v. Arnold*, 9 Mass. 519.

Agreement that Submission and Award be Made Rule of Court.—In *Moore v. Austin*, 85 N. Car. 179, it was held that an agreement of the parties entered into pending a suit to submit the matter in controversy between them to arbitration, the agreement further specifying that the submission and award should be made a rule of court, will not constitute in fact such a rule as will authorize an entry of judgment in conformity to the award. See *Lusk v. Clayton*, 70 N. Car. 184; *Simpson v. McBee*, 3 Dev. (N. Car.) 531.

Submission of Separate Actions.—It has been held that where distinct actions are pending and the parties intend to refer them, all the actions must be consolidated or a rule entered in one that all matters in dispute between the parties shall be submitted. If a consolidation is made by the arbitrators, their award will be void. *Craig v. Craig*, 9 N. J. L. 198; *Groff v. Musser*, 3 S. & R. (Pa.) 262.

But see *Brown v. Scott*, 1 Dall. (Pa.) 145, where the contrary was held. *Shippen, Prest., dissenting.*

2. Waiver of Trial by Jury.—*Spencer v. Curtis*, 57 Ind. 221; *Milner v. Noel*, 43 Ind. 324.

Where a party submits a question to arbitration, he thereby waives his right to a trial by jury as to the matters in controversy, and all questions of fact arising in the inquiry as to whether the award should be accepted, rejected, or recommitted, must be decided by the court to which the award is returned. *Boydin v. Lamb*, 152 Mass. 416.

After a reference has been once made by consent of the parties, neither of them can afterwards accept or have a jury trial. A motion must be made to set aside the report as in case of a verdict for proper legal cause. *Beattie v. David*, 40 N. J. L. 102.

See, as to the Effect of a Submission in a *Replevin Suit*, *Perrigo Gold Min., etc., Co. v. Grimes*, 2 Colo. 651.

3. Parties Bound by the Submission.—Where the parties to an action have entered into an agreement made a rule of court submitting the action and all demands to arbitrators, with an agreement that they shall proceed *ex parte*, and that judgment shall be entered on their report, neither party can rescind the rule, nor can the plaintiff discontinue the action pending the rule. *Haskell v. Whitney*, 12 Mass. 47; *Dexter v. Young*, 40 N. H. 130; *Monroe Bank v. Widner*, 11 Paige (N. Y.) 529, 43 Am. Dec. 768; *Cumberland v. North Yarmouth*, 4 Me. 459; *Frets v. Frets*, 1 Cow. (N. Y.) 335.

The power of the referees to proceed *ex parte*

the parties, the other is not obliged to enter into a new agreement to submit.¹

Statute of Limitations.—A submission has the effect of taking the subject-matter of the dispute out of the statute of limitations.²

(2) *As a Discontinuance*—**Rule Stated.**—Where the submission is statutory, or made a rule of court, it is but a continuation of the proceedings in court under another form; but in all cases not referable under the statute, where the parties submit the case to arbitration without any saving clause, or stipulation that the submission shall be made a rule of court, or that judgment shall be entered

cannot in such a case be controlled by an agreement between the parties at the time of the submission. *Bray v. English*, 1 Conn. 498.

The Consent of Parties cannot give jurisdiction to a court of equity, yet where an injunction is improperly granted, if the parties refer the matters in dispute between them to arbitrators such consent is binding, the whole case, including the question of law, being transferred thereby from the court to the arbitrators. *Brickhouse v. Hunter*, 4 Hen. & M. (Va.) 363, 4 Am. Dec. 528.

Submission under Rule of Court of Law—Transfer to Court of Equity.—Where the parties have entered into a submission under a rule of a court of law, they will not be permitted to bring the matter under the consideration of a court of equity. *Londonderry, etc., R. Co. v. Leishman*, 12 Beav. 423.

Where One of the Parties has Given a General Consent that the action be referred, he is precluded thereby from claiming that the referee has no jurisdiction. He must appeal from the order directing it. *Elliott v. Lewis*, 16 Hun (N. Y.) 581.

Submission by Agreement and Not by Rule of Court.—Where parties submit a dispute to arbitration by agreement and not by a rule of court, the agreement providing that the arbitrators shall report their award to the court "to be confirmed and made the judgment of the said court," it confers jurisdiction upon the court and is lawful and binding. *McCall v. McCall*, 36 S. Car. 80.

Where a Case is Already before the Court an agreement may be made to refer the question in issue to arbitration, and that the judgment shall be entered in accordance with the arbitrator's decision, and the award, under those circumstances, binds the parties as a judgment by consent. And, after a submission of the question to arbitration at common law, the only remedy of either party is upon the award, and if no award is made, upon the agreement. *Monroe Bank v. Widner*, 11 Paige (N. Y.) 529, 43 Am. Dec. 768. See *Bailey v. Stewart*, 3 W. & S. (Pa.) 560, 39 Am. Dec. 50; *Keavy v. Shisler*, 8 Phila. (Pa.) 54.

Where Certain Heirs Agreed to Submit to Arbitration a claim by one of them against the decedent's estate, such agreement created no personal liability against them for such claim in the absence of an express agreement to that effect. *Lorey v. Lorey*, 60 Mo. App. 417.

Where the Parties to an Injunction Suit agreed, pending such suit, to submit the matters in dispute between them to arbitrators, the agreement containing a stipulation "that the award of the arbitrators, made in pursuance of the agreement, shall terminate and

forever decide all matters of controversy at law or in equity in relation to the said livery stable," it was held that an action on the injunction bond could not be maintained unless the award was not binding. *Jesse v. Cater*, 28 Ala. 475.

It has been Held that where Parties to a Suit in Equity after Issue Joined, and pending a reference to an examiner, filed an agreement to submit the matter in dispute to arbitration, and the court vacated the appointment of the examiner at the request of the parties, the agreement for submission became thereby virtually a rule of court and irrevocable. *White's Appeal*, 108 Pa. St. 473.

Rule in England.—In England, however, after entering into a submission and consenting that it shall be made a rule of court, either party may, by deed, revoke his submission, even though a verdict has been taken, any time before the making of the award subject to the reference by order of court. *Skee v. Coxon*, 10 B. & C. 483, 21 E. C. L. 120.

1. Fault of One of the Parties—New Agreement.—*Uhrig v. Williamsburgh City F. Ins. Co.*, 101 N. Y. 362.

In *Brock v. Dwelling House Ins. Co.*, 102 Mich. 583, the court, by McGrath, Ch. J., said: "The requirement that plaintiff's appraiser should go into other portions of the state to make inquiry as to the fitness of the persons named, was not a reasonable one; the suggestion that some one be selected from the locality of the fire was not unreasonable. It is well settled that where the conduct of the company's appraiser in refusing to agree on an umpire is inexcusable and virtually amounts to a refusal to proceed with the appraisal, the fact that the appraisal was not concluded before suit brought, will not bar an action on the policy." See *McCullough v. Phoenix Ins. Co.*, 113 Mo. 606; *Bishop v. Agricultural Ins. Co.*, 130 N. Y. 488; *Uhrig v. Williamsburgh City F. Ins. Co.*, 101 N. Y. 362; *Bradshaw v. Agricultural Ins. Co.*, 137 N. Y. 137.

Where a Receipt in Full was Given, and there was an agreement to arbitrate, and arbitration failed through the fault of the payee, it was held that he could not sue on the original contract. *Hemingway v. Stansell*, 106 U. S. 399, 2 Am. & Eng. Corp. Cas. 355.

2. Submission Takes Matter out of Statute of Limitations.—*Colking v. Thackston, Cam. & N. (N. Car.)* 93. See *Hunt v. Guilford*, 4 Ohio 310.

In *Cowart v. Perrine*, 18 N. J. Eq. 454, it was held that a submission of partnership affairs to arbitrators without limit of time could not keep a claim which might have been

on the award, such submission operates as a discontinuance of the pending cause.¹

included in the submission, alive indefinitely for the purpose of an action.

1. The Reason Usually Assigned for the Rule is that the discontinuance is effected because the parties themselves have chosen another tribunal, but as there is an irreconcilable conflict of authority upon the question, the cases in which the rule in the text was sustained are set out.

California.—In *Heslep v. San Francisco*, 4 Cal. 1, it was held, where the parties failed to comply with the exact requirements of the statute, that such failure operated as a discontinuance of the cause, and that no judgment could be entered on the award.

Where an agreement is entered into to submit a pending action to arbitration, but there is no stipulation in such agreement that it shall be entered as an order of court, it operates as a discontinuance of the action, and the court has no jurisdiction to take any further proceedings. *Draghicevich v. Vulicevich*, 76 Cal. 378. See *Gunter v. Sanchez*, 1 Cal. 45.

Illinois.—In some cases it has been held that a submission of a pending suit operates as a discontinuance thereof, although the arbitrators have not assumed to decide the questions submitted to them. *Reeve v. Mitchell*, 15 Ill. 297.

But the discontinuance does not determine the validity of the award. The award may still be attacked, because the plaintiff in a proper action may show that it is not binding, and, as a consequence, is no bar to another suit for the same cause of action. *Cunningham v. Craig*, 53 Ill. 252.

Michigan.—Where one party brought a suit in attachment against another who appeared and moved to set the attachment aside for an alleged defect in the affidavit on which it was issued, which motion was denied, and issue was then joined, and the subject-matter of the dispute subsequently was submitted to arbitration under the statute, and an award was made in favor of the plaintiff, on which judgment was rendered, whereupon the defendant brought error and insisted on the supposed defect in the affidavit as a reason for reversing the judgment, it was held that the submission of the subject-matter of the action operated as a discontinuance of the suit; that, as the court had power under the statute to render judgment on the award, the part of the record prior to the submission might be rejected, and that the submission itself was a waiver of all errors up to the time of making it. *Vanderhoof v. Dean*, 1 Mich. 463.

Missouri.—Where an agreement has been entered into, pending a suit, to submit the matter in dispute to arbitration, it is equivalent to an agreement to dismiss the suit for good consideration, but such submission cannot be pleaded in bar until a binding award has been made. *Bowen v. Lazalere*, 44 Mo. 383.

New York.—Where a suit pending in the common pleas on appeal is submitted to arbitration, it operates as a discontinuance of the appeal, but leaves the judgment appealed from

in full force. A statute which declares an appeal to be a supersedeas contemplates a case where the appeal is prosecuted with effect, not where it is abandoned. *Miller v. Van Anken*, 1 Wend. (N. Y.) 516.

Where a pending suit is submitted to arbitration, it operates as a discontinuance of such suit, although the arbitrators have not taken upon themselves the burden of the submission and have not heard the parties, and have made no award, or done any other act under the submission. The court will not look beyond the submission itself. *Larkin v. Robbins*, 2 Wend. (N. Y.) 505.

Where an agreement was entered into to submit the "action" to arbitration after an appeal taken from a judgment recovered in such action, such agreement operates as a discontinuance, not only of the appeal, but of all other proceedings in the action from its commencement. The intention of the parties, as expressed in the agreement of submission, determines whether the submission itself does or does not operate as a discontinuance. It is not necessary that there should be an express agreement that the action shall cease; such agreement is implied in all cases from the selection of another mode of adjustment and settlement of the case. *Grosvenor v. Hunt*, 11 How. Pr. (N. Y. Supreme Ct.) 355.

In *Van Slyke v. Lettice*, 6 Hill (N. Y.) 610, after an appeal from the judgment of a justice to the common pleas, the parties to the suit entered into an agreement to submit it to arbitration, the submission containing the following clause: "All further proceedings in said suit at law are hereby stayed and ended." It was held under these circumstances that the submission not alone put an end to the appeal, but extinguished the right of suing upon the original judgment; that the parties intended to blot out the suit from its commencement before the justice to the appeal to the County Court. See further, *Grosvenor v. Hunt*, 11 How. Pr. (N. Y. Supreme Ct.) 355; *Baldwin v. Barrett*, 4 Hun (N. Y.) 119.

In *Baldwin v. Barrett*, 6 Thomp. & C. (N. Y.) 362, 4 Hun (N. Y.) 119, it was held that where, after a judgment in the justice's court and an appeal therefrom, the parties submitted the matter in controversy to arbitration, such submission extinguished the judgment and waived the appeal, although nothing was done under the arbitration.

Although the arbitrators never take or consent to take upon themselves the burden of the submission, a mere submission of itself operates as a discontinuance of a suit pending in court between the parties. *McNulty v. Salley*, 95 N. Y. 242, 66 How. Pr. (N. Y. Supreme Ct.) 147, 31 Hun (N. Y.) 17.

In *Wilson v. Williams*, 66 Barb. (N. Y.) 209, it was held that although an agreement to arbitrate a pending suit operates as a discontinuance of the action, yet if the agreement provides for a judgment to be entered in the action, such judgment may be entered and stands as a judgment by consent which cannot

Although the Above is Set Out as the Rule, there does not seem to be any sufficient reason why a directly contradictory proposition might not be said to be the law also, for there are numerous decisions to the effect that a mere submission does not, *ipso facto*, operate as a discontinuance of a pending action, but that either party has a right to go on with the suit, leaving the other his remedy of suing for a breach of the agreement to submit.¹

be set aside in the ordinary way by which errors are corrected.

See where a submission, although void, was held to operate as a discontinuance of both actions; and that as to the second action, although the submission was void, it did not affect the validity of the award as to the matters involved in the first, *Keep v. Keep*, 17 Hun (N. Y.) 152.

The submission of a pending cause without a rule, deprives the court of jurisdiction over the costs. *Van Alstyne v. Wimple*, 4 Cow. (N. Y.) 547.

Where the submission has the effect of working a discontinuance of the action, it has not the effect of discharging the cause of action, and this although the arbitrators fail or refuse to take upon themselves the duties of the submission. *Buel v. Dewey*, 22 How. Pr. (N. Y. Supreme Ct.) 342.

Pennsylvania.—Where an agreement contains a stipulation that the award shall be final and conclusive, and that neither party shall have the right to appeal or file exceptions thereto, it was held on exceptions taken that the court had been divested of all power to act in the matter. *McCahan v. Reamey*, 33 Pa. St. 535.

Tennessee.—Although there is no agreement that the award shall be the judgment of the court, the submission of a pending suit to arbitration operates as a discontinuance thereof, and this rule applies to courts of chancery as well as to courts of common law, and it is immaterial whether the submission be valid or invalid. *Saffle v. Cox*, 9 Humph. (Tenn.) 142; *Rogers v. Nall*, 6 Humph. (Tenn.) 29.

In certain cases it has been held that it is only where the submission is made out of court that a mere submission to arbitration will operate as a discontinuance. Where the submission is made by rule of court, it has not that effect. *Bridges v. Vick*, 2 Humph. (Tenn.) 516; *Crockett v. Beaty*, 7 Humph. (Tenn.) 66; *Norwood v. Stephens*, 7 Coldw. (Tenn.) 1; *Susong v. Jack*, 1 Heisk. (Tenn.) 415; *White v. Puryear*, 10 Yerg. (Tenn.) 441.

Vermont.—The fact that one of the parties to an action submits the matter in dispute therein to arbitration after an appeal, does not necessarily deprive the plaintiff of his right to enter his complaint for an affirmance unless an award is made before the sitting of the appellate court, or unless time beyond such sitting is allowed for making an award by the terms of the agreement to submit. *Hayes v. Blanchard*, 4 Vt. 210.

Wisconsin.—Where, in a suit pending, an agreement is entered into to submit the matter in controversy to arbitration, it operates as a discontinuance of that particular suit, but it is no bar to the right to maintain an action, but

is a discontinuance merely. Consequently, where such a submission is made in an appeal case, the case should be dismissed and not the appeal, since the latter course would leave the judgment in full force under *Wisconsin Rev. Stat.*, c. 88, § 242. *Muckey v. Pierce*, 3 Wis. 307; *Bigelow v. Goss*, 5 Wis. 421; *Dolph v. Clemens*, 4 Wis. 181. See *State v. Chamber of Commerce*, 20 Wis. 68; *Hills v. Passage*, 21 Wis. 298; *Walworth County Bank v. Farmers' L. & T. Co.*, 22 Wis. 231. But see *Sohns v. Sloteman*, 85 Wis. 113, set out in the note immediately following.

1. *Thompson v. Charnock*, 8 T. R. 139; *Street v. Rigby*, 6 Ves. Jr. 821; *Mitchell v. Harris*, 2 Ves. Jr. 129; *Tobey v. Bristol County*, 3 Story (U. S.) 800; *Campbell v. American Popular L. Ins. Co.*, 1 MacArthur (D. C.) 246, 29 Am. Rep. 591; *U. S. v. Ames*, 1 Woodb. & M. (U. S.) 76; *Corbin v. Adams*, 76 Va. 58; *Leonard v. House*, 15 Ga. 473; *Parnell v. King, Rice* (S. Car.) 376.

Where an agreement has been entered into by parties in railroad condemnation proceedings to submit the matters in dispute between them to arbitration, and no reference has taken place, and no arbitrators have been chosen, it does not abate or discontinue the suit, especially where the person alleging it as a bar has gone to trial without making any objection upon the merits. *Laffin v. Chicago, etc., R. Co.*, 34 Fed. Rep. 859.

California.—Although a submission bond contains a provision that the parties shall not appeal from the award of the arbitrators, it does not prevent a court from taking jurisdiction of the action on an appeal. *Muldrow v. Norris*, 2 Cal. 74, 56 Am. Dec. 313.

The court is not deprived of jurisdiction to order an action dismissed for want of diligence in prosecuting it before a referee, because the matter in dispute has been submitted to each referee for trial and judgment. *Saville v. Frisbie*, 70 Cal. 87.

Connecticut.—The mere fact that matters in controversy are submitted to arbitration in an action pending in court does not operate as a discontinuance of such action. Where, during its pendency in court, the parties to an action of trover entered into a written agreement submitting the matters involved in such action to the arbitration of three persons, without any stipulation in such submission that the award might be made by a less number than the whole, and an award was made by two of the arbitrators, not only without the concurrence but with the express dissent of the third, it was held that the award so made was void, and that the submission did not operate as a discontinuance of the action. *Nettleton v. Gridley*, 21 Conn. 531, 56 Am. Dec. 378. See *Bennett v. Pierce*, 28 Conn. 315; *Patterson v. Leavitt*, 4 Conn. 50, 10 Am. Dec. 98.

Waiver.—The parties may expressly, or by going on with the proceedings in

Kansas.—An agreement to submit to arbitration made by the parties to a pending suit does not operate as a discontinuance of the action where the record does not show that the agreement was made in the presence of the justice, or that his attention had been called to it, or that such agreement had been made a basis of a motion to dismiss or discontinue the suit, or even that such an arbitration had ever been made. *Snively v. Hill*, 46 Kan. 494.

Louisiana.—The jurisdiction of the court over a cause is not ousted, *ipso facto*, by the execution of a written agreement to submit to arbitration the subject-matter of an action pending therein so that the plaintiff cannot resume his proceedings in the action upon an unreasonable revocation of the submission by the defendant. *Fielding v. Westermeier*, 20 La. Ann. 51.

Maine.—Where one of two arbitrators refuses to act, the submission becomes inoperative and the suit should proceed. *Chapman v. Seccomb*, 36 Me. 102.

Neither will a discontinuance be effected by a submission where it is clearly the intention of the parties that it should not have that effect. *Hearne v. Brown*, 67 Me. 156.

Massachusetts.—Where a case pending in court was sent to an auditor, and the parties to the suit and a third person appeared before the auditor, and filed an agreement making him referee, and submitting to him all matters in dispute between the three, which grew out of a certain matter referred to in the declaration, and the parties evidently intended that the reference should be a step in the action, but no rule or reference was issued by the court, it was held that this reference could not operate as a step in the action, and neither could it work a discontinuance of the action. *McCarthy v. Swan*, 145 Mass. 471.

Michigan.—An action involving the same subject-matter is not discontinued, nor is a stay of proceedings effected therein by an agreement entered into between the parties to such action for a common-law arbitration, with a stipulation for an award and judgment therein; nor can such agreement be pleaded or shown in bar of the action, although it can be used as a basis for an application for a stay of proceedings. *Callanan v. Port Huron*, etc., R. Co., 61 Mich. 15. See also *McGunn v. Hanlin*, 29 Mich. 476; *Gibson v. Burrows*, 41 Mich. 715; *Chicago*, etc., R. Co. v. *Hughes*, 28 Mich. 186.

New Hampshire.—The general rule is, that a submission of a matter in dispute to arbitration, with a stipulation that "judgment thereon shall be final," is not a discontinuance. *Lary v. Goodnow*, 48 N. H. 170; *Dinsmore v. Hanson*, 48 N. H. 413; *Elliott v. Quimby*, 13 N. H. 183; *Weare v. Putnam*, 56 N. H. 49.

New Jersey.—In a pending suit a common-law submission to arbitrators does not, *ipso facto*, work a discontinuance of the action. It is not error for the parties afterwards to proceed with the suit, instead of applying to have a discontinuance entered. *Paulison v. Halsey*, 38 N. J. L. 488.

New York.—In *New York* it has been held that the general submission to arbitration operates as a discontinuance of the pending suit, but even there, where it is most extensively held, it appears that the submission alone will not have the effect of operating as a discontinuance where the parties agree that a judgment may be entered upon the arbitrators' award. In such a case if the submission was revoked the court may go on with the trial, notwithstanding such submission. *Ex p. Wright*, 6 Cow. (N. Y.) 399. See *Camp v. Root*, 18 Johns. (N. Y.) 22; *Green v. Patchin*, 13 Wend. (N. Y.) 293.

However, a submission will not have the effect of working a discontinuance where it appears from the terms of the submission that the parties did not intend that it should do so. *Jacoby v. Johnston*, 1 Hun (N. Y.) 242; *Ensign v. St. Louis*, etc., R. Co., 62 How. Pr. (N. Y. Supreme Ct.) 123.

Pennsylvania.—A case is not taken out of court by the entry of a rule to choose arbitrators, and notice of such rule to the parties, but the arbitrators must be actually chosen before the power of the court over the case will cease. *Hoffman v. Locke*, 19 Pa. St. 57.

A case is not taken out of court by merely entering a rule of arbitration in regard to it. *Camp v. Owego Bank*, 10 Watts (Pa.) 130.

In *Horn v. Roberts*, 1 Ashm. (Pa.) 45, it was held that after the jurisdiction of the arbitrators is once attached, the action can no longer be discontinued, and that the arbitrators' jurisdiction attaches from the moment of their appointment. See *Kimmel v. Shank*, 1 S. & R. (Pa.) 24; *M'Call v. Crousillat*, 2 S. & R. (Pa.) 167.

In *Girard v. Hutchinson*, 2 S. & R. (Pa.) 188, it was held that after arbitrators had been once appointed, the court has no authority to strike off the rule against the consent of either party. See *Thompson v. White*, 4 S. & R. (Pa.) 140.

Tennessee.—In *Bridges v. Vick*, 2 Humph. (Tenn.) 516, it was held that a reference under a rule of court is not a discontinuance of the action.

Where a submission stipulates that the award is to be the judgment of the court, it does not operate as a discontinuance, even though not under a rule of court. *McMinnville*, etc., R. Co. v. *Huggins*, 7 Coldw. (Tenn.) 217.

In *Crockett v. Beaty*, 7 Humph. (Tenn.) 66, it was held that it does not follow that because a cause is submitted to arbitration without a rule of court, it is thereby discontinued; for it might have been that it was agreed that the award should be made a judgment of the court.

Vermont.—Although a submission to arbitration may form a bar to further action in court, this refers only to matters which of necessity are included in the submission. Where a party has the choice to enforce his claim either against the other party to the arbitration or against one not a party to it, the submission does not operate to bar him

court, waive their right to claim that the case has been discontinued by the submission.¹

(3) *Suspension of the Case*.—Where, however, it is the evident intention of the parties that the cause shall not be discontinued, either because of a stipulation in the agreement to submit that judgment shall be entered on the award, or otherwise, the case is not discontinued, but the power of the court over it is entirely suspended from the time the arbitrators are chosen until the rendering of the award, or until the expiration of the time limited for that purpose.²

When Suspension Takes Effect.—It seems to be the better opinion that the suspension of the power of the court over the case takes effect at the time of

from his remedy against the latter. *Robinson v. Hawkins*, 38 Vt. 693. See *Hayes v. Blanchard*, 4 Vt. 210, set out in the note immediately preceding.

1. **Waiver of Discontinuance.**—*People v. Onondaga*, C. P. 1 Wend. (N. Y.) 314; *Buell v. Dewey*, 22 How. Pr. (N. Y.) 342; *Jewell v. Blankenship*, 10 Yerg. (Tenn.) 439.

2. **Submission Operating to Suspend Case**.—*California*.—*Ryan v. Dougherty*, 30 Cal. 218. *Georgia*.—*Tison v. Sellars*, 40 Ga. 710.

Maine.—*Chapman v. Seccomb*, 36 Me. 102; *Hearne v. Brown*, 67 Me. 156.

Michigan.—*Callanan v. Port Huron*, etc., R. Co., 61 Mich. 15.

Mississippi.—*Wear v. Ragan*, 30 Miss. 83. *New Hampshire*.—*Elliott v. Quimby*, 13 N. H. 181; *Lary v. Goodnow*, 48 N. H. 170; *Dinsmore v. Hanson*, 48 N. H. 413; *Carroll v. Locke*, 58 N. H. 163.

New Jersey.—*Hazen v. Addis*, 14 N. J. L. 333.

New York.—*Buel v. Dewey*, 22 How. Pr. (N. Y. Supreme Ct.), 342; *Ensign v. St. Louis*, etc., R. Co., 62 How. Pr. (N. Y. Supreme Ct.) 123; *Jacoby v. Johnston*, 1 Hun (N. Y.) 243; *Baldwin v. Barrett*, 4 Hun (N. Y.) 120; *Ex p. Wright*, 6 Cow. (N. Y.) 399; *Green v. Patchin*, 13 Wend. (N. Y.) 293; *Yates v. Russell*, 17 Johns. (N. Y.) 461; *Wilson v. Williams*, 66 Barb. (N. Y.) 209; *Monroe Bank v. Widner*, 11 Paige (N. Y.) 529, 43 Am. Dec. 768.

Pennsylvania.—*Hoffman v. Locke*, 19 Pa. St. 57; *Wilcox v. Payne*, 88 Pa. St. 154; *Grubb v. McCullough*, 1 Yeates (Pa.) 193; *Grubb v. Grubb*, 2 Dall. (Pa.) 191; *Pollock v. Hall*, 4 Dall. (Pa.) 222; *Horn v. Roberts*, 1 Ashm. (Pa.) 45; *DeLisle v. Priestman*, 1 Browne (Pa.) 115; *Brown v. Scheaffer*, 6 Binn. (Pa.) 177; *Withers v. Haines*, 2 Pa. St. 435; *Crawford v. Gable*, 2 Pa. St. 444; *Camp v. Owego Bank*, 10 Watts (Pa.) 130; *Douglass v. Kenton*, 1 Miles (Pa.) 21; *Schuykill Bank v. Macalester*, 6 W. & S. (Pa.) 147; *Thompson v. White*, 4 S. & R. (Pa.) 135; *McCall v. Crousillat*, 2 S. & R. (Pa.) 167.

Tennessee.—*McMinnville*, etc., R. Co. v. Huggins, 7 Coldw. (Tenn.) 217; *Rogers v. Nall*, 6 Humph. (Tenn.) 29.

Vermont.—*Maxfield v. Scott*, 17 Vt. 634.

Failure of Arbitrators to Render Decision in Time Limited.—Where the parties have entered into an agreement to submit their disputes to arbitration, the decision of the arbitrators to be within a certain time, the plaintiff has a right to begin an action at any time after the expiration of the time limited by the terms of

the agreement, if the arbitrators have failed to determine the matter in dispute. *St. Martin v. Mestaye*, 18 La. Ann. 320.

In *England*, under the early decisions, a submission was considered to be an implied stay of proceedings. *Anonymous*, 1 Mod. 24. But later it was said (2 Ld. Raym. 789) that a submission should not be a stay of proceedings unless it was so expressed in the rule of reference, and this rule has been followed in several instances. *Lowes v. Kermod*, 8 Taunt. 146; *Green v. Pole*, 6 Bing. 443, 19 E. C. L. 125.

And in more recent cases it has been held that a submission, although it contained no stipulation to that effect, would have the effect of suspending all proceedings in the cause up to the time limited for making the award. *Fountainemoreau v. Encontre*, 4 D. & L. 425; *Williams v. Gwynne*, 2 H. & W. 312. See further *Moscato v. Lawson*, 1 H. & W. 572; *Dicas v. Jay*, 6 Bing. 519, 19 E. C. L. 155; *Spurr v. Rayson*, 5 M. & W. 339, 7 Dowl. 476.

Where Several Actions were Pending between the plaintiff and the defendant, and they agreed to submit all matters in dispute between them to arbitration, the award to be final and conclusive; and the submission contained a clause that all suits pending should be suspended until the award was rendered, and then dismissed, it was held that such submission operated as a suspension, not a discontinuance, of the actions, that such actions could not be proceeded with while the submission was in force, and that if it were procured by fraud as charged, the proper course was to set it aside for that reason. *Ensign v. St. Louis*, etc., R. Co., 62 How. Pr. (N. Y. Supreme Ct.) 123.

Agreement Not to Discontinue.—Where a submission to arbitration contained a provision that it should not operate as a discontinuance of the actions, but should stay proceedings until their discontinuance, to follow on the award therein made, it was held to be valid. The court, by Winslow, J., distinguished the other Wisconsin cases, and held that a special stipulation in the submission that the suit should not be discontinued, should be given effect. *Sohns v. Sloteman*, 85 Wis. 113.

Effect upon the Award of Suspension of Right of Action.—The fact that pending a submission to arbitration the right of action is suspended does not affect the award; but the mere submission to arbitration of matters on which the arbitrators never acted, would not prevent the running of the statute of limitations during the continuance of the submission. *Cowart v. Perrine*, 21 N. J. Eq. 101.

the appointment of the arbitrators.¹

(4) *As a Discharge of Bail*.—When Discharged.—Where a pending cause is submitted to arbitration before trial, and such submission operates as a stay of proceedings, the bail, if any, are discharged from liability unless their consent has been previously obtained to the submission.²

When Not Discharged.—But where a verdict is taken subject to a reference, or in regard to the amount of damages only, the bail are not discharged.³ Nor are the bail discharged by a submission under which the award is to be made a rule of court.⁴

(5) *As a Release of Errors*.—The submission to arbitration of a pending cause operates as a release of all errors, or as an estoppel against any assignment of errors in the proceedings up to the time the submission is made, and as a waiver of all exceptions to the forms of the process.⁵

b. SUBMISSION OF PRESENT DISPUTE BARS ACTION.—Where parties to a dispute enter into an agreement by which they bind themselves to submit such dispute to arbitration, it operates as a bar to any future suit to enforce the claim of either in regard to it.⁶

1. Time when Suspension Takes Effect.—Camp v. Owego Bank, 10 Watts (Pa.) 130; Schuylkill Bank v. Macalester, 6 W. & S. (Pa.) 147; Horn v. Roberts, 1 Ashm. (Pa.) 45. See Hoffman v. Locke, 19 Pa. St. 57.

It was, however, held, in the earlier case of Mechanics' Bank v. Fisher, 1 Rawle (Pa.) 341, that the suspension took place at the time of the entry of the rule.

The jurisdiction of the arbitrators is contingent upon the regularity of the proceedings prior to their appointment, and where they are irregular the appointment will be void, and they will have no authority to make an award; but once their authority has attached, the court can no longer interfere. Thompson v. White, 4 S. & R. (Pa.) 135.

2. When Bail Discharged.—Russell on Awards (6th ed.) 89; Moore v. Bowmaker, 2 Marsh. 81; Hannington v. Beare, 4 D. P. C. 256; Underhill v. Devereux, 2 Saund. 72, note. See further Aldridge v. Harper, 10 Bing. 118, 25 E. C. L. 53; Michael v. Myers, 6 M. & G. 702, 46 E. C. L. 702; Archer v. Hall, 4 Bing. 464.

3. When Bail Not Discharged.—Moore v. Bowmaker, 6 Taunt. 379; Taylor v. Gregory, 2 B. & Ad. 774, 22 E. C. L. 182; Tidd's Pr. (9th ed.) 819. See Apsley v. Crosley, Barnes 54.

4. Cunningham v. Howell, 1 Ired. (N. Car.) 9.

It appears that in *England*, where a cause is referred to arbitration, the bail are discharged unless a verdict has been taken for the plaintiff to stand as security for what has been awarded. Underhill v. Devereux, 2 Saund. 72, note; Lee v. Lingard, 1 East 403.

Where, by the agreement of the parties, a case is referred to arbitrators after its entry in court, and by a rule of court in common form, it does not operate as a discharge of the sureties on a bond given to dissolve the attachment in the action, nor is it a waiver of the plaintiff's right to the special judgment provided by Mass. Stat. 1875, c. 68, § 1. Seavey v. Beckler, 132 Mass. 203. See Haskell v. Whitney, 12 Mass. 47; Bean v. Parker, 17 Mass. 591; Hill v. Hunnewell, 1 Pick. (Mass.) 192.

5. Release of Errors.—Maine.—Hix v. Sumner, 50 Me. 290.

Massachusetts.—Coffin v. Cottle, 4 Pick. (Mass.) 454; Forseth v. Shaw, 10 Mass. 253; Ames v. Stevens, 120 Mass. 218.

Michigan.—Vanderhoof v. Dean, 1 Mich. 463.

New Jersey.—Applegate v. Schureman, 3 N. J. L. 434; Hazen v. Addis, 14 N. J. L. 333; Taylor v. Sayre, 24 N. J. L. 647.

Pennsylvania.—McCahan v. Reamey, 33 Pa. St. 535.

Vermont.—Maxfield v. Scott, 17 Vt. 634; Spaulding v. Warren, 25 Vt. 316; Waterman v. Connecticut, etc., Rivers R. Co., 30 Vt. 610, 73 Am. Dec. 326; Swift v. Harriman, 30 Vt. 607; Reed v. Stockwell, 34 Vt. 206. See Eddy v. Sprague, 10 Vt. 216; Davis v. Campbell, 23 Vt. 236.

Virginia.—Ligon v. Ford, 5 Munf. (Va.) 10.

But where there is a palpable misjoinder of plaintiffs a submission is not such a waiver of the misjoinder as will prevent all or any of them from bringing an action. Porter v. Dickerman, 11 Gray (Mass.) 482.

Nor does a submission estop a party from objecting that the court had no jurisdiction to make the order. Garcie v. Sheldon, 3 Barb. (N. Y.) 232.

6. Submission of Present Dispute a Bar to Action.—Morse on Arb. and Award 79; Robinson v. Hawkins, 38 Vt. 693; Walters v. Hutchins, 29 Ind. 136; Armstrong v. Masten, 11 Johns. (N. Y.) 189; Jessiman v. Haverhill, etc., Iron Manufactory, 1 N. H. 68; Terre Haute, etc., R. Co. v. Harris, 126 Ind. 7.

Damages by Trespassing Cattle.—Where parties have entered into a written agreement that the damages caused by trespass of cattle shall be determined by arbitration, and not by action, such agreement precludes either from suing the other unless the latter has refused arbitration or repudiated the contract. Berry v. Carter, 19 Can. 135.

Title to Real Estate.—The submission of a cause of action in regard to the title to real estate may be set up as a bar to such an action, although the award has not been performed. Terre Haute, etc., R. Co. v. Harris, 126 Ind. 7, 46 Am. & Eng. R. Cas. 582.

But if They are Not Bound it has not that effect. A mere agreement to submit, not followed by arbitration proceedings, does not bar a suit upon the original claim.¹

c. AGREEMENT TO SUBMIT FUTURE DISPUTES—(1) *Does Not Oust Jurisdiction of Courts*.—Where the parties to a contract enter into an absolute agreement or covenant that in case a dispute should arise under such contract all matters in difference between them relating thereto shall be submitted to arbitration, such stipulation is void on grounds of public policy, because to give effect to it would be to oust the courts of their jurisdiction.²

Promissory Note.—Submission to arbitration between the maker and payee of a promissory note bars the payee from suing on the note pending the submission. *Hovil v. Wood*, 2 Menzies Cape of Good Hope 261.

Principal and Surety.—But an agreement by a principal debtor to refer certain accounts to arbitration does not bar his surety from questioning such accounts. *Orphans' Chamber v. Cloete*, 3 Menzies Cape of Good Hope 157.

Where a Landlord and Tenant enter into a verbal agreement to submit to arbitration a dispute in regard to the rent, the landlord becomes liable in trespass if he distrains in violation of the agreement. *Preston v. Appleby*, 30 New Bruns. 94.

Covenant to Refer.—An independent covenant to refer a suit to arbitration does not prevent a party from suing for a breach of another covenant in the same deed. *Locke v. Collins*, 3 Vict. L. Rep. 40.

General Submission—Neglect to Present Certain Claims.—And the fact that one of the parties to a submission neglects to present a claim where the submission was of all matters in dispute between the parties, does not deprive him of his remedy against one who was not a party to such submission. *Robinson v. Hawkins*, 38 Vt. 693.

1. Mere Agreement to Submit—No Proceedings Had.—*Tobey v. Bristol County*, 3 Story (U. S.) 800; *Laffin v. Chicago*, etc., R. Co., 34 Fed. Rep. 859; *Kinney v. Baltimore*, etc., Employees Relief Assoc., 35 W. Va. 385; *Frink v. Ryan*, 4 Ill. 324. See also *Smith v. Compton*, 20 Barb. (N. Y.) 262; *Rison v. Moon* (Va. 1895), 22 S. E. Rep. 165; *Ross v. Nesbit*, 7 Ill. 252.

In *Kill v. Hollister*, 1 Wils. 129, it was intimated that the pendency of arbitration proceedings was a bar to an action for the same demand, but this is not now the law. *Harris v. Reynolds*, 7 Q. B. 71, 53 E. C. L. 71; *Livingston v. Ralli*, 24 L. J. Q. B. 269.

Neither can a pending arbitration be pleaded in bar to a suit in equity. *Cooke v. Cooke*, L. R. 4 Eq. 77, 30 L. J. Ch. 480. See *Wood v. Copper Miners' Co.*, 25 L. J. C. P. 166.

But where two railway companies entered into an agreement to refer, under 22 & 23 Vict., c. 59, it was held that the pending arbitration might be pleaded in bar to a suit for the same cause. *Watford*, etc., R. Co. v. *London*, etc., R. Co., 38 L. J. Ch. 449.

And an agreement to submit may be pleaded as an accord and satisfaction. *Williams v. London Commercial Exch. Co.*, 10 Exch. 569.

See *Page v. Meek*, Q. B. 7 Nov. 1862, 1 N. R. 20.

The pendency of arbitration proceedings at the time an action in regard to the same matter is brought does not operate as a bar to such action. *Small v. Thurlow*, 37 Me. 504.

Refusal of Arbitrator to Act.—A suit is not barred by a submission because an arbitrator has refused to act. *Brown v. Welcker*, 1 Coldw. (Tenn.) 197. See *Elliott v. Quimby*, 13 N. H. 181; *Buel v. Dewey*, 22 How. Pr. (N. Y. Supreme Ct.) 342; *Chapman v. Seccomb*, 36 Me. 102.

Award Not Made in Time Limited.—Or because an award has not been made within the limited time. *St. Martin v. Mestaye*, 18 La. Ann. 320.

Where a Statutory Submission has been Made but no Award has been Filed thereunder, such submission is not a bar to an action for the same cause brought to enforce a lien for work and labor done. *Pitman v. Thompson*, 63 N. H. 73.

2. Future Disputes—May Not Oust Courts of Jurisdiction—England.—*Kill v. Hollister*, 1 Wils. 129; *Thompson v. Charnock*, 8 T. R. 139; *Mitchell v. Harris*, 2 Ves., Jr. 133; *Street v. Rigby*, 6 Ves. Jr. 822; *Horton v. Sayer*, 4 H. & N. 643, 26 L. J. Exch. 28; *Nichols v. Chalie*, 14 Ves. Jr. 265; *Wellington v. Mackintosh*, 2 Atk. 569; *Johnson v. Hopper*, 4 Jur. N. S. 882; *Lee v. Page*, 30 L. J. Ch. 857; *Scott v. Liverpool Corp.*, 27 L. J. Ch. 641, 28 L. J. Ch. 236, 3 De G. & J. 334; *Waters v. Taylor*, 15 Ves. Jr. 10; *Gourlay v. Somerset*, 19 Ves. Jr. 431; *Mexborough v. Bower*, 7 Beav. 127; *Tattersall v. Groote*, 2 B. & P. 131; *Milne v. Gratrix*, 7 East 608; *Clapman v. Higham*, 1 Bing. 87, 8 E. C. L. 415. See *Halfhide v. Fenning*, 2 Bro. C. C. 336; *Goldstone v. Osborn*, 2 C. & P. 550, 12 E. C. L. 256; *Roper v. London*, 1 El. & El. 825, 102 E. C. L. 825; *In re Carlisle*, 44 Ch. Div. 200.

Russell on Awards (6th ed.) 64, says that the rule that persons by private agreement cannot oust the courts of their jurisdiction, seems sometimes to have been misunderstood, citing *Thompson v. Charnock*, 8 T. R. 139; and adds that such an agreement does not oust the jurisdiction of the courts where there are no excluding words, citing *Jones v. St. John's College*, L. R. 6 Q. B. 115.

Canada.—*Hungerford Tp. v. Lattimer*, 13 Ont. App. 315.

United States.—*Trott v. City Ins. Co.*, 1 Cliff. (U. S.) 443; *Perkins v. U. S. Electric Light Co.*, 21 Blatchf. (U. S.) 308; *Home Ins. Co. v. Morse*, 20 Wall. (U. S.) 445; *The Excelsior*, 123 U. S. 40; *Laffin v. Chicago*, etc., R. Co., 34 Fed. Rep. 859; *Brush-Swan*

Although either of the parties to the contract may disregard such stipulation

Electric Light Co. v. Brush Electric Co., 41 Fed. Rep. 163.

Alabama.—*Bozeman v. Gilbert*, 1 Ala. 90; *Stone v. Dennis*, 3 Port. (Ala.) 231.

California.—*Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54; *Carey v. Brown*, 62 Cal. 373.

Connecticut.—*Chamberlain v. Connecticut Cent. R. Co.*, 54 Conn. 472.

Delaware.—*Randel v. Chesapeake, etc., Canal Co.*, 1 Harr. (Del.) 233.

Georgia.—*Leonard v. House*, 15 Ga. 473; *Liverpool, etc., Ins. Co. v. Creighton*, 51 Ga. 95.

Illinois.—*Waugh v. Schlenk*, 23 Ill. App. 433.

Indiana.—*Bauer v. Samson Lodge*, 102 Ind. 262; *Kistler v. Indianapolis, etc., R. Co.*, 88 Ind. 460; *Supreme Council v. Garrigus*, 104 Ind. 133, 54 Am. Rep. 298.

Kansas.—An arbitration clause in a contract for the sale of millinery goods, which contract contained a condition that the vendor should not in future enter into or be interested in the millinery business in the locality, was held to be no bar to an action brought by the vendee against the vendor to enjoin her from being interested in the millinery business in the locality. *Richardson v. Emmet*, 44 Kan. 262.

Maine.—*Dugan v. Thomas*, 79 Me. 221; *Hill v. More*, 40 Me. 515; *Robinson v. Georges Ins. Co.*, 17 Me. 131, 35 Am. Dec. 239; *Stephenson v. Piscataqua F. & M. Ins. Co.*, 54 Me. 55.

A mortgage was given to secure a bond which contained the stipulation that "should either party be dissatisfied with the fulfilling of the above bond, it shall be submitted to certain named persons and their decision shall be final." It was held that the mortgagee might commence proceedings to foreclose without waiting for this decision. *Hill v. More*, 40 Me. 515.

Maryland.—*Allegre v. Maryland Ins. Co.*, 6 Har. & J. (Md.) 408, 14 Am. Dec. 289.

A testator provided in his will that all disputes concerning the will should be settled by certain arbitrators, and that any party who should refuse to submit should lose his rights under the will. It was held that no such forfeiture could be incurred by contesting any disputable matter concerning the will in court. *Contee v. Dawson*, 2 Bland. (Md.) 264.

Massachusetts.—*Amesbury v. Bowditch Mut. F. Ins. Co.*, 6 Gray (Mass.) 596; *Rowe v. Williams*, 97 Mass. 163; *White v. Middlesex R. Co.*, 135 Mass. 216; *Hall v. People's Mut. F. Ins. Co.*, 6 Gray (Mass.) 185; *Pearl v. Harris*, 121 Mass. 390; *Cobb v. New England Mut. Marine Ins. Co.*, 6 Gray (Mass.) 192; *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray (Mass.) 174; *Cavanagh v. Dooley*, 6 Allen (Mass.) 66; *Wood v. Humphrey*, 114 Mass. 185; *Vass v. Wales*, 129 Mass. 38; *Evans v. Clapp*, 123 Mass. 165, 25 Am. Rep. 52.

Where the provision in a contract for the settlement of disputes arising thereon does not undertake to limit the right of action to the amount to be found due by the arbitrators or to make their right in any other way dependent upon the submission or upon the offer itself, it is no bar to an action on the con-

tract without an offer to submit. *Rowe v. Williams*, 97 Mass. 163; *Reed v. Washington F. & M. Ins. Co.*, 138 Mass. 572; *Clement v. British American Assur. Co.*, 141 Mass. 298.

An agreement between a corporation and a person entering its employ provided that the employee should deposit a certain sum of money with the corporation as security for the proper discharge of his duties; that the president of the corporation should be the sole judge between the corporation and the employee whether the corporation was entitled to retain the whole or any part of the deposit; and that his certificate in writing that the whole or any part of said sum was to be so retained and forfeited to the corporation should be conclusive evidence between the parties, in all courts of justice, that the amount thereby forfeited was so forfeited, and should bar the employee of all right, under any circumstances, to recover the money so certified to be forfeited. It was held, in an action by the employee against the corporation to recover the sum so deposited, that the latter clauses were an agreement to submit to arbitration and an attempt to oust the courts of jurisdiction, and were void. *White v. Middlesex R. Co.*, 135 Mass. 216, 15 Am. & Eng. R. Cas. 131.

A contracted with B for the sale of certain shares in a corporation, guaranteeing that the corporation would employ him at a certain salary, and stipulating that if the company failed to give him employment, A should buy the shares of B at a fair price to be determined by arbitrators if the parties could not agree upon it themselves, the decision of the arbitrators to be final. It was held that specific performance could not be compelled. *Noyes v. Marsh*, 123 Mass. 286.

Michigan.—*Callanan v. Port Huron, etc., R. Co.*, 61 Mich. 15; *McGunn v. Hanlin*, 29 Mich. 476; *Nurney v. Fireman's Fund Ins. Co.*, 63 Mich. 633, 6 Am. St. Rep. 338.

Missouri.—*Strohmaier v. Zeppenfeld*, 3 Mo. App. 429.

So it was held that a by-law of the Union Merchants' Exchange of St. Louis, which compels members to submit their business controversies to arbitration under penalty of being suspended or expelled, is unreasonable in a legal sense, and cannot be sustained. *State v. Union Merchants' Exchange*, 2 Mo. App. 96.

Nevada.—Where a contract contains a stipulation that all disputes between the parties shall be submitted to arbitration before being made the subject of an action at law, it does not bind the parties where the dispute arises out of the nonpayment of a sum of money, the contract itself fixing the amount to be paid at the time of payment. *Sutro Tunnel Co. v. Segregated Belcher Min. Co.*, 19 Nev. 121.

New Hampshire.—*Leach v. Republic F. Ins. Co.*, 58 N. H. 245; *Smith v. Boston, etc., R. Co.*, 36 N. H. 487; *March v. Eastern R. Co.*, 40 N. H. 548, 77 Am. Dec. 732.

New York.—*Ogden v. Columbian Ins. Co.*, 10 Johns. (N. Y.) 273; *Smith v. Compton*, 20

and sue upon the contract itself, yet an action will lie for such breach,¹ though, as a rule, it cannot be pleaded in bar to an action upon the contract.²

Barb. (N. Y.) 267; *Heath v. New York Gold Exchange*, 38 How. Pr. (N. Y. C. Pl.) 170, 7 Abb. Pr. N. S. (N. Y.) 256; *Binsse v. Paige*, 1 Keyes (N. Y.) 87, 1 Abb. App. Dec. (N. Y.) 138; *Hart v. Lauman*, 29 Barb. (N. Y.) 410; *Haggart v. Morgan*, 5 N. Y. 422, 55 Am. Dec. 350; *Sinclair v. Tallmadge*, 35 Barb. (N. Y.) 602; *Hurst v. Litchfield*, 39 N. Y. 377; *Gibbs v. Continental Ins. Co.*, 13 Hun (N. Y.) 611; *Mark v. National F. Ins. Co.*, 24 Hun (N. Y.) 569.

In Delaware, etc., *Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 259, the court, by Allen, J., said that the foundation of the rule is sometimes attributed "to the jealousy of the courts and a desire to repress all attempts to encroach on the exclusiveness of their jurisdiction;" sometimes, "to an aversion of the courts, from reasons of public policy, to sanction contracts by which the protection which the law affords the individual citizen is renounced." The court goes on to say that the tendency of the later decisions is to narrow rather than enlarge the operation and effect of the early decisions limiting the power of contracting parties to provide a tribunal for the adjustment of possible differences without a resort to courts of law, and that the better way is to give effect to contracts, when in themselves lawful, according to their terms and the intent of the parties, any departure from this principle being an anomaly in law, not to be extended or applied to new cases unless they come within the letter and spirit of the decisions already made.

Where one of the provisions of a contract is an absolute agreement to pay damages, a stipulation contained in such contract to submit matters arising thereunder to arbitration is but a collateral agreement, and does not prevent the bringing of an action for damages without such submission to arbitration. *Seward v. Rochester*, 39 Hun (N. Y.) 44, *affirmed* in 109 N. Y. 164.

Ohio.—*Pittsburgh, etc., R. Co. v. Garrett*, 50 Ohio St. 405; *Conner v. Drake*, 1 Ohio St. 168.

Pennsylvania.—*Gray v. Wilson*, 4 Watts (Pa.) 39; *Horton v. Stanley*, 1 Miles (Pa.) 418; *Mentz v. Armenia F. Ins. Co.*, 79 Pa. St. 478, 21 Am. Rep. 80; *Lauman v. Young*, 31 Pa. St. 306.

South Carolina.—*Percival v. Herbemont*, 1 McMull. (S. Car.) 59.

Virginia.—In *Condon v. South Side R. Co.*, 14 Gratt. (Va.) 302, it was held that the ancient principle that agreements for the final settlement of disputes by arbitration were against the policy of the law and void, as tending to oust courts of law of their jurisdiction, is one which is contrary to the spirit of modern times, and that it is not to be extended. See *Corbin v. Adams*, 76 Va. 58.

West Virginia.—The fact that a contract contains a provision that all differences arising under it shall be submitted to arbitrators to be subsequently chosen, does not estop a person from bringing an action upon the contract

itself in the first instance to enforce his rights under it. *Kinney v. Baltimore, etc., Employees Relief Assoc.*, 35 W. Va. 385. In this case the court, by Bannon, J., said: "The common-law doctrine is thus laid down in 2 Tuck. Comm. 31: 'Though parties on entering into a contract agree that if a difference should arise between them they will refer it to arbitrators, yet a bill for specific performance of such agreement will not lie (*Street v. Rigby*, 6 Ves. Jr. 818; *Gourlay v. Somerset*, 19 Ves. Jr. 431). And it seems an action at law will not lie for refusal to nominate an arbitrator in pursuance of a covenant to refer (*Browning v. Wright*, 2 B. & P. 13). Nor is an agreement to refer a bar to a suit or action, though if the party sues, contrary to his bond of submission, he is liable to an action for damages. *Mitchell v. Harris*, 2 Ves. Jr. 132. Nor can a party by an agreement to refer deprive himself of right to apply to a court of equity. *Nichols v. Charlie*, 14 Ves. Jr. 271. Indeed, a mere agreement to refer, without an actual consequent reference, is no bar to an action in any case.'"

1. Breach of the Stipulation.—*Livingston v. Ralli*, 24 L. J. Q. B. 269, 5 El. & Bl. 132, 85 E. C. L. 132; *Donegal v. Verner*, 6 Ir. R. C. L. 504; *Tattersall v. Groote*, 2 B. & P. 131; *Cavanagh v. Dooley*, 6 Allen (Mass.) 66; *Percival v. Herbemont*, 1 McMull. (S. Car.) 59; *Hill v. More*, 40 Me. 523; *Haggart v. Morgan*, 5 N. Y. 422, 55 Am. Dec. 350; *Mitchell v. Harris*, 2 Ves. Jr. 129; *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray (Mass.) 182; *Gray v. Wilson*, 4 Watts (Pa.) 41.

Damages for Refusing to Refer.—Unless there be a stipulation for the payment of a certain sum in case of the breach of such an agreement, only nominal damages can be recovered, as the jury usually have no means of estimating the true amount. See *Russell on Awards* (6th ed.) 65; *Street v. Rigby*, 6 Ves. Jr. 815.

Sometimes Substantial Damages are given, as where a party refuses to appoint a valuer to make an estimate. *Thomas v. Fredricks*, 10 Q. B. 775, 59 E. C. L. 775.

But where a Valuer has been Appointed and Refuses to Act, no action will lie. *Cooper v. Shuttleworth*, 25 L. J. Exch. 114.

As to the Damages that may be Recovered, see further, *Day v. Essex County Bank*, 13 Vt. 97; and as to the right to sue on the contract, *Goldstone v. Osborn*, 2 C. & P. 550, 12 E. C. L. 256.

2. Livingston v. Ralli, 24 L. J. Q. B. 269, 5 El. & Bl. 132, 85 E. C. L. 132; *Thompson v. Char-nock*, 8 T. R. 139.

An agreement to submit is no defense to an action for the same cause commenced after the agreement was entered into. *Smith v. Compton*, 20 Barb. (N. Y.) 262; *Stone v. Dennis*, 3 Port. (Ala.) 231; *Knaus v. Jenkins*, 40 N. J. L. 288, 29 Am. Rep. 237; *Rowe v. Williams*, 97 Mass. 163.

In *Snodgrass v. Gavit*, 28 Pa. St. 221, where the terms of the agreement were that all misunderstandings or questions between the parties

And although such stipulations are said to be void, yet when the parties have gone on with the arbitration in pursuance of the agreement, and an award has been made, the courts can no longer entertain a suit upon the original contract.¹

(2) *Condition Precedent to Right of Action*—(a) *General Rule*.—Where a contract contains a stipulation not that all questions arising thereunder, whether as to the validity or effect of such contract or otherwise, shall be submitted to arbitration, but that the decision of arbitrators upon a certain question or questions, such as the quantity, quality, or price of materials or workmanship, the value of work, the amount of loss or damage, or the like, shall be a condition precedent to the right of action upon the contract itself, no fixed sum being stated in the contract, such stipulation will be enforced, because the parties to a contract have a right to adopt whatever method they see fit for determining such questions, and until the method adopted has been pursued, or some sufficient reason given for not pursuing it, no action can be brought upon the contract.²

thereto should be submitted to three arbitrators to be mutually chosen, whose decision should be final, it was held that, in order to make this stipulation a defense to an action on the contract, the defendant must first show that he offered to choose arbitrators, and that the plaintiff refused.

1. *Cleworth v. Pickford*, 7 M. & W. 314; *Smith v. Boston, etc.*, R. Co., 36 N. H. 487; *Kill v. Hollister*, 1 Wils. 129; *Mitchell v. Harris*, 2 Ves. Jr. 136, 4 Bro. C. C. 311; *Smith v. Compton*, 20 Barb. (N. Y.) 262.

2. *Submission to Arbitration Made Condition Precedent to Right of Action—England*.—*Scott v. Avery*, 8 Exch. 487, 5 H. L. Cas. 811; *Tredwen v. Holman*, 1 H. & C. 72, 31 L. J. Exch. 398; *Russell v. Pellegrini*, 6 El. & Bl. 1020; *Hemans v. Picciotto*, 1 C. B. N. S. 646, 87 E. C. L. 646; *Braunstein v. Accidental Death Ins. Co.*, 31 L. J. Q. B. 17; *Westwood v. Secretary of State for India*, 1 N. R. 262; *Goldstone v. Osborn*, 2 C. & P. 550, 12 E. C. L. 256; *Elliott v. Royal Exch. Assur. Co.*, L. R. 2 Exch. 242; *Sharpe v. San Paulo R. Co.*, L. R. 8 Ch. 597; *Dawson v. Fitzgerald*, 1 Exch. Div. 257; *Edwards v. Aberayron Mut. Ship Ins. Soc.*, 1 Q. B. Div. 563; *Collins v. Locke*, L. R. 4 App. Cas. 674; *Worsley v. Wood*, 6 T. R. 710; *Viney v. Bignold*, 20 Q. B. Div. 172; *Scott v. Liverpool*, 3 De G. & J. 334; *Brown v. Overbury*, 11 Exch. 715; *Cooke v. Cooke*, L. R. 4 Eq. 85; *Jones v. Skinner*, 20 L. J. Ch. 90; *Wright v. Ward*, 24 L. T. N. S. 439; *Mansfield v. Doolin*, 4 Ir. R. C. L. 17; *Roper v. London*, 1 El. & Bl. 825, 102 E. C. L. 825; *Lowndes v. Stamford*, 18 Q. B. 435, 83 E. C. L. 435, 21 L. J. Q. B. 371.

Lord Chancellor Cranworth, in delivering his opinion in the House of Lords, in *Scott v. Avery*, 8 Exch. 487, 5 H. L. Cas. 811, said: "If I covenant with A to do particular acts, and it is also covenanted between us that any question that may arise as to the breach of the covenants shall be referred to arbitration, that latter covenant does not prevent the covenantee from bringing an action. A right of action has accrued, and it would be against the policy of the law to give effect to an agreement that such a right should not be enforced through the medium of the ordinary tribunals.

But if I covenant with A B that if I do or omit to do a certain act, then I will pay to him such a sum as J. S. shall award as the amount of damage sustained by him, then until J. S. has made his award and I have omitted to pay the sum awarded, my covenant has not been broken, and no right of action has arisen. The policy of the law does not prevent parties from so contracting." Lord Campbell, in his concurring opinion, said: "But what pretense can there be for saying that there is anything contrary to public policy in allowing parties to contract, that they shall not be liable to any action until their liability has been ascertained by a domestic and private tribunal upon which they themselves agree? Can the public be injured by it? It seems to me that it would be a most inexpedient encroachment upon the liberty of the subject if he were not allowed to enter into such a contract."

In *Horton v. Sayer*, 4 H. & N. 650, the court, by Bramwell, B., referring to the award in *Scott v. Avery*, 8 Exch. 487, 5 H. L. Cas. 811, said: "The principle of that decision is very intelligible. If a man covenants to do a particular act, and also covenants that if any dispute shall arise in respect thereof, it shall be referred to arbitration, that is the case with reference to which the courts have used the unfortunate expression that 'their jurisdiction is ousted by the agreement of the parties.' On the other hand, if a man covenants to do a particular act and that, in the event of his not doing it, the other party shall be entitled to receive such a sum of money as they shall agree upon, or, if they cannot agree, such an amount as shall be determined by an arbitrator, there is no debt which can be sued for until the arbitrator has ascertained what sum is to be paid."

In *Alexander v. Campbell*, 41 L. J. Ch. 478, it was held that a condition precedent in an insurance policy that the amount of loss shall be determined by arbitration, did not compel the insured to submit the question whether the policy itself was not void because of misrepresentations as to the true condition of the ship. See *Hart v. Hart*, 18 Ch. Div. 670.

Stipulations in Leases.—Where a lease contains a covenant that the lessee shall pay

(b) *Stipulations in Policies of Insurance.*—The cases in which questions have been most frequently litigated as to whether submissions under arbitration clauses in contracts are or are not conditions precedent to the right to sue upon

damages for dilapidation according to such award as may be made by arbitrators selected for the purpose, the lessor must procure such award before a right of action for damages accrues. *Babbage v. Coulburn*, 9 Q. B. Div. 235.

Where a lease contains an arbitration clause by which it is agreed that all disputes thereunder shall be submitted to arbitration, such clause is no bar to an appeal to enjoin a breach of the covenant by the lessee. *Mexborough v. Bower*, 7 Beav. 127.

Where a lease contained a covenant for the submission to arbitration of disputes arising under it, but a subsequent agreement in writing, which in some points waived the rights of the parties, was entered into which bound the lessor to take certain steps, it was held that an action brought by the lessee would not be stayed in order to refer the dispute to arbitration, as the whole subject-matter of the action was not covered by such arbitration clause. *Turnock v. Sartoris*, 43 Ch. Div. 150.

Stipulation in Trust Deed.—A trust deed of a bank provided that in case a certain proportion of the assets should be lost, the bank would be wound up, unless the shareholders agreed to carry it on; that any shareholder who did not wish to do so would be paid out, and that if any dispute arose between a shareholder and the directors, which might end in a lawsuit, it should be referred to arbitration. A meeting of the shareholders having been held to consider whether the bank would be wound up under this provision, one of the shareholders applied to the directors for information to enable him to ascertain the bank's position, which they refused to give and desired to refer the matter to arbitration under the provision in the trust deed. The shareholder thereupon applied to the court to compel the directors to furnish him with the information, but it was held that he was bound under the trust deed to submit the matter to arbitration. *Van der Spuy v. Directors of Pearl Bank*, 7 Juta, Cape of Good Hope 245.

Arbitration Clause in Society Rules.—Before an arbitration clause in the rules of a building society can be given effect, it must be shown that the dispute is between the society and a member *qua* member. *Delaney v. Sandhurst Bldg. Soc.*, 5 Vict. L. Rep. 189.

Stipulation in Contracts of Employment.—Where a contract of employment contains a provision that upon the termination of such contract before its expiration, it shall be referred to a certain person to be determined how much should be paid the employee, such employee cannot bring an action for his compensation without first making an offer to refer the matter to such determination. *Hemans v. Picciotto*, 1 C. B. N. S. 646, 87 E. C. L. 646.

Contracts Legislatively Confirmed.—Where the parties to an agreement legislatively confirmed are thereby bound to submit to arbi-

tration all disputes that might arise thereunder as to its meaning and effect, and as to the manner of carrying it out, it was held that the jurisdiction of the courts is thereby excluded, and that all disputes arising thereunder must be submitted to arbitration. *Caledonian R. Co. v. Greenock, etc.*, R. Co., 2 L. R. Sc. App. Cas. 347.

Injunction Lies.—Where an action has been brought to impeach an instrument which contained an agreement to submit to arbitration disputes arising thereunder, an injunction will lie to restrain a party to such agreement from proceeding under it. *Kitts v. Moore* (1895), 1 Q. B. 253.

United States.—*U. S. v. Robeson*, 9 Pet. (U. S.) 319; *Trott v. City Ins. Co.*, 1 Cliff. (U. S.) 439; *Hamilton v. Liverpool, etc.*, Ins. Co., 136 U. S. 255; *Fox v. Railroad*, 3 Wall. Jr. (C. C.) 243; *Perkins v. U. S. Electric Light Co.*, 16 Fed. Rep. 513, 21 Blatchf. (U. S.) 308; *Gauche v. London, etc.*, Ins. Co., 10 Fed. Rep. 347; *Knoche v. Chicago, etc.*, R. Co., 34 Fed. Rep. 471. See 16 Alb. L. J. 464; *Crossley v. Connecticut F. Ins. Co.*, 27 Fed. Rep. 30.

Where a policy of fire insurance contained a provision that "in case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy," it was held that it could not be pleaded in bar to an action on the policy unless there was a further provision in the policy that no such action should be brought until after an award. *Hamilton v. Home Ins. Co.*, 137 U. S. 370.

California.—*Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54; *Old Saucelito Land, etc.*, Co. v. Commercial Union Assur. Co., 66 Cal. 253; *Carroll v. Girard F. Ins. Co.*, 72 Cal. 297; *Scammon v. Denio*, 72 Cal. 393; *Loup v. California Southern R. Co.*, 63 Cal. 101; *Cox v. McLaughlin*, 63 Cal. 196.

Courts of justice will take jurisdiction of a matter in dispute, although there is an agreement to arbitrate; yet, if the agreement is that the party held liable shall pay such sum and only such sum as shall be decided upon by the arbitrators, the procuring of an award is as clearly a condition precedent as if the parties to the submission had so expressly provided. *Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54.

Colorado.—*Denver, etc.*, Constr. Co. v. Stout, 8 Colo. 61; *Union Pac. R. Co. v. Anderson*, 11 Colo. 293; *Denver, etc.*, R. Co. v. Riley, 7 Colo. 494.

Connecticut.—*Hall v. Norwalk F. Ins. Co.*, 57 Conn. 105.

Georgia.—*Liverpool, etc.*, Ins. Co. v. Creighton, 51 Ga. 95.

the contract itself, are those arising under stipulations for arbitration in policies of insurance, and as there have been many decisions under this head, it has

Illinois.—*Birmingham F. Ins. Co. v. Pulver*, 126 Ill. 329, 9 Am. St. Rep. 598.

Iowa.—*Gere v. Council Bluffs Ins. Co.*, 67 Iowa 272.

Kansas.—A written agreement that in case the cattle of either party should trespass and do injury on the lands of the other party, the damages payable should be ascertained by arbitration and not by action, is valid and binding, and precludes either party so injured from suing the owner of the trespassing cattle unless the latter has refused arbitration. *Berry v. Carter*, 19 Kan. 135.

Massachusetts.—*Haley v. Bellamy*, 137 Mass. 357; *Palmer v. Clark*, 106 Mass. 373; *Hood v. Hartshorn*, 100 Mass. 117, 1 Am. Rep. 89; *Rowe v. Williams*, 97 Mass. 163; *Cavanagh v. Dooley*, 6 Allen (Mass.) 66; *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray (Mass.) 182; *Reed v. Washington F. & M. Ins. Co.*, 138 Mass. 572.

Mississippi.—Where two parties enter into an agreement by which one is to erect improvements on the lands of the other, the value thereof to be estimated by two disinterested persons, one party cannot defeat the right to an appraisal by refusing to appoint an arbitrator, and a refusal or failure to appoint gives the other party an undisputed right to have the valuation made. *Orne v. Sullivan*, 3 How. (Miss.) 161, 34 Am. Dec. 74.

Nebraska.—*Mutual Hail Ins. Co. v. Wilde*, 8 Neb. 427; *Western Horse, etc., Ins. Co. v. Putnam*, 20 Neb. 321.

Nevada.—Where a dispute arises about the nonpayment of a sum which is specified exactly in the contract, a stipulation that all disputes arising under the contract should be settled before action should be brought, is not a condition precedent to an action on such contract. *Sutro Tunnel Co. v. Segregated Belcher Min. Co.*, 19 Nev. 121, 8 Am. & Eng. Corp. Cas. 209.

New Hampshire.—*Smith v. Boston, etc., R. Co.*, 36 N. H. 458.

New Jersey.—*Wolff v. Liverpool, etc., Ins. Co.*, 50 N. J. L. 453; *Boyd v. Meighan*, 48 N. J. L. 404.

New York.—*Smith v. Briggs*, 3 Den. (N. Y.) 73; *Davenport v. Long Island Ins. Co.*, 10 Daly (N. Y.) 535; *Delaware, etc., Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250; *Lafond v. Deems*, 81 N. Y. 507; *Seward v. Rochester*, 109 N. Y. 164, *affirming* 39 Hun N. Y. 46; *Hart v. Lauman*, 29 Barb. (N. Y.) 410. See *contra*, *Hurst v. Litchfield*, 39 N. Y. 377, which is *discredited* or *overruled* in *Delaware, etc., Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250, a leading case.

The result in each case depends upon the construction placed upon the arbitration clause itself. Before an award of arbitrators can be made a condition precedent to a right to sue upon a contract, it is essential that the provision containing such condition name the arbitrators or fix the mode of their appointment. *Mark v. National F. Ins. Co.*, 24 Hun (N. Y.) 565, *affirmed* in 91 N. Y. 663.

Where a contract contains an executory and general arbitration clause, providing for the adjustment of all disputes that may arise thereunder, not limited to causes of action created by the instrument, a submission to such arbitration is not a condition precedent to the right to maintain an action for damages growing out of acts done under the contract itself. *Seward v. Rochester*, 109 N. Y. 164.

So action may be brought upon the original contract when the award is void. *Morton v. Cameron*, 3 Robt. (N. Y.) 189.

In *Haggart v. Morgan*, 5 N. Y. 422, 55 Am. Dec. 350, it was held that an agreement to submit a demand to arbitration is no bar to an action at law for the same cause, and where the arbitrators neglect to make a valid award within the time stipulated in the submission, the parties not being to blame, a suit may be brought on the original cause of action.

See *Delaware, etc., Canal Co. v. Dubois*, 15 Wend. (N. Y.) 87; *Butler v. Tucker*, 24 Wend. (N. Y.) 447; *Smith v. Briggs*, 3 Den. (N. Y.) 73; *Smith v. Brady*, 17 N. Y. 173, 72 Am. Dec. 442; *McMahon v. New York, etc., R. Co.*, 20 N. Y. 463; *Wood v. Lafayette*, 46 N. Y. 484.

Where the certificate of the board of fire underwriters was made a condition precedent to payment under a contract for equipping defendant's factory with automatic sprinklers, the refusal of the certificate by such board because the pump was not of sufficient capacity, and because there was no guarantee that steam would always be maintained to work it, will not excuse payment, these being conditions entirely within defendant's control. *New York, etc., Automatic Sprinkler Co. v. Andrews*, 4 Misc. Rep. (N. Y. C. Pl.) 124.

Suit may be brought upon the original cause of action when the arbitrators cannot agree either upon a decision as to the question submitted to them or upon the choice of an umpire, when the parties are not at fault. *Reformed Protestant Dutch Church v. Parkhurst*, 4 Bosw. (N. Y.) 496.

Pennsylvania.—*North Lebanon R. Co. v. McGrann*, 33 Pa. St. 530, 75 Am. Dec. 624; *Lauman v. Young*, 31 Pa. St. 306; *Connor v. Simpson*, 104 Pa. St. 440; *Hostetter v. Pittsburgh*, 107 Pa. St. 419; *Gray v. Wilson*, 4 Watts (Pa.) 41.

In Pennsylvania the courts have been more liberal in enforcing similar conditions in contracts than in other states, and they have generally held the parties strictly to them. *O'Reilly v. Kerns*, 52 Pa. St. 214; *Reynolds v. Caldwell*, 51 Pa. St. 298; *Snodgrass v. Gavit*, 28 Pa. St. 221; *Faunce v. Burke*, 16 Pa. St. 469, 55 Am. Dec. 519; *Monongahela Nav. Co. v. Fenlon*, 4 W. & S. (Pa.) 205.

Where the provision in a contract is for arbitrators to be mutually chosen it is not necessary for the plaintiff to show that he attempted to procure an award before he brought his action. *Snodgrass v. Gavit*, 28 Pa. St. 221.

Parties are bound to an agreement entered into between them that all questions in dispute which may arise upon an executory

been thought advisable to bring them together in one place, although it is not clear that any general principles of law can be deduced from them outside of the general rule.¹

contract shall be submitted to arbitration; but where the agreement does not provide for submitting matters in dispute to a particular person or tribunal, but to one or more persons to be chosen mutually by the parties, the agreement may be revoked by either, and it does not oust the jurisdiction of the courts having jurisdiction of the subject-matter of the dispute. *Commercial Union Assur. Co. v. Hocking*, 115 Pa. St. 407, 2 Am. St. Rep. 562.

Where a jury of awards is constituted a tribunal to decide to whom prizes offered by an academy should be awarded, no recovery of such prize can be made without an award. *Trego v. Pennsylvania Academy* (Pa. 1886), 3 Cent. Rep. 156.

It may be noticed from the decisions that the naming of an arbitrator or arbitrators in the agreement to submit is not material. But in Pennsylvania it is maintained that while parties to an executory contract should agree that any question of difference which may arise between them in reference thereto, shall be submitted to the determination of one or more persons to be mutually chosen, they are not bound by such an agreement if the arbitrator or arbitrators be not named therein, but if the individual or tribunal be named or designated they are bound. *Commercial Union Assur. Co. v. Hocking*, 115 Pa. St. 407, 2 Am. St. Rep. 562; *Monongahela Nav. Co. v. Fenlon*, 4 W. & S. (Pa.) 205; *Snodgrass v. Gavit*, 28 Pa. St. 224; *Lauman v. Young*, 31 Pa. St. 306; *O'Reilly v. Kerns*, 52 Pa. St. 214; *Howard v. Allegheny Valley R. Co.*, 69 Pa. St. 489; *Hostetter v. Pittsburgh*, 107 Pa. St. 419; *Page v. Vankirk*, 1 Brews. (Pa.) 285.

Vermont.—*Herrick v. Belknap*, 27 Vt. 673.
Wisconsin.—*Hudson v. McCartney*, 33 Wis. 331; *Canfield v. Watertown F. Ins. Co.*, 55 Wis. 419; *Oakwood Retreat Assoc. v. Rathborne*, 65 Wis. 177.

1. The following cases illustrate the circumstances in the several jurisdictions, under which stipulations for arbitration on insurance policies have been held conditions precedent to a right to sue upon the original contract itself:

Arbitration Clauses in Insurance Policies—*England*.—*Elliott v. Royal Exch. Assur. Co.*, L. R. 2 Exch. 245; *Edwards v. Aberayron Mut. Ship Ins. Soc.*, 1 Q. B. Div. 563; *Scott v. Mercantile, etc., Ins. Co.*, 66 L. T. N. S. 811; *Trainor v. Fire Assur. Co.*, 65 L. T. N. S. 825.
Canada.—*Bowes v. National Ins. Co.*, 20 New Bruns. 438.

Where a fire-insurance policy contains a provision for the submission of disputes arising thereunder to arbitration, although it is not signed by the insured, it is a submission to arbitration within the English Arbitration Act of 1889, § 274, which defines submission as a written agreement to submit present or future differences to arbitration, and gives power to stay any legal proceedings commenced by any party to the submission against any other party thereto. *Baker v. Yorkshire F., etc.,*

Assur. Co. (1892), 1 Q. B. 144. See *In re Carlisle*, 44 Ch. Div. 200.

It is the rule of the *Scotch* law that a reference to arbitrators not named in the submission cannot be enforced, but this rule does not apply to a policy of insurance which provides that an award as to the amount payable shall be a condition precedent to any action upon the policy. Such clause is an integral part of the contract, which prevents any action being brought upon it until such arbitration is had. *Caledonian Ins. Co. v. Gilmour*, H. L. Sc. (1893), A. C. 85.

United States.—*Gauche v. London, etc., Ins. Co.*, 10 Fed. Rep. 347; *Wallace v. German-American Ins. Co.*, 41 Fed. Rep. 742; *Hamilton v. Liverpool, etc., Ins. Co.*, 136 U. S. 242. Compare *Crossley v. Connecticut F. Ins. Co.*, 27 Fed. Rep. 30.

But where there is an agreement in the policy which requires an award to be made as to the amount of loss, before any suit can be brought, such provision is a condition precedent to an action on the policy. *Hamilton v. Home Ins. Co.*, 137 U. S. 370.

Where an insurance policy contains an arbitration clause an action brought upon the policy without a submission to arbitration is premature, although no demand for arbitration has been made by the company. *Kahnweiler v. Phoenix Ins. Co.*, 57 Fed. Rep. 562.

So a clause in a life-insurance policy, which provided that the company would pay the amount insured if, in the opinion of their surgeon-in-chief, the party did not die of intemperance or of any disease produced or aggravated by intemperance, is a condition precedent to the right to sue. *Campbell v. American Popular L. Ins. Co.*, 1 MacArthur (D. C.) 250, 29 Am. Rep. 591.

California.—*Adams v. South British, etc., F. & M. Ins. Co.*, 70 Cal. 198; *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 17 Am. St. Rep. 233; *Case v. Manufacturers' F. & M. Ins. Co.*, 82 Cal. 263; *Old Saucelito Land, etc., Co. v. Commercial Union Assur. Co.*, 66 Cal. 253; *Carroll v. Girard F. Ins. Co.*, 72 Cal. 299; *Cowan v. Phenix F. Ins. Co.*, 78 Cal. 181.

Connecticut.—A voluntary agreement entered into by an insurance company and an insured person to submit the determination of the amount of loss to arbitrators is not invalid because the provisions in the policy as to the mode of submitting to arbitration have not been exactly complied with. *Hall v. Norwalk F. Ins. Co.*, 57 Conn. 105.

Florida.—Where a fire-insurance policy contains a stipulation that all differences as to the loss or damage, after the receipt of proof thereof, shall be determined by the arbitrator, and that the award shall be final and conclusive as to the amount of loss or damage, but not as to the company's liability under the policy, it is a valid and binding covenant, unless fraud can be shown. Nor is such stipulation invalid on the ground that it is an attempt to oust the jurisdiction of the court.

Nor is it necessary that the arbitration should be conducted in accordance with the McClell. Fla. Dig., p. 105, *et seq.*, as the submission does not come within the arbitrations provided for therein. *Hanover F. Ins. Co. v. Lewis*, 28 Fla. 209.

Georgia.—*Liverpool, etc., Ins. Co. v. Creighton*, 51 Ga. 95.

Illinois.—*Germania F. Ins. Co. v. Frazier*, 22 Ill. App. 327; *German-American Ins. Co. v. Steiger*, 109 Ill. 254; *Phenix Ins. Co. v. Stocks*, 149 Ill. 319.

Iowa.—*Gere v. Council Bluffs Ins. Co.*, 67 Iowa 272.

Kansas.—*Continental Ins. Co. v. Wilson*, 45 Kan. 250, 23 Am. St. Rep. 720.

Maine.—*Stephenson v. Piscataqua F. & M. Ins. Co.*, 54 Me. 69; *Robinson v. Georges Ins. Co.*, 17 Me. 131, 35 Am. Dec. 239.

Massachusetts.—*Reed v. Washington F. & M. Ins. Co.*, 138 Mass. 572; *Hutchinson v. Liverpool, etc., Ins. Co.*, 153 Mass. 143.

Michigan.—*Morley v. Liverpool, etc., Ins. Co.*, 85 Mich. 210; *Chippewa Lumber Co. v. Phenix Ins. Co.*, 80 Mich. 116.

Where a fire-insurance policy provides for the submission of certain matters to arbitration and expressly refuses to submit others, the report of such a submission should fully identify it. *Haslinger v. Long Island Ins. Co.*, 62 Mich. 144.

Minnesota.—*Gasser v. Sun F. Office*, 42 Minn. 315. A person is not excused from complying with a demand to submit to arbitration under the provisions of a policy of insurance by the pendency of negotiations for a compromise. *Powers Dry Goods Co. v. Imperial F. Ins. Co.*, 48 Minn. 380.

Missouri.—Where a fire-insurance policy contains a mandatory stipulation that any disagreement as to the amount of loss shall be settled by arbitration, such stipulation is not qualified by the words "when appraisal has been required," in the latter portion of the policy, and the compliance with such condition is a condition precedent to a recovery on the policy. *Murphy v. North British Mercantile Ins. Co.*, 1 Mo. App. 151.

Montana.—Where an insurance policy or other contract contains a provision requiring all differences arising between the parties as to their rights and liabilities thereunder to be submitted to arbitration, it will be set aside as against public policy, but when such provision merely requires that the value of anything which might be involved in litigation shall be submitted to arbitration, it does not oust the jurisdiction of the courts; it becomes valid and binding upon the parties. *Randall v. American F. Ins. Co.*, 10 Mont. 340, 24 Am. St. Rep. 50.

Nebraska.—*German-American Ins. Co. v. Etherton*, 25 Neb. 505; *Western Horse, etc., Ins. Co. v. Putnam*, 20 Neb. 331.

New Jersey.—*Wolff v. Liverpool, etc., Ins. Co.*, 50 N. J. L. 453.

New York.—*Bishop v. Agricultural Ins. Co.* (Supreme Ct.), 9 N. Y. Supp. 350; *Davenport v. Long Island Ins. Co.*, 10 Daly (N. Y.) 535; *Lasher v. Northwestern Nat. Ins. Co.*, 57 How. Pr. (N. Y. Supreme Ct.) 224; *Gibbs v. Continental Ins. Co.*, 13 Hun (N. Y.) 611; *Mark v. National F. Ins. Co.*, 24 Hun (N. Y.) 565,

91 N. Y. 663; *Hurst v. Litchfield*, 39 N. Y. 377.

Such a stipulation is a condition precedent, but where fraud is proved the award will be set aside. *Bradshaw v. Agricultural Ins. Co.* (Supreme Ct.) 16 N. Y. Supp. 639, 62 Hun (N. Y.) 619.

Where the appraisers appointed under an arbitration clause in an insurance policy fail to agree, the insured cannot bring an action on such policy without first doing all in his power to make the arbitration effectual. *Davenport v. Long Island Ins. Co.*, 10 Daly (N. Y.) 535.

A condition in a policy of insurance that no action shall be brought for the recovery of any claim upon such policy, unless the action shall be commenced within one year after the loss or damage, is valid and binding. *Ripley v. Aetna Ins. Co.*, 30 N. Y. 136, 86 Am. Dec. 362; *Roach v. New York, etc., Ins. Co.*, 30 N. Y. 548; *Arthur v. Homestead F. Ins. Co.*, 78 N. Y. 466, 34 Am. Rep. 550; *Mix v. Andes Ins. Co.*, 9 Hun (N. Y.) 397.

North Carolina.—*Herndon v. Imperial F. Ins. Co.*, 107 N. Car. 183.

Where a policy holder rejected an offer by an insurance company of a certain amount in payment for his loss, it was held to constitute a "difference" between the parties within the meaning of a condition in the policy that every "difference" as to the amount of loss or damage was to be submitted to arbitration before an action should be brought. *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 106 N. Car. 28.

Ohio.—Where a policy of insurance contains a provision for submitting disputes as to the amount of loss to arbitration, it is a condition precedent to a suit thereon, where there is also in such policy a provision that no suit shall be brought until all the requirements of the policy are fulfilled. *Hamilton v. Fireman's Ins. Co.*, 29 Ohio L. J. 209.

Pennsylvania.—*Mentz v. Armenia F. Ins. Co.*, 79 Pa. St. 478, 21 Am. Rep. 80. See *Wright v. Susquehanna Mut. F. Ins. Co.*, 110 Pa. St. 29.

Texas.—*Scottish Union, etc., Ins. Co. v. Clancy*, 71 Tex. 5.

Virginia.—*Tilley v. Connecticut F. Ins. Co.*, 86 Va. 811.

Wisconsin.—*Phoenix Ins. Co. v. Badger*, 53 Wis. 283; *Chapman v. Rockford Ins. Co.*, 89 Wis. 572.

Where Stipulation Held Void or Arbitration Not Deemed Condition Precedent to Right of Action.—In the following cases either the stipulation for arbitration has itself been held void, or reasons have been assigned why an arbitration should not be deemed to be a condition precedent to the right of action on the policy:

United States.—*Travellers' Ins. Co. v. McConkey*, 127 U. S. 661; *Wallace v. German-American Ins. Co.*, 4 McCrary (U. S.) 123. See *Crossley v. Connecticut F. Ins. Co.*, 27 Fed. Rep. 30; *Connecticut F. Ins. Co. v. Hamilton*, 59 Fed. Rep. 258.

An agreement in a policy of insurance not to remove any suit therein into the federal court is void. The rule of law is that every citizen has a right to resort to all the courts and to invoke the protection which all the laws afford him, and that it is not lawful for

him to bind himself beforehand by an agreement to forfeit his rights whenever the case may be presented. *Home Ins. Co. v. Morse*, 20 Wall. (U. S.) 445, *reversing* 30 Wis. 496.

A by-law of an insurance company which provides that any dispute that may arise in regard to the loss shall be referred to and determined by certain referees, cannot be pleaded in bar to an action upon the policy. Such a by-law is void. *Trott v. City Ins. Co.*, 1 Cliff. (U. S.) 439.

Where a joint demand for arbitration has been made by twelve insurance companies, one or two of which are not entitled to make such a demand, and none of which are entitled to a joint appraisal and arbitration, such demand will not be sufficient to put the insured in default, although he, as well as the companies, may have thought that a joint appraisal and arbitration was the only practicable one. *Hamilton v. Connecticut F. Ins. Co.*, 46 Fed. Rep. 42. See *Hamilton v. Phoenix Ins. Co.*, 61 Fed. Rep. 379.

Where a certificate of membership in a mutual accident association provided that "any claim under this certificate shall, if the association require it, be referred to arbitration, * * * and no suit or proceeding at law or in equity shall be brought to recover any sum under this insurance, unless the same shall be commenced after ninety days and not later than one year," after the alleged accident, it was held that this arbitration clause did not constitute a condition precedent to the right to bring an action upon the certificate and could not be pleaded in bar or abatement to such a suit. The jurisdiction of the court was not ousted by such clause. It merely referred the question of the amount of damages to arbitration. *Smith v. Preferred Masonic Mut. Acc. Assoc.*, 51 Fed. Rep. 520.

Where an insurance policy provided for an arbitration in case of disagreement as to the loss, specifying the method in which the reference should be conducted, but the proceedings showed that there was, in fact, no disagreement, and the reference was otherwise not conducted in accordance with the terms of the policy, it was held that an appraisal and award was not a condition precedent to maintaining a suit upon the policy itself. *Harrison v. Hartford F. Ins. Co.*, 59 Fed. Rep. 732.

California.—Where a stipulation to submit to arbitration is contained in a fire-insurance policy, but does not provide for the number of arbitrators or the mode of their selection, it is too indefinite to be enforced, and a submission to arbitration under such a stipulation is not a condition precedent to a right of action upon the policy by the insured against the insurer. *Greiss v. State Investment, etc., Co.*, 98 Cal. 241. See *Case v. Manufacturers' F. & M. Ins. Co.*, 82 Cal. 263.

Illinois.—See *Johnson v. Humboldt Ins. Co.*, 91 Ill. 92, 33 Am. Rep. 47; *Mechanics' Ins. Co. v. Hodge*, 46 Ill. App. 479, *affirmed* in 149 Ill. 208.

Where a condition in an insurance policy provides that the question of loss shall be submitted to arbitration in case the parties cannot agree upon it, this cannot operate to deprive the assured of his right of action on such

policy, unless it is clearly made a condition precedent to the existence of such a right. *Birmingham F. Ins. Co. v. Pulver*, 126 Ill. 329, 9 Am. St. Rep. 598.

Where the arbitrator appointed by the company refuses to go on with the work of appraisal after its commencement, or acts in bad faith so as to prevent the making of the appraisal within a reasonable time, the insured person is no longer bound by a stipulation in a fire-insurance policy that in the event of a disagreement as to the amount of loss, the loss shall be ascertained by two disinterested arbitrators. *Niagara Ins. Co., v. Bishop*, 49 Ill. App. 388.

Iowa.—*Longhurst v. Star Ins. Co.* 19 Iowa 364; *Stout v. City F. Ins. Co.*, 12 Iowa 371, 79 Am. Dec. 539.

Where an insurance company asks for and obtains an arbitration, under a provision of the policy, it cannot avoid liability because of defects in the proof of loss known to it before the arbitration took place, where the investigation extended beyond the limitation for making the required proof. *Jacobs v. St. Paul F. & M. Ins. Co.*, 86 Iowa 145.

Where the submission to arbitration, according to the terms of the policy, was to be made "at the request of either one of the parties," it was considered not to be a condition precedent, and the insured was allowed to sue before the arbitration took place. *Gere v. Council Bluffs Ins. Co.*, 67 Iowa 272.

Where the differences as to the amount of loss were to be determined by arbitration at the "written request of either party," such provision was not a condition precedent in the absence of such request. *Davis v. Anchor Mut. F. Ins. Co.* (Iowa 1895), 64 N. W. Rep. 687.

Kansas.—Where a policy of insurance contains a proviso that any difference of opinion between the company and the insured, as to the amount of loss, may be arbitrated, such arbitration is not thereby constituted a condition precedent to bringing a suit thereon, but leaves the arbitration optional with the parties. *Continental Ins. Co. v. Wilson*, 45 Kan. 250, 23 Am. St. Rep. 720.

Where a policy of insurance provides for the appointment of arbitrators, upon the request of either party, in case differences should arise as to the amount of loss, where the amount of loss has not been questioned and no request has been made for such appointment, the appointment is not a condition precedent to bringing an action upon the policy. *Capitol Ins. Co. v. Wallace*, 48 Kan. 400.

Maine.—*Hobbs v. Manhattan Ins. Co.*, 56 Me. 419, 96 Am. Dec. 472.

In *Stephenson v. Piscataqua F. & M. Ins. Co.* 54 Me. 70, it was held that parties have no more right to enter into contracts against a resort to the courts in any given case than they have to provide a remedy prohibited by the law itself.

A stipulation in a policy of insurance which provides that a dispute thereunder shall be settled by arbitration is void, as it tends to oust the jurisdiction of the courts. *Robinson v. Georges Ins. Co.*, 17 Me. 131, 35 Am. Dec. 239.

Massachusetts.—*Cobb v. New England Mut. Marine Ins. Co.*, 6 Gray (Mass.) 192;

In Order to Make an Award a Condition Precedent to the right of bringing suit upon

Hutchinson v. Liverpool, etc., Ins. Co., 153 Mass. 143; *Pearl v. Harris*, 121 Mass. 390; *Reed v. Washington F. & M. Ins. Co.*, 138 Mass. 572; *Hall v. People's Mut. F. Ins. Co.*, 6 Gray (Mass.) 185; *Rowe v. Williams*, 97 Mass. 163; *Ashworth v. Builders' Mut. F. Ins. Co.*, 112 Mass. 422, 17 Am. Rep. 117.

Where a policy of insurance provides that no suit shall be brought thereon until the matter has been first referred to arbitration, such proviso is not a condition precedent to an action before arbitration upon a policy promising to pay a certain sum on the death of the assured. *Badenfeld v. Massachusetts Mut. Acc. Assoc.*, 154 Mass. 77.

Where an insurance policy contains the usual clause of reference to arbitration in case of difference of opinion as to the amount of loss, it is no bar to an action at law upon the policy. *Clement v. British American Assur. Co.*, 141 Mass. 298.

In *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray (Mass.) 174, the difference between valid and void stipulations is pointed out as follows: The distinction is that conditions precedent annexed to contracts, such as bringing the action within a certain time, practicing no fraud, making reasonable and true representations of loss, and the like, are merely modifications of the contract, but not the remedy, and are such as the parties may lawfully insert in contracts and insurance policies, but they cannot import into such contracts stipulations in regard to the remedy itself, for that is something created and regulated by the law and not dependent upon the contract. The court, by Shaw, C.J., said that the rule was not founded on considerations of public policy alone, but "the greatest inconvenience would result in requiring courts and juries to apply different rules of law to different cases in the conduct of suits in matters relating mainly to the remedy according to the stipulations of parties in forming and diversifying their contracts in regard to remedies," and he enumerates certain stipulations which, if inserted in certain contracts, could not be relied on as a defense to a suit brought for the breach of such contract, viz.: "That in case of breach no action shall be brought; that the party in default shall be liable in equity only and not at law, or the reverse; that in any suit to be commenced no property shall be attached on mesne process, or seized on execution for the satisfaction of a judgment, or that the parties shall never be liable to arrest; that in any suit to be brought on such contract the party sued will confess judgment, or will waive a trial by jury, or consent that the report of an auditor appointed under the statute shall be final, and judgment be rendered upon it, or that the parties may be witnesses, or, as the law now stands, that the plaintiff will not offer himself as a witness; that when sued on the contract, the defendant will not plead the statute of limitations, or a discharge in insolvency," and the like.

Michigan.—*Chippewa Lumber Co. v. Phoenix Ins. Co.*, 80 Mich. 116; *Morley v. Liver-*

pool, etc., Ins. Co., 85 Mich. 210; *Nurney v. Fireman's Fund Ins. Co.*, 63 Mich. 633, 6 Am. St. Rep. 338.

Notice by the insurer of a demand for arbitration which was not served until too late to admit of its being made until subsequent to the date fixed for the payment of the loss after furnishing the proof, is too late to suspend the right of the insured to bring action upon the policy. *Zimeriski v. Ohio Farmers' Ins. Co.* 91 Mich. 600.

In *Utter v. Travelers Ins. Co.*, 65 Mich. 545, 8 Am. St. Rep. 913, it was held that where an insurance policy contains a stipulation that direct or positive proof must be adduced to show that the assured met his death accidentally, by external violence, which was not the result of design, either on his own part or on the part of any other person, such stipulation cannot be allowed to stand as a rule of evidence on the trial of an action against the insurance company, because courts will not allow the course of justice upon a trial before them to be ousted by stipulations in contracts in such a manner as to defeat their jurisdiction or the ends for which the trial is held.

Minnesota.—*Powers Dry Goods Co. v. Imperial F. Ins. Co.*, 48 Minn. 380.

Where an insurance policy contains a provision that the rights and obligations of the parties shall be determined by arbitrators, and that no action shall be maintained upon the contract, such provision is not legally effectual to bar the action where the contract fixes a certain definite sum to be paid weekly in case of disability. *Whitney v. National Masonic Acc. Assoc.*, 52 Minn. 378.

Missouri.—*Reichard v. Manhattan L. Ins. Co.*, 31 Mo. 518.

Where, in an action under an insurance policy, the defendant pleaded in defense that the question as to the amount of loss had been submitted to arbitration under the provisions of the policy, and that the suit had been brought before the decision of the arbitrators had been arrived at, and it appeared that the defendant's arbitrator had refused to agree on an umpire and had nominated persons unknown to the plaintiff's arbitrator, living some hundreds of miles distant from where the property was destroyed; and it appeared further that his refusal to agree to persons named by plaintiff's appraiser was altogether without excuse, and that his conduct was virtually a refusal to proceed with the arbitration, it was held under these circumstances that the fact that the appraisal had not been concluded was no defense to the action. *McCullough v. Phoenix Ins. Co.*, 113 Mo. 606.

Montana.—*Randall v. Phoenix Ins. Co.*, 10 Mont. 362.

Nebraska.—A provision in a fire-insurance policy that no suit or action against the insurer "shall be sustained in any court of law or chancery, until after an award shall have been obtained" by arbitration "fixing the amount" due after loss, is void. *German-American Ins. Co. v. Etherton*, 25 Neb. 505; *National*

the policy, it must be so expressed in the policy or necessarily implied by its

Masonic Acc. Assoc. *v.* Burr, 44 Neb. 256.
See Union Ins. Co. *v.* Barwick, 36 Neb. 223;
Home F. Ins. Co. *v.* Bean, 42 Neb. 537.

New Hampshire.—Leach *v.* Republic F. Ins. Co., 58 N. H. 245.

New York.—New York *v.* Hamilton F. Ins. Co., 39 N. Y. 45. See Warner *v.* Schoharie, etc., Counties Farmers Mut. F. Ins. Co., 61 Hun (N. Y.) 619, 15 N. Y. Supp. 632; Mark *v.* National F. Ins. Co., 91 N. Y., 663.

Where, through the failure and refusal of the company, the arbitration did not take place or was ineffectual, and suit was brought, and in the meantime, partly under orders of the city, the *débris* was removed, and the company then requested the plaintiff to submit to a second arbitration, which he refused, it was held that, having once consented to arbitrate, the arbitration clause could no longer stand in the way of the action. Uhrig *v.* Williamsburgh City F. Ins. Co., 101 N. Y. 362.

North Carolina.—Where a policy of insurance contains a stipulation for submitting the amount of loss to arbitration, and the arbitrators fail to agree, and the parties themselves cannot agree upon other arbitrators, the insured may sue upon the policy. Pretzfelder *v.* Merchants' Ins. Co., 116 N. Car. 491.

Where a policy of insurance contains a stipulation for a submission of all differences to arbitration, the fact that the insured refuses to submit to arbitration a dispute concerning specific articles, will not prevent him from bringing an action for the loss of other articles, where he abandons all claim for such specific articles, in the absence of anything in the policy to that effect, and although he may have alleged in his complaint a total destruction of all the property. Pioneer Mfg. Co. *v.* Phoenix Assur. Co., 110 N. Car. 176.

Pennsylvania.—Mentz *v.* Armenia F. Ins. Co., 79 Pa. St. 478, 21 Am. Rep. 80. Where a policy of insurance stipulates that the whole matter in controversy, including the right to recover at all, shall be submitted to arbitration, the condition is void as ousting the jurisdiction of the courts. Gray *v.* Wilson, 4 Watts (Pa.) 39.

Where a fire-insurance policy contained the following stipulations: "In case differences shall arise touching any loss or damage, after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, * * * but the arbitrators shall not decide as to the validity of the contract, the liability of the company, or any other question, except as to the amount of such loss or damage. * * * It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim, by virtue of this policy, shall be sustainable in any court of law or chancery until an award shall have been obtained, fixing the amount of such claim in the manner hereinbefore provided," etc., it was held that such written request was a condition precedent to an appraisal and award, but that, as there had been no written request by either party, such an appraisal

and award was not a condition precedent to the right to sue. Wright *v.* Susquehanna Mut. F. Ins. Co., 110 Pa. St. 29.

Utah.—A member of a fraternal order which is in fact a mutual life insurance company, is not precluded from resorting to his remedy at law by a provision in the constitution of such order that all claims and reports of members and beneficiaries shall be submitted to a board of arbitration of its own creation, and that its decision shall be final and conclusive. Daniher *v.* Grand Lodge, 10 Utah 110.

Virginia.—Tilley *v.* Connecticut F. Ins. Co., 86 Va. 811.

Washington.—In Pencil *v.* Home Ins. Co., 3 Wash. 485, where, by the terms of the policy, no action could be brought until the matter had been submitted to arbitration if the parties could not agree, and a few hours after the loss the insurer accused the insured of having set fire to the premises, and refused for that reason to pay the loss, it was held that the insured might bring an action on the policy without demanding an arbitration.

West Virginia.—Kinney *v.* Baltimore, etc., Employees' Relief Assoc., 35 W. Va. 388.

An insurance policy provided that no action should be sustained thereon unless commenced within six months after the loss should occur, and also that no suit could be maintained until arbitrators had fixed the amount of the loss. It was held that the action could be commenced within six months after the arbitrators had fixed the amount of the loss, although more than six months after the loss occurred. Barber *v.* Wheeling F. & M. Ins. Co., 16 W. Va. 658, 37 Am. Rep. 800.

Wisconsin.—Vangindertaelen *v.* Phenix Ins. Co., 82 Wis. 112.

Wyoming.—Where a fire-insurance policy contains a provision that the amount of "sound value and of damage" shall be determined by mutual agreement of the company and the assured, or, in case they should fail to agree, the same shall be determined by an appraisal by competent appraisers, this provision was held not to be a condition precedent to recovery on the policy where the insurance company denied all liability. Kahn *v.* Traders' Ins. Co. (Wyoming 1893), 34 Pac. Rep. 1059.

Canada.—Where an insurance policy provides that where any differences shall arise with respect to the amount of any loss or damage by fire, such difference shall, at the request of either party, be submitted to arbitrators, and that no suit or action for the recovery of any claim shall be sustained until after an award shall have been obtained fixing the amount of the claim in the manner provided, submission to such arbitration is not a condition precedent to an action where no request is made for arbitration. Bishop *v.* Norwich Union F. Ins. Soc., 25 Nova Scotia 492. See Ulrich *v.* National Ins. Co., 4 Ont. App. 84; McIntyre *v.* National Ins. Co., 5 Ont. App. 580.

Australia.—Where a clause in a policy of fire insurance provided that if any difference should arise between the assured person and

terms, otherwise it will not have such effect.¹

Denial of Liability by the Company.—Where an insurance company denies all liability, a provision for arbitration in the insurance policy is no bar to an action on the policy itself.²

Failure of Arbitration through Fault of Company.—Nor will an action be barred where the arbitration has failed through the company's fault.³

Total Destruction of Property.—Where a policy provides for a determination by arbitration of the amount of loss, no arbitration is necessary where the property is totally destroyed; there is nothing left to arbitrate.⁴

the company in regard to the loss it should be submitted to arbitration, and it was further provided that the arbitrators should fix the value as it stood immediately before the fire and immediately after, and that the insurance company was to pay the difference between the two sums, and, the premises having been destroyed, an action was brought in which the issue was raised whether certain property came within the meaning of the term "stock in trade" used in the policy, and consequently whether it was in fact insured or not, it was held that this question did not come within the provision of the arbitration clause and did not constitute a "difference" between the parties within the meaning of the clause. *Cockney v. Colonial Ins. Co. of New Zealand*, 15 Vict. L. Rep. 695.

1. **To Constitute Conditions Precedent, there must Be Express Words or Necessary Implication.**—*Mutual F. Ins. Co. v. Alvord*, 61 Fed. Rep. 752; *Birmingham F. Ins. Co. v. Pulver*, 126 Ill. 329, 9 Am. St. Rep. 598.

Where an insurance certificate issued by a mutual accident association contains a clause that all claims thereunder shall be referred to arbitration at the request of the association, it is valid when narrowly construed to include only the question of the amount of loss or damage. But where such a clause does not in terms, or by necessary implication, provide that it shall be a condition precedent to a suit upon the certificate, it will not be given that effect. *Smith v. Preferred Masonic Mut. Acc. Assoc.*, 51 Fed. Rep. 520, 12 Ry. & Corp. L. J. 190, 48 Baltimore Underwriter 278.

2. **Where the Company Denies All Liability.**—*Elliott v. Royal Exch. Assur. Co.*, L. R. 2 Exch. 237; *Dawson v. Fitzgerald*, L. R. 9 Exch. 7; *Goldstone v. Osborn*, 2 C. & P. 550, 12 E. C. L. 256; *Lasher v. Northwestern Nat. Ins. Co.*, 57 How. Pr. (N. Y. Supreme Ct.) 224, 18 Hun (N. Y.) 98; *Mentz v. Armenia F. Ins. Co.*, 79 Pa. St. 478, 21 Am. Rep. 80; *Phoenix Ins. Co. v. Badger*, 53 Wis. 283; *Robinson v. Georges Ins. Co.*, 17 Me 131, 35 Am. Dec. 239; *Millaudon v. Atlantic Ins. Co.*, 8 La. 558. See *Morley v. Liverpool, etc., Ins. Co.*, 85 Mich. 210; *Randall v. Phoenix Ins. Co.*, 10 Mont. 362; *Hutchinson v. Liverpool, etc., Ins. Co.*, 153 Mass. 143; *Delaware, etc., Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 250; *Leach v. Republic F. Ins. Co.*, 58 N. H. 245; *Patrick v. Farmers' Ins. Co.*, 43 N. H. 621, 80 Am. Dec. 197; *Trott v. City Ins. Co.*, 1 Cliff. (U. S.) 439; *Bailey v. Aetna Ins. Co.*, 77 Wis. 336; *Western Horse, etc., Ins. Co. v. Putnam*, 20 Neb. 331; *Kahn v. Traders' Ins. Co.* (Wyoming 1893), 34 Pac. Rep. 1059.

No Disagreement as to Amount of Loss—Company Denying All Liability.—It is not necessary to comply with the terms of a policy calling for a submission to arbitration if the amount of loss cannot be agreed on, when there is no disagreement as to the amount of loss, and when the company denies all liability. *North America Ins. Co. v. Forwood*, 13 Ky. L. Rep. 261.

Assertion that Policy was Not in Force and Denial of All Liability.—Where the assured, upon seeking a payment, was met by a denial of all liability and by the assertion that the policy was not in force when the loss happened, it was no defense on the part of the insurer that no arbitration was had fixing the amount of loss of the insured property. *Savage v. Phoenix Ins. Co.*, 12 Mont. 458, 21 Ins. L. J. 967. See *Randall v. American F. Ins. Co.*, 10 Mont. 340, 24 Am. St. Rep. 50.

Award as Estoppel to Deny Validity of Policy.—An arbitration and award as to the amount of loss merely, does not estop the company from denying any legal liability on the ground that the policy was void for reasons known to the assured at the time of the arbitration. *Johnson v. American Ins. Co.*, 41 Minn. 396.

3. **Company in Fault.**—*Brock v. Dwelling House Ins. Co.*, 102 Mich. 583; *Uhrig v. Williamsburgh City F. Ins. Co.*, 101 N. Y. 362; *Bishop v. Agricultural Ins. Co.*, 130 N. Y. 488; *Bradshaw v. Agricultural Ins. Co.*, 137 N. Y. 137; *McCullough v. Phoenix Ins. Co.*, 113 Mo. 606.

See *supra*, this title, *Cases Pendente Lite*.

4. **Where Property is Wholly Destroyed.**—*German Ins. Co. v. Eddy*, 36 Neb. 461.

In Cases Where Total Loss is Claimed and proof is submitted to establish this fact, the arbitration clause of insurance policy is in conflict with the statutes, and is of no binding force. In such a case a provision for arbitration, except it be to fix the value of the debris, does not apply. *Insurance Co. v. Leslie*, 47 Ohio St. 409; *Seyk v. Millers' Nat. Ins. Co.*, 74 Wis. 67; *Reilly v. Franklin Ins. Co.*, 43 Wis. 449, 28 Am. Rep. 552; *Williams v. Hartford Ins. Co.*, 54 Cal. 442, 35 Am. Rep. 77. See *Great Western Ins. Co. v. Fogarty*, 19 Wall. (U. S.) 640; *Harriman v. Queen Ins. Co.*, 49 Wis. 71.

Statute Specifying Damages Controls Stipulation in Policy.—Where a statute provided that where real property within the state, insured against fire, should be totally destroyed by fire, without any fault on the part of the assured, the amount of the insurance written in the policy "should be taken and deemed to be the true value of the property at the time of such loss, and the amount of the loss

Arbitration Clause has been Held Collateral to Agreement to Pay.—A distinction has been drawn in some cases, the courts holding that an arbitration clause in a contract is merely collateral to the agreement to pay, and is therefore no bar to an action upon the contract.¹

Arbitration Clause Not Waiver of Right to Rebuild or Repair.—A provision in an insurance policy, for the submission of disputes as to the amount of loss to arbitration, does not amount to an election to pay the loss, and waive the right given by the policy to rebuild or repair.²

Decisions of Architects, Engineers, and Other Experts.—Although it may be doubted whether the decisions of architects, engineers, and other experts, under stipulations in building, construction, and other contracts of the kind, as to the quantity and value of work done are, in the true sense, awards of arbitrators,³ yet such decisions have been held binding on the parties, in the absence of fraud or gross mistake, and are conditions precedent to a right to sue upon the contract itself.⁴

sustained" and the measure of damages; and the parties to a policy issued after the statute took effect stipulated therein that the damages should be established "according to the true and actual cash marketable value" of the property when the loss happened, it was held that the amount written in the policy was conclusive as to the amount of damages, and on grounds of public policy could not be changed by such stipulation. *Reilly v. Franklin Ins. Co.*, 43 Wis. 449, 28 Am. Rep. 552. See also *Thompson v. St. Louis Ins. Co.*, 43 Wis. 459; *Emery v. Piscataqua F. & M. Ins. Co.*, 52 Me. 322; *White v. Connecticut Mut. L. Ins. Co.*, 4 Dill. (U. S.) 177; *Chamberlain v. New Hampshire F. Ins. Co.*, 55 N. H. 249. Compare *Farmers, etc., Ins. Co. v. Curry*, 13 Bush (Ky.), 312, 26 Am. Rep. 194.

1. Arbitration Clause Held Collateral to Agreement to Pay.—*Roper v. Lendon*, 1 El. & El. 825, 102 E. C. L. 825; *Dawson v. Fitzgerald*, 1 Exch. Div. 257; *Collins v. Locke*, L. R. 4 App. Cas. 674; *Hamilton v. Home Ins. Co.*, 137 U. S. 370; *Mutual F. Ins. Co. v. Alvord*, 61 Fed. Rep. 752; *Crossley v. Connecticut F. Ins. Co.*, 27 Fed. Rep. 30; *Birmingham F. Ins. Co. v. Pulver*, 126 Ill. 329, 9 Am. St. Rep. 598; *Reed v. Washington F. & M. Ins. Co.*, 138 Mass. 572; *Seward v. Rochester*, 109 N. Y. 164; *Gibbs v. Continental Ins. Co.*, 13 Hun (N. Y.) 611; *Mark v. National F. Ins. Co.*, 24 Hun (N. Y.) 565. See also *Carpenter v. Tucker*, 98 N. Car. 316; *Thornton v. McCormick*, 75 Iowa 285; *Cobb v. Dolphin Mfg. Co.*, 108 N. Y. 463.

Stipulation in Leases.—Where in leases the stipulation has been made that at the expiration a renewal can be had at a rent to be determined by arbitrators or appraisers, the courts, although willing to enforce renewals of leases so contracted for, have refused to compel the naming of arbitrators. *Johnson v. Conger*, 14 Abb. Pr. (N. Y. Supreme Ct.) 195; *Kelso v. Kelly*, 1 Daly (N. Y.) 419; *Greason v. Keteltas*, 17 N. Y. 491; *Biddle v. Ramsey*, 52 Mo. 153; *Strohmaier v. Zeppenfeld*, 3 Mo. App. 429; *Hopkins v. Gilman*, 22 Wis. 476. But compare *Tscheider v. Biddle*, 4 Dill. (U. S.) 55.

2. Provision as to Arbitration Not Election to Pay and Waiver of Right to Rebuild.—*Etna Ins. Co. v. Platt*, 40 Ill. App. 191.

See, as bearing on this principle, *Williamsburg City F. Ins. Co. v. Cary*, 83 Ill. 453; *Wynkoop v. Niagara F. Ins. Co.*, 91 N. Y. 478, 43 Am. Rep. 686; *Morrell v. Irving F. Ins. Co.*, 33 N. Y. 429; *Beals v. Home Ins. Co.*, 36 N. Y. 522; *Soars v. Home Ins. Co.*, 140 Mass. 343; *West v. Platt*, 127 Mass. 372; *Texas, etc., R. Co. v. Rust*, 19 Fed. Rep. 245.

3. *Wadsworth v. Smith*, L. R. 6 Q. B. 332; *Northampton Gas-Light Co. v. Parnell*, 15 C. B. 630, 80 E. C. L. 630; *White v. Middlesex R. Co.*, 135 Mass. 220.

The distinction between such stipulations and other agreements to submit to arbitration is pointed out in *Wadsworth v. Smith*, L. R. 6 Q. B. 332, by Blackburn, J., who said: "Where by an agreement the right of one of the parties to have or do a particular thing is made to depend on the determination of a third person, that is not a submission to arbitration, nor is the determination an award; but where there is an agreement that any dispute about a particular thing shall be inquired of and determined by a person named, that may amount to a submission to arbitration, and the determination, though in form of a certificate, be an award."

See *supra*, this title, *Must Act as Agent of Both Parties*.

4. Decisions of Architects, Engineers, and Other Experts.—*England*.—*Scott v. Liverpool Corp.*, 3 De G. & J. 336; *Mills v. Bayley*, 2 H. & C. 41; *London Tramway Co. v. Bailey*, 3 Q. B. Div. 217; *Ranger v. Great Western R. Co.*, 27 Eng. L. & Eq. 35; *Tullis v. Jackson* (1892), 3 Ch. 441; *Babbage v. Coulburn*, 9 Q. B. Div. 235; *Brown v. Overbury*, 11 Exch. 715.

Canada.—*Reg. v. Cimon*, 23 Can. Sup. Ct. 62.

United States.—*Kennedy v. U. S.*, 24 Ct. of Cl. 122; *Low v. Fisher*, 27 Fed. Rep. 542.

California.—*Bullock v. Consumers' Lumber Co.* (Cal. 1892), 31 Pac. Rep. 367; *Holmes v. Richet*, 56 Cal. 307, 38 Am. Rep. 54.

Florida.—*Wilcox v. Stephenson*, 30 Fla. 377; *Summerlin v. Thompson*, 31 Fla. 369.

Illinois.—*Arnold v. Burnique*, 144 Ill. 132; *St. Louis, etc., R. Co. v. Kerr*, 48 Ill. App. 496.

Indiana.—*McCoy v. Able*, 131 Ind. 417.

Iowa.—*Ross v. McArthur*, 85 Iowa 203.

Massachusetts.—*Hood v. Hartshorn*, 100 Mass. 117, 1 Am. Rep. 89; *McIntosh v. Hastings*, 156 Mass. 344.

In Some Cases the Decisions Held Not to Be Conclusive.—In many cases, however, it has been held that decisions or certificates under such stipulations were not

Michigan.—Guthat v. Gow, 95 Mich. 527; Schuler v. Eckert, 90 Mich. 165.

Minnesota.—St. Paul, etc., R. Co. v. Bradbury, 42 Minn. 222; Langdon v. Northfield, 42 Minn. 464.

Missouri.—Roy v. Boteler, 40 Mo. App. 213. *New Hampshire.*—Smith v. Boston, etc., R. Co., 36 N. H. 487.

New Jersey.—Monmouth Park Assoc. v. Wallis Iron Works, 55 N. J. L. 132.

New York.—Butler v. Tucker, 24 Wend. (N. Y.) 447; Smith v. Brady, 17 N. Y. 173, 72 Am. Dec. 442; Smith v. Briggs, 3 Den. (N. Y.) 73; Weeks v. Little, 47 N. Y. Super. Ct. 1; O'Brien v. New York, 139 N. Y. 543; Fitzgerald v. Moran, 141 N. Y. 419; Dorwin v. Westbrook, 71 Hun (N. Y.) 405; New York v. Brady, 115 N. Y. 599; Blazo v. Gill, 69 Hun (N. Y.) 69.

Oregon.—Ball v. Doud, 26 Oregon 14.

Pennsylvania.—Hartup v. Pittsburgh, 131 Pa. St. 535; Kennedy v. Poor, 151 Pa. St. 472; North Lebanon R. Co. v. McGrann, 23 Pa. St. 530, 75 Am. Dec. 624; O'Reilly v. Kerns, 52 Pa. St. 214; Drhew v. Altoona, 121 Pa. St. 401; Gallagher v. Sharpless, 134 Pa. St. 134; Faunce v. Burke, 16 Pa. St. 469, 55 Am. Dec. 519; Gray v. Wilson, 4 Watts (Pa.) 41; Howard v. Allegheny Valley R. Co., 69 Pa. St. 489; Malone v. Philadelphia, etc., R. Co., 157 Pa. St. 430; Monongahela Nav. Co. v. Fenlon, 4 W. & S. (Pa.) 205.

Rhode Island.—Lee v. Brayton, 18 R. I. 232.

South Carolina.—Percival v. Herbemont, 1 McMull. (S. Car.) 59.

Texas.—Boettler v. Tendick, 73 Tex. 488; Wright v. Meyer (Tex. Civ. App. 1894), 25 S. W. Rep. 1122.

Vermont.—Herrick v. Belknap, 27 Vt. 673.

Virginia.—Condon v. South Side R. Co., 14 Gratt. (Va.) 302; Baltimore, etc., R. Co. v. Polly, 14 Gratt. (Va.) 447.

Wisconsin.—Hudson v. McCartney, 33 Wis. 331.

Opinion Already Formed and Expressed.

Where the provisions of a construction contract refer disputes arising thereunder to the decision of a railway company's engineer, he is not disqualified from acting as arbitrator by repeating in a letter an opinion which, as engineer for the company, he must necessarily have expressed, unless, upon a fair construction of the letter, it appears that he has so made up his mind that arguments or evidence will not change it. Jackson v. Barry R. Co. (1893), 1 Ch. 238.

Decision of United States Engineer.—In Ogden v. U. S., 60 Fed. Rep. 725, the decision of the United States engineer officer in charge was held to be final under the provisions of the contract. In the absence of fraud or such gross error or mistake as would imply bad faith the court will not disturb the decision of such an officer because the United States is not an interested party in the sense in which such terms are used in judicial proceedings.

Extra Work.—Where an action was brought upon a building contract to recover balance al-

leged to be due for building a house, the plaintiff was not entitled to recover for extra work done, where the contract provided that claims for such extras should be submitted to arbitration, and where the plaintiff had made no offer or request to submit. Scammon v. Denio, 72 Cal. 393.

Where one of the stipulations of a building contract was that the price of extras, unless settled by agreement, should be submitted to arbitration, it was held that a lien for such extras could not be enforced in the absence of such agreement or settlement. Boots v. Steinberg, 100 Mich. 134.

Where a building contract stipulated for an arbitration in case of dispute as to the true value of extra work or of work omitted, it was held that disputes as to whether certain work was extra work, and as to whether extra work done at agreed prices was properly done, were not within the stipulation. Such a stipulation would oust a court of law or equity of all jurisdiction over the matter falling within the stipulation. Weeks v. Little, 47 N. Y. Super. Ct. 1; Hart v. Lauman, 29 Barb. (N. Y.) 410; Sinclair v. Tallmadge, 35 Barb. (N. Y.) 607; Doyle v. Halpin, 33 N. Y. Super. Ct. 369; Binsse v. Paige, 1 Abb. App. Dec. (N. Y.) 144, 1 Keyes (N. Y.) 91; Hurst v. Litchfield, 39 N. Y. 380.

Failure of Engineer to Furnish Contractor with Monthly Estimates.—Where an engineer is required by the terms of a construction contract, which make him judge of any difference arising thereunder, to furnish the contractor with monthly estimates, his award will not be set aside because he has failed to do so where he has exercised his own judgment and no fraud is shown, although such failure may afford a cause of action as a breach of covenant. Crumlish v. Wilmington, etc., R. Co., 5 Del. Ch. 270.

Architect's Certificate as Condition Precedent to Right of Action.—Where a stipulation in a building contract made a certificate of the architects a condition precedent to the right to bring action on such contract, unless the architect has been guilty of fraud or collusion, such certificate must be obtained before the action can be brought. Remedying the defects pointed out by the architect, but not in the way suggested by him, cannot give a cause of action without the certificate, nor can a recovery be had upon a quantum meruit based on a contract which makes a certificate a condition precedent to a right of action unless the certificate has been obtained. Hanley v. Walker, 79 Mich. 607.

In Oberlies v. Bullinger, 75 Hun (N. Y.) 248, the contract contained this clause: "Eighty per cent. of the value of the work executed will be paid from time to time as the work progresses, and the balance when the whole job has been completed and accepted. Payments made in accordance with the architect's certificates." It was held that this did not render an architect's certificate that the work had been completed in full compliance with the contract and specifications, a

conclusive, and that they did not deprive the contractors of the right to seek redress by an action on the contract.¹

condition precedent to the contractor's right of action against the owner for the balance of the contract price withheld until the completion of the work.

In *Cole Mfg. Co. v. Collier*, 91 Tenn. 525, it was held that the refusal to submit to arbitration on the part of one of the parties to a building contract, which contained a stipulation for reference, could not be pleaded by the other party as a defense to an action on the contract itself, as such stipulation did not either expressly or by implication make the submission a condition precedent to the bringing of an action.

The Decision of the Inspector of Ties of a Railroad company was held to be conclusive, although the tie contract did not contain a specific provision to that effect. *Chapman v. Kansas City, etc.*, R. Co., 114 Mo. 542. See *Neenan v. Donoghue*, 50 Mo. 493; *Williams v. Chicago, etc.*, R. Co., 112 Mo. 463; *Dinsmore v. Livingston County*, 60 Mo. 244; *Kihlberg v. U. S.*, 97 U. S. 398.

Employment of Subordinates to Make Measurements.—Where, by the terms of a construction contract, the engineer is made the sole judge of disputes arising thereunder between the contractors and the company, and the contract provides that he shall estimate, but does not provide that he shall make personal measurements, he is not precluded thereby from making his estimate upon the measurements made by his subordinates, and he cannot be compelled to take the evidence of the contractor or his witnesses. *Sweet v. Morrison*, 116 N. Y. 19, 15 Am. St. Rep. 376.

1. In Some Cases Decisions Held Not Conclusive.—*United States.*—*Lewis v. Chicago, etc.*, R. Co., 49 Fed. Rep. 708; *Summers v. Chicago, etc.*, R. Co., 49 Fed. Rep. 714.

Arkansas.—*Fitzgerald v. Walker*, 55 Ark. 148. *Illinois.*—*Michigan Ave. M. E. Church v. Hearson*, 41 Ill. App. 89.

Louisiana.—*O'Donnell v. Henry*, 44 La. Ann. 845.

Missouri.—*Fitzgerald v. Beers*, 31 Mo. App. 356.

Nebraska.—*Anderson v. Imhoff*, 34 Neb. 335. *New Jersey.*—*Mackinson v. Conlon*, 55 N. J. L. 564.

New York.—*Williams v. Shields (C. Pl.)*, 9 N. Y. Supp. 502; *O'Brien v. New York*, 65 Hun (N. Y.) 112.

Oregon.—*Meyers v. Pacific Constr. Co.*, 20 Oregon 603.

Pennsylvania.—*Huckestein v. Kelly, etc.*, Co., 152 Pa. St. 631.

Texas.—*Galveston v. Devlin*, 84 Tex. 319.

Canada.—*Guilbault v. McGreevy*, 18 Can. Sup. Ct. 609; *Peters v. Quebec Harbour Com'rs*, 19 Can. Sup. Ct. 685.

Contractor to be Given Opportunity to Remedy Defects.—Where the terms of a construction contract require that the contractor shall be informed of defects in his work and given an opportunity to perfect it, although a decision of the engineer is to be final, a general refusal of the engineer to accept the work will not

conclude the contract. *Kimball v. U. S.*, 24 Ct. of Cl. 35.

Modification of Engineer's Decision.—In *St. Louis, etc.*, R. Co., *v. Kerr*, 48 Ill. App. 496, it was held that the decision of the engineer, to whose arbitration disputes under a construction contract were referred, might be modified. See *Dorwin v. Westbrook*, 71 Hun (N. Y.) 405.

Certificate of Superintendent—Builder Himself the Superintendent.—Where a building contract contains a stipulation for the payment of the whole consideration "on certificates of superintendent," it does not require the production of such certificates as a condition precedent to payment, when it is provided that the builder himself shall be the superintendent, and that payment is to be made in instalments upon the work being done to the satisfaction of the owner. *Albrecht v. Kraisinger*, 44 Ill. App. 313.

Where One of the Stipulations of a Building Contract was that the decision of the architect should be final upon disputes arising thereunder, it was held that such submission was specific, and, as it did not embrace outside matters, the fact that such matters were not brought to the notice of the architect at the time of hearing, did not prevent their being set up in subsequent independent proceedings. *Busse v. Agnew*, 10 Ill. App. 527.

Where One of the Provisions of a Railroad Contract was that the engineers of the company should make final estimates of the work done by the contractors in building the railway, and that such estimates should be conclusive as against the contractors, it was held that it did not deprive the contractors of the right to resort to the courts for the redress of wrongs and for the recovery of whatever might have been due to them. *Louisville, etc.*, R. Co. *v. Donnegan*, 111 Ind. 179. See *Bauer v. Samson Lodge*, 102 Ind. 262; *Supreme Council v. Garigus*, 104 Ind. 133, 54 Am. Rep. 298; *Kistler v. Indianapolis, etc.*, R. Co., 88 Ind. 460.

Where it was agreed in a contract for the construction of a railroad that the company's engineer should certify to the performance of the work, and should determine all questions in dispute between the parties, it was held that this did not preclude the builders from maintaining an action in court to recover of the company the balance due them under the facts certified by the engineer. *Flynn v. Des Moines, etc.*, R. Co., 63 Iowa 492.

Work for a County to be Submitted to Its Surveyor.—Where the work done under a contract between a county and a private person is to be submitted to the county surveyor for his inspection and certificate of its proper performance, and a dispute arises between the contractor and the surveyor, the contractor's only remedy is an action at law, and adverse reports of the surveyor are not conclusive as a defense to such action. *Campbell County v. Youtsey*, 11 Ky. L. Rep. 529 (Ky. 1889), 12 S. W. Rep. 305.

Erroneous Survey.—Where a judgment was rendered ordering one of the parties to an ac-

Notice.—Where a building contract requires a certificate of the architect and notice of the hearing, such notice must be given to render the certificate binding on the parties.¹

(c) **Stipulations in Building and Other Contracts—Arbitrator Personally Interested.**—Where, by the stipulations of a contract, disputes arising thereunder are referred to the decisions of an engineer, the fact that he is personally interested and a judge in his own case will not invalidate his decision, unless there is reason to believe that he has acted unjustly.²

Implication Is that Decision shall Be an Honest One.—When the contract provides that the decision of the architect shall be conclusive on the question whether work done in the course of the erection of a building was within the specifications or not, it is an implication indispensable to the effectuation of the intention of the parties that such decision should be an honest one.³

Arbitrator in Employ of One of the Parties.—Where an engineer or other person, who has been selected to estimate the work done under a contract, is in the employ of one of the parties, the court is bound to scrutinize his estimate very closely.⁴

tion to convey to the other a third of the land found contained within the limits of a confirmed land claim, and the parties agree "that a survey shall be made by B, so as to cut off from the upper portion of the land * * * one-third thereof which, on the survey, may be found to be contained within the limits of the confirmed claim, etc., which survey, without further formality, shall serve as the basis of the conveyance which the defendant has been adjudged to make to the plaintiff," it was held that the parties should not be deemed bound to abide by an erroneous survey made by the said B. *Bach v. Slidell*, 2 La. Ann. 626.

Where an Ineffectual Attempt at Arbitration was made under an arbitration clause in a building contract, this was held to be no defense to an action on the building contract itself. *Cavanagh v. Dooley*, 6 Allen (Mass.) 66.

Arbitration without Witnesses.—Where a building contract contains a stipulation to submit disputes arising thereunder to arbitration, such stipulation does not bind the contractor to submit to an arbitration without witnesses. *Anderson v. Meislahn*, 12 Daly (N. Y.) 149. See *In re Jenkins*, 1 Dowl. N. S. 276; *Salkeld v. Slater*, 12 Ad. & El. 767, 40 E. C. L. 189; *Day v. Hammond*, 57 N. Y. 479, 15 Am. Rep. 522.

Owner Refusing to Allow Contractor to Do the Work.—A clause in a building contract that disputes in regard to the value of extra work, or of work omitted by direction of the owner, should be determined by arbitrators, is no bar to an action by the contractor for damages for breach of contract by the owner in refusing to allow the contractor to do the work contracted for and in letting the work to another party. *Boyd v. Meighan*, 48 N. J. L. 404.

Where there has Been No Submission.—Where a building contract contained a stipulation to submit differences arising thereunder to arbitration, the existence of such a provision in the contract is no bar or defense to a suit at law for the amount alleged to be due, where neither party has availed himself of the privilege to submit the dispute to arbitration. *Williams v. Shields* (C. Pl.), 30 N. Y. St. Rep. 556, 9 N. Y. Supp. 502.

Where the Engineer's Certificate has been Unreasonably Delayed, the contractor may recover upon the contract. *Coon v. Citizens' Water Co.*, 152 Pa. 644.

1. Notice and Hearing before Final Decision of Arbitrator.—*Haunroth v. Peters*, 50 Ill. App. 366. See *Johnson v. White* (Tex. Civ. App. 1894), 27 S. W. Rep. 174; *McEntyre v. Tucker*, 25 N. Y. Supp. 95; *Smith v. Molleson*, 74 Hun (N. Y.) 606; *Snaith v. Smith* (C. Pl.), 57 N. Y. St. Rep. 86; *Gay v. Haskins*, 8 Misc. Rep. (Buffalo Super. Ct.) 626; *Granniss, etc., Lumber Co. v. Deeves*, 72 Hun (N. Y.) 171; *Wyckoff v. Meyers*, 44 N. Y. 143; *Pucci v. Barney*, 1 Misc. Rep. (N. Y. City Ct.) 84; *Whiteman v. New York*, 21 Hun (N. Y.) 117.

In *Haunroth v. Peters*, 50 Ill. App. 366, the court, by Shepard, J., said: "While the law is well settled in this state that the decision of the architect is conclusive where the parties to a building contract make him the final arbitrator between themselves as respects the character of the work done and the amount to be paid, it is equally the law that if the parties, by their contract, provide for notice and a hearing by the superintendent, before his final decision shall be rendered, such notice must be given." See *Korf v. Lull*, 70 Ill. 420.

2. Arbitrator Personally Interested.—*Ives v. Willans* (1894), 2 Ch. 478; *Eckersley v. Mersey Docks, etc., Board* (1894), 2 Q. B. 667.

The fact that a railroad company's engineer is also a stockholder in the company will not invalidate his decision, where questions arising under a building contract have been submitted to him. *Williams v. Chicago, etc., R. Co.*, 112 Mo. 463.

3. Chism v. Schipper, 51 N. J. L. A stipulation in a construction contract, that the engineer of the company shall be the sole judge of disputes arising thereunder, implies that the engineer is competent, and that he will act honestly, and neither party is bound by his fraudulent estimates. *Georgia Pac. R. Co. v. Brooks*, 66 Miss. 583.

4. Wood v. Chicago, etc., R. Co., 39 Fed. Rep. 52.

Neglect to Make Estimate, or Withholding Certificate.—Where the architect or engineer fraudulently neglects to make an estimate, or withholds his decision certificate, unless it be by collusion with the other parties, suit cannot be brought upon the contract; ¹ the remedy in such a case is against the architect or engineer himself. ²

The Engineer Actually Acting at the Time an adjudication is called for, is the proper person to decide such disputes. ³

Written Certificate.—Where a building contract contains a provision that an architect's "certificate" as to the work be procured, it requires a written certificate. ⁴

(d) **Waiver of Arbitration Clause.**—Arbitration clauses in policies of insurance and other contracts may be waived by either party. The waiver may be effected by expressly foregoing the right reserved in the contract, or by laches in failing or neglecting to demand an arbitration, or it may be inferred by necessary implication from the acts of the parties. ⁵

1. **Neglect of Referee to Make Estimate or Give Certificate.**—*Batterbury v. Vyse*, 2 H. & C. 42; *Clarke v. Watson*, 18 C. B. N. S. 278, 114 E. C. L. 278; *Reynolds v. Caldwell*, 51 Pa. St. 298. But see *Hudson v. McCartney*, 33 Wis. 331; *Herrick v. Belknap*, 27 Vt. 673; *Baltimore, etc., R. Co. v. Polly*, 14 Gratt. (Va.) 459; *Baasen v. Baehr*, 7 Wis. 521.

See, as to the effect of the engineer or architect's withholding certificates, *Van Keuren v. Miller*, 71 Hun N. Y. 68; *Wright v. Meyer*, (Tex. Civ. App. 1894), 25 S. W. Rep. 1122; *O'Brien v. New York*, 139 N. Y. 543; *Frost v. Rand*, 51 Ill. App. 276; *Bradner v. Roffsell* (N. J. 1894), 29 Atl. Rep. 317; *Milner v. Field*, 5 Exch. 829; *Thomas v. Fleury*, 26 N. Y. 26; *Morgan v. Birnie*, 9 Bing. 672, 23 E. C. L. 414; *Grafton v. Eastern Counties R. Co.*, 8 Exch. 699.

2. *Reynolds v. Caldwell*, 51 Pa. St. 298.

3. *Connor v. Simpson* (Pa. 1886), 7 Atl. Rep. 161.

Where a building contract left the decision of disputed matters arising thereunder to the decision of the chief engineer of the owner, he will no longer be the person to decide upon them after he has left the owner's employ. *Monmouth Park Assoc. v. Wallis Iron Works*, 55 N. J. L. 132.

4. *Fay v. Muhlker*, 1 Misc. Rep. (N. Y. C. Pl.) 321.

5. **Waiver of Arbitration Clause**—*United States*.—*Hamilton v. Connecticut F. Ins. Co.*, 46 Fed. Rep. 42; *Kahnweiler v. Phenix Ins. Co.*, 67 Fed. Rep. 483; *Harrison v. German-American F. Ins. Co.*, 67 Fed. Rep. 577.

California.—*Farnum v. Phenix Ins. Co.*, 83 Cal. 246, 17 Am. St. Rep. 233.

Illinois.—*North America Ins. Co. v. McDowell*, 50 Ill. 120, 99 Am. Dec. 497; *Phenix Ins. Co. v. Stocks*, 149 Ill. 319.

Iowa.—*Ayres v. Hartford F. Ins. Co.*, 17 Iowa 176, 85 Am. Dec. 553.

Kansas.—*Continental Ins. Co. v. Wilson*, 45 Kan. 250, 23 Am. St. Rep. 720; *Walker v. German Ins. Co.*, 51 Kan. 725.

Maryland.—*Franklin F. Ins. Co. v. Chicago Ice Co.*, 36 Md. 102, 11 Am. Rep. 469; *Rokes v. Amazon Ins. Co.*, 51 Md. 512, 34 Am. Rep. 323; *Citizens F. Ins., etc., Co. v. Doll*, 35 Md. 89, 6 Am. Rep. 360.

Massachusetts.—*Clark v. New England Mut. F. Ins. Co.*, 6 Cush. (Mass.) 342, 53 Am. Dec. 44; *Wainer v. Milford Mut. F. Ins. Co.*, 153 Mass. 335.

Michigan.—*Morley v. Liverpool, etc., Ins. Co.*, 85 Mich. 210.

Missouri.—*St. Louis Ins. Co. v. Kyle*, 11 Mo. 278, 49 Am. Dec. 74; *Minor v. Edwards*, 12 Mo. 139, 49 Am. Dec. 121.

Montana.—*Randall v. American F. Ins. Co.*, 10 Mont. 340, 24 Am. St. Rep. 50.

Nebraska.—*German-American Ins. Co. v. Etherton*, 25 Neb. 505; *Union Ins. Co. v. Barwick*, 36 Neb. 223.

New Jersey.—*Jones v. Mechanics F. Ins. Co.*, 36 N. J. L. 29, 13 Am. Rep. 405.

New York.—*Keeney v. Home Ins. Co.*, 71 N. Y. 396, 27 Am. Rep. 60; *Pratt v. New York Cent. Ins. Co.*, 55 N. Y. 505, 14 Am. Rep. 304; *Williams v. Shields* (C. Pl.), 30 N. Y. St. Rep. 556.

Pennsylvania.—*Everett v. London, etc., Ins. Co.*, 142 Pa. St. 332, 24 Am. St. Rep. 499, 28 W. N. C. (Pa.) 205; *Trask v. State F. & M. Ins. Co.*, 29 Pa. St. 198, 72 Am. Dec. 622; *Lycoming Ins. Co. v. Schreffler*, 42 Pa. St. 188, 82 Am. Dec. 501; *Beatty v. Lycoming County Mut. Ins. Co.*, 66 Pa. St. 9, 5 Am. Rep. 318; *Girard F. & M. Ins. Co. v. Hebard*, 95 Pa. St. 51; *Wright v. Susquehanna Mut. F. Ins. Co.*, 110 Pa. St. 29.

Virginia.—*Tilley v. Connecticut F. Ins. Co.*, 86 Va. 811.

West Virginia.—*Levy v. Peabody Ins. Co.*, 10 W. Va. 560, 27 Am. Rep. 598.

Wisconsin.—*Chandos v. American F. Ins. Co.*, 84 Wis. 184.

In *Wright v. Susquehanna Mut. F. Ins. Co.*, 110 Pa. St. 29, the court said: "It was the right of either party to demand arbitration; it was the right of either party to waive it, and the defendant, having made no such demand, must be presumed to have waived it." See *Nurney v. Fireman's Fund Ins. Co.*, 63 Mich. 633, 6 Am. St. Rep. 338; *German-American Ins. Co. v. Steiger*, 109 Ill. 254; *Phenix Ins. Co. v. Badger*, 53 Wis. 283.

• **The Arbitration may be Waived Orally.**—*Hutchinson v. Liverpool, etc., Ins. Co.*, 153 Mass. 143.

Agreeing to Award Not in Accordance with

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(3) *Operates as a Submission—English Doctrine.*—Where a contract contains a stipulation that disputes arising thereunder shall be submitted to arbitration, this, in England, is held to be a complete submission if the arbitrators are named in the original contract,¹ or when it provides for the manner in which they shall be appointed, and they are so appointed, although against the will of one of the parties to the dispute.²

7. Effect of Agreements Not to Sue.—Although the courts, both of law and of equity, held that their jurisdiction could not be ousted by private agreement, yet where a submission contained a stipulation that the parties would take no proceedings at law or in equity in regard to the matters submitted, this was upheld as valid by the courts of law on the ground that a man may renounce

Policy.—An insurer, by agreeing to a submission in accordance with the terms of the policy, and by relying upon the validity of the award, waives his rights under the policy to insist that the award must be made before the action is brought. *Adams v. New York Bowery F. Ins. Co.*, 85 Iowa 6.

Insisting on Agreement Not Contained in Policy.—It is not permitted to an insurance company to insist that an agreement made between it and the insured to submit disputes as to the amount of loss to arbitration shall contain provisions not stated in the policy itself. And where the insurance company does insist on the execution of such an agreement, it waives all rights to arbitration under the policy. *Walker v. German Ins. Co.*, 51 Kan. 725.

Repairing Damaged Property.—An insurance company may waive the agreement to arbitrate by repairing or rebuilding the insured and damaged property. *Cobb v. New England Mut. Marine Ins. Co.*, 6 Gray (Mass.) 193.

Where Neither Party has Availed Himself of His Right to submit the matter to arbitration, where it is optional with both to do so, it will be presumed to have been waived by both, and the plaintiff will have to bring action on the policy. *Nurney v. Fireman's Fund Ins. Co.*, 63 Mich. 633, 6 Am. St. Rep. 338.

Acceptance of the Building.—A party to a building contract may waive a stipulation therein that the final payment to be made by him shall not be required unless the architect shall certify that the contract has been fully performed to his satisfaction; an acceptance of the building as under a completed contract is such a waiver, and entitles the contractor to recover the sum due, although no certificate has been given, and although the architect is not satisfied. *Smith v. Alker*, 102 N. Y. 87.

Demand Made after Property is Scattered.—Where the assured demands an appraisal as provided by the policy, after the property has been sold and scattered, such demand is of no effect. *Hamilton v. Fireman's Ins. Co.*, 29 Ohio L. J. 209.

Pleading to the Merits.—Where the defendant, in an action to enforce a mechanic's lien for extra work, pleads to the merits, he thereby waives a provision in the contract that the true value of the extra work shall be decided by arbitration. *Chamberlain v. Hibbard*, 26 Oregon 428.

Ignoring Request of Insured for Arbitration.—A waiver of an arbitration clause in a policy of insurance is effected by the failure of the in-

surance company to pay any attention to a request for such arbitration. *McDowell v. Aetna Ins. Co.* (Mass. 1895), 47 N. E. Rep. 665.

Denying that Policy is in Force.—Where a policy contains a provision for the arbitration of the amount of loss, on failure of the parties to agree thereon, it does not contemplate or require that there should be any arbitration, except where the parties fail to agree, and if, after the loss, the necessary proofs of the amount of the loss are furnished to the company, and it does not object to the amount so furnished or to the proofs thereof, but denies its liability on the ground that the policy does not exist and was cancelled before the loss occurred, this proves that the company acquiesced in the amount of loss claimed, and its right to have the matter submitted to arbitrators is thereby waived. *Farnum v. Phoenix Ins. Co.*, 83 Cal. 246, 17 Am. St. Rep. 233.

Refusal to Arbitrate.—Where a policy of insurance contains a condition which makes the arbitration of loss a condition precedent to suit, and the insured after loss attempts arbitration, which the insurer refuses, such refusal amounts to a waiver of the arbitration, and the insurer is estopped from insisting upon arbitration and from setting up a failure to arbitrate as a defense in an action brought to recover the amount lost. *Continental Ins. Co. v. Wilson*, 45 Kan. 250, 23 Am. St. Rep. 720. See *Everett v. London, etc., Ins. Co.*, 142 Pa. St. 332, 24 Am. St. Rep. 499; *Morley v. Liverpool, etc., Ins. Co.*, 85 Mich. 210; *Tilley v. Connecticut F. Ins. Co.*, 86 Va. 811; *Snowden v. Kittanning Ins. Co.*, 122 Pa. St. 502.

1. *Parkes v. Smith*, 15 Q. B. 297, 69 E. C. L. 297.

2. *In re Haddan and Roupell*, 9 C. B. N. S. 683, 99 E. C. L. 683; *In re Newton and Hetherington*, 19 C. B. N. S. 342, 115 E. C. L. 342; *In re Woodcroft*, 9 D. P. C. 538; *In re Willcox*, L. R. 1 C. P. 671.

In *Russell on Awards* (6th ed.) 63, it is said that until the arbitrators are named in such an agreement the submission is not complete, because there is no one who has binding authority to determine the questions submitted.

In *Ex p. Glaysher*, 3 H. & C. 442, 34 L. J. Exch. 41, it is held that where the arbitrators in such a case are appointed by parol the submission is only an oral one, though the agreement is by deed.

See further, as to the validity of the appointment, *In re Haddan and Roupell*, 9 C. B. N. S. 683, 99 E. C. L. 683.

or deprive himself of a right which the law gives him, if he sees fit.¹ Where a party persisted in bringing an action or suit, contrary to such a stipulation, an

1. Agreements Not to Sue.—Russell on Awards (6th ed.) 70; Webb v. Taylor, 1 D. & L. 676; Heath v. Brindley, 2 Ad. & El. 365, 29 E. C. L. 119, 4 N. & M. 235; Sherran v. Marshall, 1 D. & L. 689. See Street v. Rigby, 6 Ves. Jr. 815; Dimsdale v. Robertson, 2 J. & L. 58, *overruling* Tattersall v. Groote, 2 B. & P. 131; Percival v. Herbe-mont, 1 McMull. (S. Car.) 59.

Effect of Such Agreements at Law.—It has been held that a clause not to sue in a submission precluded a judgment for the plaintiff *non obstante veredicto*, on a motion in arrest of judgment. Britt v. Pashley, 16 L. J. Exch. 240. See Chownes v. Brown, 2 D. & L. 706; Moore v. Butlin, 7 Ad. & El. 595, 34 E. C. L. 167; Jones v. Victoria Graving Dock Co., 2 Q. B. Div. 314.

But a person is not prevented by such a clause from moving to set aside the award for a defect apparent on its face; the clause, being limited to actions and suits, does not apply to a question as to the validity of the award. *In re Mackay*, 2 Ad. & El. 356, 29 E. C. L. 116.

Effect in Equity.—It appears that the effect in equity of such agreements has not been determined in *England*. Russell on Awards (6th ed.) 72; Nichols v. Roe, 3 Myl. & K. 431; Nichols v. Chalie, 14 Ves. Jr. 265.

In *Halfhide v. Fenning*, 2 Bro. C. C. 336, where a clause not to sue was pleaded in bar to a bill in equity, the court, by Lord Kenyon, M. R., held that the clause should be upheld, and allowed the plea. This ruling has been shaken by later decisions. See *Dimsdale v. Robertson*, 2 J. & L. 58; *Scott v. Liverpool Corp.*, 28 L. J. Ch. 236, 3 De G. & J. 334; *Lee v. Page*, 30 L. J. Ch. 857; *Johnson v. Hopper*, 4 Jur. N. S. 882; *Horton v. Sayer*, 4 H. & N. 643, 26 L. J. Exch. 28.

Staying Proceedings Contrary to Reference.—See *infra*, this title, *Staying Proceedings*.

In cases of a similar character, where there are stipulations or agreements in deeds or contracts to refer to arbitration, and where proceedings are taken by either of the parties in the courts of law contrary to such agreements, such proceedings have been set aside. *Dicas v. Jay*, 6 Bing. 519, 19 E. C. L. 155; *Moscatti v. Lawson*, 1 H. & W. 572.

And when in equity they have been treated by the courts of law as contempts of court, and punished by attachment. *Rex v. Wheeler*, 3 Burr. 1257; *Hilton v. Hopwood*, 1 Marsh. 66; *Coulson v. Graham*, 2 Chit. Rep. 57, 18 E. C. L. 248. See further, *Nichols v. Chalie*, 14 Ves. Jr. 265; *Burton v. Petrie*, cited in *Lonsdale v. Littledale*, 2 Ves. Jr. 451; *Grimstone v. Bell*, 4 Taunt. 254; *Braddick v. Thompson*, 8 East 344; *R. v. Hardy*, B. C. T. T. 1849, 19 L. J. Q. B. 196.

But in some instances the courts have refused to stay proceedings, although the submission or contract contained a stipulation that no action should be brought. See *Bright v. Durnell*, 4 D. P. C. 756; *Sturges v. Curzon*, 21 L. J. Exch. 38.

In *England* there is a statutory provision

for staying such proceedings, 17 & 18 Vict., c. 125, § 11. See *West London Dairy Soc. v. Abbott*, 44 L. T. 376; *Horton v. Sayer*, 26 L. J. Exch. 28, 4 H. & N. 643; *Piercy v. Young*, 14 Ch. Div. 200; *Hodgson v. Railway Pass. Assur. Co.*, 9 Q. B. Div. 188.

Where contracts contain provisions for arbitration or agreements not to sue, the disposition of the courts in *England* is to stay proceedings in any action taken, so as to force the parties to resort to arbitration. Russell on Awards (6th ed.) 45, 46; *Russell v. Pellegrini*, 26 L. J. Q. B. 75, 6 El. & Bl. 1020; *Seligmann v. Le Boutillier*, L. R. 1 C. P. 681; *Hirsch v. Im Thurn*, 4 C. B. N. S. 569, 93 E. C. L. 569, 27 L. J. C. P. 254; *Randegger v. Holmes*, L. R. 1 C. P. 679; *Forwood v. Watney*, 49 L. J. Q. B. 447; *Halsey v. Windham*, W. N. 108, 8 July, 1882; *Roper v. London*, 28 L. J. Q. B. 260, 1 El. & El. 825, 102 E. C. L. 825; *Randell v. Thompson*, 1 Q. B. Div. 748, 45 L. J. Q. B. Div. 713; *Moffat v. Cornelius*, 26 W. R. 914; *Mason v. Hadden*, 6 C. B. N. S. 526, 95 E. C. L. 526; *Hattersley v. Hatton*, 3 F. & F. 116; *Law v. Garrett*, 8 Ch. Div. 26; *Wickham v. Hardy*, 28 L. J. Exch. 215; *Wade-Gery v. Morrison*, 37 L. T. N. S. 270; *Plews v. Baker*, L. R. 16 Eq. 566; *Gillett v. Thornton*, L. R. 19 Eq. 599, 44 L. J. Ch. 398; *Kitchen v. Turnbull*, 20 W. R. 253. See further, *Newton v. Taylor*, L. R. 19 Eq. 14; *Bustros v. Lenders*, L. R. 6 C. P. 259.

In some cases, however, the courts have refused to stay proceedings or have questioned the right to do so. See *Daunt v. Lazard*, 27 L. J. Exch. 399; *Wallis v. Hirsch*, 26 L. J. C. P. 72, 1 C. B. N. S. 316, 87 E. C. L. 316; *Smith v. Allen*, 3 F. & F. 156; *Lury v. Pearson*, 1 C. B. N. S. 639, 87 E. C. L. 639; *Blyth v. Lafone*, 1 El. & El. 435, 102 E. C. L. 435, 28 L. J. Q. B. 164; *Orphan Working School v. Henley*, 27 L. J. Exch. 426; *Pennell v. Walker*, 26 L. J. C. P. 9, 18 C. B. 651, 86 E. C. L. 651; *Young v. Buckett*, 51 L. J. Ch. 504.

The rule in equity as applied in *England* is that when fraud is charged the court will refuse to stay the proceedings if the party charged with fraud desires a public inquiry; but where the objection to arbitration comes from the party charging the fraud, the proceedings will be stayed, unless a *prima facie* case of fraud is proved. *Russell v. Russell*, 14 Ch. Div. 471; *Minifie v. Railway Pass. Assur. Co.*, 44 L. T. 552. See further, *Cooke v. Catchpole*, 34 L. J. Ch. 60; *Wheatley v. Westminster Brymbo Coal, etc., Co.*, 2 D. & S. 347; *Piercy v. Young*, 14 Ch. Div. 200; *Willesford v. Watson*, L. R. 8 Ch. 473; L. R. 14 Eq. 572.

Pennsylvania.—In *Wynn v. Bellas*, 34 Pa. St. 160, it was held that parties may proceed under the Compulsory Arbitration Law, waiving the original rule and the right of appeal, and that, if the parties to a reference under this law agree that the arbitrator's award shall be final, and that no appeal shall be taken from it, such stipulation will be enforced by striking out an appeal taken in violation of such agreement.

action would lie against him for breach of such agreement.¹

8. Amending or Altering the Submission.—*a. GENERAL RULE.*—Consent of Parties.—A submission, being a contract, may be altered or amended at any time by the consent of the parties.²

Power of Courts.—But the court cannot alter it in any material point without their consent,³ except in order to insert into the submission, in furtherance of the agreement, that which, by implication, the parties assented to at the time of the reference.⁴

b. CORRECTING ERRORS.—A Clerical Error or an Immaterial Omission or mistake will be amended by the courts without consent of the parties.⁵

Material Error Made by Officer of Court.—But where the mistake is material, even if made by an officer of the court, an amendment will not be allowed.⁶

c. SUBSTITUTION OF NEW ARBITRATOR.—Consent of Parties.—Where the arbitrators are named in the agreement to submit, no others can be substituted without the consent of the parties.⁷

1. *Webb v. Taylor*, 1 D. & L. 676.

2. **Amendment of Submission.**—Consent of the Parties.—Russell on Awards (6th ed.) 82; Morse on Arb. and Award 81.

In *Eveleth v. Chase*, 17 Mass. 458, it was held that an oral submission may be altered or enlarged at any time orally.

And in *Woods v. Page*, 37 Vt. 252, it was held that at the hearing the parties, by mutual consent, may extend the terms of a written submission orally. See *Blanchard v. Murray*, 15 Vt. 548; *Loring v. Alden*, 3 Met. (Mass.) 576.

Where the terms of a written submission were enlarged by instrument under seal, it was held that this constituted a new submission and not an amendment of the original submission. *Bullock v. Koon*, 4 Wend. (N. Y.) 531.

It has been held in several cases that a written submission may be altered by parol. *Graham v. Graham*, 9 Pa. St. 254, 49 Am. Dec. 557; *French v. New*, 20 Barb. (N. Y.) 481; *Shockey v. Glasford*, 6 Dana (Ky.) 9; *Cooley v. Dill*, 1 Swan (Tenn.) 313.

See *contra*, *In re Morphet*, 2 D. & L. 967.

3. **Court may Not Materially Alter Submission without Consent of Parties.**—Russell on Awards (6th ed.) 82; *Pearse v. Cameron*, 1 M. & S. 675; *Smurthwaite v. Richardson*, 15 C. B. N. S. 463, 109 E. C. L. 463.

Unless the parties consent, a rule agreed on by them cannot be enlarged by the court. *Rice v. Clark*, 8 Vt. 104.

4. **Extent of Courts' Power.**—Russell on Awards (6th ed.) 83; *Morel v. Byrne*, 28 L. T. 627; *Evans v. Senor*, 5 Taunt. 662; *Thompson v. Bowyer*, 30 L. J. C. P. 1, 9 C. B. N. S. 284, 99 E. C. L. 284. See further *Braddick v. Thompson*, 8 East 344; *Grimstone v. Bell*, 4 Taunt. 254; *Wright v. Fairfield*, 2 B. & Ad. 727, 22 E. C. L. 175; *Fairfield v. Wright*, *cited* in *Steeple v. Bonsall*, 4 Ad. & El. 950, note (c), 31 E. C. L. 233, *Kendil v. Merrett*, 25 L. J. C. P. 251, 18 C. B. 173, 86 E. C. L. 173; *Bell v. Postlethwaite*, 5 El. & Bl. 695, 85 E. C. L. 695; *Gibbs v. Knightly*, 26 L. J. Exch. 294, 2 H. & N. 34; *Winn v. Nicholson*, 7 C. B. 819, 62 E. C. L. 819.

But where an application is made to the court to alter the original terms of the submission, it will be refused. *Vanderbyl v. McKenna*, 1 L. R. 3 C. P. 252.

The courts of law had originally no power

to alter or amend an agreement to submit so as to make it conform to the original intention of the parties. Such power was in the courts of equity only. *Shaw v. Pitt*, B. C. Nov. 21, 1856.

5. **Court may Correct Clerical Errors or Immaterial Omissions.**—*Price v. James*, 2 D. P. C. 435.

Omission of Name of One of the Arbitrators.—In *Hill v. Taylor*, 15 Wis. 190, the accidental omission of the third arbitrator's name in a bond was corrected. See *Kesler v. Kerns*, 5 Jones (N. Car.) 191; *Bacon v. Ward*, 10 Mass. 141.

6. **Material Errors by Officer of Court.**—Russell on Awards (6th ed.) 85; *Pearman v. Carter*, 2 Chit. Rep. 29, 18 E. C. L. 238; *Alder v. Savill*, 5 Taunt. 454; *Winn v. Nicholson*, 7 C. B. 819, 62 E. C. L. 819. In *Rawtree v. King*, 5 Moore 167, 16 E. C. L. 391, where the order of reference, by mistake, submitted all questions in difference between the parties instead of all matters in difference in the cause only, the court would not interfere to correct the error.

7. **Arbitrators Named in Agreement.**—Consent of Parties Necessary to Substitution.—*Smith v. Warner*, 14 Mich. 152; *Shippen v. Bush*, 1 Dall. (Pa.) 251.

In *Cooley v. Dill*, 1 Swan (Tenn.) 313, it was held that both parties to a suit pending may, by rule of court and by their bond, submit the matters in dispute between them to several arbitrators, naming them in the bond and in the order of reference, and they may, at any time before the arbitrators take action with regard to the matters submitted, change such arbitrators by parol agreement; and such change will not affect the terms of the agreement to submit any further than as to such arbitrators.

Where an award of arbitrators, appointed by the court, appeared by the record to have been made after the substitution of another person for one of the arbitrators appointed, it was held that it would not be accepted unless the record showed also that the substitution was sanctioned by the court and the parties. *Hicks v. McDonnell*, 99 Mass. 459.

Where a dispute was referred to three arbitrators, one of whom took no part in the hearing

Where Submission Made Rule of Court.—Where the submission has been made a rule of court, the parties themselves cannot, by private agreement indorsed on the rule, substitute a new arbitrator for the one named in such rule.¹

Stipulation for Appointment of Other Arbitrators.—But if there is a stipulation in the submission for a right to appoint other arbitrators, the courts will recognize the authority of such persons as the parties themselves accept as arbitrators.²

d. ALTERING THE RULE OF REFERENCE, NOT THE SUBMISSION.—After a rule of reference has once been made, the rule is that the courts cannot alter its terms, either upon recommitment or otherwise, unless the parties give their consent to the same extent as if the reference were entirely

because he had no notice to attend, and his place was filled by another, appointed by the remaining two without the consent of the plaintiff and without notice to him, it was held that the award was void. *Hills v. Home Ins. Co.*, 129 Mass. 345.

In *Binsse v. Wood*, 47 Barb. (N. Y.) 624, affirmed in 37 N. Y. 526, where, by the terms of a lease, the time when the rent for leased premises should begin, was to be fixed by two arbitrators named in such lease, and it was there provided that if either of the arbitrators named should refuse to perform his duties or should be unable to do so, a substitute should be appointed in a certain way, it was held that the absence of one of the arbitrators in Europe was sufficient evidence of his inability to act to justify the appointment of another arbitrator. It was further held that notice of the appointment of the substituted arbitrator need not be given to the surety in the lease, because a notice of such appointment to his principal, the lessee, was sufficient.

Power to Substitute under the Statutes.—Under the *English Arbitration Act* 1889, § 5, the court has no jurisdiction to appoint a second arbitrator because the arbitrator originally chosen is temporarily absent from the country, since he has neither refused to act nor become incapable of acting. *In re Wilson and Eastern Counties Nav., etc., Co.* (1892), 1 Q. B. 81.

The power of appointing a substitute for a disqualified or absent arbitrator, under an early *Pennsylvania* statute, is explained in the following cases: See *Wells v. Scott*, 1 Miles (Pa.) 125; *McEntire v. McElduff*, 1 S. & R. (Pa.) 19; *Girard v. Hutchinson*, 2 S. & R. (Pa.) 188; *Wilson v. Cross*, 7 Watts (Pa.) 495; *Browning v. McManus*, 1 Whart. (Pa.) 177.

Alabama Code, § 3225, requires that a memorandum of the substitution of an arbitrator for one originally appointed, who declines to act, shall be embodied in the submission where no action is pending, but it is not necessary that such memorandum should appear in the submission when a suit is pending. It was also held that where one of the arbitrators named by an order of court, entered into by consent of the parties, refuses to act, another may be substituted by oral agreement, and it will be enough if this appears by the award. *Snodgrass v. Armbruster*, 90 Ala. 493.

In *McEntire v. McElduff*, 1 S. & R. (Pa.) 19, it was held that when a majority of the

arbitrators attend, they may, under *Pennsylvania Act* of March 20, 1810, even in the absence of the defendant, proceed to appoint a substitute for one who does not attend, if no sufficient excuse be made for his absence.

However, in *Wilson v. Cross*, 7 Watts (Pa.) 495, it was held that after all the arbitrators have once assembled and been sworn, they have no power to fill vacancies, under the *Pennsylvania Act* of 1836. Where one of them is unable or unwilling to attend, the others are to proceed without him, and award, if they can agree, or otherwise choose an umpire. There is no provision for proceeding in the absence of more than one. *Semble*, that in the absence of more than one, the proper course is to adjourn if their attendance would probably be had, or to move the court for a rescission of the rule, but it is clear that no vacancy can be supplied.

1. When Submission Made Rule of Court.—*Woodbury v. Proctor*, 9 Gray (Mass.) 18. See *Browning v. McManus*, 1 Whart. (Pa.) 177; *Lazell v. Houghton*, 32 Vt. 579; *McCawley v. Brown*, 12 B. Mon. (Ky.) 132. And compare *Lattimore v. Martin*, Add. (Pa.) 11; *Manlove v. Thrift*, 5 Munf. (Va.) 493.

But in *McClure v. Gulick*, 17 N. J. L. 340, it was held that a submission cannot be made a rule of court after an award has been made, and that an agreement made by the parties, to substitute other arbitrators in the place of those first chosen, being indorsed on the original submission, with an express reference to what it contains, is as binding as if it had been first included in the submission.

Where the matters in a cause are referred to arbitration by a judge, and the order made a rule of court, the parties have afterwards no power by agreement between themselves to vary the terms of the submission. *Cudmore v. McPherson*, 8 Vict. L. Rep. 208 (Australia). See *Tobin v. Layton*, 7 New Bruns. 584, to the same effect.

2. Where Submission Contains Stipulation for Appointment of Other Arbitrators.—*Henneigh v. Kramer*, 50 Pa. St. 530; *Blanchard v. Murray*, 15 Vt. 548.

Waiver of Right to Object to Substitution.—Where parties appeared at the hearing before an arbitrator who had been substituted for the person originally appointed, and went on with the proceedings, it was held that they thereby waived their right to object to the award on the sole ground of the substitution. *Browning v. McManus*, 1 Whart. (Pa.) 177; *Bemus v. Clark*, 29 Pa. St. 251.

new.¹ Nevertheless, they have sometimes permitted a practical alteration of the terms of the reference.²

e. EXTENDING THE TIME FOR MAKING THE AWARD—(1) By Consent of the Parties—No Authority in Submission for Extension—Expiration of Time Named.—Where the submission contains no power for enlarging the time for making the award, or if it does contain such a power, but the time originally fixed within which the award should be made has elapsed without the power being exercised, the time for making the award may be extended by the consent of the parties.³

How Extension should be Evidenced.—The consent of the parties when given amounts in effect to a new submission, and consequently the extension of time should be made by an instrument of equal degree with the original agreement, or it may not be possible to enforce the award by attachment.⁴

(2) *By Courts of Law.*—At the common law, neither the court nor a judge

1. Alteration of Rule of Reference—Consent of Parties.—Morse on Arb. and Award 85; Baxter *v.* Thompson, 25 Vt. 505; Rice *v.* Clark, 8 Vt. 104; Houghton *v.* Bankart, 3 De G. F. & J. 16; Morgan *v.* Tarte, 11 Exch. 82; Cross *v.* Metcalfe, 5 Ad. & El. 800, 31 E. C. L. 442; Ashworth *v.* Heathcote, 6 Bing. 596, 19 E. C. L. 173.

2. Blunt *v.* Cooke, 4 M. & G. 458, 43 E. C. L. 240; Alder *v.* Parke, 5 D. P. C. 16.

3. Where Submission Contains No Power to Extend—Expiration of Time Named.—Benwell *v.* Hinxman, 1 C. M. & R. 935; Staite *v.* Hadron, 9 D. P. C. 995. See Tyerman *v.* Smith, 25 L. J. Q. B. 359, 6 El. & Bl. 719; Winteringham *v.* Robertson, 27 L. J. Exch. 301; *In re Hick*, 8 Taunt. 694; Hallett *v.* Hallett, 7 D. P. C. 389; Lawrence *v.* Hodgson, 1 Y. & J. 16; Hawksworth *v.* Brammall, 5 Myl. & C. 281; Leggett *v.* Finlay, 6 Bing. 255, 19 E. C. L. 74, in which cases it was held generally that the general conduct of the parties may have the effect of extending the time for making the award either by way of waiver or estoppel.

Bringing New Matter to the Notice of the Arbitrators, after the time has expired, has also been held to work an extension. *Rex v. Hill*, 7 Price 636.

Or Specifying a Date to the Umpire as the last day, but which is subsequent to the time limited for making his award. *In re Higham*, 9 D. P. C. 203.

So in *England*, if an award is made subsequent to the time limited by statute by the consent of the parties, it will not be set aside. *Palmer v. Metropolitan R. Co.*, 31 L. J. Q. B. 259; *Caledonian R. Co. v. Lockhart*, 3 Macq. H. L. Cas. 808; *Watson v. Bennett*, 29 L. J. Exch. 357, 5 H. & N. 831.

But the Acts of the Parties cannot be construed as justifying an extension of the time by the arbitrator himself without their consent, and an extension so made has been held to be void. *Mason v. Wallis*, 10 B. & C. 107, 21 E. C. L. 34.

As to Special Requirements of Consent, in England, when in writing, see *Stephens v. Lowe*, 9 Bing. 32, 23 E. C. L. 254; *Evans v. Thomson*, 5 East 189.

Agreement for Extension Signed by Only One of the Parties.—Where an agreement to extend the time is signed by one party only, it is of no effect. *Peters v. Johnson*, 3 Har. & J. (Md.) 291.

Acknowledgment of Extension.—Where a submission under a statute is required to be acknowledged, it must, if extended as to time, be acknowledged again after such extension. *Tudor v. Peck*, 4 Mass. 242; *Bent v. Erie Tel., etc., Co.*, 144 Mass. 165.

Where the Submission is under a Rule Made by a Justice, any extension of such submission must be entered on his record, or judgment cannot be entered on the award. *Lazell v. Houghton*, 32 Vt. 579. See *Russell v. Gray*, 6 S. & R. (Pa.) 145.

4. Extension should Be by Instrument of Equal Dignity with Original Submission.—*Russell on Awards* (6th ed.) 150; *Hoyle v. Jennings*, cited in *Lawrence v. Hodgson*, 1 Y. & J. 16; *Bennett v. Watson*, 29 L. J. Exch. 357; *Caledonian R. Co. v. Lockhart*, 3 Macq. H. L. Cas. 808; *Burley v. Stephens*, 1 M. & W. 156.

It has been held, where the original submission has been by deed, that the extension of time must be by instrument under seal. *George v. Farr*, 46 N. H. 171; *Brown v. Copp*, 5 N. H. 223.

In other cases, where the submission was by bond, it was held that the time might be extended by instrument not under seal. *Bloomer v. Sherman*, 5 Paige (N. Y.) 575; *Hill v. Taylor*, 15 Wis. 190.

Where the extension is made by indorsement on the original submission the instrument should be again properly delivered, and if the original submission contains a stipulation for making it a rule of court, it ought to be repeated in the instrument. *Shermer v. Beale*, 1 Wash. (Va.) 11; *Bryer v. Stewart*, 2 Hayw. (N. Car.) 111.

Massachusetts.—Where, under the Pub. Stat. of Massachusetts, c. 188, an agreement to submit matters in dispute to arbitration has been made, such agreement can only be extended as to time, or altered in any material respect, by a supplemental agreement made in the manner required by the statute. *Bent v. Erie Tel., etc., Co.*, 144 Mass. 165; *Downes v. Erie Tel., etc., Co.* (Mass. 1887), 10 N. E. Rep. 782.

See *Franklin Min. Co. v. Pratt*, 101 Mass. 359; *Tudor v. Peck*, 4 Mass. 242; *Burghardt v. Owen*, 13 Gray (Mass.) 300; *Abbott v. Dexter*, 6 Cush. (Mass.) 108; *Heath v. Tenney*, 3 Gray (Mass.) 380; *Lazell v. Houghton*, 32 Vt. 579.

could extend the time limited in the submission for making the award without the consent of the parties.¹ But in *England*, by statute, the court may now, in its discretion, enlarge the time within which the award may be made.²

(3) *By Courts of Equity*.—In *England* the provisions of the statutes in regard to extending the time for making awards have been held to apply to courts of equity;³ and equity has also interposed to extend the time when the arbitrators have been unable to make their award within the time limited because of the misconduct of a party to the submission.⁴

(4) *By the Arbitrator*.—**Must Have Express Power to Extend Time**.—Unless power to do so is expressly conferred on him by the submission, an arbitrator cannot, of his own act, extend the time originally limited for making his award.⁵

Time within Which Extension must be Made.—Where power has been conferred upon him by the submission, to extend the time, he must do so within the time originally fixed for making the award, or the extension will be of no effect.⁶

1. Extension by Courts of Law—Common-law Rule.—Russell on Awards (6th ed.) 152; *Haldin v. Glasscock*, 5 B. & C. 390, 11 E. C. L. 259, 8 D. & R. 151; *Teasdale v. Atkins*, cited in *Tidd's Practice* (9th ed.) 826.

2. Extension by Courts of Law—English Statutes.—3 & 4 Will. IV., c. 42, § 39; 52 & 53 Vict., c. 49; *Burley v. Stephens*, 1 M. & W. 156; *Parbery v. Newnham*, 7 M. & W. 378, 9 D. P. C. 288; *Leslie v. Richardson*, 6 C. B. 378, 60 E. C. L. 378; *Bowen v. Williams*, 3 Exch. 93; *Lambert v. Hutchinson*, 2 M. & G. 858, 40 E. C. L. 662.

The Submission must be Made a Rule of Court before an application can be made for an extension of the time. *Lambert v. Hutchinson*, 2 M. & G. 858, 40 E. C. L. 662.

The Power of the Court to Extend the Time is not limited because the power of the arbitrator to extend the time has been limited to a stated period. *Denton and Strong*, L. R. 9 Q. B. 117. See *Bowen v. Williams*, 3 Exch. 93; *Johnson v. Collie*, 24 L. J. Q. B. 64; *Parkes v. Smith*, 15 Q. B. 297, 69 E. C. L. 297.

Award Made after Expiration of Time Named.—Although the arbitrator may have made his award after the time limited in the submission had elapsed, yet the court, notwithstanding such award, may extend the time. *Brown v. Collyer*, 2 L. M. & P. 470, 20 L. J. Q. B. 420; *Ward v. Secretary of War*, 32 L. J. Q. B. 53.

All the steps taken from the date at which the time limited in the original submission expired, until the expiration of the extended time, are rendered valid by the order of court making such extension. *Lord v. Lee*, 9 B. & S. 269, 37 L. J. Q. B. 121, L. R. 3 Q. B. 404; *In re Warner*, L. R. 3 Eq. 261.

Application of Assignees of Bankrupt.—In *Gaffney v. Killen*, 12 Ir. C. L. R. App. 25, the court refused to extend the time on the application of the assignees of a bankrupt. See further, *Clarke v. Stocken*, 5 D. P. C. 32, 3 Scott 90; *Lambert v. Hutchinson*, 2 M. & G. 858, 40 E. C. L. 662; *Andrews v. Eaton*, 7 Exch. 221.

As to Drawing up the Rule, see *Brown v. Collyer*, 20 L. J. Q. B. 426.

Where wrong title in the order was held immaterial error, see *Oldfield v. Price*, 6 C. B. N. S. 539, 95 E. C. L. 539.

Where the Appointment of an Umpire was Invalid or defective, the court extended the time, leaving the question of validity to be determined. *Johnson v. Collie*, 24 L. J. Q. B. 64.

The arbitrator must exercise his power of extending the time within the time limited for making his award, but the court may extend the time in its discretion. *Hall v. Rouse*, 4 M. & W. 24; *Leslie v. Richardson*, 6 C. B. 378, 60 E. C. L. 378; *Porbery v. Newnham*, 7 M. & W. 378; *Bowen v. Williams*, 3 Exch. 93.

17 & 18 Vict., c. 125, § 15, makes further provision for the extension of the time by the courts. *In re Burdon*, 27 L. J. C. P. 250. See further, *Kellett v. Local Board of Health*, 34 L. J. Q. B. 87; *Warburton v. Haslingden Local Board*, 48 L. J. C. P. 451.

3. Extension by Courts of Equity—England.—*In re Warner*, L. R. 3 Eq. 261; *In re Dare Valley R. Co.*, L. R. 4 Ch. 554. But see *Hall v. Ellis*, 9 Sim. 530.

4. Misconduct of a Party to the Submission.—*Morse v. Merest*, 6 Madd. 26; *Dimsdale v. Robertson*, 2 J. & L. 58.

5. Russell on Awards (6th ed.) 146.

6. When Arbitrator must Act with Reference to Extension.—Good v. Wilks, cited in *Tidd's Practice* (9th ed.) 827. See further, *Reid v. Fryatt*, 1 M. & S. 1; *Denton and Strong*, L. R. 9 Q. B. 117; *Kerr v. Jeston*, 1 Dowl. N. S. 538; *Knox v. Symmonds*, 3 Bro. C. C. 358; *Rex v. Stevens*, 5 East 244; *Dakins v. Wagner*, 3 D. P. C. 535; *Tyler v. Jones*, 3 B. & C. 144, 10 E. C. L. 39; *Clarke v. Crofts*, 4 Bing. 143, 13 E. C. L. 380; *Mason v. Wallis*, 10 B. & C. 107, 21 E. C. L. 34.

Where the submission conferred power upon the arbitrators to extend, whether the time originally limited should have previously expired or not, and where they made the extension subsequent to such time, it was held that the enlargement revived their powers. *Dimsdale v. Robertson*, 2 J. & L. 58.

Where a case was submitted to two arbitrators with power to appoint a third, and with a stipulation that the award should be made by a stated time or such other day as the arbitrators or any two of them should appoint, it was held that the two original arbitrators could not make a valid extension of the time until the third was appointed, as such extension was an

When Submission does Not Prescribe Manner of Making the Extension.—If the submission does not prescribe the manner in which the extension shall be made, the arbitrator may adopt any mode, whether oral or in writing, which signifies his intention of making such extension.¹

When Submission Prescribes Manner of Making the Extension.—But if the submission directs any manner in which the enlargement is to be made, it should be complied with exactly.²

An Enlargement of Time Made by an Umpire does not enlarge the arbitrator's time.³

(5) *Effect of Extension of Time.*—An extension of the time operates as a discharge of the surety on an arbitration bond, because, if the time originally limited has been allowed to expire without an award being made, his liability cannot be revived by agreement between the parties to consent to such extension unless he consents to it himself.⁴

f. **EFFECT OF ALTERING THE SUBMISSION**—Enlargement of Scope of Reference.—Where the original submission is by bond, and it is materially altered by a new agreement which enlarges the scope of the reference, such agreement has the effect of discharging the sureties on the bonds.⁵

Suit must, therefore, be brought upon the new submission which is implied from the agreement to alter the original submission taken together with the original bond. But suit cannot be brought upon the original bond itself, because its conditions have not been broken.⁶

Written Submission Altered by Parol.—It has been held that a written submission may be altered or amended by a subsequent parol agreement.⁷

act of judgment and the parties were entitled to have all the arbitrators placed in a position to exercise their judgment on the question. *Reade v. Dutton*, 2 M. & W. 69; *Hughes v. Garnett*, cited in 2 M. & W. 69.

1. **How Extension to be Made When Submission Contains No Specification.**—*Russell on Awards* (6th ed.) 148; *Burley v. Stephens*, 1 M. & W. 156.

2. **Manner of Making the Extension Named in the Submission.**—*Russell on Awards* (6th ed.) 148.

The Usual Manner Prescribed in the Submission is by indorsement thereon to be made by the arbitrator, and this must be strictly complied with. *Leggett v. Finlay*, 6 Bing. 255, 19 E. C. L. 74. But see *Davison v. Gauntlett*, 3 M. & G. 550, 42 E. C. L. 289, 1 Dowl. N. S. 198.

No Special Form of Words Necessary.—It is not necessary that any special form of words should be used in such indorsement. *Hallett v. Hallett*, 5 M. & W. 25, 7 D. P. C. 389.

General Power to Extend Time.—Nor is it necessary that the arbitrator should get express power to make the extension from time to time. Where the submission directs the award to be made on a stated day, or on or before any other day to which the arbitrator shall extend the time, it thereby confers on him power to make the extension as often as he deems necessary. *Payne v. Deakle*, 1 Taunt. 509; *Leggett v. Finlay*, 6 Bing. 255, 19 E. C. L. 74; *Barrett v. Parry*, 4 Taunt. 658. See *Anonymous*, 2 Chit. Rep. 45, 18 E. C. L. 245; *Skerratt v. North Staffordshire R. Co.*, 17 L. J. Ch. 161, 8 & 9 Vict. c. 18, §§ 23, 31.

3. *Lang v. Brown*, H. L. May 8, 1855.

4. **Effect of Extension of Time upon Surety in Arbitration Bond.**—*Staite v. Haddon*, 9 D. P. C. 995; *Brookins v. Shumway*, 18 Wis. 98. See *Feich v. Lee*, 15 Wis. 265; *Riley v. Gregg*,

16 Wis. 666; *Meiswinkle v. Jung*, 30 Wis. 361, 11 Am. Rep. 572; *Leffingwell v. Freyer*, 21 Wis. 392.

5. **Enlarging Scope of Reference—Effect upon Surety in Arbitration Bond.**—*Bullock v. Koon*, 4 Wend. (N.Y.) 531. See also 6 Waite's Actions and Defenses, 525; *Bigelow v. Newell*, 10 Pick. (Mass.) 348; *Boston Water Power Co. v. Gray*, 6 Met. (Mass.) 166; *Gardner v. Boston*, 120 Mass. 266; *Johnson v. Noble*, 13 N. H. 286, 38 Am. Dec. 485; *Allen v. Galpin*, 9 Barb. (N.Y.) 246.

6. *Brown v. Goodman*, 3 T. R. 592, note b; *Freeman v. Adams*, 9 Johns. (N.Y.) 115; *Myers v. Dixon*, 2 Hall (N.Y.) 456; *Shockey v. Glasford*, 6 Dana (Ky.) 9; *Bloomer v. Sherman*, 5 Paige (N.Y.) 575; *Fleming v. Gilbert*, 3 Johns. (N.Y.) 528. See *contra*, *Brookins v. Shumway*, 18 Wis. 98.

Where an Entirely New Submission has been Substituted for the original one, action lies upon the new, not upon the original, submission. *George v. Farr*, 46 N. H. 171.

7. **Altering Written Submission by Parol Agreement.**—*Ashworth v. Heathcote*, 6 Bing. 596, 19 E. C. L. 173; — *v. Mills*, 17 Ves. Jr. 419; *Thames Iron Works, etc., Co. v. Reg.*, 20 L. T. 318. See *supra*, this title, *Oral Submission*.

Where the parties to a submission agreed orally that certain items of the claims submitted should be heard and determined separately by the arbitrator in the first instance, and joined in a request for such hearing and determination, and the arbitrator agreed thereto, and a full hearing was had upon such items accordingly, and arguments made, and the arbitrator's award upon them was reduced to writing and duly published by reading the same to the parties, it was held that the award so made would not be affected by a subsequent revocation of the submission. The award was a

9. Setting Aside the Submission.—The court, on motion, will set aside a submission which has been obtained by fraud, or where there is a mistake made in drawing it up, or where the arbitrator is interested, prejudiced, or neglects to act; but an award will not be set aside because of fraud or mistake in the submission.¹

Bad Faith.—So the court will set aside a submission where the reference has failed because of bad faith in one of the parties.²

And a Compulsory Submission has been set aside where the matter in controversy was not the amount due, but the liability under the contract.³

10. Revoking the Submission.—*a.* COMMON-LAW RULE—Revocable at Any Time before Award.—At the common law, a submission might be revoked by any of the parties thereto at any time before the award was made.⁴ Nor was this right

complete defense to an action by one of the parties against the other on account of any of the items included in it. *Nashua, etc., R. Corp. v. Boston, etc., R. Corp.*, 157 Mass. 268.

Where a special contract has been entered into to submit questions in dispute to arbitrators, it may be altered by parol, and is to be liberally construed. *Graham v. Graham*, 9 Pa. St. 254, 49 Am. Dec. 557.

1. Setting Aside the Submission.—*Doe v. Morpeth*, 3 Taunt. 378; *Prosser v. Goringe*, 3 Taunt. 426; *Sackett v. Omen*, 2 Chit. Rep. 39, 18 E. C. L. 241.

After a cause has been submitted to arbitration, the court still retains a certain jurisdiction over the submission, but it exercises such jurisdiction not arbitrarily, but according to certain rules. *Wade v. Simeon*, 13 M. & W. 647.

Undue Influence—Delay.—Equity will not interfere to set aside a submission on the ground that it was obtained by undue influence, where the party who objects went on with the hearing, and took the chance of the award being made in his favor. *Ormes v. Beadel*, 30 L. J. Ch. 1, 2 Giff. 166; *Ex p. Wyld*, 30 L. J. Bank. 10, 2 De G. F. & J. 642.

Nor will the submission be set aside when the plaintiff has delayed in objecting to it. *Rogers v. Kearns*, 29 L. J. Exch. 328. See *Cross v. Mitchell*, Exch. May 8, 1855.

Where the Submission has been Made a Rule of Court, under the statute, the court may set it aside if it is not executed by the next term, and may take up the case and render judgment on it by default, without any notice to defendant, as he is presumed to be in court, and as the statute contemplates that the cause shall remain on the docket and be subject to the order of the court. *Shelby Iron Co. v. Cobb*, 59 Ala. 636.

After an Award of Arbitrators has been Declared Valid, the agreement to submit is no longer a binding contract. It falls with it. *Calvert v. Carter*, 18 Md. 73.

Litigation between Arbitrator and One of Parties to Submission.—The court will set aside a submission to arbitration on the ground of active litigation between one of the parties to the submission and the arbitrator agreed on, although the litigation arose at a period long after the date of the submission and was in respect to matters entirely unconnected with it. *In re Baring and Doulton*, 61 L. J. Q. B. 704.

Attacking the Award but Not the Submission.—Under *Massachusetts Gen. Stat.*, c. 147, one

of the parties to a submission, after his motion to have an award made under such submission set aside has been overruled, cannot assign the same reasons in support of a motion to have the submission set aside. *Cowley v. Dobbins*, 131 Mass. 327.

Arbitrator Indorser on Note of Insured Secured by Mortgage on the Property Injured.—A submission to arbitration will not be set aside because one of the arbitrators, under a provision in a policy of insurance to determine the amount of loss, was an indorser on a note made by the insured and secured by mortgage on the injured property, where there is nothing to show that the arbitrator was himself interested in the recovery of the policy, and as he was otherwise secured against his liability as indorser. *Bullman v. North British, etc., Ins. Co.*, 159 Mass. 118.

2. Bad Faith of One of Parties to Submission.—*Morgan v. Miller*, 6 Bing. N. Cas. 168, 37 E. C. L. 332; *Bacon v. Cresswell*, 1 Hodges 189.

3. Brown v. Girard, 19 L. T. N. S. 324.

4. Common-law Rule as to Revocability of Submission.—*Bac. Abr., Arb., B.; Com. Dig., Arb., D. 5*; *Vinyor's Case*, 8 Coke 82; *Russell on Awards* (6th ed.) 156; *Green v. Pole*, 6 Bing. 443, 19 E. C. L. 125; *Oliver v. Collings*, 11 East 367; *Clapman v. Higham*, 1 Bing. 87, 8 E. C. L. 415; *Brown v. Tanner*, 1 C. & P. 651, 11 E. C. L. 512; *King v. Joseph*, 5 Taunt. 452; *Marsh v. Bulteel*, 5 B. & Ald. 507, 7 E. C. L. 175; *In re Rouse v. Meier L. R.*, 6 C. P. 212; *In re Fraser v. Ehrensperger*, 12 Q. B. Div. 310.

Form of the Submission.—The revocation might be made whether the submission was by deed, *Warburton v. Storr*, 4 B. & C. 103, 10 E. C. L. 282; by bond, *Milne v. Gratrix*, 7 East 608; by instrument not under seal, *Newgate v. Gelder*, 2 Keb. 10, 20, 24; by judge's order, *Greenwood v. Misdale*, 1 M'Clel. & Y. 276; *Aston v. George*, 2 B. & Ald. 395; or by rule of court, *Green v. Pole*, 6 Bing. 443, 19 E. C. L. 125; *Power v. Power*, 7 Watts (Pa.) 205.

Compulsory Arbitration under Void Statute.—Where proceedings are taken for compulsory arbitration made by rule of court under a void statute, the right to object to such proceedings is not waived by meeting the other party and selecting with him the arbitrator thereunder, since, there being no right to compel arbitration, the whole proceedings amount to a voluntary reference without consideration which may be revoked at any time before award. *Farel v. Roberts*, 11 Pa. Co. Ct. Rep. 58.

taken away by an express stipulation in the submission that it should be

Variation from Covenant—New Agreement.—A covenant in a lease was to the effect that the rent should be fixed by two or three persons agreed on by the parties, but it did not make an award by a majority of these binding. The parties to the lease submitted the decision of the amount of rent to two persons, with the provision that if they could not agree they should appoint a third, and that the award of two should be binding. The arbitrators so chosen selected the third, and he, with one of the others, united in an award. The submission departed from the terms of the covenant in making a majority award binding, consequently it was held that one of the parties to the submission had a right to revoke it before the award was made, and that an award after such revocation was void. *Sherman v. Cobb*, 15 R. I. 570; *Flint v. Pearce*, 11 R. I. 576, distinguished.

Withdrawal from Agreement—Damages.—Either party may withdraw an agreement to arbitrate, where the agreement has been made after a cause of action has arisen and before the award has been rendered; such agreement being no bar to a suit in law or in equity, and no foundation for a decree of specific performance, the only remedy being an action for damages growing out of the breach of the agreement. *Rison v. Moon* (Va. 1895), 22 S. E. Rep. 165.

Revocation Considered to Be Too Late.—In *Hunt v. Wilson*, 6 N. H. 36, where, by the terms of the agreement to submit, the award was to be made and published to the parties on or before a day specified in such agreement, and the arbitrator made an award before that day, but before the award was published to both parties one of them revoked the submission, it was held that this revocation was too late and that the award was binding. A proviso that an award shall be published does not imply a formal notification to the parties.

Revocation Unconditional.—Two railroad companies entered into a written agreement to submit certain matters in dispute between them to arbitration, and, before an award was made, the president of one of the companies delivered to the arbitrators a paper revoking the submission signed by him in behalf of the company and the directors of the company; but subsequently, and before an award was made, a resolution was passed that the president's act be ratified, and that the submission be no longer in force. It was held that the authority of the arbitrators was unconditionally revoked, and that their award was void. *Boston, etc., R. Corp. v. Nashua, etc., R. Corp.*, 139 Mass. 463.

Attorney and Client.—An attorney has a right to submit his client's cause to arbitration, but the client also has a right to revoke such submission if such revocation is made in seasonable time. *Coleman v. Grubb*, 23 Pa. St. 393. See *Wilson v. Young*, 9 Pa. St. 101; *Bingham v. Guthrie*, 19 Pa. St. 418.

Where a Submission is Made by Bond, whether such submission is expressed to be irrevocable or not, either party may revoke

such submission before the award is made and published, and such revocation has the effect of annulling all contracts as relative to the submission conditioned in the bond, and leaves the party to rest entirely for his remedy upon the penalty of the submission bond. *Aspinwall v. Tousey*, 2 Tyl. (Vt.) 328; *Allen v. Watson*, 16 Johns. (N. Y.) 205; *Bray v. English*, 1 Conn. 498; *Rowley v. Young*, 3 Day (Conn.) 118.

Submission for Valuable Consideration.—Where a party with a surety signs a written agreement to submit a controverted matter to arbitration, he may revoke the submission before the award is made, and this, although a valuable consideration was paid him for his signature. *Jones v. Harris*, 59 Miss. 214.

But in *McGhee v. Duffield*, 5 Pa. St. 497, where proceedings in a chancery suit for an account were discontinued by agreement of the parties, and in consideration of such discontinuance a submission was made to a final reference, it was held that this submission was irrevocable. It was also held that where, by agreement of the parties, an award is recommended to the referees to correct a mistake, this is not a new submission, but merely a continuance of the former proceedings. See *Monroe Bank v. Widner*, 11 Paige (N. Y.) 529, 43 Am. Dec. 768; *Paist v. Caldwell*, 75 Pa. St. 161; *Forwood v. Watney*, 49 L. J. C. L. 447; *Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174; *Monongahela Nav. Co. v. Fenlon*, 4 W. & S. (Pa.) 205; *Pollock v. Hall*, 4 Dall. (U. S.) 222; *McNulty v. Solley*, 95 N. Y. 242.

New York.—In New York, under 2 N. Y. Rev. Stat. 544, § 23, either of the parties to a submission may revoke the powers of the arbitrators at any time before the cause is finally submitted to them. *Heath v. New York Gold Exchange*, 38 How. Pr. (N. Y.) C. Pl. 168, 7 Abb. Pr. N. S. (N. Y.) 251; *Allen v. Watson*, 16 Johns. (N. Y.) 205; *Curtis v. Barnes*, 30 Barb. (N. Y.) 225; *Monroe Bank v. Widner*, 11 Paige (N. Y.) 534, 43 Am. Dec. 768; *Bloomer v. Sherman*, 2 Edw. Ch. (N. Y.) 452, 5 Paige (N. Y.) 575.

But once the cause is finally submitted to the arbitrators, neither party afterwards has any right to revoke the submission. *Bloomer v. Sherman*, 5 Paige (N. Y.) 578; *Monroe Bank v. Widner*, 11 Paige (N. Y.) 534, 43 Am. Dec. 768; *Cope v. Gilbert*, 4 Den. (N. Y.) 347.

In *Bloomer v. Sherman*, 5 Paige (N. Y.) 575, 2 Edw. Ch. (N. Y.) 452, it was held that the provision of 2 New York Rev. Stat. 544, which restrains the parties to a submission from revoking the powers of the arbitrators, after a final submission has been made to them of the matter in dispute between the parties, applies to all cases of arbitration, whether the parties have or have not agreed in their submission that a judgment shall be entered in the award which is to be made in pursuance of such submission.

In *New York Lumber, etc., Co. v. Schnieder*, 119 N. Y. 475, following *People v. Nash*, 111 N. Y. 310, 7 Am. St. Rep. 747, it was held that

irrevocable.¹ And where one of several persons, who jointly make but one party, revokes the submission, even against the will of the others, it makes the submission void as to all.²

section 2383 of the *New York Code of Civil Procedure*, which provides that a submission to arbitration, whether made as prescribed in that code or otherwise, cannot be revoked by either party after the matter has been finally submitted to arbitrators, applies to a common-law submission.

Submissions to arbitration are revocable in their nature, and it has been held that the parties cannot make that irrevocable which is by its nature revocable. *People v. Nash*, 111 N. Y. 310, 7 Am. St. Rep. 747.

Ohio.—In *Cary v. Montgomery County*, 19 Ohio 245, it was held that, under the statute of that state, a submission cannot be revoked after the arbitrators are sworn, although the award has not in fact been signed.

Indiana.—Neither party to a statutory submission can revoke his submission after the arbitrators have commenced the hearing of a cause submitted to them. *Shroyer v. Bash*, 57 Ind. 349. See *Bush v. Christian*, 84 Ind. 180; *Madison Ins. Co. v. Griffin*, 3 Ind. 277.

Revocation by Joint Consent of Parties.—Where the revocation is by joint consent of the parties, it may be either of the whole submission or of part only. *Varney v. Brewster*, 14 N. H. 49.

And it has been said that in such a case it might be made after the rendering of the award. *Clement v. Hadlock*, 13 N. H. 185.

By Agent or Officer.—A revocation can be made through an agent, but he must be especially authorized for it. So where the president and secretary of an insurance company are authorized to carry on the business of the company without the presence of the board of directors, this does not authorize them to revoke a submission entered into by the board of directors. *Madison Ins. Co. v. Griffin*, 3 Ind. 277.

In *Richards v. Attleborough Nat. Bank*, 148 Mass. 187, where a national bank elected to go into liquidation on the expiration of its charter, and a board of directors was elected which was disqualified by reason of its members not possessing the requisite shares of stock when the bank commenced liquidation, it was held that the election of such board was invalid, and that the board had consequently no power to revoke a submission to arbitration entered into by the bank before such board was elected.

Waiver.—A revocation of a submission is considered to be waived when the revoking party appears before the arbitrators and enters into the trial. *Seely v. Pelton*, 63 Ill. 101.

Where certain parties entered into an agreement to submit disputes existing between them to arbitration, and one of them revoked such submission before the award was made, but the award was made afterwards, directing a certain sum of money with the costs of the arbitration to be paid by the party so revoking to the other, and directing releases to be executed by both at a certain day, and the party so re-

voking paid the sum awarded, but the releases were not executed; it was held in an action by him against the party in whose favor the award was made, that the payment so made by him of the sum awarded was not a waiver of his revocation of the submission. *Hathaway v. Strong*, 2 Tyl. (Vt.) 105.

1. Express Stipulation that Submission should Be Irrevocable.—*Bac. Abr., Arb., B.*; *Marsh v. Bulteel*, 5 B. & Ald. 507; 7 E. C. L. 175, 1 D. & R. 106; *Hide v. Petit*, 1 Ch. Cas. 185, 2 Freem. 133; *Vinyor's Case*, 8 Coke 816; *Tobey v. Bristol County*, 3 Story (U. S.) 800; *Power v. Power*, 7 Watts (Pa.) 205; *Erie v. Tracy*, 2 Grant's Cas. (Pa.) 20; *Coon v. Allen*, 156 Mass. 113.

Agreement that under Certain Circumstances Proceedings may Be Ex Parte.—Even when the submission contains the stipulation that in case one of the parties fails to appear the proceedings may go on *ex parte*, the submission is not irrevocable. *Boston, etc., R. Corp. v. Nashua, etc., R. Corp.*, 139 Mass. 463.

Unless there Be Some Statutory Provision Restricting It, a common-law agreement to submit to arbitration is revocable at any time until an award has been made therein by either party to such agreement. No stipulation in the agreement will be sustained either at law or in equity as defeating this right so as to prevent either party from having recourse to courts of justice. *Davis v. Maxwell*, 27 Ga. 368; *Tobey v. Bristol County*, 3 Story (U. S.) 800; *Johnson v. Andress*, 5 Phila. (Pa.) 8; *Marsh v. Packer*, 20 Vt. 198; *Leonard v. House*, 15 Ga. 473.

By Their Nature, Submissions of Disputes to Arbitration Are Revocable, and the parties cannot, of their own action, make that irrevocable which is by its nature revocable. Although an express agreement has been entered into not to revoke, and to waive any right to revoke, a submission to arbitration, this does not prevent a revocation of such submission under the *New York Code of Civil Procedure*, § 2383, at any time before the closing of the proofs and final submission of the case for a decision; and after the submission has been so revoked, the foundation of the arbitrators' power is gone, and no further proceedings can be taken upon the submission. *People v. Nash*, 111 N. Y. 310, 7 Am. St. Rep. 747.

2. One of Several Persons, Who Constitute but One Party, Revoking against Will of the Others.—*Com. Dig., Arb., D. 5*; *Rolle Abr., Authority*, D. 1, 2, p. 331; *Vin. Abr., Authority*, H. 1, 2; *Russell on Awards* (6th ed.) 156; *Brown v. Leavitt*, 26 Me. 251; *Hathaway v. Cliff*, 7 New Bruns. 267. See *Haggett v. Welsh*, 1 Sim. 134.

But the Rule has been Doubted in certain cases. *Bac. Abr., Arb., B.*; *West's Symbol.*, pt. 2, tit. *Compromise*, § 42; *Kyd on Awards* 30; *Wilde v. Vinor*, 1 Brownl. 62; *Robertson v. M'Niell*, 12 Wend. (N. Y.) 578; *Greason v. Keteltas*, 17 N. Y. 491.

Where the parties to several equity suits

After Award — Consent of Party.—But after an award is once made, the submission can no longer be revoked by either party without the other's consent.¹

Submission under Arbitration Clause in Deed or Contract.—And it has been held that where the submission is made under an arbitration clause in a deed or contract, it is not revocable like an actual reference to a particular arbitrator.²

Submission Made Rule of Court.—After a submission has been made a rule of court,

entered into a written agreement to refer the controversies involved in such suits and all collateral questions arising thereunder to three masters, the decision of whom would be necessary to the determination of such suits, and by the terms of the agreement the reports of the masters were to be "without exception or appeal," and the agreement was made and read in court by consent, it was held that one of the parties to the agreement could not revoke his submission and that the appeal would be quashed, particularly as the debtors in the awards were to have the privilege of paying in instalments upon time. *Lewis' Appeal*, 91 Pa. St. 359.

1. **Revocation of Submission after Award.**—*Clement v. Hadlock*, 13 N. H. 185; *Tobey v. Bristol County*, 3 Story (U. S.) 800; *Marsh v. Packer*, 20 Vt. 198; *Coon v. Allen*, 156 Mass. 113; *Union Ins. Co. v. Central Trust Co.* 58 Hun (N. Y.) 610, 13 N. Y. Supp. 17. See *Dexter v. Young*, 40 N. H. 130; *Great Western R. Co. v. Miller*, 12 U. C. Q. B. 654; *Haskell v. Whitney*, 12 Mass. 47; *Tyson v. Robinson*, 3 Ired. (N. Car.) 333; *Ferris v. Munn*, 22 N. J. L. 161; *Oxley v. Oldden*, 1 Dall. (U. S.) 430; *Frets' v. Frets*, 1 Cow. (N. Y.) 335; *Ross v. Bruce*, 21 U. C. C. P. 41.

Contempt.—In *Haggett v. Welsh*, 1 Sim. 134, it was held that although a reference to arbitration is made under an order of court, either party may revoke the authority of the arbitrator before the award is made, but it is a high contempt to do so.

Parol Submission.—Unless a parol submission to arbitration is unconditionally revoked before the award is made, it is binding upon the parties even where one of the parties refused to reduce the submission to writing. *Dilks v. Hammond*, 86 Ind. 563. See *Griggs v. Seeley*, 8 Ind. 264; *Webb v. Zeller*, 70 Ind. 408; *Carson v. Earlywine*, 14 Ind. 256; *Boots v. Canine*, 58 Ind. 450; *Miller v. Goodwine*, 29 Ind. 46; *Shroyer v. Bash*, 57 Ind. 349.

After a question is referred to arbitrators and they have acted under the reference, one of the parties cannot put an end to the contract and revoke the authority of the arbitrators, by an expression of a determination not to stand by the agreement. Such declarations are nugatory, unless the party expressly revokes the authority of the arbitrator. *Brown v. Welcker*, 1 Coldw. (Tenn.) 197.

One of the parties to a submission cannot revoke it *invito altero* under the *Dutch law*. *Twentyman v. Chisholm*, 3 Menz. Cape of Good Hope 161.

California Code.—The rule is that a submission is irrevocable after an award is made, and this rule is not changed by the provisions of the California Code, § 1283, which provides

that after the clerk has entered the proper order revoking the submission as a rule of court, "the submission cannot be revoked without the consent of both parties." This provision is a restriction, not an enlargement, of the right of revocation. The court, by McFarland, T., said: "At common law, either party could revoke before award; but under the code a party who has stipulated that the submission be made an order of court cannot revoke before the award after the clerk has made the proper court order. On the other hand, in such a case, the arbitrators may be compelled by the court to make an award. But in no case does the code give the right of revocation *after award*; and with respect to that right, the code does not provide for two kinds of arbitration." *California Academy of Sciences v. Fletcher*, 99 Cal. 207.

Where the Parties to a Foreclosure Suit refer the matter to a solicitor, agreeing that a decree be entered on his decision, such agreement is binding upon them, and the defendant cannot revoke the referee's authority so as to prevent a foreclosure and sale being made on the coming in of the master's report. *Monroe Bank v. Widner*, 11 Paige (N. Y.) 529, 43 Am. Dec. 768; *Matter of New York, etc., R. Co.*, 40 Hun (N. Y.) 134.

2. *Piercy v. Young*, 14 Ch. Div. 200; *Moffatt v. Cornelius*, 26 W. R. 914; *Christie v. Noble*, 14 Ch. Div. 203, note. See *Forwood v. Watney*, 49 L. J. C. L. 447.

Submission Containing Other Terms to be Performed by the Parties.—Where a submission to arbitration forms part of an agreement containing other terms to be performed by the parties, it is irrevocable, especially if these terms have been executed in whole or in part. *McKenna v. Lyle*, 155 Pa. St. 599; *Haley v. Bellamy*, 137 Mass. 357. See *Hood v. Hartshorn*, 100 Mass. 117, 1 Am. Rep. 89; *Palmer v. Clark*, 106 Mass. 373; *Lewis' Appeal*, 91 Pa. St. 359; *Williams v. Tracey*, 95 Pa. St. 308; *Mitchell v. Newman*, 4 Penny. (Pa.) 443; *White's Appeal*, 108 Pa. St. 473.

Where a Contractor and Sub-contractor upon a Railroad entered into an agreement that any dispute that might arise between them should be decided by the chief engineer of the railway company for which the work was to be done, it was held binding upon both parties, and not revocable, and no obligation to pay arises until the estimate is made by the chief engineer. *Sweet v. Morrison*, 116 N. Y. 19, 15 Am. St. Rep. 376.

The submission in such a case, being on consideration, is more obligatory than an ordinary submission to arbitration, and is irrevocable, no obligation to pay arising until the estimate is made by the engineer. See *Herrick v. Belknap*, 27 Vt. 673.

it cannot be revoked; any attempt to do so is a contempt.¹ Such a submission cannot be revoked, even by the consent of the parties, without the sanction of the court by its order.²

b. REVOCATION IN EQUITY.—Where a submission was made by order in equity, it was as revocable at the will of a party as a submission in an action at common law.³ But the courts of equity, for sufficient reason, have sometimes sustained the submission, notwithstanding such revocation.⁴

c. REVOCATION BY LEAVE OF COURT—Statutory Enactments.—In *England*, in consequence of the abuse of the common-law right of revocation, there are various statutory provisions prohibiting the revocation of submissions without

1. Submission Made Rule of Court is Irrevocable.—Where the parties to an action have entered into a rule of court in the common form, submitting the action and all demands to arbitrators to be mutually chosen, neither party can rescind the rule. *Haskell v. Whitney*, 12 Mass. 47; *Cumberland v. North Yarmouth*, 4 Me. 459; *Ferris v. Munn*, 22 N. J. L. 161; *Freeborn v. Denman*, 8 N. J. L. 116; *Horn v. Roberts*, 1 Ashm. (Pa.) 45; *Ruston v. Dunwoody*, 1 Binn. (Pa.) 42; *Pollock v. Hall*, 4 Dall. (Pa.) 222; *Sutton v. Tyrrell*, 10 Vt. 94; *Dexter v. Young*, 40 N. H. 130; *Frets v. Frets*, 1 Cow. (N. Y.) 335; *Bray v. English*, 1 Conn. 498; *Tyson v. Robinson*, 3 Ired. (N. Car.) 333; *Phillips v. Shipley*, 1 Bland (Md.) 516; *Masterson v. Kidwell*, 2 Cranch C. C. 669; *Brickhouse v. Hunter*, 4 Hen. & M. (Va.) 363, 4 Am. Dec. 528; *Oregon, etc., Sav. Bank v. American Mortg. Co.*, 35 Fed. Rep. 22.

Where the parties to a suit in equity, after issue joined, and pending a reference to an examiner, file an agreement to submit the controversy to the final decision of arbitrators, and in consequence of such agreement the court, at the request of the parties, vacates the appointment of the examiner, the agreement of reference is virtually made a rule of court, and becomes irrevocable. *White's Appeal*, 108 Pa. St. 473.

But a submission "to be Made a Rule of Court," is revocable until it has been made a rule of court, or until award has been rendered. *Huston v. Clark*, 12 Phila. (Pa.) 383.

Submission Made Rule of Court Held Revocable in Some Cases.—Some authorities hold that a submission made by rule of court is revocable. *Green v. Pole*, 6 Bing. 443, 19 E. C. L. 125; *Power v. Power*, 7 Watts (Pa.) 205.

A revocation of a submission which has been made a rule of court is a contempt; yet, up to the time that the rule is actually made, the submission may be revoked and a party is not placed in contempt by doing so. *Frets v. Frets*, 1 Cow. (N. Y.) 335. See *Milne v. Gratrix*, 7 East 608.

California Code of Civ. Pro., §§ 1282, 1283, provides "that if the submission is not made an order of the court, it may be revoked at any time before the award is made." Under this provision, a submission to arbitration which contained no stipulation that it might be made an order of court, was held to be revocable. *Sidlinger v. Kerkow*, 82 Cal. 42.

The mere fact that the question agreed to

be submitted to arbitration is the subject of a pending suit, does not make the submission one "by rule of court," and although a submission by rule of court may be made, yet, where the submission is in fact a common-law submission only, it is revocable at any time before an award. *Minneapolis, etc., R. Co. v. Cooper* (Minn. 1894), 61 N. W. Rep. 143.

2. Sanction of Court Necessary.—*Phillips v. Shipley*, 1 Bland (Md.) 516; *Masterson v. Kidwell*, 2 Cranch C. C. 669.

Where an agreement to submit a dispute to arbitration contains a provision that the award shall be entered as the judgment of the court, such agreement cannot be revoked by either party under *West Virginia Code*, c. 108, without leave of the court. *Stiringer v. Toy*, 33 W. Va. 86.

See, where a submission of a pending cause was held irrevocable unless made with the permission of the court, *Haskell v. Whitney*, 12 Mass. 47; *Bickham v. Denny*, 1 N. J. L. 14; *Tyson v. Robinson*, 3 Ired. (N. Car.) 333.

3. Revocation of Submission in Equity.—*Haggett v. Welsh*, 1 Sim. 134; *Hide v. Petit*, 1 Ch. Cas. 185, 2 Freem. 133. See *Barker v. Lees*, 2 Keb. 64; *Harcourt v. Ramsbottom*, 1 Jac. & W. 485.

4. Pope v. Duncannon, 9 Sim. 177. See *Harcourt v. Ramsbottom*, 1 Jac. & W. 485; *Hall v. Ellis*, 9 Sim. 530; *In re Warner v. Powell*, L. R. 3 Eq. 261; *O'Sullivan v. Hutchins*, cited in *Bignold v. Springfield*, 7 Cl. & F. 85.

In *Pope v. Duncannon*, 9 Sim. 177, it was held that where an award is made after a submission has been revoked by the plaintiff, equity would not interfere to restrain the defendants from acting on the award unless the plaintiff had good grounds for revoking the submission. The vice-chancellor said: "I observe that in *Morse v. Merest*, 1 Russ. & M. 337, note 1, Sir John Leach, V.-Ch., states that in equity a defendant is not permitted to set up a legal defense which grows out of his own misconduct; so, varying the terms of the proposition, I say that a plaintiff is not at liberty to ask the aid of a court of equity in respect of an act done by him against good faith. And as * * * there is nothing whatever to show that the power which the plaintiffs had given the arbitrators was revoked upon any just or reasonable grounds, I am bound to conclude that the revocation was a wanton and capricious exercise of authority on their part, and consequently the motion must be refused."

leave of court.¹ But in order to deprive a party of his common-law right, the case must be brought clearly within the provisions of the statute.² The court will grant leave to revoke the submission for sufficient reason,³ but will do so sparingly and with caution.⁴ And it has no power to give such permission after the award is made.⁵

In the *United States*, whether statutory submissions are revocable or not, depends on the provisions of the statutes.⁶

d. FORM OF REVOCATION—No Particular Form Required—Intention.—It is not necessary to the validity of the revocation that it should be in any special form, so long as the intention is clearly expressed.⁷ It may be made even by parol,⁸ but the rule is that it must be of the same dignity as the submission.⁹

1. English Statutes Prohibiting Revocation without Leave of Court.—3 & 4 Will. IV., c. 42, § 39; 3 & 4 Vict., c. 103, § 63; 17 & 18 Vict., c. 125, § 17; 9 & 10 Vict., c. 18, § 25, 126, 128; 23 & 24 Vict., c. 50, § 11; 52 & 53 Vict., c. 49, § 1; *In re Mitchell v. Governor of Ceylon*, 21 Q. B. Div. 408.

2. Case must be Brought Clearly within the Statute.—*Rex v. Bardell*, 5 Ad. & El. 619, 31 E. C. L. 403; *In re Woodcroft v. Jones*, 9 D. P. C. 538. See *Hall v. Ellis*, 9 Sim. 530; *In re Warner v. Powell*, L. R. 3 Eq. 261; *Reg. v. Hardey*, 14 Q. B. 529, 68 E. C. L. 529; *Mills v. Bayley*, 11 W. R. 598, 2 H. & C. 36; *Thomson v. Anderson*, L. R. 9 Eq. 523; *Drury v. Lyne*, 38 L. J. Ch. 278; *Rouse v. Meier*, L. R. 6 C. P. 212, 45 L. J. C. P. 106; *Bright v. Durnell*, 4 D. P. C. 756.

3. Leave Given for Good Cause.—See *Alder v. Parke*, 5 D. P. C. 16. Mistake of law in the arbitrator is a sufficient reason, *Faviell v. Eastern Counties R. Co.*, 2 Exch. 344; or corruption in the arbitrator, *Drew v. Leburn*, 2 Macq. H. L. Cas. 1; examining witness in the absence of one of the parties, *Drew v. Drew*, H. L. March 8, 1855; refusal of an arbitrator to act, *Cooper v. Shuttleworth*, 25 L. J. Exch. 114; appointing an umpire by lot, *European, etc., Steam Shipping Co. v. Crosskey*, 29 L. J. C. P. 155, 8 C. B. N. S. 397, 98 E. C. L. 397; or bankruptcy of one of the parties, *Gaffney v. Killen*, 12 Ir. C. L. App. 25.

4. Court Acts with Caution in Granting Leave.—*Scott v. Van Sandau*, 1 Q. B. 102, 41 E. C. L. 456; *In re Woodcroft v. Jones*, 9 D. P. C. 538; *Wilson v. Morrell*, 15 C. B. 720, 80 E. C. L. 720. See *Forwood v. Watney*, 49 L. J. C. L. 447; *Morgan v. Tarte*, 11 Exch. 82; *Hart v. Duke*, 32 L. J. Q. B. 55; *Robinson v. Davies*, 5 Q. B. Div. 26.

Mistake in Matter of Law.—The court will not grant to a party against whom the arbitrator has decided, leave to revoke the submission on the ground that the arbitrator had made a mistake in point of law. *James v. James*, 23 Q. B. Div. 12. See *East & West India Dock Co. v. Kirk*, L. R. 12 App. Cas. 738.

5. After Award Made.—*Phipps v. Ingram*, 3 Dowl. 669.

6. Statutes in the United States.—Submissions made under statutory provisions must of course follow the statutory rules, and whether they are revocable or not, and at what state of the proceedings, depends on the statutes. See *Montgomery County v. Carey*, 1 Ohio St.

463; *Shroyer v. Bash*, 57 Ind. 349; *Bash v. Christian*, 84 Ind. 180; *Bloomer v. Sherman*, 5 Paige (N. Y.) 575; *Heath v. New York Gold Exchange*, 38 How. Pr. (N. Y. C. Pl.) 168; *Phillips v. Shipley*, 1 Bland (Md.) 516; *Masterson v. Kidwell*, 2 Cranch (C. C.) 669; *Stiringer v. Toy*, 33 W. Va. 86; and *supra*, this title, *Common-law Rule—Revocation by Leave of Court*.

7. Form of the Revocation—Intention.—It was held in *Goodwine v. Miller*, 32 Ind. 419, that a revocation of a common-law submission, in order to be effective, must be express and positive, and coupled with no conditions whatsoever.

A Revocation must Be Absolute.—A promise by one of the contesting parties to a submission to arbitration, to pay certain claims embraced in the submission, the promise being upon such conditions, however, as to leave unsettled the very question of liability in respect to such claims, which question was covered by the submission, will not be regarded as a withdrawal of them from the consideration of the arbitrators. *Steere v. Brownell*, 113 Ill. 415.

Although the instrument of revocation does not in express terms declare that the party revokes the submission, yet it is enough to effect that purpose if it appears to show an intention to make such revocation. Where a sealed revocation read as follows: "We, the subscribers, revoke. Take notice that the arbitration bonds," etc., the court transposed the words "Take notice that," so as to make it read, "Take notice that we, the subscribers, revoke the arbitration bonds," and upheld the revocation. *Frets v. Frets*, 1 Cow. (N. Y.) 335.

8. Revocation by Parol.—*Barker v. Lees*, 2 Keb. 64. See *Hawley v. Hodge*, 7 Vt. 237.

9. Fitzherbert Abr., Arb., 22; West's Symb., pt. 2, tit. Compromise, § 42; Vinyor's Case, 8 Coke 81b; *Wilde v. Vinor*, 1 Brownl. 62; *Rex v. Wait*, 1 Bing. 121, 8 E. C. L. 433.

A Revocation must Conform to the Submission.—A written submission requires a written revocation; a submission under seal can only be revoked under seal. *Shroyer v. Bash*, 57 Ind. 349; *Keyes v. Fulton*, 42 Vt. 159; *Sutton v. Tyrrell*, 10 Vt. 91; *Brown v. Leavitt*, 26 Me. 251; *Evans v. Cheek*, 3 Hayw. (Tenn.) 42; *Mullins v. Arnold*, 4 Sneed (Tenn.) 262; *Wallis v. Carpenter*, 13 Allen (Mass.) 19; *McFarlane v. Cushman*, 21 Wis. 401; *Relyea v. Ramsay*, 2 Wend. (N. Y.)

e. NOTICE OF REVOCATION.—However, in order to make a revocation complete, notice thereof should be given the arbitrator, unless the revocation be by the marriage or death of one of the parties, when such notice is not necessary.¹

f. REVOCATION BY IMPLICATION OF LAW—(1) *By Death of a Party.*—If one of the parties to a submission dies before the award is made, this operates as a revocation of the submission,² unless there is an express

602; *Howard v. Cooper*, 1 Hill (N. Y.) 44; *Van Antwerp v. Stewart*, 8 Johns. (N. Y.) 125.

Revocation of a submission to arbitration must, under the *New York Code of Civil Procedure*, § 2383, be in writing, signed by the party revoking.

1. *Notice to Arbitrators of Revocation.*—Vin. Abr., Authority, E. 3, 4; Com. Dig., Arb., D. 5; *Vinyor's Case*, 8 Coke 81b; *March v. Bulleel*, 5 B. & Ald. 507, 7 E. C. L. 175; *Blundell v. Brettargh*, 17 Ves. Jr. 232; *Allen v. Watson*, 16 Johns. (N. Y.) 205; *Brown v. Leavitt*, 26 Me. 251. See *Mitchell v. Neuman*, 4 Penny. (Pa.) 443.

Notice before Award Reduced to Writing.—It is necessary that an order of revocation should be served upon the arbitrators before an award has been agreed upon. Subsequent service, though made before the award has been reduced to writing, is of no effect. *Buckwalter v. Russell*, 119 Pa. St. 495.

Notice before Corrected Award Made.—In *McGheehen v. Duffield*, 5 Pa. St. 407, where the award was sent back for correction and the notice of revocation was served before the corrected award was made, it was held to be too late.

The Rule in Pennsylvania is that a notice of revocation to be effective must be served before an award has been agreed upon. *Buckwalter v. Russell*, 119 Pa. St. 502. See *Shisler v. Keavy*, 75 Pa. St. 79.

2. *Revocation—Death of Party—England.*—*Cooper v. Johnson*, 2 B. & Ald. 394; *Tyler v. Jones*, 3 B. & C. 144, 10 E. C. L. 39; *Caledonian R. Co. v. Lockhart*, 3 Macq. 808; *President, etc., v. Van Reenan*, 1 Knapp Pr. Rep. 83.

United States.—*Gregory v. Boston Safe Deposit, etc., Co.*, 36 Fed. Rep. 408.

New York.—*M'intire v. Morris*, 14 Wend. (N. Y.) 90.

North Carolina.—*Tyson v. Robinson*, 3 Ired. (N. Car.) 333; *Cain v. Pullam*, 1 Hayw. (N. Car.) 173; *Whitfield v. Whitfield*, 8 Ired. (N. Car.) 163, 47 Am. Dec. 350.

Pennsylvania.—*Power v. Power*, 7 Watts (Pa.) 205; *Bailey v. Stewart*, 3 W. & S. (Pa.) 560, 39 Am. Dec. 50; *Marseilles v. Kenton*, 17 Pa. St. 238.

South Carolina.—*Farmer v. Frey*, 4 McCord (S. Car.) 160.

The Spanish and Civil Law adopt the same principle. *Johnson's Spanish Law*, 295; Dig. Lib. 4, tit. 8, l. 27.

In France the submission is not revoked if the heir is of full age. *Code de Proc. Civ.*, p. 11, liv. 3, tit. Unique, § 1013.

Where Submission a Rule of Court.—But where the submission is by rule of court, the death of one of the parties does not work a revocation. *Freeborn v. Denman*, 8 N. J. L. 116;

Bacon v. Crandon, 15 Pick. (Mass.) 79; *Moore v. Webb*, 6 Heisk. (Tenn.) 301.

Several Persons Constituting But One Party—Death of One.—It is doubtful whether the death of one party, where there are several on the same side, effects a revocation of the submission. *Russell on Awards* (6th ed.) 171; *In re Hare v. Milne*, 6 Bing. N. Cas. 158, 37 E. C. L. 326. See *Edmunds v. Cox*, 2 Chit. Rep. 432, 18 E. C. L. 390; *Cooper v. Johnson*, 2 B. & Ald. 394; *Rhodes v. Haigh*, 2 B. & C. 345, 9 E. C. L. 100; *Potts v. Ward*, 1 Marsh. 366, 4 E. C. L. 341; *Bower v. Taylor*, cited in *Rhodes v. Haigh*, 2 B. & C. 345, 7 Taunt. 574, 9 E. C. L. 100; *Toussaint v. Hortop*, 1 Moore 287, 2 E. C. L. 571; *Cooper v. Johnson*, 2 B. & Ald. 394. See *James v. Crane*, 3 D. & L. 661.

The Death of a Member of a Partnership, parties to a submission, does not necessarily operate a revocation; the remaining members may go on with the proceedings if they so desire. *Emerson v. Udall*, 8 Vt. 357; *Power v. Power*, 7 Watts (Pa.) 205.

Separate Interests.—Where in one submission there are several parties on the same side, who have separate interests, the death of one revokes the submission only as to him. 2 Archb. Prac. (13th ed.) 1323.

The Death of an Infant has been held to be a revocation of the submission so far as it affected his guardians and trustees, and an award made against them after his death was set aside. *Bristow v. Binns*, 3 D. & R. 184, 16 E. C. L. 165.

Death of Party after Award, but before Final Decree.—The death of a party after the making of the award, but before a final decree has been entered on it, does not effect a revocation of the submission. *Baker v. Crockett*, Hard. (Ky.) 396; *Bash v. Christian*, 77 Ind. 290. But it was held otherwise in *Farmer v. Frey*, 4 McCord (S. Car.) 160.

Scotland.—Where an arbitrator is appointed to fix the price of an estate, the death of one of the parties does not revoke the submission in *Scotland*. *Caledonian R. Co. v. Lockhart*, 3 Macq. 808; *Selkirk v. Nasmith*, Morr. 627.

Interposition of Equity.—Where one of the parties to a submission has died, equity will not interfere to enforce the contract under which the submission was made. *Blundell v. Brettargh*, 17 Ves. Jr. 232.

In Cases where the Submission is Not Revoked by Death, or if the administrator goes on with the arbitration, or becomes a party to the action, the award will be upheld. *Bacon v. Crandon*, 15 Pick. (Mass.) 79; *Edmund v. Cox*, 2 Chit. Rep. 432, 18 E. C. L. 390; *Ruston v. Dunwoody*, 1 Binn. (Pa.) 42; *Wheatley v. Martin*, 6 Leigh (Va.) 62.

stipulation that it shall survive.¹

(2) *By Death, or Refusal to Act, of Arbitrator.*—Where a single arbitrator,² or one of several,³ dies, this has the effect of revoking the submission. Where all the arbitrators refuse to act, the submission will also be revoked; and the submission will be revoked by implication where one of the arbitrators refuses to act, unless there are statutory provisions for the appointment of new arbitrators in such a case, or unless there is a special stipulation in the submission that it shall not be revoked by such refusal.⁴

(3) *By Marriage of Female Party.*—The marriage of a woman who is party to a submission revokes it, both as to herself⁵ and as to

After a Suit has been Abated by the Death of One of the Parties thereto, an order of submission made in such suit will not support an award. *Galloway v. Hill*, 4 Bibb (Ky.) 475.

The Death of One of the Parties in a Cause Pending in a court of record, does not operate as a revocation of a submission to arbitration. In such a case the cause may be revived against the administrator, the award entered and judgment rendered upon it. But execution cannot be levied upon the realty descended, nor can the heirs be brought before the court by scire facias. *Moore v. Webb*, 6 Heisk. (Tenn.) 301.

The Death of the Trustee of an Express Trust who takes out a policy of insurance and agrees to submit the amount of loss to arbitration, where the death occurs before the award is made, does not revoke the submission. *Citizens' Ins. Co. v. Coit*, 12 Ind. App. 161.

And where an Action Survives, the authority of a referee is not revoked by the death of one of the parties. *Bacon v. Crandon*, 15 Pick. (Mass.) 79.

1. Express Stipulation for Survival of Submission.—*McDougal v. Robertson*, 4 Bing. 435; *Dowse v. Coxe*, 3 Bing. 20, 11 E. C. L. 12, 10 Moore 272; *Clarke v. Crofts*, 4 Bing. 143, 13 E. C. L. 380; *Lewis v. Winter*, W. W. & D. 47. See *Blundell v. Brettargh*, 17 Ves. Jr. 232; *Cooper v. Johnson*, 2 B. & Ald. 394; *Prior v. Hembrow*, 8 M. & W. 873; *Bailey v. Stewart*, 3 W. & S. (Pa.) 560; *Power v. Power*, 7 Watts (Pa.) 205.

The Effect of Such a Clause is to bind the assets of the person who died as by a simple contract. *Lewin v. Holbrook*, 2 Dowl. N. S. 991; *Dowse v. Coxe*, 3 Bing. 20, 11 E. C. L. 12; *Tyler v. Jones*, 3 B. & C. 144, 10 E. C. L. 39; *Prior v. Hembrow*, 8 M. & W. 873.

In some of the *English* statutes there are special provisions that the death of one of the parties to an arbitration under such statutes shall not operate as a revocation of a submission. See 8 & 9 Vict., cc. 20, 16, 25.

The Court Sanctioned an Amendment of the Submission by inserting a clause providing that the proceedings should not abate because of the death of one of the parties, in *Tomkins v. Cunningham*, 9 Vict. L. Rep. 109 (Australia).

2. Death of Single Arbitrator.—*Crawshay v. Collins*, 3 Swanst. 90; *Harper v. Abrahams*, 4 Moore 3, 16 E. C. L. 353; *Chesley v. Dalby*, 2 Y. & Coll. 170; *Lutton v. Tyrrell*, 10 Vt. 91.

3. Death of One of Several Arbitrators.—

Crawshay v. Collins, 3 Swanst. 90; *Potter v. Sterrett*, 24 Pa. St. 411.

The decision in *Potter v. Sterrett*, 24 Pa. St. 411, was based upon the principle that there can be no delegation of a power, and as the power to arbitrate had been conferred on three, it could not be executed by two, although the three were authorized to act jointly and severally. A power is terminated by the death either of the party receiving it or of the party conferring it.

4. Refusal to Act.—*Russell on Awards* (6th ed.) 169; 8 & 9 Vict., cc. 16, 18, 20, 26, 30; 22 & 23 Vict., c. 59, §§ 9, 10. See *Hill v. Hill*, Vin. Abr., Authority, L. 2; *In re Tunno v. Bird*, 5 B. & Ad. 488, 27 E. C. L. 107; *Crawshay v. Collins*, 3 Swanst. 90. So it has been held that the refusal of one of several will revoke the submission. *Rex v. Whitaker*, 9 B. & C. 648, 17 E. C. L. 467; *Grindley v. Barker*, 1 B. & P. 229; *R. v. Hobbes*, Noy 47; *Doe v. Middleton*, 3 Brod. & B. 214, 7 E. C. L. 416.

For Authorities in United States, see *Wilson v. Cross*, 7 Watts (Pa.) 495; *Binsse v. Wood*, 47 Barb. (N. Y.) 624; *Relyea v. Ramsay*, 2 Wend. (N. Y.) 602; *Crofoot v. Allen*, 2 Wend. (N. Y.) 494; *Kimball v. Gilman*, 60 N. H. 54; *Woodbury v. Proctor*, 9 Gray (Mass.) 18; *Ross v. Pleasants*, Wythe (Va.) 147.

Where the parties agreed in writing that a suit should be referred, each to pay his own costs, it was held, where one of the referees refused to act, that the agreement became inoperative, and that the suit must stand for trial, and that the question whether one of the referees refused to act was a matter for the jury to determine. *Chapman v. Seccomb*, 36 Me. 102.

Arbitrators with Power to Appoint Umpire.—In *Small v. Thurlow*, 37 Me. 504, it was held that if arbitrators, who have power under the terms of the submission to appoint an additional arbitrator in case they cannot agree, do not make an award in a reasonable time, but do not refuse to appoint the umpire, neither party to the reference is in a situation to revoke the submission, and the matters are consequently still pending. If an action at law be commenced on a claim so pending before arbitrators, it can only be defeated by pleading such pendency in abatement.

6. Marriage of Female Party.—*Charnley v. Winstanley*, 5 East 266; *M'Can v. O'Terrall*, 8 Cl. & F. 30; *Saccum v. Norton*, 2 Keb. 865, 3 Keb. 9; *Andrews v. Palmer*, 4 B. & Ald. 250, 6 E. C. L. 471.

others¹ who are joined with her therein, nor is it necessary that the arbitrator should get notice of such marriage.² But she is liable to an action for such revocation.³

(4) *By Bankruptcy*.—A submission is not revoked by the bankruptcy of one of the parties.⁴

(5) *Certain Implied Revocations*.—Although there is no direct revocation of the submission by the parties interested, there may be a revocation by implication, either through circumstances or through an act of one of the parties.⁵

g. **REVOCATION BY LEGISLATURE**.—Where Congress, by resolution, submits a claim to be awarded upon by the head of one of the executive departments, and the official's award is void for having exceeded his authority, Congress may revoke the submission by repealing the resolution of appointment.⁶

h. **LIABILITY FOR REVOCATION—General Rule Stated**.—Where one of the parties revokes the submission without the consent of the other, it is a breach

The marriage of a *feme sole* party to a submission will operate as a revocation where the marriage would disable her from disposing of the property in dispute in her own name and by her own individual action. *Sutton v. Tyrrell*, 10 Vt. 91; *Marseilles v. Kenton*, 17 Pa. St. 238; *Abbott v. Keith*, 11 Vt. 525; *Quimby v. Melvin*, 35 N. H. 198.

1. *Bac. Abr.*, Baron and Feme, E.; *Com. Dig.*, Arb., D. 5; *White v. Gifford*, *Rolle's Abr.*, Auth., E. 4, p. 333.

2. **Notice of Marriage**.—*Vin. Abr.*, Auth., 1, 3; *White v. Gifford*, 1 *Rolle's Abr.*, Auth., E. 4, p. 333; *Com. Dig.*, Arb., D. 5.

3. *Charnley v. Winstanley*, 5 East 266. See *Lambert v. Hutchinson*, 2 M. & G. 858, 40 E. C. L. 662.

4. **Bankruptcy**.—*Russell on Awards* (6th ed.) 165. See *Marsh v. Wood*, 9 B. & C. 659, 17 E. C. L. 468; *Andrews v. Palmer*, 4 B. & Ald. 250, 6 E. C. L. 471; *Taylor v. Shuttleworth*, 8 D. P. C. 280; *Taylor v. Marling*, 2 M. & G. 55, 40 E. C. L. 258; *Marsh v. Wood*, 9 B. & C. 659, 17 E. C. L. 468; *Boorman v. Nash*, 9 B. & C. 145, 17 E. C. L. 344; *Gaffney v. Killen*, 12 Ir. C. L. R. App. xxv; *Hemsworth v. Brian*, 1 C. B. 131, 50 E. C. L. 131; *Snook v. Hellyer*, 2 Chit. Rep. 43, 18 E. C. L. 243; *Hobbs v. Ferrars*, 8 D. P. C. 779, 4 Jur. 825; *Haswell v. Trorogood*, 7 B. & C. 705, 14 E. C. L. 111; *Reg. v. Hemsworth*, 3 C. B. 745, 54 E. C. L. 745.

5. **Revocation Implied from Circumstances and Conduct—Instituting Suit**.—The fact that a suit was brought after the agreement to submit had been entered, and before any binding award was made, is a sufficient reason for presuming that such submission has been revoked. *Peters v. Craig*, 6 Dana (Ky.) 307; *Kimball v. Gilman*, 60 N. H. 54.

But where a suit was entered with the only purpose of keeping the action in existence, should the other party revoke or refuse to attend, this was held not to be a revocation. *Sutton v. Tyrrell*, 10 Vt. 91.

Where a policy contains a provision to submit questions in dispute to arbitration, which is revocable by either party, and one of them brings an action to recover the loss, such action amounts to a revocation of the agreement, but the policy is not invalidated thereby, where there is no express condition of forfeit-

ure in case of a breach of the agreement. *Nurney v. Fireman's Fund Ins. Co.*, 63 Mich. 633, 6 Am. St. Rep. 338.

Where an action is brought upon the matter in dispute, after an agreement to submit has been made between the parties, but before an award, it operates as a revocation of the submission. *Paulsen v. Manske*, 24 Ill. App. 95, affirmed 126 Ill. 72, 9 Am. St. Rep. 532.

An agreement to submit may be revoked at any time before an award is made, and where one of the parties brings an action it will be presumed that such submission has been revoked. *Leonard v. House*, 15 Ga. 473; *Davis v. Maxwell*, 27 Ga. 368; *Peters v. Craig*, 6 Dana (Ky.) 307; *Snodgrass v. Gavit*, 28 Pa. St. 221.

But in *Knaus v. Jenkins*, 40 N. J. L. 288, 29 Am. Rep. 237, it was held that the bringing of an action by one of the parties, during the pendency of the arbitration proceedings for the same subject matter which was involved in such proceedings, did not operate as a revocation of the submission, and that the pendency of such arbitration proceedings could not be invoked or pleaded in abatement of the action.

So in *New York*, the commencement of a suit in regard to the matter submitted is not a revocation; a revocation must be by instrument in writing, signed by the revoking party. *New York Lumber, etc., Co. v. Schneider* (C. Pl.), 1 N. Y. Supp. 441. See *Smith v. Compton*, 20 Barb. (N. Y.) 262.

In *Seamans v. White*, 8 Ala. 656, it was held that where an order is made for the reference of the subject-matter of an action to arbitration, and a trial is subsequently had before a jury without setting aside such order, it will be deemed to have been waived.

Nonperformance of Certain Conditions Necessary to the Proceedings.—Where one of the parties has, according to the submission, to fulfil certain conditions before the arbitrators can proceed, a failure to fulfil the condition will operate as a revocation. *Allen v. Galpin*, 9 Barb. (N. Y.) 246.

But Simply Neglecting to Attend a Meeting by one party will not act as a revocation. *Brown v. Leavitt*, 26 Me. 251; *Bray v. English*, 1 Conn. 498.

6. *De Groot v. U. S.*, 5 Wall. (U. S.) 419.

of the agreement for which, if the submission has been made a rule of court, an attachment may issue against him;¹ or, whether the submission is one that can be made a rule of court or not, he will be liable to an action for damages for breach of the bond,² covenant,³ or agreement⁴ to refer.

Failure of Arbitrator to Act—Refusal to Appoint Another.—But he will not be liable for the failure of the arbitrator to act, or for his refusal to appoint another.⁵

In an Action for the Breach of the Bond or Agreement to submit, the plaintiff should assign the revocation itself, not the nonperformance of the award;⁶ and the defendant may answer that he had reasonable grounds for such revocation, and that he acted on those grounds.⁷

i. EFFECT OF REVOCATION.—Outside of the liability for breach of the agreement to submit, the effect of revoking the submission is to restore the

1. Liability for Revocation — Attachment.—*Davila v. Almanza*, 1 Salk. 73; *King v. Joseph*, 5 Taunt. 452; *Milne v. Gratrix*, 7 East 608; *Haggett v. Welsh*, 1 Sim. 134; *Green v. Pole*, 6 Bing. 443, 19 E. C. L. 125.

2. Liability for Revocation—Damages.—*Noble v. Harris*, 3 Keb. 745; *Baldway v. Ouston*, 1 Vent. 71; *Green v. Taylor*, T. Jones 134; *Warburton v. Storr*, 4 B. & C. 103, 10 E. C. L. 282; *Vinyor's Case*, 8 Coke 81b; *Craftsbury v. Hill*, 28 Vt. 763; *Aspinwall v. Tousey*, 2 Tyl. (Vt.) 328; *Brown v. Leavitt*, 26 Me. 251; *Quimby v. Melvin*, 28 N. H. 250, 35 N. H. 198.

Where a party revokes an agreement to submit, he forfeits his bond to abide by the award. *Brown v. Leavitt*, 26 Me. 251.

**3. King v. Joseph, 5 Taunt. 452.
4. England.—*Reg. v. Hardey*, 14 Q. B. 529, 68 E. C. L. 529; *Charnley v. Winstanley*, 5 East 266; *Newgate v. Degelder*, 2 Keb. 10, 20, 24; *Skee v. Coxon*, 10 B. & C. 483, 21 E. C. L. 120; *King v. Joseph*, 5 Taunt. 452. *Maine.*—*Brown v. Leavitt*, 26 Me. 251; *Call v. Hagar*, 69 Me. 521.**

New Hampshire.—*Dexter v. Young*, 40 N. H. 130.

New York.—*Haggart v. Morgan*, 5 N. Y. 422, 55 Am. Dec. 350; *Frets v. Frets*, 1 Cow. (N. Y.) 335; *Miller v. Junction Canal Co.*, 53 Barb. (N. Y.) 590, affirmed in 41 N. Y. 98.

Vermont.—*Hawley v. Hodge*, 7 Vt. 240; *Craftsbury v. Hill*, 28 Vt. 763; *Aspinwall v. Tousey*, 2 Tyl. (Vt.) 328.

Where a Deposit was Made with a Trust Company as a security for any award that might be made under an agreement to submit a certain dispute to arbitration, and was made payable by the trust company "in accordance with any judgment that may be entered upon such award," it was held that this agreement was within the provision of *New York Code Civ. Pro.*, § 2384, which says that where a party revokes a submission, any other party thereto "may maintain an action against him and also against his sureties, if any, upon the submission, or any instrument collateral thereto" for the costs, expenses, and damages incurred in preparing for the arbitration and in conducting the proceedings to the time of the revocation. *Union Ins. Co. v. Central Trust Co.*, 58 Hun (N. Y.) 610, 13 N. Y. Supp. 17, 32 N. Y. Supp. 838. See *New York Lumber, etc., Co. v. Schneider*, 15 Daly (N. Y.) 15.

Measure of Damages.—Damages may include the costs of the discontinued suit and the expenses incurred by reason of the submission; but not the damages sought to be recovered by the original suit, unless the proceedings have been such that it has become impossible to recover in a fresh suit. *Blaisdell v. Blaisdell*, 14 N. H. 78; *Hawley v. Hodge*, 7 Vt. 237; *Rowley v. Young*, 3 Day (Conn.) 118; *Call v. Hagar*, 69 Me. 521; *Pond v. Harris*, 113 Mass. 114.

The measure of damages where there is a bond is, however, not the penalty named in the bond, but actual damages as proved. *Blaisdell v. Blaisdell*, 14 N. H. 78.

5. Failure of Arbitrator to Act—Refusal to Appoint Another.—*Cooper v. Shuttleworth*, 25 L. J. Exch. 114. Where one of the parties to the submission refused to appoint an arbitrator after agreeing to refer disputes to three arbitrators, each party to appoint one, and those two to appoint the third, the court has no power to compel him to do so, either under or apart from the English Arbitration Act of 1889. *In re Smith and Nelson*, 25 Q. B. Div. 545. See *Chappell v. North*, 2 Q. B. 252; *In re Rouse v. Meier*, L. R. 6 C. P. 212, explained.

In *Hoagland v. Veghte*, 30 N. J. L. 516, it was held that one of the parties to the submission is not justified in declining to select an arbitrator because the other party, who claimed damages under an agreement by which they were to be determined by arbitrators to be chosen one by each party, refused to specify what damages he claims.

6. Frets v. Frets, 1 Cow. (N. Y.) 335.

It need not be set out in the pleadings that the arbitrator received notice of the revocation. *Marsh v. Bulteel*, 5 B. & Ald. 507; 7 E. C. L. 175; *Vinyor's Case*, 8 Coke 81b.

7. Grounds for Revocation.—*Winterflood v. Stoveld*, *Watson on Awards* (3d ed.) 43.

Misconduct of the arbitrator is such a ground. *Brown v. Tanner*, 1 C. & P. 651, 11 E. C. L. 512; *Stewart v. Williamson*, 2 M. & P. 765. So also is bankruptcy of the other party, or marriage of a woman by consent of the party bringing an action for the revocation. *Charnley v. Winstanley*, 5 East 266.

Although after a revocation an arbitrator's award is a nullity, the courts have no power to prevent him from making it. *Rex v. Bardell*, 5 Ad. & El. 619, 31 E. C. L. 403.

parties to their original rights against each other, as they existed before the submission was made.¹

11. Duration of the Submission.—A submission to arbitration remains in force as long as the arbitrator's authority lasts; but if, for any reason, the submission ceases to be binding on any of the parties thereto, it ceases at the same time to be binding on all the others.²

12. Specific Performance of the Submission.—A court of equity will not interfere to enforce the specific performance of an agreement to submit to arbitration, whether it be by the voluntary act of the parties or under an arbitration clause in a contract. The fact that either party has a right to revoke the submission; the insufficient power of the arbitrators to compel the attendance of witnesses or the production of documents and papers and books of account, or to insist upon a discovery of facts from the parties under oath; and the fact that arbitrators are not ordinarily well enough acquainted with the principles of law and equity to administer either effectually in complicated cases, have been held to be sufficient reasons why agreements to submit to arbitration should not be specifically enforced by the courts.³

1. Revocation Restores Parties to Their Original Rights.—*Haggart v. Morgan*, 5 N. Y. 422, 55 Am. Dec. 350; *Reformed Dutch Protestant Church v. Parkhurst*, 4 Bosw. (N. Y.) 496; *Morton v. Cameron*, 3 Robt. (N. Y.) 191; *Schepp v. Manley*, 59 Hun (N. Y.) 446. See *Dodds v. Hakes* (Ct. App.), 23 N. Y. St. Rep. 193. See also *Orne v. Sullivan*, 3 How. (Miss.) 161, 34 Am. Dec. 74.

Arbitrators Declining to Decide—Return of Deposit.—Where certain parties entered into an agreement to select two persons to ascertain the value of property sold by one to the other, and a deposit was made by both which was to be forfeited by them in the event that either failed to execute the contract, and paid over to the other by the stakeholder, and the arbitrators afterwards agreed that they would not decide the matter referred to them, and recommended the parties to settle it themselves, it was held that if the arbitrators had declined of their own accord to make an award the agreement was thereby put an end to, and the parties were entitled respectively to receive back each his deposit from the stakeholder. *Brown v. Welcker*, 1 Coldw. (Tenn.) 197.

2. How Long Submission Continues in Force.—*Morse on Arb. and Award* 86; *Power v. Power*, 7 Watts (Pa.) 205; *Yeamans v. Yeamans*, 99 Mass. 585.

3. General Rule as to Specific Performance—England.—*Wilks v. Davis*, 3 Meriv. 507; *Vickers v. Vickers*, L. R. 4 Eq. 529; *Kill v. Hollister*, 1 Wils. 129; *Thompson v. Charnock*, 8 T. R. 139; *Mitchell v. Harris*, 4 Bro. C. C. 311, cited in 2 Ves. Jr. 129; *Wellington v. Mackintosh*, 2 Atk. 569; *Tattersall v. Groote*, 2 B. & P. 131; *Lees v. Laforest*, 14 Beav. 250; *Mexborough v. Bower*, 7 Beav. 127; *Agar v. Macklew*, 2 Sim. & S. 418; *Cooth v. Jackson*, 6 Ves. Jr. 34; *Street v. Rigby*, 6 Ves. Jr. 815; *Milnes v. Gery*, 14 Ves. Jr. 400; *Blundell v. Brettargh*, 17 Ves. Jr. 232; *Gourlay v. Somerset*, 19 Ves. Jr. 431.

United States.—*Perkins v. U. S. Electric Light Co.*, 21 Blatchf. (U. S.) 308; *Tobey v. Bristol County*, 3 Story (U. S.) 800.

Alabama.—*Stone v. Dennis*, 3 Port. (Ala.) 231.

Delaware.—*Randel v. Chesapeake, etc., Canal Co.*, 1 Harr. (Del.) 275.

Maine.—*Hill v. More*, 40 Me. 515.

Maryland.—*Contee v. Dawson*, 2 Bland (Md.) 264; *Allegre v. Maryland Ins. Co.*, 6 Har. & J. (Md.) 408, 14 Am. Dec. 289.

Massachusetts.—*Cavanagh v. Dooley*, 6 Allen (Mass.) 66; *Nute v. Hamilton Mut. Ins. Co.*, 6 Gray (Mass.) 174; *Rowe v. Williams*, 97 Mass. 163.

Missouri.—*Strohmaier v. Zeppenfeld*, 3 Mo. App. 429; *Lasar v. Baldrige*, 32 Mo. App. 362; *King v. Howard*, 27 Mo. 21; *Biddle v. Ramsey*, 52 Mo. 153; *Hug v. Van Burkleo*, 58 Mo. 202; *St. Louis v. St. Louis Gaslight Co.*, 70 Mo. 69.

New Hampshire.—*Smith v. Boston, etc., R. Co.*, 36 N. H. 458; *March v. Eastern R. Co.*, 40 N. H. 548, 77 Am. Dec. 732.

New Jersey.—*Copper v. Wells*, 1 N. J. Eq. 10.

New York.—*Sinclair v. Tallmadge*, 35 Barb. (N. Y.) 602; *Hurst v. Litchfield*, 39 N. Y. 377; *Greason v. Keteltas*, 17 N. Y. 491; *Smith v. Compton*, 20 Barb. (N. Y.) 262.

North Carolina.—*Norfleet v. Southall*, 3 Murph. (N. Car.) 189.

Ohio.—*Conner v. Drake*, 1 Ohio St. 167.

Pennsylvania.—*Gray v. Wilson*, 4 Watts (Pa.) 39.

Virginia.—*Corbin v. Adams*, 76 Va. 58.

Wisconsin.—*Hopkins v. Gilman*, 22 Wis. 476.

But in *Conner v. Drake*, 1 Ohio St. 166, it was held that although a court of equity will not decree specific performance of a contract to arbitrate it may, by consent of the parties, permit the amount to be ascertained by arbitrators and decree the amount so found by them.

And Where a Settlement was Made in an Action Regarding a Boundary Line, and as incidental to such settlement an agreement was entered into that the value of a strip of land should be determined, it was held that this agreement would be enforced, and that the court would

13. Staying Proceedings—Where Injury would Result were the Proceedings Allowed.—Equity will interfere to prevent a submission to arbitration where injury would result to the party complaining, if the arbitration proceedings were allowed to go on.¹

Agreement Not to Proceed in Court pending Reference.—So the court will sometimes stay proceedings in an action begun against provisions of the submission which contains an agreement not to proceed pending the reference.²

14. Rules for Construing Submissions—*a. LEADING RULE*—**Arbitration Favored—Liberal Construed.**—The rule is that courts favor arbitrations, and they will always put as liberal and comprehensive a construction upon agreements to submit as the apparent intention of the parties will allow.³

substitute itself in the place of the arbitrators where one of the parties refused to select an arbitrator. *Black v. Rogers*, 75 Mo. 441.

Under a Lease of a Lot for a Term, the lease provided that the lessee might erect a building, and that at the end of the term the lessor might elect to renew the lease, or to buy the building or sell the lot, at a price to be ascertained by arbitrators. The lessee built, but the lessor failed to elect. The lessee then elected to purchase the lot, but the lessor refused to join in an arbitration to fix the price. It was held that the lessee was entitled to equitable relief. *Coles v. Peck*, 96 Ind. 333, 49 Am. Rep. 161.

Absolute Covenant.—In *Johnson v. Conger*, 14 Abb. Pr. (N. Y. Supreme Ct.) 195, it is held that equity may compel the specific performance of an absolute covenant to renew a lease at a rental to be fixed by arbitrators, and that if the defendant in such a case declines to arbitrate, the court will fix the rent or direct a renewal at the former rate.

1. *Farrar v. Cooper*, 44 Ch. Div. 323. So the court may stop arbitration proceedings where the submission is impeached. *Ketts v. Moore* (1895), 1 Q. B. 253.

2. **Agreement in Submission Not to Sue Pending Reference.**—*Dicas v. Jay*, 6 Bing. 519, 19 E. C. L. 155; *Moscatti v. Lawson*, 1 H. & W. 572; *Russell v. Pellegrini*, 6 El. & Bl. 1020; *Wallis v. Hirsch*, 26 L. J. C. P. 72; *Brighton Marine Palace, etc., Co. v. Woodhouse* (1893), 2 Ch. 486; *Lury v. Pearson*, 1 C. B. N. S. 639, 87 E. C. L. 639; *Randegger v. Holmes*, L. R. 1 C. P. 679; *Roper v. London*, 1 El. & Bl. 825, 102 E. C. L. 825; *Halsey v. Windham* (July 8, 1882), W. N. 108; *Compagnie du Senegal v. Smith*, 53 L. J. Ch. 166; *Pini v. Roncoroni* (1892) 1 Ch. 633, 52 & 53 Vict., c. 49, § 4. See *Daunt v. Lazard*, 27 L. J. Exch. 399; *Russell v. Russell*, 14 Ch. Div. 471; *Law v. Garrett*, 8 Ch. Div. 26; *Davis v. Starr*, 41 Ch. Div. 242; *Lyon v. Johnson*, 40 Ch. Div. 579; *Swiney v. Ballymena Comrs.*, 23 L. R. 1r. 122; *In re Carlisle*, 44 Ch. Div. 200; *Chappell v. North* (1891), 2 Q. B. 252; *Baker v. York-shire, etc., Assur. Co.* (1892), 1 Q. B. 144; *Adams v. Catley*, 66 L. T. 687; *North London R. Co. v. Great Northern R. Co.*, 11 Q. B. Div. 30; *Wood v. Lillies*, 61 L. J. Ch. 158; *London, etc., R. Co. v. Cross*, 31 Ch. Div. 354.

Where no sufficient reason exists why the matter should not be settled by arbitration, and the defendant is willing to concur in all the acts necessary for the arbitration, proceedings will be stayed by the court. *Thomp-*

son v. Tasmanian F. Ins. Co., 11 Vict. Law Rep. 54 (Australia).

See, where a stipulation for a submission in case of differences arising under a lease was held not sufficient to justify a stay of proceedings in an action brought on the lease, and a reference to arbitration according to the stipulation, because the arbitration clause did not cover the whole subject-matter of the action, *Turnock v. Sartoris*, 43 Ch. Div. 150.

A "step in the proceedings" which will preclude a defendant from applying for a stay of the proceedings under the English Arbitration Act, 1889, § 4, seems to be some application to the court, and not a verbal or written communication between the solicitors of the parties. *Ives v. Willans* (1894), 2 Ch. 478. See *Bartlett v. Fords Hotel Co.* (1895), 1 Q. B. 850. See also cases cited *supra*, this title, *Effect of Agreement Not to Sue*.

3. **Submissions to Arbitration Favored—Liberal Construction**—*England.*—*Belfield v. Bourne* (1894), 1 Ch. 521.

United States.—*Gordon v. U. S.*, 7 Wall. (U. S.) 188; *DeGroot v. U. S.*, 5 Wall. (U. S.) 419; *Chorpenning's Case*, 11 Ct. of Cl. 625.

Alabama.—*Jesse v. Cater*, 28 Ala. 475; *King v. Jemison*, 33 Ala. 499.

California.—*Solomon v. Maguire*, 29 Cal. 227.

Connecticut.—*Hopson v. Doolittle*, 13 Conn. 236.

Georgia.—*Fowler v. Jackson*, 86 Ga. 337; *Atlantic, etc., R. Co. v. Mann*, 43 Ga. 200.

Illinois.—*Gerrish v. Ayres*, 4 Ill. 245; *Merritt v. Merritt*, 11 Ill. 565; *Ross v. Watt*, 16 Ill. 99; *Ingraham v. Whitmore*, 75 Ill. 24.

Indiana.—*Indiana Cent. R. Co. v. Bradley*, 7 Ind. 49; *Estep v. Larsh*, 21 Ind. 190.

Iowa.—*Woodward v. Atwater*, 3 Iowa 61; *McKinnis v. Freeman*, 38 Iowa 364; *Zook v. Spray*, 38 Iowa 273.

Kentucky.—*Shockey v. Glasford*, 6 Dana (Ky.) 9.

Louisiana.—*Jackson v. Hoffman*, 31 La. Ann. 99.

Maine.—*Bixby v. Whitney*, 5 Me. 192; *Harmon v. Jennings*, 22 Me. 240; *Brown v. Leavitt*, 26 Me. 251; *Orcutt v. Butler*, 42 Me. 83; *Colcord v. Fletcher*, 50 Me. 398; *Patterson v. Triumph Ins. Co.*, 64 Me. 500; *Comery v. Howard*, 81 Me. 421.

Maryland.—*Calvert v. Carter*, 18 Md. 73, 4 Md. Ch. 199.

Forced Construction.—But the courts will not put a forced construction upon the terms of the submission in order to include within it matters which

Massachusetts.—Com. v. Pejepsut Proprietors, 7 Mass. 399; Berkshire Woollen Co. v. Day, 12 Cush. (Mass.) 128.

Michigan.—James v. Schroeder, 61 Mich. 28.

Minnesota.—Irvine v. Marshall, 7 Minn. 286; Heglund v. Allen, 30 Minn. 38.

Missouri.—Price v. White, 27 Mo. 275; Cochran v. Bartle, 91 Mo. 636; Leonard v. Cox, 64 Mo. 32.

Nebraska.—Doane College v. Lanham, 26 Neb. 421.

New Hampshire.—Cheshire Bank v. Robinson, 2 N. H. 126; Thrasher v. Haynes, 2 N. H. 429; Adams v. Adams, 8 N. H. 82; Marshall v. Reed, 48 N. H. 36; Samson v. Young, 50 N. H. 62; Burleigh v. Ford, 59 N. H. 536; Ford v. Burleigh, 60 N. H. 278.

New Jersey.—Jersey City, etc., R. Co. v. Jersey City, etc., Horse R. Co., 20 N. J. Eq. 61.

New York.—Munro v. Alaire, 2 Cai. (N. Y.) 320; Halstead v. Seaman, 82 N. Y. 27, 37 Am. Rep. 536; Masury v. Whiton (Ct. App.), 19 N. Y. St. Rep. 141; Owen v. Boerum, 23 Barb. (N. Y.) 187; DeLong v. Stanton, 9 Johns. (N. Y.) 38; Matter of Union El. R. Co. (Supreme Ct.), 9 N. Y. Supp. 915; Sellick v. Addams, 15 Johns. (N. Y.) 197; Byers v. Van Deusen, 5 Wend. (N. Y.) 268; Hays v. Hays, 23 Wend. (N. Y.) 363.

North Carolina.—Masters v. Gardner, 5 Jones (N. Car.) 298; Crawford v. Orr, 84 N. Car. 246; Osborne v. Colvert, 86 N. Car. 170; Bryan v. Jeffreys, 104 N. Car. 242.

Pennsylvania.—Scott v. Barnes, 7 Pa. St. 134; Graham v. Graham, 9 Pa. St. 254, 49 Am. Dec. 557; Weichardt v. Hook, 83 Pa. St. 434; Noble v. Peebles, 13 S. & R. (Pa.) 319; Montgomery's Appeal (Pa. 1886), 7 Atl. Rep. 231; Knickerbocker Ice Co. v. Smith, 147 Pa. St. 248.

Tennessee.—Henniken v. Brown, 4 Baxt. (Tenn.) 397.

Texas.—Bowden v. Crow, 2 Tex. Civ. App. 591.

Vermont.—Rixford v. Nye, 20 Vt. 132; Woods v. Page, 37 Vt. 252; Barker v. Belknap, 39 Vt. 168.

West Virginia.—Swann v. Deem, 4 W. Va. 368.

Partnership Matters.—Where partnership matters and accounts are submitted to arbitrators, such submission includes the determination of the question whether an instrument between the parties was an absolute bill of sale or only a pledge which left the property embraced therein partnership property subject to the lien of the pledge. Fulmore v. McGeorge, 91 Cal. 611.

Copartners in the brick-making business submitted a dispute to arbitration in order "that all rights of action of each of said parties against the other, arising out of said brick business, may be conclusively settled." It was held, under this submission, that the arbitrators had a right to decide the amount of the uncollected assets of the business

which was due to each party. Simons v. Mills, 80. Cal. 118.

Calling in Umpire.—Where parties entered into a contract by which they agreed that the value of goods was to be determined by two merchants, one to be chosen by each, "and if said merchants cannot agree, to call in a third merchant," it was held that this stipulation gave the merchants, and not the parties to the submission, the right to call in the third merchant. Veal v. Willingham, 80 Ga. 243.

Boundaries.—Where the terms of the submission authorized the arbitrator to decide upon all actions, etc., concerning certain real estate, the object of the arbitration being to settle disputes between the parties as to boundary lines, such submission will empower the arbitrators to award conveyances. Williams v. Warren, 21 Ill. 541.

Lease.—In Thornton v. McCormick, 75 Iowa 285, where a lease provided that, at the end of the term, the lessee should leave upon the premises certain stacks of hay, oats, etc., equal to what had been received by him at the beginning of the term, it was held that it did not mean that the place and property should be left in the same condition in all respects as at the beginning of the term, but that the arbitrators were to take the provisions into consideration and make proper allowance accordingly.

Damages.—Where the question submitted was "what the damages should be," for the failure of the defendant to give the plaintiff possession of a store, the arbitrators were held not empowered to make any allowance for loss that the plaintiff might have suffered from being thrown out of business. Dodds v. Hakes (Ct. App.), 23 N. Y. St. Rep. 192, 114 N. Y. 260.

Agreement to Abide by "Whatever the Arbitrators might Determine."—Where the submission contains general words to the effect that the parties agree to abide by "whatever the arbitrators might determine," such words cannot operate to enlarge the stipulation so as to include all matters in dispute between the parties; nor do they prevent the application of the rule that when arbitrators exceed their powers in determining matters submitted to them, their award will be void. Bethea v. Hood, 9 La. Ann. 88.

Notice.—Where the terms of the submission required that the award should be made and published in writing, it was held that this did not require a written notice to be given to the parties that such an award was made and subject to their examination. The meaning was, that the award should be made in writing, and that the parties should be enabled to obtain a knowledge of it. Thompson v. Mitchell, 35 Me. 281.

A Submission of "a Claim" includes both the legality and the amount of such claim. Colcord v. Fletcher, 50 Me. 398.

"To be Decided according to the Principles of Law."—Where, in a submission entered into

evidently were not intended to be included, although they might naturally have come within its scope.¹

In Determining What is Included within the terms of the submission, all documents recited or referred to therein and laid before the arbitrators should be taken into consideration.²

b. GENERAL SUBMISSIONS—Controversies of All Kinds Embraced.—A submission is general when it includes all questions, as well of law as of fact, all actions and causes of actions, whether at law or in equity, all questions affecting the civil rights of the parties, all demands between them, whether relating to realty or personalty, and all quarrels, controversies, trespasses, damages, and disputes whatsoever.³

before a justice of the peace, the whole matter in dispute was submitted to arbitrators "to be decided according to the principles of law," it was held that the law and the facts were thereby equally submitted to their decision, and that the clause specified did not prevent their being the final judges of both, nor did it require them to report the facts and their conclusions upon them to the court for its revision. *Latham v. Wilton*, 23 Me. 125. See *Payne v. Massey*, 9 Moore 666, 17 E. C. L. 129.

A Building Contract stipulated for an arbitration in case of dispute as to the value of extra work. Under this agreement it was held that a dispute as to whether certain work was extra work, and as to whether extra work done at agreed prices was properly done, was not within the terms of the stipulation. *Weeks v. Little*, 47 N. Y. Super. Ct. 1.

The Presumption is, that an agreement to submit embraces all the issues of law and fact that are necessary to its final termination. *Robbins v. Killebrew*, 95 N. Car. 19.

Any "Difficulty."—Where a testator gives power to a third person to determine any "difficulty," the authority thereby given extends to the determination of questions of interpretation, and is not limited merely to such as may arise outside of the will. *Phillips' Estate*, 48 Leg. Int. (Pa.) 232, 28 W. N. C. (Pa.) 229.

1. *Forced Construction—Intention.*—*Solomon v. Maguire*, 29 Cal. 227; *Hopson v. Doolittle*, 13 Conn. 236; *Richards v. Todd*, 127 Mass. 167; *Irvine v. Marshall*, 7 Minn. 286; *Furber v. Chamberlain*, 29 N. H. 405; *Osborne v. O'Reilly*, 42 N. J. Eq. 467; *Sutro Tunnel Co. v. Segregated Belcher Min. Co.*, 19 Nev. 121; *Scott v. Barnes*, 7 Pa. St. 134; *Naglee v. Ingersoll*, 7 Pa. St. 185; *Robinson v. Morse*, 29 Vt. 404; *Briggs v. Brewster*, 23 Vt. 100.

A submission is to be construed according to the meaning of the words in common parlance, not according to their strict technical meaning. *Munro v. Alaire*, 2 Cai. (N. Y.) 320.

Where the terms of submission provided that the arbitrators should make inquiry as to certain publications, and determine whether the articles were true or false, and, if found to be false, the person whose name appeared with them should be obliged to retract, it was held that the question submitted to the arbitrators was to determine whether the publications were true or false, not to decide that

they should be retracted. *Lynch v. Nugent*, 80 Iowa 422.

The Term "Parties" Construed.—In *Keith v. Gore*, 1 J. J. Marsh. (Ky.) 8, where the "parties" submitted a certain dispute to arbitration, it was held that the word "parties" embraced only the persons before the court by service of process, and it was held not competent for one of them to object to a decree on the award, on the ground that process had not been served upon all who had been prayed to be made defendants.

2. *Walsh v. Gilmor*, 3 Har. & J. (Md.) 383, 6 Am. Dec. 503; *Com. v. Pejepsct Proprietors*, 7 Mass. 399.

3. *What Submissions Are General—Georgia.*—*Overby v. Thrasher*, 47 Ga. 10.

Illinois.—*Merritt v. Merritt*, 11 Ill. 565. *Indiana.*—*Indiana Cent. R. Co. v. Bradley*, 7 Ind. 49.

Iowa.—*Richards v. Holt*, 61 Iowa 529. *Louisiana.*—*Jackson v. Hoffman*, 31 La. Ann. 97.

Maine.—*Adams v. Macfarlane*, 65 Me. 143; *Brown v. Leavitt*, 26 Me. 251; *Orcutt v. Butler*, 42 Me. 83.

Mississippi.—*Guerrant v. Smith*, 48 Miss. 90. *New York.*—*Sellick v. Addams*, 15 Johns. (N. Y.) 197; *Munro v. Alaire*, 2 Cai. (N. Y.) 320; *De Long v. Stanton*, 9 Johns. (N. Y.) 38; *Byers v. Van Deusen*, 5 Wend. (N. Y.) 268; *Jones v. Welwood*, 71 N. Y. 208.

Pennsylvania.—*Connor v. Simpson*, 104 Pa. St. 440.

Vermont.—*Barker v. Belknap*, 39 Vt. 168; *Woods v. Page*, 37 Vt. 252.

Under a General Submission, by which is understood a submission containing no express reservation or limitation upon the authority conferred, both law and fact are submitted to the judgment of the arbitrators for consideration and decision. *Johnson v. Noble*, 13 N. H. 286, 38 Am. Dec. 485; *Indiana Cent. R. Co. v. Bradley*, 7 Ind. 49.

A General Submission cannot be Limited to such matters as form the subject of an actual dispute. *De Long v. Stanton*, 9 Johns. (N. Y.) 38.

Nor can a Submission of "All Controversies" be made to include matters which are not in dispute between the parties. *Robinson v. Morse*, 29 Vt. 404.

Realty.—In *Munro v. Alaire*, 2 Cai. (N. Y.) 320, it was held that questions in regard to realty might be submitted without being specially named. See *Marks v. Marriot*, 1 Ld. Raym. 114.

It is immaterial what terms are used to make the submission general, as "divers other matters," "all controversies," "all matters, claims, and demands at law or equity," "all other actions or causes of actions," as long as the intention of the parties is evident to submit all matters of dispute or controversy.¹ Under such a general submission, the arbitrators have a right to decide upon all questions concerning the civil rights of the parties between them, whether legal or equitable, relating to personal or real property; and the courts will construe the submission as liberally as possible, so as to terminate all controversies, and to dispose of all rights of action.²

1. *Shackelford v. Purket*, 2 A. K. Marsh. (Ky.) 435, 12 Am. Dec. 422; *Hoover v. Neighbors*, 64 N. Car. 429; *Bryant v. Fisher*, 85 N. Car. 69; *Grumley v. Webb*, 44 Mo. 444, 100 Am. Dec. 304; *Byers v. Van Deusen*, 5 Wend. (N. Y.) 268; *Donican v. Mulry*, 69 Iowa 583; *Woodward v. Atwater*, 3 Iowa 61; *Zook v. Spray*, 38 Iowa 273; *McKinnis v. Freeman*, 38 Iowa 365.

Matters of Account.—A submission stipulating to abide by any award made by their mutual friends M and C in the arbitration of an unsettled account between them, was held to cover all matters of dispute between the parties growing out of the account. *Henniken v. Brown*, 4 Baxt. (Tenn.) 397.

Partnership Matters.—And where two partners submitted to arbitration all the differences between them in respect to their partnership affairs in general terms, the arbitrators were authorized to adjust every question of dispute arising out of the partnership transactions. They were not limited to the books of the partnership's accounts. *Tucker v. Page*, 69 Ill. 179.

A Submission of "All Causes of Action" has been held to include a charge of fraud in a sale of property. *De Long v. Stanton*, 9 Johns. (N. Y.) 38.

And of "All Business, of Whatever Kind, in dispute between the parties," a prosecution for assault and battery. *Noble v. Peebles*, 13 S. & R. (Pa.) 319. But where a submission was made in order "to end all controversies," an indictment for abetting was held not included. *Horton v. Benson*, *Freem.* 204.

And a Submission of "All Demands," prospective damages on an indemnity bond then outstanding, *Cheshire Bank v. Robinson*, 2 N. H. 126; and also costs, *Young v. Shook*, 4 Rawle (Pa.) 299; but a submission of "all demands" will not prevent one of the parties from showing that a particular demand, not being in dispute, was not laid before the arbitrators, *Webster v. Lee*, 5 Mass 334.

Authority to Assign to One of the Parties the Other's Interest in Subject-matter.—Where a dispute in reference to the ownership of a tent was submitted to arbitration under authority to "adjudicate and settle all matters existing between the parties," it was held that authority to assign one person's personal claim, to another, was included. *Ford v. Burleigh*, 60 N. H. 278.

Where the agreement to submit specifies certain matters so submitted specifically, and otherwise sets forth that the submission shall be made of "divers other matters," it is equivalent to a general submission of all ques-

tions between the parties, and general releases may be awarded thereunder. *Munro v. Alaire*, 2 Cai. (N. Y.) 320. See *Shepherd v. Briggs*, 28 Vt. 81.

"All Suits, Controversies, and Demands," includes the question of liability for a debt due from the wife of one of the parties as executrix. *Lumley v. Hutton*, *Cro. Jac.* 447.

"All Debts, Trespasses, and Injuries," covers all demands, wrongs, and matters of law and equity. *Cable v. Rogers*, 3 Bulst. 311.

"All Demands Due and Owning," covers all that one party has a right to recover from the other at the time of the submission, and extends to a right of entry or a suit for partition. *Knight v. Burton*, 6 Mod. 231.

"All Debts," includes specialties and judgments. *Roberts v. Moriett*, 2 Saund. 190.

Causes of Action are Not Included in a Submission "of All Actions." *Com. Dig., Arb., D. 4*; *Rolle Abr., Arb., c. 1, p. 245*.

But Causes of Action are Included in a reference of "of all actions and complaints." *Com. Dig., Arb., D. 4*.

Actions Real are included in a reference of actions personal, *ac sectis et querelis*. *Com. Dig., Arb., D. 4*.

2. *England.*—*Thorburn v. Barnes*, 36 L. J. C. P. 184, L. R. 2 C. P. 384; *Adams v. Great North of Scotland R. Co.* (1891), A. C. 31, H. L. (Sc.); *Weall v. James*, 5 R. 157, 68 L. T. 54; *Willesford v. Watson*, L. R. 8 Ch. 473; *Charleton v. Spencer*, 3 Q. B. 693, 43 E. C. L. 930. But see *Skipworth v. Skipworth*, 9 Beav. 135; *Smalley v. Blackburn R. Co.*, 27 L. J. Exch. 65, 2 H. & N. 158; *Joplin v. Postlethwaite*, 61 L. T. 629.

United States.—*King Iron Bridge, etc., Co. v. St. Louis*, 43 Fed. Rep. 768.

Georgia.—*Fowler v. Jackson*, 86 Ga. 337.

Illinois.—*Merritt v. Merritt*, 11 Ill. 565; *Tucker v. Page*, 69 Ill. 179.

Kansas.—*Anderson v. Beebe*, 22 Kan. 768.

Maine.—*Brown v. Leavitt*, 26 Me. 251; *Orcutt v. Butler*, 42 Me. 83; *Duren v. Getchell*, 55 Me. 241.

Massachusetts.—*Webster v. Lee*, 5 Mass. 334. *New Hampshire.*—*Greenough v. Rolfe*, 4 N. H. 357; *Baker v. Merrifield*, 13 N. H. 357; *Cheshire Bank v. Robinson*, 2 N. H. 126; *Thrasher v. Haynes*, 2 N. H. 429.

New York.—*Byers v. Van Deusen*, 5 Wend. (N. Y.) 268; *DeLong v. Stanton*, 9 Johns. (N. Y.) 38; *Jones v. Welwood*, 71 N. Y. 208; *Sellick v. Addams*, 15 Johns. (N. Y.) 197. See *Munro v. Alaire*, 2 Cai. (N. Y.) 320.

Pennsylvania.—*Scott v. Barnes*, 7 Pa. St. 134; *Connor v. Simpson*, 104 Pa. St. 440; *Duer v. Boyd*, 1 S. & R. (Pa.) 203.

Former Disputes Already Settled.—However, under a general submission, such matters only are rightly included as are in dispute at the time of the submission and which exist between the parties directly. Matters formerly in dispute, but which are settled, are not included.¹

Other Parties Interested.—And on a general submission between the plaintiff and the defendant the arbitrator has no authority to award in regard to matters in which the plaintiff and others are interested.²

Vermont.—*Woods v. Page*, 37 Vt. 252; *Barker v. Belknap*, 39 Vt. 168.

New Zealand.—*McKellar v. White*, 1 New Zealand Ct. of App. 282.

See *Thygerson v. Whitbeck*, 5 Utah 406; *Tennessee Mfg. Co. v. Haines*, 16 R. I. 204.

"All Matters in Difference between the Parties."—Under a submission in the above form an arbitrator may pass upon disputes in regard to things which a man has in right of his wife. *Bac. Abr., Arb., E. 1*; *Berry v. Perry*, 3 Bulst. 65.

So all questions affecting the parties' civil rights may be considered by him. *Baker v. Townshend*, 7 Taunt. 422, Co. Litt. 1 Inst., § 511.

A claim made by one side which is admitted to be correct by the other is a matter in difference within the meaning of such a submission, and should be passed upon by the award. *In re Robson v. Railston*, 1 B. & Ad. 723, 20 E. C. L. 483; *Hutchinson v. Sheperton*, 13 Q. B. 955, 66 E. C. L. 955.

A claim made by a party as executor or administrator is within the scope of such a submission. *Elletson v. Cummins*, 2 Stra. 1144.

However, a claim made and abandoned or withdrawn, is not a matter in difference. *Bird v. Cooper*, 4 Dowl. 148; *Lawrence v. Bristol, etc., R. Co.*, 16 L. T. N. S. 326.

Nor is a claim within the scope of a former submission in which an award has been made a matter of difference in a subsequent reference, although it has not been awarded upon by the former arbitrator. *Trimingham v. Trimingham*, 4 N. & M. 786, 30 E. C. L. 405.

A Submission of **"All Matters between the Parties"** authorized the arbitrators to award that the defendant's intestate was indebted to the plaintiff in a certain sum, and to direct the cancellation of two mortgages from the plaintiff, which were put in evidence by the defendant, the debt which was secured by them having been adjusted by the arbitrators. *Bryant v. Fisher*, 85 N. Car. 69. See *Young v. Shook*, 4 Rawle (Pa.) 299; *Backman v. Reigart*, 3 P. & W. (Pa.) 270; *Gratz v. Gratz*, 4 Rawle (Pa.) 411.

"All Matters in Difference between the Parties in the Cause," has been held to include cross-claims and other matters in difference as well as a pending action; but where it was of "all matters in difference in the cause between the parties," nothing but the questions in the action is submitted. *Malcolm v. Fullarton*, 2 T. R. 645. See *Smith v. Muller*, 3 T. R. 624; *Baillie v. Edinburgh Oil Gas Light Co.*, 3 Cl. & F. 639; *Blanchard v. Snider*, 28 U. C. Q. B. 210. "Of a cause," and "of all matters

in difference in a cause," are the same. *Wild v. Holt*, 9 M. & W. 161; *Dresser v. Stansfield*, 14 M. & W. 822; *Angus v. Radford*, 11 M. & W. 69; *Hobson v. Stewart*, 4 D. & L. 589.

See Further, as to References of a Cause, *Atkinson v. Jones*, 1 D. & L. 225; *Cooper v. Langdon*, 9 M. & W. 60; *Ashworth v. Heathcote*, 6 Bing. 596, 19 E. C. L. 173; *Steeple v. Bonsall*, 4 Ad. & El. 950, 31 E. C. L. 233; *Britt v. Pashley*, 16 L. J. Exch. 240; *Grenfell v. Edgcome*, 7 Q. B. 661, 53 E. C. L. 661; *Toby v. Lovibond*, 5 C. B. 770, 57 E. C. L. 770; *Linegar v. Pearce*, 9 Exch. 417.

When the Cause and Matters beyond the Cause are referred, it will include a demurrer. *Allen v. Lowe*, 4 Q. B. 66, 45 E. C. L. 66; *Wynne v. Wynne*, 4 M. & G. 253, 43 E. C. L. 137. See *Mathew v. Davis*, 1 Dowl. N. S. 679.

1. Former Disputes Already Settled Not Embraced.—*Barnardiston v. Fowler*, 10 Mod. 204, 1 Roll. Abr. 145, pl. 8; *Adams v. Adams*, 8 N. H. 82; *Thrasher v. Haynes*, 2 N. H. 429; *Samson v. Young*, 50 N. H. 62; *Calvert v. Carter*, 18 Md. 73, 4 Md. Ch. 199; *Graham v. Graham*, 9 Pa. St. 254, 49 Am. Dec. 557; *Robinson v. Morse*, 29 Vt. 404.

2. Matters in which Other Parties are Interested.—*Fisher v. Pimbley*, 11 East 188.

So if A and B submit "all suits and actions depending between them two," the arbitrator has no authority to award in regard to an action between A on the one side and B and his wife on the other. *Brocas v. Savage*, Rolfe Abr., Arb., D. 4; *Morse v. Sury*, 8 Mod. 212.

But on a submission by A and B on the one side and C on the other "of all matters in difference between them," the arbitrator may decide all matters that either of the two has against the third jointly or severally, such as an action by either A or B alone against C, as in such a case the words will be construed distributively. *Arnold v. Pole*, Rolfe Abr., Arb., D. 5; *Æthelstone v. Moon*, Comyn Rep. 547; *Libtrat v. Field*, 1 Keb. 885; *Carter v. Carter*, 1 Vern. 259; *Thomlinson v. Arriskin*, Comyn Rep. 328; *Rees v. Waters*, 16 M. & W. 263; *Stockley v. Shopland*, 26 L. T. N. S. 586; *Adcock v. Wood*, 6 Exch. 814, 7 Exch. 468. But see *Bean v. Newbury*, 1 Lev. 139; *Garland v. Noble*, 1 Moore 187, 4 E. C. L. 395.

On a general submission between the parties to a suit in equity, it was held that the arbitrators could not only decide between the plaintiffs on one side and the defendants on the other, but that they could also award in regard to the claims of the codefendants against each other and adjust the individual rights of each. *Turner v. Turner*, 3 Russ. 494. See *Joyce v. Haines*, Hard. 399; *Winter v. White*, 1 B. & B. 350. See cases cited in preceding note.

Period of Time Covered.—A submission of all matters in difference means, as a rule, all matters in difference down to the date of the submission but not after.¹

c. CONDITIONAL SUBMISSIONS—Substantial Performance of Condition.—Where it is the intention of the parties to submit a question to arbitration upon the condition that a certain agreement shall be fulfilled, such submission is valid, and effect will not be given to it until the condition is fulfilled, but the courts will hold a substantial fulfilment to be sufficient.²

d. WRITTEN SUBMISSION IS FINAL.—Parol Evidence is Not Admissible to vary the terms of a written submission.³

Merger of Oral Agreement into Written Submission.—Where there has been an oral agreement to submit, a subsequent written submission of the same subject-matter merges the oral agreement.⁴

And a Subsequent Completed Written Submission supersedes altogether a prior memorandum of an agreement to submit.⁵

e. UNCERTAIN OR INDEFINITE SUBMISSION.—Although a submission be indefinite or obscure, if the deficiency can be supplied so as to make it certain,

1. **Confined to Matters in Dispute down to Time of Submission.**—*In re Brown v. Croydon Canal Co.*, 9 Ad. & El. 522, 36 E. C. L. 188; *Manser v. Heaver*, 3 B. & Ad. 295, 23 E. C. L. 73; *Cockburn v. Newton*, 2 M. & G. 899, 40 E. C. L. 682; *Harding v. Forshaw*, 1 M. & W. 415.

A submission of all matters in difference and "of anything in any wise relating thereto," does not extend the time. *In re Morphett*, 2 D. & L. 967.

Where only the matters in controversy in a cause are referred, the arbitrator can receive no evidence in regard to a claim arising after the date of the writ. *Atkinson v. Jones*, 1 D. & L. 225; *Ashworth v. Heathcote*, 6 Bing. 596, 19 E. C. L. 173.

But a reference of a "cause, and all matters relating to the annuity in question in the cause," was held to empower the arbitrator to award in regard to the arrears of the annuity accruing in the interval between the commencement of the action and the date of the submission. *Wynne v. Wynne*, 4 M. & G. 253, 43 E. C. L. 137. See *R. v. Brewer*, Q. B. June 11, 1845.

Re-execution of the Submission.—Where arbitration bonds dated Dec. 9th were on Jan. 4th altered by substituting a later date as the limit of time within which the award should be made, and were then reexecuted and re-delivered, it was held that the arbitrator might pass upon claims arising between Dec. 9th and Jan. 4th, as the reexecution of the bonds not only extended the time but amounted to a new submission. *Watkins v. Phillpotts, M'Clell. & Y.* 393.

Where the submission was made in regard to ewes with lamb, and the ewes after the submission but before the award had lambs, it was said that the arbitrator had no power to award in regard to the lambs. *West's Symb.*, p. II., tit. Compromise, § 33.

Parties may Authorize Award upon Matters Subsequently Arising.—Power may be conferred by the parties upon the arbitrator to award upon contingent claims or upon matters arising after the date of the submission. *In re Brown v. Croydon Canal Co.*, 9 Ad. & El. 522, 36 E. C. L. 188; *Lewis v. Rossiter*, 44 L. J. Exch. 136; *In re Morphett*, 2 D. &

L. 967. See *In re Leeming v. Fearnley*, 5 B. & Ad. 403, 27 E. C. L. 102; *Carpenter v. Joynes*, 14 Pract. Reg. 45; *Petch v. Fountain*, 5 Bing. N. Cas. 442, 35 E. C. L. 169.

2. **Conditional Submission.**—*Boston v. Brazier*, 11 Mass. 447; *Merritt v. Thompson*, 27 N. Y. 225; *People v. McGinnis*, 1 Park. Cr. Cas. (N. Y. Supreme Ct.) 387. See *Berkshire Woollen Co. v. Day*, 12 Cush. (Mass.) 128; *Com. v. Pejepsct Proprietors*, 7 Mass. 399.

3. **Written Submission Final.**—*Efner v. Shaw*, 2 Wend. (N. Y.) 567; *McNear v. Bailey*, 18 Me. 251; *De Long v. Stanton*, 9 Johns. (N. Y.) 38; *Barlow v. Todd*, 3 Johns. (N. Y.) 367. See *Kyd on Awards* 328; *Wills v. Maccarmick*, 2 Wils. 148; *Newland v. Douglass*, 2 Johns. (N. Y.) 63.

Both latent and patent ambiguities, in a submission, may be explained by parol, under *Georgia Code*, §§ 2757, 3801. *Riley v. Hicks*, 81 Ga. 265. See generally the title AMBIGUITY.

4. **Merger of Oral Agreement into Written Submission.**—*Loring v. Alden*, 3 Met. (Mass.) 576; *Palmer v. Green*, 6 Conn. 14; *Symonds v. Mayo*, 10 Cush. (Mass.) 39.

But in *Platt v. Aetna Ins. Co.*, 153 Ill. 113, it was held that a written submission to arbitration, which on its face excludes all questions except the amount of loss, does not merge in it previous conversations in regard to any allegation to rebuild. See 1 Greenl. Evidence 284; *Ludeke v. Sutherland*, 87 Ill. 481, 29 Am. Rep. 66; *Lafin v. Howe*, 112 Ill. 253; *Lane v. Sharpe*, 4 Ill. 566.

See further, cases *supra*, this article, *Form of Submission at Common Law*.

5. *Billington v. Sprague*, 22 Me. 34.

Where there is a Separate Written Agreement for a submission it will be presumed that such agreement supersedes the provisions of an insurance policy respecting the duties of appraisers or an umpire in case of loss, so far as there is any material difference between such agreement and the provisions of the policy. *Bangor Sav. Bank v. Niagara F. Ins. Co.*, 85 Me. 68. See *Wiggin v. Goodwin*, 63 Me. 392; *Goss v. Nugent*, 5 B. & Ad. 58, 27 E. C. L. 33; *Hall v. Norwalk F. Ins. Co.*, 57 Conn. 105.

it will be upheld by the courts.¹ And for this purpose the acts of the parties at the hearing, which go to show their own understanding of its scope, will be taken into consideration.²

f. ORDER OF AGREEMENTS.—Agreements will be taken in their proper order, where there are several made by the same instrument, or on the same date.³

g. REFERENCE CONSTRUED AS SUBMISSION.—Where there Are Statutory Provisions for the determination of certain questions by referees, and the parties depart from the requirements of the statutes in regard to references voluntarily, the court will construe a reference so made as a submission to arbitration.⁴

1. Submissions Uncertain and Indefinite.—*Rexford v. Nye*, 20 Vt. 132; *Price v. White*, 27 Mo. 275; *King v. Jemison*, 33 Ala. 499; *Newton v. West*, 3 Metc. (Ky.) 24; *Shackelford v. Purket*, 2 A. K. Marsh. (Ky.) 435, 12 Am. Dec. 422. See Bac. Abr. 211.

Submission of "Said Case."—Where an agreement to submit to arbitration recited that an action at law was pending between the parties, and the agreement then proceeded to submit "said case" to the decision of the arbitrators named therein, and it appeared from other evidence that there was a suit pending at the time between the parties, it was held that the court, in the absence of any evidence that any other suit was pending between the same parties, would assume that this was the case referred to in the submission; that it contained the subject-matter of the submission, and that, consequently, the submission was sufficiently definite and certain in its terms. *Rexford v. Nye*, 20 Vt. 132.

Question of "Title to the Following Land."—In *Galloway v. Webb*, Hard. (Ky.) 326, it was held that the reference to arbitrators "to settle and finally adjust the title to the following land," and which recited the entries under which the land was claimed, was sufficiently certain.

"Purchase and Settlement of a Horse."—Where a submission describes the subject of the dispute as "the purchase and settlement of a horse," it is not too vague or uncertain to render the submission void. *Riley v. Hicks*, 81 Ga. 265.

Error in Name of Referee.—Where, in the submission, the middle initial letter in the name of the referee was wrong, it was held that this would not vitiate the award if it appeared that the referee selected actually kept and signed the award. *Riley v. Hicks*, 81 Ga. 265.

"Our Business Pertaining to a Trade in Land."—And so a submission of "our business pertaining to a trade in land," was held sufficiently definite. *McKinnis v. Freeman*, 38 Iowa 364. See *Burroughs v. David*, 7 Iowa 155.

Greater Particularity is Required in Submissions under the Statutes than in common-law submissions. See *Woodward v. Atwater*, 3 Iowa 61; *Thompson v. Blanchard*, 2 Iowa 44; *King v. Jemison*, 33 Ala. 499.

For Further Illustrations, see *Lyle v. Rodgers*, 5 Wheat. (U. S.) 394; *Zook v. Spray*, 38 Iowa 273; *Woodward v. Atwater*, 3 Iowa 61; *Gere v. Council Bluffs Ins. Co.*, 67 Iowa 272;

Payne v. Crawford (Ala. 1892), 10 So. Rep. 911; *Boyden v. Lamb*, 152 Mass. 416; *Pierce v. Pierce*, 30 Me. 113; *Woodsum v. Sawyer*, 9 Me. 15; *Harmon v. Jennings*, 22 Me. 240; *Wood v. Holden*, 45 Me. 374.

2. Acts of Parties Considered.—*Cheshire Bank v. Robinson*, 2 N. H. 126. See *Hays v. Hays*, 23 Wend. (N. Y.) 363.

Where the parties to a submission describe the subject-matter of the arbitration as "a matter in difference between the parties," and they dispute a certain specific matter at the hearing, without objection, neither party has a right, after the award is made, to object to the indefiniteness of the submission. *Price v. White*, 27 Mo. 275.

3. Order of the Agreements.—In *Massey v. Thomas*, 6 Binn. (Pa.) 333, where an agreement to submit and an agreement to enter a friendly action were made on the same paper, it was held that the case would be first entered and then the submission made.

And in *Bixby v. Whitney*, 5 Me. 192, where a submission and a note were of the same date, but the priority could not be determined, and the submission was of all debts "heretofore existing between the parties," it was held that the note could not be taken as included in the submission.

Where an action is brought upon a bond entered into to secure the payment of an award, the bond and the agreement to submit need not be construed together, as they were not entered into simultaneously, therefore the limitation specified in the agreement as to the time for making the award forms no part of the condition of the bond. *James v. Schroeder*, 61 Mich. 28.

4. When References under Statutes Construed as Submissions to Arbitration.—*Dodge v. Waterbury*, 8 Cow. (N. Y.) 136. See *Cranston v. Kenny*, 9 Johns. (N. Y.) 212; *Miller v. Vaughan*, 1 Johns. (N. Y.) 315; *Stevenson v. Beecker*, 1 Johns. (N. Y.) 492; *Blunt v. Whitney*, 3 Sandf. (N. Y.) 4; *Silmsen v. Redfield*, 19 Wend. (N. Y.) 21; *Beardsley v. Dygert*, 3 Den. (N. Y.) 380; *Akely v. Akely*, 17 How. Pr. (N. Y. Supreme Ct.) 21.

Where a Matter Not Referable under the Statute is attempted to be referred by the parties the proceedings will be treated as an arbitration. *Diedrick v. Richley*, 2 Hill (N. Y.) 271; *Green v. Patchen*, 13 Wend. (N. Y.) 293; *Johnson v. Parmely*, 17 Johns. (N. Y.) 129.

But in other instances of a similar character, the referee's report has been sustained as

Or Where the Language of the Parties shows that it was their intention to submit the matter to arbitration, although they have complied with most of the requirements of a statute regarding references, their act will be held to be a submission.¹

h. CONSTRUCTION OF STATUTES RELATING TO SUBMISSIONS.—The tendency of the courts, as a rule, has been to give a broad construction to statutes relating to submissions to arbitration, so as to include as many matters as possible within their scope.²

i. STIPULATIONS IN SUBMISSIONS—(1) *Submission of a Cause*.—Where a case is submitted to arbitration it will include nothing except what is involved in the action, unless there is an express stipulation to that effect, but the

such. *Thomas v. Reab*, 6 Wend. (N. Y.) 503; *Harris v. Bradshaw*, 18 Johns. (N. Y.) 26; *Armstrong v. Percy*, 5 Wend. (N. Y.) 535; *Bloore v. Potter*, 9 Wend. (N. Y.) 480.

The Parties to a Suit at Law and to Another in Equity agreed to refer the matters in dispute to a commissioner of the court to state an account, to hear evidence, and to return it with his report, which was to be entered up as a judgment of the court. It was held that this was a submission to arbitration and not simply a reference, and that the report of the commissioner should be treated as an award and not as an ordinary commissioner's report in chancery, subject to the usual exceptions. *Duff v. Core*, 27 W. Va. 232. See *Brickhouse v. Hunter*, 4 Hen. & M. (Va.) 363, 4 Am. Dec. 528.

Where a reference was made to a certain party to determine certain amounts due to and from an estate, and for the statement of an account, it was held to be a reference to arbitration, and that the report of the arbitrator was an award, and not merely a report of the referee taking account. *Hilliard v. Rowland*, 68 N. Car. 506.

But in *Tucker v. Tucker*, 4 Abb. App. Dec. (N. Y.) 428, it was held that the submission of a contested claim to the surrogate could not be sustained as an arbitration, all the parties in interest being present.

1. **Intention of the Parties**.—*Akely v. Akely*, 17 How. Pr. (N. Y. Supreme Ct.) 21; *Moore v. Barnett*, 17 Ind. 349. See *Pleasant v. Ross*, 1 Wash. (Va.) 156, 1 Am. Dec. 449.

2. **Statutes Concerning Submissions Construed Broadly**.—*Primer v. Kuhn*, 1 Dall. (Pa.) 452; *Austin v. Snow*, 2 Dall. (Pa.) 157; *White v. Story*, 43 Barb. (N. Y.) 124; *Tomlinson v. Hammond*, 8 Iowa 40.

See *Francisco v. Fitch*, 25 Barb. (N. Y.) 130; *Dana v. Prescott*, 1 Mass. 200; *Hubbell v. Bissell*, 13 Gray (Mass.) 298; *Fowler v. Bigelow*, 8 Mass. 1; *Dana v. Prescott*, 1 Mass. 200; *Butler v. Mace*, 47 Me. 423; *Bent v. Erie Tel., etc., Co.* 104 (Mass.) 165; *Downes v. Erie Tel., etc., Co.* (Mass. 1887), 10 N. E. Rep. 782; *Estanton v. Dupuy*, 2 Browne (Pa.) 100; *Brisbane v. Mitchell*, 8 S. & R. (Pa.) 423.

But where, as in *Pennsylvania*, the arbitration by statute is compulsory (Act 1836, § 8) they have excluded several matters from its operation, as a cause brought to an issue on demurrer, action on a bail bond, a suit in equity begun by bill, a case where judgment

by default was opened on terms, or where the defendant has in effect admitted that he has no defense and has thereby entitled the plaintiff to judgment. *Hoffman v. Locke*, 19 Pa. St. 57; *Taggart v. Fox*, 1 Grant's Cas. (Pa.) 191. But see *Pettit v. Wingate*, 25 Pa. St. 74.

English Arbitration Act.—Submission under the 27th section of the Arbitration Act of 1889, means a written agreement to submit. Consequently, a fire-insurance policy containing a clause that any difference arising under it should be referred to arbitration, although not signed by the assured, was held to be a submission to arbitration within the meaning of the act. *Baker v. Yorkshire F., etc., Assur. Co.* (1892), 1 Q. B. 144.

Colorado.—It was held in *Wilson v. Wilson*, 18 Colo. 615, that the Colorado statute relating to arbitration must be considered as part of a contract of submission entered into under it, as much as if it were inserted in the articles providing for the submission.

Iowa.—In *Marion v. Ganby*, 68 Iowa 142, it was held that a proceeding to condemn land for a street extension is a "suit" within the provisions of the Iowa Code, § 3419, which provides that a "suit" may be submitted to arbitration.

New Jersey.—The arbitrators under the New Jersey P. L. 1882, p. 256, are not compelled to take into consideration all the assessments for the improvements of public roads, but only those against the applicant. *Essex Public Road Board v. Skinkle*, 49 N. J. L. 65.

Maryland.—A case pending was referred to an arbitrator under a rule of court by consent of the parties. While the matter was still before the arbitrator the defendant obtained an injunction restraining the plaintiff from proceeding with the reference. The plaintiff filed an answer, taking an appeal from the order which granted the injunction, and gave bond as required by law. The arbitrator filed his award during the pendency of the appeal, and, on exceptions taken to it for that cause, it was held that by the proper construction of the Maryland Code of Procedure, art. 5, upon an appeal taken and the giving of an appeal bond, the operation and effect of the injunction entirely ceased until judgment should be pronounced by the appellate tribunal, and that the arbitrator was not prevented by the pendency of the injunction case from proceeding with his award. *Northern Cent. R. Co. v. Canton Co.*, 24 Md. 500. See *Blondheim v. Moore*, 11 Md. 371.

submission may be made to include any number of other matters by the agreement of the parties.¹

(2) *Right of Appeal*.—In *Tennessee* it was held that where a submission under a rule of the Circuit Court contains a reservation of a right of appeal to the Supreme Court, it is void.²

Waiver.—But the parties to a submission may waive their right of appeal from an award if they do so in express terms.³

(3) *To "Abide by" Award*.—A stipulation "to abide by" the award has been held to mean that the parties would "await the award without revoking the submission," not that they waived the right to dispute the validity of the award itself.⁴

(4) *For Arbitration on Principles of Equity*.—Where a submission contains a provision that the arbitrators shall proceed on principles of equity, it means

1. Stipulations in Submission of a Cause.—*Henderson v. Walker*, 2 Grant's Cas. (Pa.) 36; *Remington v. Morris*, 2 Grant's Cas. (Pa.) 457; *Bemus v. Quiggle*, 7 Watts (Pa.) 362; *Harrison v. Wortham*, 8 Leigh (Va.) 296; *Smith v. Kincaid*, 7 Humph. (Tenn.) 28; *Harmon v. Jennings*, 22 Me. 240; *Berkshire Woollen Co. v. Day*, 12 Cush. (Mass.) 128; *Com. v. Pejepsicut Proprietors*, 7 Mass. 399.

The Record must Set Out the outside matters that have been included. *Fitzgerald v. Fitzgerald*, Hard. (Ky.) 235.

The parties may even insert stipulations in the submission which are not called for by the statutes or by rule of court. *Anderson v. Farnham*, 34 Me. 161; *Bingham v. Guthrie*, 19 Pa. St. 418.

See further, *Caton v. MacTavish*, 10 Gill & J. (Md.) 192; *Woods v. Page*, 37 Vt. 252.

In *Henderson v. Walker*, 2 Grant's Cas. (Pa.) 36, it was held that persons who have a suit pending between them may refer it to arbitration under *Pennsylvania* Act of 1836, § 6, and include in the submission the subject of another action, whether the other action be already brought or not.

2. Reservation of Right of Appeal.—*Bone v. Rice*, 1 Head (Tenn.) 149.

3. Waiver of Right of Appeal.—*McCahan v. Reamey*, 33 Pa. St. 535; *Bingham v. Guthrie*, 19 Pa. St. 418; *Rogers v. Playford*, 12 Pa. St. 181; *Wightman v. Pettis*, 29 Pa. St. 283. See *Louisville, etc., R. Co. v. Meyer*, 30 L. Ed. (U. S.) 689.

The Waiver must Be Express and Unequivocal.—*McCahan v. Reamey*, 33 Pa. St. 535; *Mussina v. Hertzog*, 5 Binn. (Pa.) 387; *Large v. Passmore*, 5 S. & R. (Pa.) 51; *McCracken v. Clarke*, 31 Pa. St. 498. See *Daniels v. Willis*, 7 Minn. 374.

It has been held that such a stipulation would estop a party from claiming a writ of error, although it is a writ of right. *Cuncle v. Driggs*, 3 P. & W. (Pa.) 291. See *Ranck v. Becker*, 12 S. & R. (Pa.) 412; *Townsend v. Masterson, etc.*, *Stone Dressing Co.*, 15 N. Y. 587; *Andrews v. Lee*, 3 P. & W. (Pa.) 99; *McCahan v. Reamey*, 33 Pa. St. 535.

Corruption or Misconduct will render an award void, notwithstanding such a stipulation. *Muldrow v. Norris*, 2 Cal. 74, 56 Am. Dec. 313; *Andrews v. Lee*, 3 P. & W. (Pa.) 99.

Attorney and Client.—See *Bingham v. Guth-*

rie, 19 Pa. St. 418, as to the right of the attorney of one of the parties to enter into a stipulation to waive appeal from the award.

4. Stipulation "to Abide by the Award."—*Shaw v. Hatch*, 6 N. H. 162.

The words "abide by" in a submission do not mean acquiesce in, but simply to await the award without revoking the submission. *Marshall v. Reed*, 48 N. H. 36.

Where a docket entry was made in an action at law "to abide the decision" in an equity suit it was held to mean, not that the action at law should be dependent on the final determination of the equity suit, but that so much of the issue as was common to both should be decided in the action at law in the same way as in the suit in equity. *Hodges v. Pingree*, 108 Mass. 585.

In *Hodge v. Hodgdon*, 8 Cush. (Mass.) 297, the court, by Shaw, C. J., said that "to abide the order of the court" meant to perform, to execute, to conform to such order.

Where the Stipulation was to "Abide, Do, and Perform" the judgment, it was held to mean "to submit to, to stand to, or to abide. The words are an useless iteration * * * employed to add force and expression to the idea conveyed by the words 'to abide.'" *Hewins v. Currier*, 62 Me. 239.

Where an arbitration bond was conditioned that the principal should "well and truly submit and stand to and abide by the decision and award of the arbitrators," it was held that this undertaking required that the principal should perform the award after it was made. *Washburne v. Lufkin*, 4 Minn. 466. See *Pars v. Critcher*, 112 N. Car. 405; *Thompson v. Deans*, 6 Jones Eq. (N. Car.) 22; *Kesler v. Kerns*, 5 Jones (N. Car.) 191.

In *Bac. Abr.* 346, it is stated that "if there be an obligation to stand to an award, each ought to perform on his own part at the peril of his obligation."

Agreement to Abide by Award Implied.—It is not necessary that there should be any express agreement to abide by the award; such agreement is implied from the submission. *Valentine v. Valentine*, 2 Barb. Ch. (N. Y.) 430.

Legal Award Intended.—When the agreement is that the parties shall submit the matter in dispute to arbitrators and abide by the award, such agreement will be considered to mean that they will abide by a legal award. *Atlanta, etc., R. Co., v. Mangham*, 49 Ga. 266.

equity in the sense of "fair dealing" and "justice," not equity in the technical sense of the word.¹

j. **EFFECT OF PARTICULAR TERMS IN THE SUBMISSION.**—As the construction of particular terms and expressions in the submission depends on the context and the circumstances in each case, no general rule can be stated; instances are given below illustrating the effect of such expressions and the extent of the authority conferred by them upon the arbitrator.²

15. Who may Be Parties to Submission.—*a.* **PERSONS WITH INTEREST IN SUBJECT-MATTER.**—(1) *General Rule.*—All persons who are legally capable of making a contract,³ and who have such power over the subject-matter as will enable them to carry out an award,⁴ may be parties to a submission to arbitration.

1. Stipulation for Arbitration on Principles of Equity.—*In re Curtis*, 64 Conn. 501.

But it is not essential to the provisions of an award that the arbitrators should proceed on principles of equity, and that it should contain findings of fact upon which its conclusions are based, unless the submission so requires. *In re Curtis*, 64 Conn. 501.

2. In a submission of partnership affairs a recital of a suit in equity for the dissolution of the partnership does not give authority to the arbitrators to award in regard to the suit. *In re Marsh*, 16 L. J. Q. B. 330.

See further, as to the authority conferred by particular statements in the submission, *West v. Downman*, 14 Ch. Div. 111; *Burgess v. Norwick Local Board*, 37 L. T. N. S. 355; *Bayley v. Wilkinson*, 16 C. B. N. S. 161, 111 E. C. L. 161.

A provision "that any differences or disputes that may arise between the parties shall be settled by an arbitrator," does not include a question as to whether the partnership has been dissolved, or whether certain shares have been bought on account of the partnership or of the defendant only. *Piercy v. Young*, 14 Ch. Div. 200.

A submission to determine the damages for loss in regard to "wool in the process of wooling, carding, scribbling, and spinning," was held not to include "raw" wool which had been somewhat dressed but which was not in the process of manufacture. *In re Hurst*, 1 H. & W. 275.

A submission in regard to moneys laid out at the request of a person does not authorize the arbitrator to award in regard to sums which were laid out, but not at the request of such person. *Waters v. Bridges*, Cro. Jac. 639.

Where a submission to arbitrators stipulated that no writ should issue until "the determination of the matters submitted," it was held that a writ of possession should not be issued in ejectment before payment of the sum awarded in favor of the defendants. *Field v. Moody*, 111 N. Car. 353.

"All matters in difference between the parties in the cause," was held to limit the authority of the arbitrators to matters in the cause only. See *Blanchard v. Snider*, 28 U. C. Q. B. 210. See *supra*, this title, *Rules for Constructing Submission—General Submissions.*

3. Persons Legally Competent to Contract.—*Russell on Awards* (6th ed.) 15; *Com. Dig.*, Arb., D. 3; *Morse on Arb. and Award* 3.

It was held under the Early Authorities that persons under duress, *femes covert*, persons professed in religion, or those who are outlawed or attainted, could not be parties to an arbitration. *Bac. Ab.*, Arb., C.; *Com. Dig.*, Arb., D. 3.

Duress.—In *Shephard v. Watraus*, 3 Cai. (N. Y.) 166, it was held that where a person at the time of entering into a submission was under arrest under a process sued out in the same matter, it did not constitute such duress or undue advantage as would render the submission void.

Where Father's Interest Adverse to that of Children.—In *Fortune v. Killebrew*, 86 Tex. 172, it was held that the father claiming a tract of land in his own right could not, as guardian for his minor children, submit the claims of the latter to said land to arbitration by signing for them an agreement to submit, as their interests were adverse to his.

4. Parties Must Have Power over Subject-matter Sufficient to Execute the Award.—*Kyd on Awards* 61; *Morse on Arb. & Award* 4; *Brady v. Brooklyn*, 1 Barb. (N. Y.) 584; *Bean v. Farnam*, 6 Pick. (Mass.) 269. See *Dallas v. Loonie*, 83 Tex. 291; *Buckland v. Conway*, 16 Mass. 396; *Smith v. Van Nostrand*, 5 Hill (N. Y.) 419; *Snow v. Walker*, 42 Tex. 154.

Real Estate.—Everyone who is competent to transfer real estate or to exercise acts of ownership over it may be a party to a submission to arbitration, consequently a claim to dower may be so submitted. *Cox v. Jagger*, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522.

Wherever parties have a right to transfer real estate or to exercise any act of ownership in regard to it by their own act, they may submit any dispute concerning it to arbitration, and the arbitrators under such submission may order the same acts to be done which the parties themselves might do by agreement. *Blair v. Wallace*, 21 Cal. 317. See *Spencer v. Winselman*, 42 Cal. 483.

The Parties to a Suit Pending may enter into an agreement to refer such suit, under *Georgia* statute 1856. *Dulin v. Caldwell*, 29 Ga. 362.

Religious Corporation.—But in *Wyatt v. Benson*, 23 Barb. (N. Y.) 327, it was held that where a religious corporation which had no power to sell real estate, except by consent of the Supreme Court, submitted the question of sale to arbitration, and the arbitrators ordered a sale to be made, the award was invalid.

(2) *Husband and Wife*.—At the Common Law, a *Feme Covert* was absolutely incapacitated from entering into a submission to arbitration.¹

Controversies between Husband and Wife.—However, a married woman may be party to a submission of disputes arising between herself and her husband.²

Property over Which Wife Has Absolute Control.—So she may enter into a sole submission in regard to any property over which she has the absolute power of disposal.³

Pennsylvania—Taking Case out of Court.—And neither party is empowered without the other's consent, by the provisions of the Pennsylvania statute of 1809, to take a case out of court and submit it to arbitrators after it has once been decided by a jury, or by referees, or by a justice of the peace, or alderman, and is pending in court on a matter of law. *Mann v. Alberti*, 2 Binn. (Pa.) 195.

1. *Kyd on Awards*, c. 2, p. 35; *Palmer v. Davis*, 28 N. Y. 242; *Rumsey v. Leek*, 5 Wend. (N. Y.) 20; *Miller v. Moore*, 7 S. & R. (Pa.) 164.

Femes Covert.—Where a married woman, without the consent of her husband, enters into an agreement to submit a dispute to arbitration, and gives her note to bind the submission, such submission and note are void; and the coverture may be pleaded in bar to an action on a note given by the opposite party to bind the agreement on his part, because such evidence shows a want of consideration for the note on which the suit was brought. *Rumsey v. Leek*, 5 Wend. (N. Y.) 20. However, although it has been held that a married woman cannot be party to a submission, whatever might be the subject of the dispute, whether arising before or after her marriage, yet even in the old cases there were exceptions to this rule, for where the husband was exiled, banished, or likewise civilly dead, the wife was always held capable of acting as a *feme sole*, and consequently of being party to a submission. *Co. Litt.* 1 Inst. 133a; *Portland v. Prodders*, 2 Vern. 104; *Newsome v. Bowyer*, 3 P. Wms. 37; *Lean v. Schutz*, 2 W. Bl. 1197; *Carrol v. Blencow*, 4 Esp. 27; *Sparrow v. Carruthers*, cited in *Marsh v. Hutchinson*, 2 B. & P. 226.

The wife of an alien enemy, but not of an alien friend, has been held capable of making a submission to arbitration. *Marsh v. Hutchinson*, 2 B. & P. 226; *Deerly v. Mazarine*, 1 Salk. 116, 1 Ld. Raym. 147; *Barden v. Keverberg*, 2 M. & W. 61; *Walford v. DePienne*, 2 Esp. 554; *De Gaillon v. L'Aigle*, 1 B. & P. 357; *Kay v. De Pienne*, 3 Campb. 123.

Where a married woman is by local custom invested with the character of a *feme sole*, she may be party to a submission. See *Beard v. Webb*, 2 B. & P. 93.

Where one of the parties to a submission has allowed an award to be made thereunder, although he knew that the other party was a married woman, he will be estopped from objecting to the award on the ground of the coverture. *In re Warner*, 2 D. & L. 148; *Palmer v. Davis*, 28 N. Y. 242.

In *Anonymous*, 1 Crompt. 265, where an award was made against a *feme sole* and she subsequently married, it was doubted whether an

attachment could issue against either herself or her husband, on her failure to comply with the award.

In equity, a married woman was held competent to submit a question regarding real estate which was settled on her to her separate use. *Peacock v. Monk*, 2 Ves. 190; *Pybus v. Smith*, 1 Ves. Jr. 189; *Allen v. Papworth*, 1 Ves. 163; *Jones v. Harris*, 9 Ves. Jr. 486; *Dubois v. Hale*, 2 Vern. 613; *Hulme v. Tenant*, 1 Bro. C. C. 16; *Grigby v. Cox*, 1 Ves. 517; *Heatley v. Thomas*, 15 Ves. Jr. 596. But this rule did not apply in law, *Marshall v. Rutton*, 8 T. R. 545, *overruling Corbett v. Poelnitz*, 1 T. R. 5; nor did it apply in equity when she had separate estate which was not settled to her separate use, see *Davis v. Page*, 9 Ves. Jr. 350.

See further, where submissions made by married women were held invalid, *Strachan v. Dougall*, 7 Moo. P. C. 365.

It has been held that where an award has been made, a married woman cannot be bound by consenting to it as a *feme sole* can. *Evans v. Cogan*, 2 P. Wms. 450.

2. Disputes between Husband and Wife.—*Bateman v. Ross*, 1 Dow 235.

It has been held that a submission made by the husband and the trustee of the wife, of a dispute between the husband and wife, was such as would be made a rule of court. *Soilleu v. Herbst*, 2 B. & P. 444.

3. Statutory Enactments.—*Morse on Arb. and Award* 26. The statutes of the various jurisdictions must be referred to, in order to determine how far the rigor of the old common-law rule has been modified in any particular case.

In *Duren v. Getchell*, 55 Me. 241, the statute was held to authorize her to submit a question regarding damages done to her separate real estate.

In *Rumsey v. Leek*, 5 Wend. (N. Y.) 20, it was held that the burden of proving the wife's capacity to submit is on the party seeking to uphold the submission.

But where the submission is made by the husband for the wife, the presumption is that the submission is valid. *McComb v. Turner*, 14 Smed. & M. (Miss.) 119.

In *Weston v. Stuart*, 11 Me. 326, it was held that a wife may join with her husband in a submission to arbitration of a matter affecting her own property.

Although married women are excepted from the operation of How. Stat. *Michigan*, § 8474, which authorizes the submission of causes to arbitration, yet where a married woman has no interest in the matters submitted other than as a wife, the award is binding on the husband, although the submission was

But in Other Cases Her Husband must Join in the submission.¹

When Husband may Bind Wife.—A husband may bind his wife by a submission to arbitration, provided he can carry out the award without her acquiescence or joinder, or if the law would compel her to perform the award.² But a husband cannot submit any matter which concerns his wife's separate estate, without her knowledge or authority, or any question in regard to her property which he cannot by his own act alien.³

Acquiescence of Wife.—However, such a submission may be given effect where the wife subsequently executes the agreement or acquiesces therein.⁴

(3) **Infants.**—Where an infant enters into a submission to arbitration, it is not absolutely void; it is a voidable contract only.⁵ But where a person of

signed by both. *Taylor v. Smith*, 93 Mich. 160.

The decision in this case was based on the principle that the law will not permit one party to an award to profit by its execution by the other party and then repudiate it. See *Jones v. Bailey*, 5 Cal. 345.

1. *Weston v. Stuart*, 11 Me. 326; *Emery v. Wase*, 5 Ves. Jr. 846; *French v. Richardson*, 5 Cush. (Mass.) 450.

Where the Husband and Wife Submit to Arbitration anything in the right of the wife, the wife, after the husband's death, shall be bound by the award. *Lumley v. Hutton*, 1 Rolle 268.

See where a submission entered into by a married woman was held invalid, *Bagley v. Humphries*, 11 Grant's Ch. (U. C.) 118; *Great Western R. Co. v. Baby*, 12 U. C. Q. B. 106.

2. **When Husband's Act Binds Wife.**—*Morse on Arb. and Award* 27; *Bac. Abr.*, Arb., C.; *Smith v. Wood*, Sty. 351; *Fort v. Battle*, 13 Smed. & M. (Miss.) 133; *Hunter v. Rice*, 15 East 100; *Oglander v. Boston*, 1 Vern. 396; *Lumley v. Hutton*, 1 Rolle 269, Cro. Jac. 447, Com. Dig., Arb., D. 2, 1 Rolle Abr. 246, 2.

Equity has compelled the husband to get the wife to join in a conveyance of real estate where he sold her interest therein at a price to be determined by arbitration; but it was doubted by Lord Eldon whether this was proper, as a married woman ought not to be compelled to part with her property except by her own free will. *Emery v. Wase*, 5 Ves. Jr. 846, 8 Ves. Jr. 505; *Berry v. Wade*, Cas. Temp. Finch 180.

In *Palmer v. Davis*, 28 N. Y. 242, where the submission was by the husband for the wife, it was held that it was a material point whether the demand in the matter in controversy was in the wife's favor, and no claim against her, so that she would not be required to do anything by the award.

3. **Wife's Separate Estate.**—*Kyd on Awards* 47; *Fort v. Battle*, 13 Smed. & M. (Miss.) 133; *Miller v. Moore*, 7 S. & R. (Pa.) 164; *Coldw. Arb.* 24; *Smith v. Ward*, Sty. 351; *Palmer v. Davis*, 28 N. Y. 247.

Where the husband enters into an agreement to submit to arbitration a dispute as to the true location of a fence upon the wife's land, the wife will not be bound by such agreement when it is made in her absence and without her knowledge or consent. *Benedict v. Pearce*, 53 Conn. 496.

4. **Wife's Subsequent Execution.**—Where a husband agreed in his wife's name to an ex-

tension of time for making an award, without authority from her, such defect would be cured by the subsequent execution of the agreement by the wife. *Cobb v. Parham*, 4 La. Ann. 148.

Acquiescence.—A submission was entered into by a husband in right of his wife, touching the distribution of an estate, and no objection was made to the submission in the court below, but it did not appear when the wife's right accrued or whether she was living or not, or what interest the husband had. The court refused, in an action on the award, to declare the submission void. *McComb v. Turner*, 14 Smed. & M. (Miss.) 119.

Ratification.—When the submission is made by an agent in regard to realty, the title to which is in the wife, but the submission is by mistake made in the husband's name, the wife may become bound by the award made under such submission if she ratifies the submission made by her agent before the award is made. *Smith v. Sweeny*, 35 N. Y. 291. But see *Evans v. Cogan*, 2 P. Wms. 450.

5. **Submission by Infant.**—*Bac. Abr.*, Arb., C.; *Com. Dig.*, Arb., D. 2; *Harvy v. Ashley*, 3 Atk. 607; *Holt v. Ward*, Fitzgibbon 175, 275; *Godfrey v. Wade*, 6 Moore 488, 17 E. C. L. 50; *Britton v. Williams*, 6 Munf. (Va.) 453; *Baker v. Lovett*, 6 Mass. 78, 4 Am. Dec. 88; *Handy v. Cobb*, 44 Miss. 699.

It has, however, been held that a submission made by an infant was absolutely void. *Rudston v. Yeates*, March 111, 141, 1 Rolle Abr., Arb., A. 268; *Britton v. Williams*, 6 Munf. (Va.) 453.

In some cases, it has been held that equity will not interfere to enforce an award made under a submission by an infant. *Cavendish v. Wood*, Eq. Cas. Abr. 49, 1 Ch. Cas. 279; *Evans v. Cogan*, 2 P. Wms. 450.

But it has been held otherwise also. *Bishop of Bath v. Hipplesey*, 28 Cha. 2, cited in *Harvy v. Ashley*, 3 Atk. 607.

Where an Infant Was a Plaintiff in an Equity Suit, the court referred the matter to the master to determine whether it would be in this infant's interest to submit it to arbitration. *Davis v. Page*, 9 Ves. Jr. 350; *Dowse v. Cox*, 10 Moore 272.

Infant parties to equity suits have been held bound by references to arbitration made by their solicitors. *Biddell v. Dowse*, 6 B. & C. 255, 13 E. C. L. 164.

But the Opposite Parties to Such Suits cannot defeat the submission on the ground of the

full age is bound jointly with an infant to stand to an award, such person will be bound to perform it.¹

(4) *Partners*.—A partner cannot bind his copartners by a submission to arbitration, whether it be under seal or not, unless he is specially authorized to do so;² but where he makes a submission he will be himself bound to perform

infancy, because they are presumed to know that infants cannot be bound. *Wrightson v. Bywater*, 3 M. & W. 199; *Jones v. Powell*, 6 D. P. C. 483; *In re Warner*, 2 D. & L. 148; *Ex p. Wyld*, 30 L. J. Bank. 10, 2 De G. F. & J. 642.

Costs.—An infant may be directed by an award to pay costs. *Proudfoot v. Poile*, 3 D. & L. 524.

Damages for Assault and Battery.—Where an infant submitted a claim for damages for assault and battery, to arbitration, and received an award of fifty dollars, and brought suit afterwards, the jury were instructed by the court to give only nominal damages if they should find that the infant had received adequate compensation for the injury; but to give a verdict for such additional sum as, with the fifty dollars already received, would form a reasonable satisfaction, if they found that the original award was inadequate. *Baker v. Lovett*, 6 Mass. 78, 4 Am. Dec. 88.

In Mississippi the statutes do not authorize infants or married women to make submissions. *Handy v. Cobb*, 44 Miss. 699.

In Georgia it has been held that a submission is not binding at any time against an objection of infancy. *Jones v. Payne*, 41 Ga. 23.

Texas.—An agreement to submit to arbitration, and a judgment rendered thereon in favor of minors, when such agreement is beneficial to them and the adult party is bound thereby, is not void because of their minority. *Chambers v. Ker*, 6 Tex. Civ. App. 373.

The Best General Rule to Apply is that which prevails in regard to other contracts: that the agreement is not absolutely void, but may be ratified by the infant after coming of age. *Jones v. Phoenix Bank*, 8 N. Y. 228; *Barnaby v. Barnaby*, 1 Pick. (Mass.) 221.

1. Com. Dig., Arb., D. 2; *Bean v. Newbury*, 1 Lev. 139.

See also *infra*, this title, *Guardians and Parents*.

2. **Submission by Partners**.—*Russell on Awards* (6th ed.) 20; *Morse on Arb. and Award* 1.

England.—*Steiglitz v. Egginton*, Holt 141, 3 E. C. L. 63; *Strangford v. Green*, 2 Mod. 228; *Stead v. Salt*, 3 Bing. 101, 11 E. C. L. 50; *Adams v. Bankart*, 1 C. M. & R. 681; *Burnell v. Minot*, 4 Moo. 340, 16 E. C. L. 375. See *Harrison v. Jackson*, 7 T. R. 203; *Hatton v. Royle*, 3 H. & N. 500.

Canada.—*French v. Weir*, 17 U. C. Q. B. 245; *Baby v. Davenport*, 3 U. C. Q. B. 54.

United States.—*Karhaus v. Ferrer*, 1 Pet. (U. S.) 222.

California.—*Jones v. Bailey*, 5 Cal. 345.

Connecticut.—*Hutchins v. Johnson*, 12 Conn. 376, 30 Am. Dec. 622.

Kentucky.—*Southard v. Steele*, 3 T. B. Mon. (Ky.) 435.

Michigan.—*Buchoz v. Grandjean*, 1 Mich. 367; *Backus v. Coyne*, 35 Mich. 5; *Davis v. Berger*, 54 Mich. 652.

New Hampshire.—*Eastman v. Burleigh*, 2 N. H. 484.

New York.—*McBride v. Hagan*, 1 Wend. (N. Y.) 326; *Harrington v. Higham*, 13 Barb. (N. Y.) 660; *Buchanan v. Curry*, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200.

Rhode Island.—*Tillinghast v. Gilmore*, 17 R. I. 413.

Vermont.—*St. Martin v. Thrasher*, 40 Vt. 460. See *Onion v. Robinson*, 15 Vt. 510.

Virginia.—*Wood v. Shepherd*, 2 Patt. & H. (Va.) 442.

See *Wesson v. Newton*, 10 Cush. (Mass.) 114; *Abbott v. Dexter*, 6 Cush. (Mass.) 108; *Horton v. Wilde*, 8 Gray (Mass.) 425.

The Rule Applies in the Case of a General Partnership as well as in a partnership for a particular purpose. *Salt v. Stead*, 10 Moore 389, 3 Bing. 101, 11 E. C. L. 50; *Burnell v. Minot*, 4 Moore 340, 16 E. C. L. 375; *Wood v. Thompson*, Rolle's Abr., Arb., F. 11, p. 249; *Adams v. Bankart*, 1 C. M. & R. 681; *Boyd v. Emmerson*, 2 Ad. & El. 184, 29 E. C. L. 68; *Thomas v. Atherton*, 10 Ch. Div. 185.

Power to Partner to Sue and Collect Notes.—A power given by one partner to another to sue and collect assets, does not give him the power to submit to arbitration an action brought on such authority. *Hatton v. Royle*, 3 H. & N. 500, 27 L. J. Exch. 486. But see *Buckland v. Conway*, 16 Mass. 396; *Wilks v. Back*, 2 East 142.

Adjustment of General Average.—One party has no power to submit partnership matters to arbitration without special authority for that purpose from his copartner. An adjustment of a claim for a general average, by a third person selected for the purpose under a special agreement which contemplated the introduction of witnesses, the statement of the parties, etc., is within this principle, being in effect an arbitration and something more than an apportionment, according to the custom and law of general average. *Backus v. Coyne*, 35 Mich. 5.

Where the Surviving Partner is Also the Administrator of the Deceased Partner, he cannot submit a dispute between the partnership and the estate, because he would be acting in the double capacity of representative and a debtor or creditor of the estate. *Boynton v. Boynton*, 10 Vt. 107.

Receipt Given for Amount of Award.—In *Buchanan v. Curry*, 19 Johns. (N. Y.) 319, 10 Am. Dec. 200, where the award was for an amount due the firm, and the person against whom the award was made paid the amount to the partner who had signed the submission, who thereupon indorsed a receipt and acknowledgment of satisfaction on the back of the award, it was held that the partner who had not signed was bound, not, however, by the submission or award, but by the compromise or liquidation of the claim which the

the award,¹ and if his copartners refuse to abide by it, it is a breach of the submission on his part for which he will be individually liable.² However, the other partners may bind themselves to such a submission by giving their consent to it.³

(5) *Bankrupts*.—A bankrupt cannot enter into a valid submission so as to bind his estate,⁴ or the assignees;⁵ but such a submission may be binding on himself so that he may be compelled to pay costs if they are awarded against him.⁶

(6) *Persons Jointly Interested*.—Where there are several parties jointly interested in the same matter, as joint heirs or the like, those only who

one partner might make for the firm, and which was not invalidated by the fact that it had been brought about through the intervention of arbitrators. The receipt operated as a release, or as an accord and satisfaction.

Where Two Partners Together Make Only One of the Parties to the Submission, an award against one of them only, will be upheld. *Dater v. Wellington*, 1 Hill (N. Y.) 319.

By Instrument under Seal.—In *Eastman v. Burleigh*, 2 N. H. 484; *Buchanan v. Curry*, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200; *McBride v. Hagan*, 1 Wend. (N. Y.) 326; *Steiglitz v. Egginton*, Holt 141, 3 E. C. L. 63, it was held that one partner could not bind the others by a sealed instrument.

Nonjoinder of Partner.—B. & Co., with whom C. was a silent partner, sublet a building contract with a city to L., and entered into an agreement to submit disputes between them to arbitration, and an award was subsequently made upon a submission under such agreement, upon which L. sued the city and B. & Co. to enforce it in his favor but did not join C., the silent partner. The nonjoinder was held to be immaterial because the agreement for arbitration, signed by C., and the proceedings under it, amounted to an assignment by him of the funds in the hands of the city to the extent of any award to L. *Dallas v. Loonie*, 83 Tex. 291.

1. When Partner Personally Bound—*United States*.—*Karthauss v. Ferrer*, 1 Pet. (U. S.) 222.

California.—*Jones v. Bailey*, 5 Cal. 345.

Maryland.—*Armstrong v. Robinson*, 5 Gill & J. (Md.) 412.

New York.—*Brink v. New Amsterdam*, etc., Ins. Co., 5 Robt. (N. Y.) 104; *Buchanan v. Curry*, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200; *Dater v. Wellington*, 1 Hill (N. Y.) 319; *McBride v. Hagan*, 1 Wend. (N. Y.) 326.

Virginia.—*Wood v. Shepherd*, 2 Patt. & H. (Va.) 442.

The same principle holds good of an award rendered against two parties, not partners, one of whom did not submit. *Mathews v. Mathews*, 1 Heisk. (Tenn.) 669; *Woodward v. Woodward*, 14 Ill. 466.

Where one of three partners agreed to submit a partnership matter to arbitration and another assented to such agreement, but the third knew nothing about it, it was held that the arbitrator's award bound the two partners so submitting, but not the third, and that the award was also binding upon the other party to the submission. *Harrington v. Higham*, 15 Barb. (N. Y.) 524.

It sometimes happens, however, that the individual partners themselves, who make the submission, are not bound by the award, because, where the consideration for each to execute his own submission is the submission of all the others until all have joined in the agreement, the arbitrators have no authority. *Antram v. Chace*, 15 East 209; *Adams v. Bankart*, 1 C. M. & R. 681.

2. Russell on Awards (6th ed.) 20; Bac. Abr., Arb., C.; Com. Dig., Arb., D. 2; *Strangford v. Green*, 2 Mod. 228.

As a rule, a person who submits for others, as well as for himself, renders himself personally liable. Bac. Abr., Arb., C.; *Alsop v. Senior*, 2 Keb. 707, 718; *Shelf v. Bailey*, Com. Rep. 183; *Bacon v. Dubarry*, 1 Ld. Raym. 246, 1 Salk. 70, 12 Mod. 129; *Mudy v. Osam*, Litt. 30.

3. Consent of Partner Implied from Circumstances.—The consent of the other partner need not, however, be given in a formal way; it may be implied from circumstances. Russell on Arb. 20; *Mackay v. Bloodgood*, 9 Johns. (N. Y.) 285; *McBride v. Hagan*, 1 Wend. (N. Y.) 326; *Davis v. Berger*, 54 Mich. 652. But compare *St. Martin v. Thrasher*, 40 Vt. 460, where it was held that the mere presence of the partner at the signing of the award did not imply consent.

A joinder of partners in suing out a writ of error to review the judgment on an award against the firm has the effect of affirming the authority delegated to one partner to submit to arbitration. *Davis v. Berger*, 54 Mich. 652.

Consent must be given before the award is rendered. *Eastman v. Burleigh*, 2 N. H. 484; *Mackay v. Bloodgood*, 9 Johns. (N. Y.) 285.

4. Submission by Bankrupt Not Binding on His Estate.—Russell on Awards (6th ed.) 33; *Whitacre v. Pawlin*, 2 Vern. 229; *Ex p. Kemshead*, 1 Rose 149; *In re Ford*, 18 Nat. Bank Reg. 426.

5. Submission by Bankrupt Not Binding on Assignee.—*Marsh v. Wood*, 9 B. & C. 659, 17 E. C. L. 468; *Andrews v. Palmer*, 4 B. & Ald. 250, 6 E. C. L. 471; *Snook v. Hellyer*, 2 Chit. Rep. 43, 18 E. C. L. 43.

But if the assignees appear before the arbitrator and adopt the proceedings, they are bound by the award. *Dod v. Herring*, 3 Sim. 143, 1 Russ. & M. 153; *Ex p. Michie*, 1 Mont. D. & De Gex. 181, 9 L. J. Bank 28. See *Sutcliffe v. Brooke*, 9 Jur. 1112, 15 L. J. Exch. 118; *Casborne v. Barsham*, 6 Sim. 317.

6. Submission by Bankrupt may Bind Him to

submit are bound by the award; one cannot bind the others by a submission, except by special authority.¹

(7) *Persons Bound in Severalty*.—It will be assumed, where there are two or more parties on either side, that they have submitted severally, although this has not been expressly declared. In such a case a submission of all matters between the parties is the same as a submission of all matters between the parties, any, or either of them.² If the parties to a submission bind themselves severally, such as are able to contract will be bound by it, although it may be void or voidable as to others because of incapacity or defective execution.³

(8) *Parties to a Pending Suit—Nominal and Real Parties*.—If the parties to a pending cause enter into a submission to arbitration, all those who are of record parties to the suit must unite in the submission, whether they are really interested or nominal parties only.⁴

Sometimes Strangers to the Record are added as parties to the submission, and under some forms of submission such persons are treated as parties to the cause itself, and are bound by the award.⁵

Pay Costs.—*Milnes v. Robertson*, 24 L. J. C. P. 29.

1. **Submission in Case of Parties Jointly Interested.**—*Kyd on Awards* 42; *Eastman v. Burleigh*, 2 N. H. 484; *Smith v. Smith*, 4 Rand. (Va.) 95; *Boyd v. Magruder*, 2 Rob. (Va.) 761. See *Bac. Abr., Arb., C.*

But it has been held that where one of several parties to an action agrees to submit the matters involved, to arbitration, without the assent of the other parties whose interest may be affected, whether he does so by rule of court or otherwise, the submission is illegal and void. *Gregory v. Boston Safe Deposit, etc., Co.*, 36 Fed. Rep. 408.

And in *Fortune v. Killebrew*, 86 Tex. 172, *reversing* (Tex. Civ. App. 1893) 21 S. W. Rep. 986, it was held that where a testator divided his estate among his children, and portions thereof were set apart to devisees in partial satisfaction of their interests, and the devisees and legatees subsequently entered into an agreement with the executor, who had a claim against the estate, "to submit to arbitration all matters in dispute between them or either of them" and the executor, and to "determine the amount received by each legatee, and the amount that each is now entitled to out of the estate," if the submission was void as to any one of them, it was void as to all.

2. **Persons Bound in Severalty.**—*Kyd on Awards* 121; *Rolle Abr., Arb., D.* 5; *Carter v. Carter*, 1 Vern. 259; 1 Eq. Ca. Ab. 49, *cited in* *Chapman v. Dalton*, 1 Plowd. 289; *Baspole's Case*, 8 Coke 98a.

3. *Elliot v. Davis*, 2 B. & P. 338; *Hayes v. Hayes*, Cro. Car. 433; *Bean v. Newbury*, 1 Lev. 139; *Com. Dig., Arb., D.* 2; *Cutter v. Whittemore*, 10 Mass. 442; *Dickey v. Sleeper*, 13 Mass. 244; *Keith v. Gore*, 1 J. J. Marsh. (Ky.) 8; *Mudy v. Osam*, Litt. 30.

Where there were several claimants on One Side, and they all agreed to submit the matter to arbitration, but some only executed a bond to perform the award, it was held that the award would bind the others. *Wood v. Thomson*, M. 24 Car., Rol. Abr., Arb., F. 11.

Where there were several respondents to a Bill in Equity, some of whom appeared, filed

answers, and agreed to submit the matter to arbitration, it was held that they were bound by the award, although others did not appear, as they were aware of the nonconcurrence of those parties. *Smith v. Virgin*, 33 Me. 148.

In some cases a submission has been upheld between two parties who sign, although a third person named in the body of the instrument, and intended to be a party to it, did not sign. *Summerville v. Painter*, 44 Pa. St. 110.

But where the consideration for which each party enters into the submission is that all the parties shall join therein, it is not binding upon any until it is signed by all, although it refers all matters in difference between them, or any two of them. *Antram v. Chace*, 15 East 209.

4. **Submission by Parties to Pending Suit.**—*Owen v. Hurd*, 2 T. R. 643; *McCarthy v. Swan*, 145 Mass. 471; *Gregory v. Boston Safe Deposit, etc., Co.* 36 Fed. Rep. 411. But see *Keith v. Gore*, 1 J. J. Marsh. (Ky.) 8.

5. **Strangers to the Award.**—*Hawkins v. Benton*, 2 D. & L. 465, 8 Q. B. 479, 55 E. C. L. 479, 15 L. J. Q. B. 139; *Rogers v. Stanton*, 7 Taunt. 575; *Prosser v. Goringe*, 3 Taunt. 426; *Morgan v. Miller*, 6 Bing. N. C. 168, 37 E. C. L. 332; *Williams v. Lewis*, 7 El. & Bl. 929, 90 E. C. L. 929; *Stockley v. Shopland*, 26 L. T. N. S. 586; *Nickalls v. Warren*, 9 Jur. 10.

The Assent of Such a Person to the Proceedings, even when he has not been inserted as a party in the order of reference, will estop him from disputing his liability to abide by the award. *Guntton v. Nurse*, 5 Moore 259.

The Courts will Sometimes Enforce Compliance with the agreement on the part of such persons by the same methods as are used towards parties to the record. *Williams v. Lewis*, 7 El. & Bl. 929, 90 E. C. L. 929, 3 Jur. N. S. 1324.

Where there are only two parties to the original submission, a third is sometimes added subsequently, and the arbitration is proceeded with as if he had been one of the original parties. *Winter v. Munton*, 2 Moore 723, 4 E. C. L. 421.

Subsequent Consent to an Award has sometimes been a ground for the interference of

Where the parties really and those nominally interested are different, those who are really in interest should join in the submission.¹

(g) *Corporations Sole and Aggregate*.—Corporations sole² or aggregate³

equity to bind the assenting party to stand to it. *Evans v. Cogan*, 2 P. Wms. 450.

And where a contract is made on the footing of such an award, an action will lie on it at law. *Hill v. Levey*, 3 H. & N. 7, 702, 27 L. J. Exch. 259, 28 L. J. Exch. 80.

Where a Person Acquiesces in the Terms of an Award, he will be concluded by it, *Taylor v. Parry*, 1 M. & G. 604, 39 E. C. L. 569; or he will be bound in equity by an award on account of laches in bringing forward a claim, *Govett v. Richmond*, 7 Sim. 1.

Where Persons Who Were Not Parties to the Suit agreed in writing to the arbitration, it was held that they became thereby parties to the suit, and that the award would be binding upon them. *Shultz v. Lempert*, 55 Tex. 273.

1. *Thomas v. Leach*, 2 Mass. 152; *Paine v. Ball*, 3 Mass. 235.

Where there were several parties plaintiff in an ejectment suit, but only one of them was really in interest, a submission entered into by him was upheld. *Griggs v. Seeley*, 8 Ind. 264.

In *Thomas v. Leach*, 2 Mass. 152, it was held that an action on an administration, brought in the name of the probate judge, to whom the bond had been made in his official capacity, could not be referred, as the probate judge was a mere trustee of the administration bond for the next of kin and creditors, and was legally incompetent to submit their rights to reference or arbitration.

2. Submission by Corporation Sole.—It is stated that an award made on a submission entered into by a prior would bind his successor. *Rolle Abr., Arb.*, 268 A. 3, 2 H. 4, 4b.

But it has been held that an award made as to tithes upon a submission by a rector is not binding beyond the period of his own incumbency. *Atty.-Gen. v. Cholmley*, 2 Eden 304, Ambl. 510; *Prosser v. Goringe*, 3 Taunt. 426.

3. Submission by Corporation Aggregate.—*United States*.—*Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83.

Illinois.—*Shawneetown v. Baker*, 85 Ill. 563.

Indiana.—*Madison Ins. Co. v. Griffin*, 3 Ind. 277.

Maine.—*Fryeburg Canal v. Frye*, 5 Me. 38.

New York.—*Wood v. Auburn, etc., R. Co.*, 8 N. Y. 160; *Brady v. Brooklyn*, 1 Barb. (N. Y.) 584.

Wisconsin.—*Kane v. Fond du Lac*, 40 Wis. 495.

Canada.—*In re Arbitration between Township of Eldon and Ferguson*, 6 U. C. L. J. 207.

Awards against Eleemosynary Corporations have been enforced in equity. *Atty.-Gen. v. Clements, T. & R.* 58.

But in *England* equity will not allow a reference in regard to charity property unless it is consented to by the attorney-general. *Atty.-Gen. v. Fea*, 4 Madd. 274; *Atty.-Gen. v. Hewitt*, 9 Ves. Jr. 232; *Prior v. Hembrow*, 8 M. & W. 873. See *Atty.-Gen. v. Green*, 6 Ves.

452; *Atty.-Gen. v. Owen*, 10 Ves. Jr. 555; *Atty.-Gen. v. Backhouse*, 17 Ves. Jr. 283.

As to the Power of a Religious Corporation in New York to submit to arbitration a question in regard to real estate, see *Wyatt v. Benson*, 23 Barb. (N. Y.) 327.

Foreign Corporation—Injunction.—Two corporations organized under the laws of Great Britain entered into an agreement, which provided, in case of difference, for arbitrators to be appointed and to act in the state of New York, having the powers given to arbitrators under the English common-law procedure, their award to be made a rule of the Queen's Bench. In an action brought by one of said corporations against the other, and arbitrators appointed under the agreement, to restrain the prosecution of the arbitration, the special term denied the plaintiff's motion for a preliminary injunction, on the ground, as stated in the order, "that the court has no jurisdiction in this action." This was held error; as the plaintiff, although a foreign corporation, could invoke the jurisdiction of the courts, and the individual defendants were residents of the state. *Direct U. S. Cable Co. v. Dominion Tel. Co.*, 84 N. Y. 153.

The Power to Sue and be Sued, which belongs to a corporation, imports also the right to enter into an agreement to submit, as that is one of the means by which a dispute may be prosecuted to judgment. It is immaterial whether the power of reference is lodged in the president and directors or in the stockholders assembled in general meeting; for the entire corporation is represented in court by its counsel, and his acts in making a submission or in conducting a suit are presumed to be authorized by such corporation. *Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83.

Municipal Corporations.—A municipal corporation, unless restricted by its charter, has power to submit a question in regard to corporate debts or demands, to arbitration, and the common council, being the chief organ of the corporation, may bind it by such a submission, and may intrust the selection of the arbitrators to the city attorney. *Kane v. Fond du Lac*, 40 Wis. 495. See *Gibbs v. Holcomb*, 1 Wis. 23; *Buckland v. Conway*, 16 Mass. 396; and cases already cited.

In *Brady v. Brooklyn*, 1 Barb. (N. Y.) 584, it was held that there is generally a power to submit to arbitration where there is a capacity to contract and a liability to pay. It makes no difference that one of the parties is a corporation. A corporation may submit a matter in dispute to arbitration, by resolution or ordinance adopted at one of its meetings, and the submission need not be made under seal. See *Shelf v. Bailey*, 1 Com. Rep. 183; *Weed v. Ellis*, 3 Cai. (N. Y.) 253; *New York v. Butler*, 1 Barb. (N. Y.) 325.

One of the Earliest Decided Cases concerning the right of a municipality to submit the settlement of disputed questions to arbitration

may be parties to submissions to arbitration, with the same liability to perform the award that rests upon private persons; but the submission must be by an act of the corporate body.¹

is the case of the Magistrates of Edinburgh. After the occurrence of a great fire in Edinburgh it was regarded as an important object of public policy that all the new tenements to be erected on the site of the conflagration "should be of stone-work," and should be otherwise constructed with a due regard to the safety of the city against fire, as well as to its improved appearance. With this view, an amicable arrangement seems to have been made, in the form of a "submission by the whole neighbors of Edinburgh" to the magistrates and council, to which the privy council interposed an act of ratification, and under which powers were given to the arbiters to regulate as to the building of the new tenements. An attempt being made by one of the citizens to evade his obligations under the contract of submission, on the allegation of "enormous lesion or injustice," it was repelled by a decision, the report of which has handed down some notice of the transaction. The Magistrates of Edinburgh, 1 Suppt. 732, Feb. 12, 1675, reported in Gosford's Reports.

A Railway Lease was made by the trustees of a railway company and approved by the trustees of the city sinking fund, pursuant to statute. The lease contained the usual clause for the submission of disputes arising thereunder to arbitration. It was held that such provision was binding, not only on the parties thereto, but also on the city, which was the real owner of the leased property, as a city may make a valid and binding agreement to submit a disputed question to arbitration. *Cincinnati v. Cincinnati S. R. Co.*, 6 Ohio Cir. Ct. Rep. 247.

The Abutters on a Street in Boston entered into an agreement with a committee of the selectmen of said town for the widening of the street. They mutually promised to submit to the award of certain arbitrators concerning what each should pay or receive on account of the premises, according to the damage or benefit they should respectively receive. An action was sustained by the inhabitants of Boston, on the agreement, against one of the abutters for the sum he was awarded to pay, although the said widening had not been recorded, and the money was awarded to be paid to the other abutters and not to the inhabitants; and a part of it was to be paid to an abutter who was not a party to the agreement. *Boston v. Brazer*, 11 Mass. 447.

But it has also been held in *Massachusetts* that where a city enters into an agreement with the owners of land taken for a street, to submit the assessment of the damages and betterments to the decision of arbitrators, such agreement is *ultra vires* and void in the city, because a city cannot maintain an action to enforce an award made under such a submission. The court, by Morton, J., said: "It is not necessary to decide whether, in a case where a way is laid out under the Gen. Stat., c. 43, the city or town has the power to submit

to arbitration the question of the damages sustained by the landowner. In such a case the controversy or question is between the town and each landowner separately as to the damage he has sustained by the taking of his land; it concerns no one else, it may well be and often is settled by agreement, and it would seem that it might be referred to arbitrators as a convenient mode of settlement without affecting the rights of others or violating any principles of public policy. It was so held in *Boston v. Brazer*, 11 Mass. 447, under the laws as they then were. See *Everett v. Charlestown*, 12 Allen (Mass.) 93; *Campbell v. Upton*, 113 Mass. 67. But where a way is laid out under the betterment law, a different case is presented. Then it is the duty of the board of street commissioners or of aldermen in cities, and of selectmen in towns, to determine what real estate has received special benefit from the laying out, and to assess upon such estate a proportional share of the expense. This assessment is in the nature of a tax which must be laid proportionally upon all the estates which are specially benefited. In laying it, the said boards act not as agents of the city or town, but as public officers in a *quasi-judicial* character. They are not subject to the direction or control of the city or town. The city or town cannot, by any agreement, abridge or limit the rights of the board, or exonerate an owner of benefited land from the liability to be assessed." *Somerville v. Dickerman*, 127 Mass. 272. See *Boylston Market Assoc. v. Boston*, 113 Mass. 528; *Harvard College v. Board of Aldermen*, 104 Mass. 470; *Brimmer v. Boston*, 102 Mass. 19.

So a claim against a municipal corporation for damages arising from a change in the grade of the street cannot form the subject of arbitration under the statute. *Osborn v. Fall River*, 140 Mass. 508, 13 Am. & Eng. Corp. Cas. 534.

1. Bac. Abr., Arb., c. 21, Ed. IV. 13; Russell on Awards (6th ed.) 21.

In *Brady v. Brooklyn*, 1 Barb. (N. Y.) 584, it was held that a resolution or ordinance adopted at a meeting of the common council submitting a question to arbitration need not be under the corporate seal.

Counsel of the Corporation.—It has been questioned in *England* whether the attorney of a corporation required special authority under the corporate seal to empower him to submit a cause. A subsequent ratification of his acts under the corporate seal would be sufficient. *Ludlow v. Charlton*, E. T. 1845 Ex.; *Atty.-Gen. v. Clements*, T. & R. 58.

In the *United States* it has been held that a submission entered into by the counsel of a corporation would be presumed to be duly authorized. *Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83. See *Madison Ins. Co. v. Griffin*, 3 Ind. 277; *Wood v. Auburn*, etc., R. Co., 8 N. Y. 160; *Fryeburg Canal v. Frye*, 5 Me. 38.

(10) *Mortgagees*.—It has been held that where a mortgagor takes out a policy of insurance which is delivered subsequently to the mortgagee with an indorsement that the loss, if any, should be payable to him, and the policy provides for arbitration on the request of either party, the mortgagee is entitled to be a party to such arbitration, and that an arbitration by the mortgagor and the insurer without notice to him does not bind his rights.¹ However, there is a conflict of opinion on this question, for it has been held also that a mortgagee to whom, in the event of loss, insurance is made payable, as his interest may appear, but who is not entitled to the whole amount of the insurance money, need not be made a party or given notice of an appraisal made by arbitrators of the injury done to the property in which he is interested.²

b. PERSONS WITHOUT INTEREST IN SUBJECT-MATTER—(1) *Agents*—(a) **Where the Principal Alone is Bound**.—It may be stated as a general rule that when one person authorizes another on his behalf to submit a dispute between himself and a third party to arbitration, an award made under such a submission is binding on the principal alone.³

Ratification by Principal.—Although an agent may not be authorized to submit any of his principal's affairs to arbitration, yet if he does so, the principal may ratify such submission so as to make it binding upon himself, and such ratification may be implied from the circumstances.⁴

1. Rights of Mortgagees.—*Kentucky*.—Bergman *v.* Commercial Union Assur. Co., 13 Ky. L. Rep. 720.

Massachusetts.—Harrington *v.* Fitchburg Mut. F. Ins. Co., 124 Mass. 126.

New Hampshire.—Hall *v.* Philadelphia F. Assoc., 64 N. H. 405.

New York.—Hathaway *v.* Oriental Ins. Co., 134 N. Y. 409, 58 Hun (N. Y.) 602; Browning *v.* Home Ins. Co., 71 N. Y. 508, 27 Am. Rep. 86.

Rhode Island.—Brown *v.* Roger Williams Ins. Co., 75 R. I. 398.

See Alexander *v.* Cunningham, 111 Ill. 511; Adams *v.* New York Bowery F. Ins. Co., 85 Iowa 6; Hall *v.* Niagara F. Ins. Co., 93 Mich. 184.

Where the amount of a fire-insurance policy is expressly made payable to a mortgagee, he is not bound by an arbitration made between the insured and the company to which he has not been made a party. Georgia Home Ins. Co. *v.* Stein, 72 Miss. 943.

2. Rights of Mortgagees—Conflict of Authority.—In Chandos *v.* American F. Ins. Co., 84 Wis. 184, the court, by Orton, J., referring to the conflict of the opinion upon the question in issue said: "It follows that in all cases where the language of direction is that the insurance should be paid to the mortgagee, 'as her interest may appear,' the assured mortgagor remains the responsible party, or the party in interest to control the insurance and the adjustment of the loss. This is the distinction, as I understand it, which divides the authorities on the question."

* * * We must hold, therefore, that the assured had the right and power to enter into the appraisal or arbitration, according to the terms of the contract, without notice to the mortgagee and without his approval."

See further, Martin *v.* Franklin F. Ins. Co., 38 N. J. L. 140, 20 Am. Rep. 372; Winne *v.*

Niagara F. Ins. Co., 91 N. Y. 185; Thatch *v.* Metropole Ins. Co., 3 McCrary (U. S.) 387, 11 Fed. Rep. 29; Grosvenor *v.* Atlantic F. Ins. Co., 17 N. Y. 391; Perry *v.* Lorillard F. Ins. Co., 61 N. Y. 214, 19 Am. Rep. 272; Brunswick Sav. Inst. *v.* Commercial Union Ins. Co., 68 Me. 313, 28 Am. Rep. 56; Loring *v.* Manufacturers' Ins. Co., 8 Gray (Mass.) 28; Franklin Sav. Inst. *v.* Central Mut. F. Ins. Co., 119 Mass. 240; Smith *v.* Union Ins. Co., 120 Mass. 90; Fitchburg Sav. Bank *v.* Amazon Ins. Co., 125 Mass. 431; Nevins *v.* Rockingham Mut. F. Ins. Co., 25 N. H. 22; Blanchard *v.* Atlantic Mut. F. Ins. Co., 33 N. H. 9; Baldwin *v.* Phoenix Ins. Co., 60 N. H. 164. See Pupke *v.* Resolute F. Ins. Co., 17 Wis. 379, 84 Am. Dec. 754; Appleton Iron Co. *v.* British America F. Assur. Co., 46 Wis. 23; Hammel *v.* Queen L. Ins. Co., 50 Wis. 240.

3. Submission by Duly Authorized Agent—Principal Bound.—Russell on Awards (6th ed.) 23; Bac. Abr., Arb., C.; Com. Dig., Arb., D. 2; Cayhill *v.* Fitzgerald, 1 Wils. 28, 58. See also the title AGENCY, vol. 1, p. 1031.

Where it distinctly appears in the body of a parol agreement, signed by an agent in his own name without adding the name of his principal, that the principal is the contracting party, the agreement will be construed to be that of the principal and not of the agent. Detroit *v.* Jackson, 1 Dougl. (Mich.) 106.

4. Ratification by Principal.—Smith *v.* Morse, 9 Wall. (U. S.) 82; Perry *v.* Mulligan, 58 Ga. 479; Terre Haute, etc., R. Co. *v.* Hains, 126 Ind. 7, 46 Am. & Eng. R. Cas. 582; Fryburg Canal *v.* Frye, 5 Me. 38; Milliken *v.* Coombs, 1 Me. 343; Detroit *v.* Jackson, 1 Dougl. (Mich.) 106; Furber *v.* Chamberlain, 29 N. H. 405; Isaacs *v.* Beth Hamedash Soc., 1 Hilt. (N. Y.) 469; Diedrick *v.* Richley, 2 Hill (N. Y.) 271. See Hays *v.* Hays, 23 Wend. (N. Y.) 366; Troy Turnpike, etc., Co. *v.*

(b) **Where the Principal is Not Bound—Express Authority Necessary.**—The rule is that the authority of an agent must be express, otherwise the principal will not be bound by the award.¹

A General Agent without specified functions has no authority to submit a question to arbitration on behalf of his principal.²

(c) **Where the Agent is Personally Bound.**—The rule is that where a person submits to an award for another, without authority, he is bound by it himself.³

McChesney, 21 Wend. (N. Y.) 296; *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 501; *Faviell v. Eastern Counties R. Co.*, 2 Exch. 344.

Circumstances Amounting to Ratification.—So where, after submission by the agent, the principal attends by agent and attorney, and does not object to the proceedings, this will be a ratification of the agent's act. *Memphis, etc., R. Co. v. Scruggs*, 50 Miss. 284.

And where the principal, after the award had been rendered without his authority, took an assignment of the award to himself and then assigned it to a stranger, it was held that these were emphatic acts of ratification. *Lowenstein v. McIntosh*, 37 Barb. (N. Y.) 251.

In *Johnson v. Cochran*, 81 Ga. 39, 12 Am. St. Rep. 294, where a person's name was signed to a submission without his knowledge or consent, yet he was present at the hearing and gave evidence without making any objection, it was held that he was estopped from disputing the correctness of the award.

An agent submitted to arbitration, matters concerning some real estate which he supposed to belong to his principal. He afterwards learned that the property belonged to his principal's wife, and informed the other parties, proposing to alter the submission accordingly. The other party, however, refused, saying: "It is good enough as it is." The proceedings then continued with full knowledge of the wife, who did not object. This was held to be a ratification. *Smith v. Sweeney*, 35 N. Y. 291.

Principal Accepting Benefits.—A principal will be estopped from questioning the acts of his agent where he accepts any benefits from the award. *Furber v. Chamberlain*, 29 N. H. 405; *Perry v. Mulligan*, 58 Ga. 479.

Ratification must Be before Award.—In *Eastman v. Burleigh*, 2 N. H. 484, it was held that where a person enters into a submission in behalf of another, without authority, the want of authority cannot be cured by a ratification of the submission after an award in the principal's favor, so as to enable him to enforce it against the party against whom the award was made, but that the submission must be ratified before the award is made.

1. Express Authority of Agent.—*Bacon v. Dubarry*, 1 Ld. Raym. 246; *Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83; *Scarborough v. Reynolds*, 12 Ala. 252; *Huber v. Zimmerman*, 21 Ala. 488, 56 Am. Dec. 255; *Michigan Cent. R. Co. v. Gougar*, 55 Ill. 503; *Trout v. Emmons*, 29 Ill. 433, 81 Am. Dec. 326; *Eastman v. Burleigh*, 2 N. H. 484; *McPherson v. Cox*, 86 N. Y. 472; *Lowenstein v. McIntosh*, 37 Barb. (N. Y.) 251; *Cox v. Fay*, 54 Vt. 446.

Authority must be Strictly Pursued.—An

agent who has received express authority to submit the matters of his principal to arbitration must keep strictly to his authority. Authority to refer to A does not include the right to refer to B if A refuses to serve. *Cox v. Fay*, 54 Vt. 446.

Power to Submit Held Not Embraced by Authority Conferred.—Where a principal authorized his agent as follows: "If you can, honorably and fairly, settle with Reynolds for me out of court, do so; and, if not, let the court and jury settle," it was held that this did not authorize the agent to submit the matter in question to arbitrators. Nor will authority to exercise a reasonable discretion, or to submit to a reasonable sacrifice, confer on an agent the power to submit the question in dispute to arbitrators. *Scarborough v. Reynolds*, 12 Ala. 252.

But when Special Power is Conferred upon an Agent for such a purpose, he is authorized to submit to arbitration any dispute in which his principal may be interested. *Henley v. Sooper*, 8 B. & C. 16, 15 E. C. L. 147. See *Buckland v. Conway*, 16 Mass. 396; *Wilks v. Back*, 2 East 142; *Schoff v. Bloomfield*, 8 Vt. 472.

2. General Agent.—*Trout v. Emmons*, 29 Ill. 433, 81 Am. Dec. 326; *Lowenstein v. McIntosh*, 37 Barb. (N. Y.) 251.

A Factor cannot Bind His Principal by submitting to arbitration a claim for damages arising out of an alleged breach of an implied warranty of the quality of the thing sold. *Carnochan v. Gould*, 1 Bailey (S. Car.) 179, 19 Am. Dec. 668.

Nor can a Mere Broker or Commission Merchant submit his principal's matters to arbitration. *Ingraham v. Whitmore*, 75 Ill. 24.

3. When Agent Personally Bound.—*Russell on Awards* (6th ed.) 21; *Bac. Abr., Arb., C.*; *Alsop v. Senior*, 2 Keb. 707; *Bacon v. Dubarry*, 1 Ld. Raym. 246, 1 Salk. 70, *Skin. 679*, 12 Mod. 129; *Shelf v. Bailey*, *Com. Rep.* 183.

In *Smith v. Van Nostrand*, 5 Hill (N. Y.) 419, it was held that where a person binds himself and others to submit to an award without their authority, he is personally bound to perform the award.

In *Winsor v. Griggs*, 5 Cush. (Mass.) 210, it was held that where a person signs a submission to arbitration as agent, without disclosing the name of his principal, and without the name of the principal being known to the other party, such agent was personally bound by the submission. See *Thomson v. Davenport*, 9 B. & C. 78, 17 E. C. L. 335; *Stackpole v. Arnold*, 11 Mass. 27, 6 Am. Dec. 150.

Where a deed of arbitration was executed by the chairman of a certain board, simply

(d) **Extent and Sufficiency of Authority.**—No precise rule can be laid down as to the extent or sufficiency of an agent's authority; it must be gathered from the circumstances of each case.¹ Where the submission is required to be by specialty, the agent's authority ought to be under seal, in other cases it need not be under seal.²

under his personal signature of William English, the parties in whose favor the award was made sued English individually, and recovered a verdict. It was held on appeal that English was liable, and that the verdict was right. *English v. White*, 2 W. & W. L. Victoria 165 (Australia).

See *in pari materia* *Stone v. Wood*, 7 Cow. (N. Y.) 453, 17 Am. Dec. 529; *Spencer v. Field*, 10 Wend. (N. Y.) 87; *Pentz v. Stanton*, 10 Wend. (N. Y.) 271, 25 Am. Dec. 558.

1. **General Usage or a Rule of Court** may impliedly or directly confer upon an agent power to submit for his principal. 2 Pars. on Contr. 689; *Buckland v. Conway*, 16 Mass. 396.

An agent appointed by a town to compromise a claim against the town for damages was held authorized to submit the claim on behalf of the town. *Schoff v. Bloomfield*, 8 Vt. 472.

A Person Who Underwrites and Settles Losses for another, has implied authority from him to refer to arbitration a dispute about a loss. *Goodson v. Brooke*, 4 Campb. 163; *Hine v. Stephens*, 33 Conn. 497, 89 Am. Dec. 217.

Captain of Vessel—Salvage.—The captain of a ship, when unable to communicate with the owners, may submit a claim for salvage; but he must act in entire good faith, and the arbitrators be worthy of trust. *Houseman v. Schooner North Carolina*, 15 Pet. (U. S.) 40.

A Member of a Partnership gave his son power of attorney to act on his behalf in dissolving the partnership with power of substitution. It was held that this gave the son power to submit the accounts to arbitration. *Henley v. Soper*, 8 B. & C. 16, 15 E. C. L. 147. See *Wilks v. Back*, 2 East 142.

An Agent Appointed to Prosecute and Defend a Suit has, like an attorney, a power to submit the matter to arbitration by rule of court. *Buckland v. Conway*, 16 Mass. 396.

An Assignee of a Contract, with a Power of Attorney to take proceedings in the name of the assignees to enforce the contract, has power to submit questions arising thereunder to arbitration. *Hancock v. Reid*, 21 L. J. Q. B. 78.

An Assignee of Debts was also held entitled to submit matters in difference between his principal and one of their debtors. *Banfill v. Leigh*, 8 T. R. 571.

Consignees of Goods have been held authorized to submit questions concerning them. *Curtis v. Barclay*, 5 B. & C. 141, 11 E. C. L. 181.

An Agent Authorized to Submit may bind his principal by waiving an objection to an umpire chosen by lot, *Backhouse v. Taylor*, 20 L. J. Q. B. 233; or that the opposite party may produce his books before the arbitrator alone on a subsequent day, *Hamilton v. Rankin*, 3 De G. & S. 782.

Where an Agent is Authorized Expressly to submit a claim to arbitration, he is not for that reason empowered to ratify and confirm the award. *Bullitt v. Musgrave*, 3 Gill (Md.) 31.

Where an Agent is Authorized to Settle a Claim, no further authority being given him, it does not give him a right to submit that matter to arbitration, for a settlement is a personal trust. *Huber v. Zimmerman*, 21 Ala. 488, 56 Am. Dec. 255. See *Scarborough v. Reynolds*, 12 Ala. 252; *O'Regan v. Quebec, etc., Steamship Co.*, 19 New Bruns. 528.

The Power of Sale Given to a Factor does not authorize him to bind his principal by submitting to arbitration a claim for damages which has arisen from an alleged breach of an implied warranty of the quality of the thing sold. *Carnochan v. Gould*, 1 Bailey (S. Car.) 179, 19 Am. Dec. 668.

Agreement Signed by Next Friend.—An agreement to submit cannot be objected to on the ground that it was signed by the next friend of the complainant, and not by the complainant in person. *Wade v. Powell*, 31 Ga. 1.

Power of Substitution.—Where an agent was empowered to submit the question of ownership of property to a designated person as arbitrator, and such person refused to act, it was held that the agent had no authority of his own act to submit the matter to any other person. *Cox v. Fay*, 54 Vt. 446.

Appointment of Additional Arbitrator.—In *Security Live Stock Ins. Assoc. v. Briggs*, 22 Ill. App. 107, it was held that where full authority to submit a question to arbitration has been given to any one, he may agree that an additional arbitrator may be chosen, and that an award made by less than the full number of arbitrators shall be binding on the parties.

Louisiana — Public Board — Injunction.—In *New Orleans City, etc., R. Co. v. State Board of Arbitration*, 47 La. Ann. 874, it was held that an injunction to prevent the State Board of Agriculture from investigating a controversy between employer and employees will not be granted in advance of any decision by the board, on the ground that a sufficient application by an authorized agent has not been made to the board, and that an application by an employees' union is not shown to be authorized by the employees involved in the controversy.

2. **Agent's Authority under Seal.**—*Worrall v. Munn*, 5 N. Y. 229, 55 Am. Dec. 330; *Wood v. Auburn, etc., R. Co.*, 8 N. Y. 160.

But if the submission does not require a seal, although a seal be added, the agent's power to execute such submission need not be under seal. *Eastman v. Burleigh*, 2 N. H. 484. See *Wood v. Auburn, etc., R. Co.*, 8 N. Y. 160.

In *White v. Fox*, 29 Conn. 570, where a submission which was not required to be under seal by the statute was signed by an agent who had been appointed by instrument under seal,

(6) **Officers and Agents of Private Corporations.**—Officers of private corporations are agents whose power to submit corporate matters to arbitration depends upon the general authority conferred on them by the charter, by-laws, or votes of the corporation.¹

(2) **Attorneys—Matters Arising in the Cause.**—The rule is, that attorneys are empowered to submit to arbitration any matters arising in the cause.²

it was held that it was not necessary that the agent's appointment should be under seal.

Generally, it is not necessary that the agent of a corporation should be appointed by an instrument under the seal of the corporation. *Detroit v. Jackson*, 1 Dougl. (Mich.) 113. See *U. S. Bank v. Dandridge*, 12 Wheat. (U. S.) 64; *Roe v. Pierce*, 2 Campb. 96; *Yarborough v. Bank of England*, 16 East 6.

1. **Agents of Private Corporations.**—See *Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83; *U. S. Bank v. Dandridge*, 12 Wheat. (U. S.) 69; *Fryeburg v. Frye Canal*, 5 Mc. 38; *Memphis, etc., R. Co. v. Scruggs*, 50 Miss. 284; *Wood v. Auburn, etc., R. Co.*, 8 N. Y. 160.

As a general rule, the agent of a corporation, acting under a parol assignment, may submit to arbitration a question in which such corporation is interested. *Detroit v. Jackson*, 1 Dougl. (Mich.) 106.

In *Wood v. Auburn, etc., R. Co.*, 8 N. Y. 160, it was held that where certain agents of a railroad company had frequently, without express authority, submitted to arbitrators to determine the price of land purchased by the company, and the price awarded under such submission had been paid by the company, the latter was bound by the award of arbitrators to whom such agents had submitted the question of the price of the lands in this particular case.

Secretary of Corporation—Indiana.—Where an insurance company rejected the claim of the insured and proposed a reference to arbitration, which he accepted, and the board of directors entered upon the books of the company a request that the insured join the secretary of the company in choosing the arbitrators, and designated particular matters to be referred to them, and arbitrators were selected, and the secretary executed a bond as prescribed by the statute and signed the name and annexed the corporate seal of the company thereto, it was held that the submission intended was the statutory one provided by *Indiana Rev. Stat.* 1843, and that the secretary was empowered by the board to execute and annex the seal of the company to the bond, and that the submission so made was valid. *Madison Ins. Co. v. Griffin*, 3 Ind. 277.

Ratification.—Where the agents of a private corporation have entered into a submission without authority, such submission may be subsequently ratified by the acts of the corporation. *Isaacs v. Beth Hamedash Soc.*, 1 Hilt. (N. Y.) 469.

2. **Authority of Attorneys—United States.**—*Holker v. Parker*, 7 Cranch (U. S.) 436; *Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83.

Alabama.—*Beverly v. Stephens*, 17 Ala. 701.

California.—*Bates v. Vischer*, 2 Cal. 355. *Georgia.*—*Wade v. Powell*, 31 Ga. 1; *McElreath v. Middleton*, 89 Ga. 83.

Kentucky.—*Talbot v. McGee*, 4 T. B. Mon. (Ky.) 377.

Maryland.—*White v. Davidson*, 8 Md. 169, 63 Am. Dec. 699.

Massachusetts.—*Buckland v. Conway*, 16 Mass. 396; *Everett v. Charlestown*, 12 Allen (Mass.) 93.

Mississippi.—*Jenkins v. Gillespie*, 10 Smed. & M. (Miss.) 31, 48 Am. Dec. 732.

New Hampshire.—*Pike v. Emerson*, 5 N. H. 393, 22 Am. Dec. 468; *Brooks v. New Durham*, 55 N. H. 559. *Compare* *Alton v. Gilmanton*, 2 N. H. 520.

New York.—*Gorham v. Gale*, 7 Cow. (N. Y.) 744, 17 Am. Dec. 549. *Compare* *Tilton v. U. S. L. Ins. Co.*, 8 Daly (N. Y.) 84.

North Carolina.—*Morris v. Grier*, 76 N. Car. 410.

Pennsylvania.—*Stokely v. Robinson*, 34 Pa. St. 315; *Evars v. Kamphaus*, 59 Pa. St. 379; *Somers v. Balabrega*, 1 Dall. (Pa.) 164; *Williams v. Danziger*, 91 Pa. St. 232; *Cahill v. Benn*, 6 Binn. (Pa.) 99; *Coleman v. Grubb*, 23 Pa. St. 393; *Wilson v. Young*, 9 Pa. St. 101; *Bingham v. Guthrie*, 19 Pa. St. 418.

South Carolina.—*Smith v. Bossard*, 2 McCord Eq. (S. Car.) 406.

Wisconsin.—*Clark v. Randall*, 9 Wis. 135, 76 Am. Dec. 252.

Express Restriction upon Power of Attorney.—In *Haynes v. Wright*, 4 Hayw. (Tenn.) 64, it was held that an attorney employed to defend or prosecute cannot submit the matters in issue to arbitration, but there was an express restriction in that case upon the powers of the attorney.

Once a Submission has been Made by an Attorney, the courts are slow in going behind the record. *Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83.

A Client may Revoke a Submission entered into by his attorney, *Coleman v. Grubb*, 23 Pa. St. 393; *Wilson v. Young*, 9 Pa. St. 101; or apply to the court for relief, *Millar v. Criswell*, 3 Pa. St. 449; but a writ of error does not lie in such cases, *Sargeant v. Clark*, 108 Pa. St. 588; *Millar v. Criswell*, 3 Pa. St. 449.

Stipulation by Attorney against "Exception or Appeal."—Where a submission entered into by an attorney contained a stipulation that judgment should be entered on the award "without exception or appeal," the submission was upheld, as such words would not prevent the court from reviewing the award if the circumstances called for it. *Wilson v. Young*, 9 Pa. St. 101; *Bingham v. Guthrie*, 19 Pa. St. 418.

Extension of Time for Making Award.—An attorney may enter into an agreement to

But They Have No General Authority to submit their client's affairs to arbitration; their right to do so is limited to a *lis pendens* which they are employed to

extend the time for making the award. *Rex v. Hill*, 7 Price 636.

The Consent of All the Members of a Firm will be Presumed where their attorney appeared at the hearing, although only one member of the firm asked the arbitrator to act. *Adams v. Bankart*, 1 C. M. & R. 681.

Reference under Rule of Court.—In *Buckland v. Conway*, 16 Mass. 396, it was held that authority to prosecute or defend a suit implies authority to refer it to arbitration under a rule of court, as this is a legal mode of prosecuting or defending an action. See *Smith v. Bossard*, 2 McCord Eq. (S. Car.) 406; *Jones v. Horsey*, 4 Md. 306, 59 Am. Dec. 81; *Hutchins v. Johnson*, 12 Conn. 376, 30 Am. Dec. 622; *Henck v. Todhunter*, 7 Har. & J. (Md.) 275, 16 Am. Dec. 300; *Kent v. Ricards*, 3 Md. Ch. 392; *Loney v. Bayly*, 45 Md. 450.

Pennsylvania.—In Pennsylvania an attorney cannot submit matters of his client to arbitration when it would endanger the client's title to real estate; as where, by the award, land is taken instead of money. *Huston v. Mitchell*, 14 S. & R. (Pa.) 307, 16 Am. Dec. 506; *Pearson v. Morrison*, 2 S. & R. (Pa.) 20; *Naglee v. Ingersoll*, 7 Pa. St. 185.

An attorney-at-law may bind his client by an agreement, signed by him without an express warrant of attorney, to submit the matters in dispute in a pending action of ejectment (where the principal contention was one of boundary and not title) to arbitrators, whose decision shall be final, without right to writ of error. In such case, where, in pursuance of the submission, judgment was entered on the award, a writ of error taken to such judgment by the unsuccessful party will not lie. *Sargeant v. Clark*, 108 Pa. St. 588.

In *Wilson v. Young*, 9 Pa. St. 101, it was held that an attorney may refer his client's case to arbitration with an agreement that the arbitrator's award shall be final, and that such agreement will be binding upon his client.

The authority of attorneys in Pennsylvania is said to be more extensive than it is in other states. See *Lynch v. Com.*, 16 S. & R. (Pa.) 368, 16 Am. Dec. 582; *Wilson v. Young*, 9 Pa. St. 101; *Mussina v. Hertzog*, 5 Binn. (Pa.) 387; *Horton v. Stanley*, 1 Miles (Pa.) 418; *Babb v. Stromberg*, 14 Pa. St. 398; *Grier v. Bilger*, 13 Pa. St. 58.

The Attorney cannot Change the Terms of an Agreement to submit, which has been already entered into by his client. *Jenkins v. Gillespie*, 10 Smed. & M. (Miss.) 31, 48 Am. Dec. 732.

See Further, as to the Limitations to an Attorney's Authority to bind his principal, *Ex p. Holbrook*, 5 Cow. (N. Y.) 35; *Nolan v. Jackson*, 16 Ill. 272; *Filby v. Miller*, 25 Pa. St. 264; *Lewis v. Gamage*, 1 Pick. (Mass.) 347; *Simonton v. Barrell*, 21 Wend. (N. Y.) 362; *Terhune v. Colton*, 10 N. J. Eq. 21; *Howe v. Lawrence*, 22 N. J. L. 99; *Hubbart v. Phillips*, 13 M. & W. 702.

Where a Client Ratifies a Submission made by his attorney by appearing before the arbitrators and taking part in the hearing, he is

bound by such submission whether the attorney was authorized by him to enter into it or not. *Diedrick v. Richley*, 2 Hill (N. Y.) 271. See *Wharton v. King*, 1 M. & Rob. 96; *Matson v. Trower*, R. & M. 17, 21 E. C. L. 371; *Hays v. Hays*, 23 Wend. (N. Y.) 366.

Massachusetts—Jury Trial upon Question of Attorney's Authority.—A party to a submission under Massachusetts Pub. Stat., c. 188, purporting to be made by him by his attorney, is entitled, if the award is adverse, to a jury trial upon the question of the attorney's authority, and this right is not affected by the circumstance that his motion therefor embraces other issues, upon which he is not entitled to a jury trial. *Boyden v. Lamb*, 152 Mass. 416.

The Rule in England—Attorneys.—In England attorneys and solicitors have been looked upon by the courts as agents, clothed with peculiar powers to bind their clients, and submissions made by them in pending cases are upheld. *Russell on Awards* (6th ed.) 24, 25; *Latuch v. Pashevante*, 1 Salk. 86; *Bodington v. Harris*, 1 Bing. 187, 8 E. C. L. 464; *Buckle v. Roach*, 1 Chit. Rep. 193, 18 E. C. L. 64; *In re Jamieson and Binns*, 4 Ad. & El. 945, 31 E. C. L. 231; *Dowse v. Cox*, 3 Bing. 20, 11 E. C. L. 12; *Paull v. Paull*, 2 C. & M. 235; *Thomas v. Hewes*, 2 C. & M. 519; *Mole v. Smith*, 1 J. & W. 645; *In re Hobler*, 8 Beav. 101; *Faviell v. Eastern Counties R. Co.*, 2 Exch. 344; *Furnival v. Bogle*, 4 Russ. 142; *Banfill v. Leigh*, 8 T. R. 571.

Submission made by attorneys of all matters in difference between their clients and third parties have been upheld, *Dowse v. Cox*, 3 Bing. 20, 11 E. C. L. 12; and even where the clients swore that they distinctly directed their attorneys not to submit, the submission has been sustained, *Filmer v. Delber*, 3 Taunt. 486; *Smith v. Troup*, 7 C. B. 757, 62 E. C. L. 757. See *Thomas v. Hewes*, 2 C. & M. 519; *Arnold v. Poole*, 4 M. & G. 860, 43 E. C. L. 444; *Ludlow v. Charlton*, Ex. E. T. 1845; *Faviell v. Eastern Counties R. Co.*, 2 Exch. 344.

A submission made by the town agent of an attorney is binding on the client, *Griffiths v. Williams*, 1 T. R. 710; but an attorney's clerk cannot bind the attorney or his client by agreeing to the appointment of an umpire by lot, *In re Greenwood v. Titterington*, 9 Ad. & El. 699, 36 E. C. L. 247.

Attorneys for infants in chancery proceedings have no power to bind such infants by a submission to arbitration. *Biddell v. Dowse*, 6 B. & C. 255, 13 E. C. L. 164. See further, *R. v. J. J. Northampton*, Cald. 20.

Solicitors.—A distinction was drawn at one time between the power of a solicitor and of an attorney. It was argued that a solicitor could not bind his client to a submission by order of a court of equity without the client's consent, but this does not seem to hold good now. *Russell on Awards* (6th ed.) 27; *Bac. Abr., Arb., C.*; *Colwel v. Child*, Cas. in Chan. 86; *Furnival v. Bogle*, 4 Russ. 142. /

manage.¹ And even in a *lis pendens* the submission of an attorney must be by rule of court, and must appear of record.²

Submission must Be Formal One.—A submission made by an attorney on behalf of his client must be a formal one, whether it be by writing, parol, or by consenting to a rule of court; that an award has been signed by the attorneys of both parties which recites that there has been a submission, is not enough.³

When Attorney Personally Bound.—Where attorneys expressly bind themselves, like other agents, they are liable to perform the award;⁴ and when they submit without authority, they alone are liable.⁵

Counsel.—In England a submission by counsel is binding upon the client. See generally, *Mole v. Smith*, 1 J. & W. 645; *Colledge v. Horn*, 3 Bing. 119, 11 E. C. L. 59; *Reg. v. Helston*, 10 Mod. 202; *Elworthy v. Bird*, 1 Tam. 43; *Furnival v. Bogle*, 4 Russ. 142; *In re Hobler*, 8 Beav. 101; *Swinfen v. Swinfen*, 18 C. B. 485, 86 E. C. L. 485; *Swinfen v. Chelmsford*, 5 H. & N. 890; *Rumsey v. King*, 33 L. T. 728.

Scotland.—The rule is the same in Scotland. *Baillie v. Edinburgh Oil Gas Light Co.*, 3 Cl. & F. 639.

1. Authority Limited to Lis Pendens.—*Morse Arb. and Award* 16; *Billings Arb. and Award* 53; *Weeks Attys.-at-Law*, § 233; *Jenkins v. Gillespie*, 10 Smed. & M. (Miss.) 31, 48 Am. Dec. 732; *Scarborough v. Reynolds*, 12 Ala. 252; *Markley v. Amos*, 8 Rich. (S. Car.) 468; *McGinnis v. Curry*, 13 W. Va. 29.

In *Daniels v. New London*, 58 Conn. 156, it was held that an attorney who was employed in a case has no implied authority to enter into an agreement to submit the matter involved therein to arbitration, by a submission made *in pais* without further direction of the court or the knowledge of his client. Nor can an attorney by an *in pais* act make a material change in a submission which has been actually entered into, unless he is expressly authorized to do so. A change in a written submission by which the arbitrators' award is to be made final instead of being returned into court in order that judgment may be rendered upon it, is such a material change as the attorney cannot make, unless he is expressly authorized to do so.

In *McGinnis v. Curry*, 13 W. Va. 29, the court, by Green, P., said: "While I have found no case deciding that an attorney has a general authority to submit his client's controversies to arbitration, there are cases in which it has been decided that he does not possess such general authority."

In *Jenkins v. Gillespie*, 10 Smed. & M. (Miss.) 31, 48 Am. Dec. 732, it was held that an attorney who is employed to conduct a suit may submit the subject-matter in controversy in such suit to arbitration, because, by the implied assent of his client, he may do anything arising from his employment in the suit, of which the court may approve in the progress of the cause. But in order to enable him to submit a dispute to arbitration, there must be a cause actually pending which he is employed to manage. Where a submission is made under statute where no suit is pending, the matter is not necessarily placed in the hands of an attorney, and to make his submis-

sion binding he ought to have express authority in such case. Even if an attorney has general authority to submit a dispute to arbitration, whether a cause is pending or not, he cannot consent to a change in the terms of the submission already agreed upon by his client, such as will bind the latter, where it does not appear whether he was employed before or after the submission, or to what extent his authority went. See *Hutchins v. Johnson*, 12 Conn. 376, 30 Am. Dec. 622.

2. Submission must Be by Rule of Court and Appear of Record.—*Daniels v. New London*, 58 Conn. 156; *Mitchell v. Harris*, 2 Ves. Jr. 137; *Millar v. Criswell*, 3 Pa. St. 449; *Bates v. Vischer*, 2 Cal. 355; *Stokely v. Robinson*, 34 Pa. St. 315; *Evars v. Kamphaus*, 59 Pa. St. 379; *Jenkins v. Gillespie*, 10 Smed. & M. (Miss.) 31, 48 Am. Dec. 732.

In *Markley v. Amos*, 8 Rich. (S. Car.) 468, it was said that the authorities showing that an attorney had power to submit a pending cause to arbitration by rule of court, "affords a fair inference that he cannot submit in any other way."

3. Formal Submission Necessary.—*Stokely v. Robinson*, 34 Pa. St. 315.

An Oral Agreement Made in Open Court and entered at the time by the clerk, has been held to constitute a sufficient submission. *Millar v. Criswell*, 3 Pa. St. 449; *Stokely v. Robinson*, 34 Pa. St. 315.

In *German-American Ins. Co. v. Buckstaff*, 38 Neb. 135, it was held that an oral agreement to submit a suit to arbitration, made by an attorney, was invalid.

But in *Faggard v. Williamson*, 4 Tex. Civ. App. 337, such an agreement was sustained. See *Northwestern Guaranty Loan Co. v. Channell*, 53 Minn. 269; *Sohns v. Sloteman*, 85 Wis. 113; *Greiss v. State Invest., etc., Co.*, 98 Cal. 241.

Where an Office Judgment was Entered and Confirmed against the defendant by default in an action of assumpsit, and a writ of inquiry of damages was awarded and authority that "the parties come by their attorneys," without setting aside the judgment or writ of inquiry, and submit the matters in dispute to arbitration, and such submission was entered on the record, it was held to be good and binding upon the parties thereto. *Sutton v. Dickinson*, 9 Leigh (Va.) 142.

4. Attorney Binding Himself Expressly.—*Com. Dig., Arb.*, D. 2; *Iveson v. Covington*, 1 B. & C. 160, 8 E. C. L. 69; *Cayhill v. Fitzgerald*, 1 Wils. 28, 58; *Russell on Awards* (6th ed.) 27.

5. Attorney Acting without Authority.—*Bac.*

Corporations, like Private Persons, are bound by submissions entered into by their attorneys, nor is it necessary that the attorney should be specially empowered by instrument under seal.¹

(3) *Executors and Administrators*—General Rule.—An executor or administrator may, in his official capacity, submit to arbitration demands for or against the estate of the deceased, or he may be joined as a party.²

After Settlement of Estate.—But he cannot make a submission without the consent and against the interests of the parties interested, after the estate is in fact settled.³

Abr., Arb., C.; *Bacon v. Dubarry*, 1 Salk. 70, 1 Ld. Raym. 246. See Anonymous, 6 Mod. 16; *Wade v. Stanley*, 1 J. & W. 654; *Russell on Awards* (6th ed.) 27.

1. **Attorneys of Corporations.**—*Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83; *Faviell v. Eastern Counties R. Co.*, 2 Exch. 344; *Ludlow v. Charlton*, Ex. E. T. 1845.

Attorneys of Municipal Corporations.—Where a city attorney, after praying for an appeal from a judgment against the city, agreed with counsel for the plaintiff to submit the question of the liability of the city to the arbitrator and decision of an arbitrator, if the city council, after the lapse of several months, made no objection to the agreement to arbitrate, and afterwards availed of the decision of the referee by bringing suit to have his decision carried into effect, it was held that the other party could not avoid the effect of the award on the ground of want of authority on the part of the city attorney to bind the city by his agreement. *Connett v. Chicago*, 114 Ill. 233.

The authority to prosecute or defend a suit implies a power to refer it by rule of court, that being a legal mode of prosecuting or defending. And when a municipal corporation appointed agents to prosecute an action, and the agents thus appointed employed an attorney, by whose assent the submission was made, it was held that it was binding upon the municipality. *Buckland v. Conway*, 16 Mass. 396.

2. *United States.*—*Strodes v. Patton*, 1 Brock. (U. S.) 228.

Alabama.—*Jones v. Deyer*, 16 Ala. 221; *Woolfork v. Sullivan*, 23 Ala. 548, 58 Am. Dec. 305; *Jones v. Blalock*, 31 Ala. 180.

Connecticut.—*Netleton v. Buckingham*, 1 Root (Conn.) 149; *Alling v. Munson*, 2 Conn. 691.

Georgia.—*Merchants Bank v. Taylor*, 21 Ga. 334.

Kentucky.—*Overly v. Overly*, 1 Metc. (Ky.) 117; *Logsdon v. Roberts*, 3 T. B. Mon. (Ky.) 256.

Maine.—*Eaton v. Cole*, 10 Me. 137; *Weston v. Stuart*, 11 Me. 326; *Kendall v. Bates*, 35 Me. 357.

Massachusetts.—*Chadbourn v. Chadborn*, 9 Allen (Mass.) 173; *Coffin v. Cottle*, 4 Pick. (Mass.) 454; *Bean v. Farnam*, 6 Pick. (Mass.) 269; *Whitney v. Cook*, 5 Mass. 139; *Dickey v. Sleeper*, 13 Mass. 244.

New York.—*Russell v. Lane*, 1 Barb. (N. Y.) 519; *Wood v. Tunnichliff*, 74 N. Y. 38.

South Carolina.—*Swicard v. Wilson*, 2 Mill Const. (S. Car.) 218.

Texas.—*Yarborough v. Leggett*, 14 Tex. 677.

Virginia.—*Wheatley v. Martin*, 6 Leigh (Va.) 62.

Canada.—*Koella v. McKenzie*, 15 Grant's Ch. (U. C.) 331; *Reid v. Reid*, 16 U. C. C. P. 247.

But compare *Reitzell v. Miller*, 25 Ill. 67; *Clark v. Hogle*, 52 Ill. 427; *Lattier v. Rachal*, 12 La. Ann. 695.

The Rule is that the Award will Bind the Estate, but if there were items not known to the executor which were not included in the award, these may be subsequently set up by the executor or by the creditors, although an award of a general balance has been made by the arbitrators. *Strodes v. Patton*, 1 Brock. (U. S.) 228.

It will Also Bind the Legatees and Distributees.—*Wheatley v. Martin*, 6 Leigh (Va.) 62.

Description.—Where one of several obligors in an arbitration bond executed the bond without adding to his signature the office of administrator, and the award was that certain moneys should be paid to him as administrator, it was held to be good. *Dickey v. Sleeper*, 13 Mass. 244.

Acquiescence.—Even where the administrator's authority is denied, such want of authority will be cured by the acquiescence of the heirs and creditors who are the only persons interested in opposing it. *Lattier v. Rachal*, 12 La. Ann. 695.

3. **Consent of Parties in Interest.**—*Crum v. Moore*, 14 N. J. Eq. 436, 82 Am. Dec. 262. See *Legh v. Legh*, 1 B. & P. 447; *Winch v. Keeley*, 1 T. R. 619; *Henry v. Milham*, 13 N. J. L. 266; *Johnson v. Bloodgood*, 1 Johns. Cas. (N. Y.) 58, 1 Am. Dec. 93; *Wardell v. Eden*, 2 Johns. Cas. (N. Y.) 121; *Teman v. Leland*, 6 Hill (N. Y.) 237; *Littlefield v. Storey*, 3 Johns. (N. Y.) 425.

A Deputy Sheriff, to whom the administration of the estate of a deceased person has been committed, cannot submit to arbitration a suit to which the deceased was a party, and which is revived in the name of the sheriff as administrator. *Thompson v. Thompson*, 6 Munf. (Va.) 514.

An Administrator will be Enjoined from submitting to arbitration a claim of an heir to an estate without the consent of the other heir. *Crum v. Moore*, 14 N. J. Eq. 436, 82 Am. Dec. 262.

An Administrator with the Will Annexed, as the allowance of claims against the estate should depend on his own judgment, has no power to submit to arbitration an attorney's claim for services rendered under a contract

Award for Amount Less than could have been Recovered by Suit.—Where the administrator or executor enters into a submission on account of the estate, and the award is for a less sum than would have been recoverable at law, he will be liable for the difference.¹

As Admission of Assets.—Entering into a submission has been held to be an admission of assets, and where the award was for a stated sum and the assets were insufficient, the executor or administrator has been held liable,² but it is doubtful whether this is now the law.³

Realty.—An administrator having no control over the real estate of the deceased cannot make a valid submission in regard to it, unless the proceeding is joined in or ratified by the heir.⁴

(4) **Guardians and Parents.**—A Guardian may Enter into a Submission on behalf of his infant ward, and such submission will be binding on the ward and on himself; and the performance of the award will estop the ward from suing for the same cause of action after coming of age.⁵

with the executor. The award of the arbitrators, under such a submission, does not bind the estate. *Callaghan v. Grenet*, 66 Tex. 236.

1. Award for Smaller Sum than Recoverable at Law.—Russell on Awards (6th ed.) 29; Bac. Abr., Arb., C.; Com. Dig., Admr. 11, Assets C.; *Yard v. Eland*, 1 Ld. Raym. 368; *Bean v. Farnam*, 6 Pick. (Mass.) 269; *Wheatley v. Martin*, 6 Leigh (Va.) 62; *Strodes v. Paton*, 1 Brock. (U.S.) 228; *Yarborough v. Leggett*, 14 Tex. 677; *Crum v. Moore*, 14 N. J. Eq. 436, 82 Am. Dec. 262.

At the common law, an executor or an administrator submitted a claim to arbitration at his peril, the award being binding on himself as well as on the estate. When, however, he enters into such a submission under a statute it is doubtful whether he would be held liable where there was no culpable error on his own part. In *Kentucky* it has been expressly decided that an executor or administrator who acts fairly and prudently on entering into a submission under the Kentucky statute, incurs no personal liability in such a case. *Overly v. Overly*, 1 Metc. (Ky.) 117. See *Yarborough v. Leggett*, 14 Tex. 677.

2. Submission as Admission of Assets.—Former Rule.—*Barry v. Rush*, 1 T. R. 691; *Robson v. —*, 2 Rose 50; *Riddell v. Sutton*, 5 Bing. 200, 15 E. C. L. 416; *Overly v. Overly*, 1 Metc. (Ky.) 117; *Tallman v. Tallman*, 5 Cush. (Mass.) 325; *Konigmacher v. Kimmel*, 1 P. & W. (Pa.) 207, 21 Am. Dec. 374.

It was held later that a submission by an executor was not exactly an admission of assets, but a submission of the question as to whether there were any assets or not. *Worthington v. Barlow*, 7 T. R. 449.

In *Pearson v. Henry*, 5 T. R. 6, where the award was that a certain sum was due by the intestate's estate without saying by whom it was to be paid, the administrator was held not to be personally liable, and the court, by Lord Kenyon, held that a submission to arbitration was not of itself an admission of assets. See *Love v. Honeybourne*, 4 D. & R. 814, 16 E. C. L. 222; *Joseph v. Webster*, 1 Russ. & M. 496; *Spivy v. Webster*, 2 Dowl. 46.

3. Submission as Admission of Assets.—Present Rule.—*McKeen v. Oliphant*, 18 N. J. L. 442; *Wood v. Tunnicliff*, 74 N. Y. 46; *Sumner v.*

Williams, 8 Mass. 162, 5 Am. Dec. 83; *Ferrin v. Myrick*, 41 N. Y. 315.

Where an executor submitted a matter to arbitration, it was formerly looked upon as an admission of assets, but now it is considered merely a method of ascertaining facts upon which the parties cannot agree. *Konigmacher v. Kimmell*, 1 P. & W. (Pa.) 207, 21 Am. Dec. 374.

Where an administrator or executor is described as such in the body of the submission, he will not be personally liable because he signs it in his own name only, without adding his official character. *Dickey v. Sleeper*, 13 Mass. 244; *Chadbourn v. Chadbourn*, 9 Allen (Mass.) 173; *Bennett v. Pierce*, 28 Conn. 315. See further, *Whitney v. Cook*, 5 Mass. 139.

In *Hutchins v. Johnson*, 12 Conn. 376, 30 Am. Dec. 622, it was held that where a statute empowered an executor to enter into a submission with any "creditor or debtor" of the estate, it did not entitle him to enter into an agreement with the widow, because, as such, she was neither a creditor nor a debtor.

In a case in *New Jersey*, where the administrator in words bound himself and his heirs, he was nevertheless held not to be personally liable, as the court held that the object of the suit was to determine whether or not the deceased's estate owed anything or not. *McKeen v. Oliphant*, 18 N. J. L. 442. But see *Tallman v. Tallman*, 5 Cush. (Mass.) 325, where the contrary was held. See cases cited in note immediately preceding.

Mistake—Equity.—Equity will set aside an award made under a submission agreed to by an administrator in the mistaken belief that his intestate had been served with process. *Bright v. Ford*, 11 Heisk. (Tenn.) 252.

4. Submission in Regard to Real Estate.—As an administrator's authority does not extend to the realty, except in so far as may be necessary for the purposes of administration, he cannot enter into a valid submission in a real action commenced against his intestate in his lifetime before the heir has appeared or been notified. An award made in favor of the plaintiff under such a submission is altogether void. *Bridgham v. Prince*, 33 Me. 176.

5. Submission by Guardian.—*Roberts v. Newbold*, Comb. 318; *Strong v. Beroujon*, 18

But a Guardian Ad Litem cannot make a valid submission.¹

Guardian Adversely Interested or without Power to Comply with Award.—And the same is true in case of a guardian whose interests are adverse to his wards,² or who cannot comply with the award.³

A Parent may Enter into a Submission on account of an injury done his minor child.⁴

And Either a Guardian or Parent may bind himself that a ward or minor child shall perform an award.⁵

(5) *Committees of Lunatics.*—In the *United States* the committee of a lunatic may bind him by submitting his interests to arbitration;⁶ but in *England* it cannot do so without the consent of the court of chancery.⁷

(6) *Assignees of Bankrupts.*—Assignees of bankrupts may enter into a submission so as to bind their principals, like executors and administrators,⁸ and, like them, they will be held personally liable by the submission, unless they make it clear that it is not an admission of assets on their part.⁹

Ala. 168; Beebe v. Trafford, Kirby (Conn.) 215; Weston v. Stuart, 11 Me. 326; Bean v. Farnam, 6 Pick. (Mass.) 269; Goleman v. Turner, 14 Smed. & M. (Miss.) 118; McComb v. Turner, 14 Smed. & M. (Miss.) 119; Weed v. Ellis, 3 Cai. (N. Y.) 253.

In Goleman v. Turner, 14 Smed. & M. (Miss.) 118, the court said: "It was formerly much doubted whether a guardian could even bind himself by submitting for his ward. The point is now settled that although the infant cannot submit, the guardian may, and thus bind himself. Then if the submission be mutually binding on the parties who enter into it, it would seem that the award should be good." See Kyd on Awards 36, 39; Watson on Arb. 41; Weed v. Ellis, 3 Cai. (N. Y.) 253.

The Submission should be Made in the Ward's Name.—Hutchins v. Johnson, 12 Conn. 376, 30 Am. Dec. 622.

Rights of Ward.—In Hume v. Hume, 3 Pa. St. 144, where a dispute in regard to an obscure will was submitted to arbitration by a family arrangement, and a fair and just award was made, it was held that such submission, if made by a guardian, was for the benefit of his ward, and valid, or, at any rate, that the infant could only avoid it upon coming of age.

Georgia.—By Georgia Code, § 2884, guardians are authorized to submit to arbitration disputes in which the interests of their wards are at issue, and the award under such submission becomes binding on the wards, whether ratified by them when *sui juris* or not. Jones v. Bond, 76 Ga. 517.

A Guardian by Leave of Court may Enter into a Submission.—Allan v. O'Neill, 2 Ch. Chamb. (Ont.) 22; Secord v. Costello, 17 Grant's Ch. (U. C.) 328.

1. Guardians Ad Litem.—A guardian *ad litem* has no power except to defend the suit in which he is appointed, under the direction of the court which appoints him, and he cannot, for that reason, transfer the cause to another tribunal by entering into a submission to arbitration. He must conduct the suit under the direction of the court. Fort v. Battle, 13 Smed. & M. (Miss.) 133; Hannum v. Wallace, 9 Humph. (Tenn.) 129. See Knickerbocker v. De Freest, 2 Paige (N. Y.) 304.

2. Fortune v. Killebrew, 86 Tex. 172. It

was held where a guardian acted both individually and as guardian in making a submission in a suit between him and his wards, and the wards were not represented by a guardian *ad litem* or next friend, that the attitude of the guardian towards them was inconsistent, and the award was not admissible in evidence against them. Poullain v. Poullain, 79 Ga. 11.

3. Weston v. Stuart, 11 Me. 326.

4. Submission by Parents.—Beebe v. Trafford, Kirby (Conn.) 215. In this case it was held that the award was not vitiated because the damages awarded the child for the injury done him were blended with other damages belonging wholly to the parent. See Weed v. Ellis, 3 Cai. (N. Y.) 253.

Where Interests Are Adverse.—In Fortune v. Killebrew, 86 Tex. 172, it was held that a parent who claimed a tract of land in his own right could not submit to arbitration the claims of his minor children to the same land, as their interest was adverse to his.

5. Gill v. Russell, Freem. 62; Roberts v. Newbold, Comb. 318; Bowyer v. Blorksidge, 3 Lev. 17. But if, by such a submission and the award made thereunder, the infant child or ward is required to do something which he is in law incapable of doing, then the award will be void. Knight v. Stone, Sir W. Jones 164, Latch 207, Noy 93.

6. Submission by Committee of Lunatic.—Hutchins v. Johnson, 12 Conn. 376, 30 Am. Dec. 622; Weston v. Stuart, 11 Me. 326. See Cameron v. Pottinger, 3 Bibb (Ky.) 11.

7. Drury v. Fitch, Hilt. 16; Dane v. Kirkwall, 8 C. & P. 679, 34 E. C. L. 581; Com. Dig., tit. Idiot, D. 7.

The court will refer the matter to the master to determine whether it is in the lunatic's interest or not. Russell on Awards (6th ed.) 32; *In re Baker*, Shelford on Lunatics 204.

Wife of Lunatic.—Where there is no committee, it has been held that a wife may sue for debts in the lunatic's name, but this has not been extended to empower her to submit his interests to arbitration. Rock v. Slade, 7 D. P. C. 22.

8. Submission by Assignee of Bankrupt.—Morse on Arb. and Award 30; Kyd Awards 41; Watts Arb. 48.

9. When Personally Liable.—Russell on

(7) *Trustees*.—Trustees may submit trust matters to arbitration, but it has been held that they do not make themselves personally liable by doing so.¹ However, as their position is similar to that of executors, their liability would more properly depend upon the terms of the submission.²

(8) *Public Officers*.—It has been held in *England* that a public officer does not render himself personally liable by submitting to arbitration a matter affecting the interests of a public company.³ But the extent to which public officers are empowered *virtute officii* to submit questions to arbitration so as to bind the public interest is not clear.⁴

Awards (6th ed.) 33; *Robson v. —*, 2 Rose 50. *In re Wansborough v. Dyer*, 2 Ch. 40; *Davies v. Ridge*, 3 Esp. 101.

In *England* there are special statutory provisions in regard to such submissions. See 32 & 33 Vict., c. 71, § 27; 12 & 13 Vict., c. 108, § 153; *Exp. Wyld*, 30 L. J. Bank. 10; 2 De G. F. & J. 642; *Jones v. Yates*, 3 Y. & J. 373; *Piercy v. Roberts*, 1 Myl. & K. 4; *Nerot v. Wallace*, 3 T. R. 17; *Exp. Whitchurch*, 1 Atk. 91; *Bannatyne v. Leader*, 3 Myl. & C. 379.

1. *Submission by Trustees*.—*Davies v. Ridge*, 3 Esp. 101; *Bristow v. Binns*, 3 D. & R. 184, 16 E. C. L. 165.

Boundary.—The legal title to land being vested in trustees, they are competent to submit questions of disputed boundary to arbitration, and the arbitrator's award, when made, will be binding upon the *cestui que trust*. *Brower v. Osterhout*, 7 W. & S. (Pa.) 344.

Trustees of a Society.—In *Isaacs v. Beth Hamedash Soc.*, 1 Hilt. (N. Y.) 469, it was held that a submission and all proceedings before an award will be binding upon a society where such proceedings are sanctioned by the presence and participation of all trustees of the society, although the submission was signed by part of them only.

Injunction.—Trustees will be enjoined in equity from submitting to arbitration, without the consent of the *cestuis que trustent*, matters in which the *cestuis que trustent* are alone interested. *Crum v. Moore*, 14 N. J. Eq. 436, 82 Am. Dec. 262.

Cestui Que Trust.—Where the plaintiff in an action had made a lease to one M., and M. assigned the lease to the defendant as trustee for one F., and at the expiration of the term, which was renewable, arbitration bonds were entered into by F. and the plaintiff, and the defendant appeared and acted for F. at the arbitration, and the arbitrators directed a renewal of the lease at an advanced rent, and that the lessor should pay a certain sum for improvements; and the lessor elected to renew, and so notified the lessee, who refused to accept the lease at the new rent, and the lessor then brought an ejectment; it was held that the defendant was not bound by the award, as the submission was made only by his *cestui que trust*. *McDonell v. Boulton*, 17 U. C. Q. B. 14.

2. *Russell on Awards* (6th ed.) 31.

Joint Liability.—Where several trustees, who have received moneys belonging to the plaintiff at different times, enter into an agreement to refer the matter to arbitration, stipulating "that no advantage shall be taken as to the form of suit or the liabilities of the par-

ties," it was held that they became jointly responsible in the action, and that an award made against them jointly was good. *Gratz v. Phillips*, 14 S. & R. (Pa.) 144.

3. *Corpe v. Glyn*, 3 B. & Ad. 801, 23 E. C. L. 188.

4. *Officers of the United States*.—The United States had machinery in operation, carried by water, on land which had been sold to them and over which jurisdiction had been ceded to them by the State of Massachusetts. A. owned mills above and below them on the same stream, and the dams of each party flowed back so as to obstruct the other. A submission of the matters in dispute was entered into by A., on the one part, and by the district attorney, authorized by the solicitor of the Treasury or War Department, on the other part, but without any authority from Congress; and an award was made thereon, prescribing the height of the dam. The United States afterwards brought an action of trespass against A. for flowing their land. He pleaded a special bar of the award, alleging that he had complied with its terms. On general demurrer, it was held that the special plea could not be sustained. It was held also that no officer of the United States has authority to enter into a submission in their behalf which shall be binding on them, unless the power is given by special act of Congress. The reason for the decision is stated to be that as the whole judicial power of the constitution is vested in the Supreme Court, and in such inferior courts as Congress may establish, no officer of the government can confer judicial powers upon any other tribunal. *U. S. v. Ames*, 1 Woodb. & M. (U. S.) 76. See also *Smith v. Raleigh*, 3 Am. & Eng. Corp. Cas. 615.

Submission by a State.—A state may drop its sovereignty and its exemption from suits, and by a legislative act submit claims against it to arbitration. And where it does consent to arbitration, the agreement is necessarily implied that the award to be made is to be legal, and, if it is not, that either party shall have the right to show its illegality by appropriate proceedings. *State v. Ward*, 9 Heisk. (Tenn.) 100.

Governor in Council in Canada.—It has been held in Canada that the Governor in Council may enter into a binding submission. *Commissioners of Public Works v. Daly*, 6 U. C. Q. B. 33.

Selectmen.—Selectmen and common councils have, as a rule, power to submit to arbitration matters relating to the town which they represent. It depends, however, largely

II. THE ARBITRATOR—1. Defined.—An arbitrator is a person selected by the mutual consent of the parties to determine the matters in controversy between

on the powers conferred upon them by statute or town resolutions. *Dix v. Dummerston*, 19 Vt. 262; *Boston v. Brazer*, 11 Mass. 447; *Brady v. Brooklyn*, 1 Barb. (N. Y.) 584; *Hollister v. Pawlet*, 43 Vt. 425; *Hine v. Stephens*, 33 Conn. 504, 89 Am. Dec. 217. Compare *Griswold v. North Stonington*, 5 Conn. 367; *Buckland v. Conway*, 16 Mass. 396; *Detroit v. Jackson*, 1 Dougl. (Mich.) 106.

But a submission cannot be made by a selectman from each of three towns respectively. Authority to arbitrate can proceed only from the board of selectmen. Where one of the selectmen entered into an agreement to submit a case to arbitration, without authority from the board, it was held that it was not binding on the town. *Haddam v. East Lyme*, 54 Conn. 34.

Where one has submitted to arbitration his claim against a town, and has appeared before and been fully heard by the arbitrators, he cannot, after an adverse decision, dispute the authority of the selectmen of the town to enter into the submission on its behalf. *Campbell v. Upton*, 113 Mass. 67.

In *Vermont*, where a town at an annual meeting appointed an agent to compromise a disputed claim for damages on account of a road laid across the plaintiff's land by the selectmen, and such agent referred to arbitrators the question of the amount to be paid, it was held that the town was bound by the award. *Schoff v. Bloomfield*, 8 Vt. 472. This was the case of an agent especially appointed to compromise a claim for damages, and the question was whether the power to submit to arbitration was within the scope of his authority.

Connecticut Gen. Stat., § 2706, provides that if the selectmen and one interested in the laying out of a public highway cannot agree as to the damages, etc., the selectmen shall apply to the judge of the superior court, who will appoint a committee to decide upon the matter in dispute. But this provision does not preclude the selectmen and person claiming damages from agreeing to submit the question of damages to arbitration. *Mallory v. Huntington*, 64 Conn. 88.

Commissioners of Highways.—Where the law imposes a personal duty upon an officer in relation to a matter of public interest, he cannot delegate it to others, and therefore such officer cannot submit such matters to arbitration. So where commissioners of highways are unable to agree with the owner of land over which a highway is sought to be laid out, as to the damages to be paid him, they have no authority to submit the question of such damages to arbitration and thus bind their town. *Mann v. Richardson*, 66 Ill. 481.

Boards of Supervisors.—A board of supervisors has the right to submit questions arising within its jurisdiction to arbitration. *People v. Oneida County*, 24 Hun (N. Y.) 413.

School Districts.—A school district may submit differences arising between it and its treasurer, to arbitration. *Walnut Dist. Tp. v. Rankin*, 70 Iowa 65.

Overseers of the Poor.—In *Maine* it has been held that the overseers of the poor of a town have not the power, *virtute officii*, to submit a claim on behalf of a pauper to arbitration. The plaintiff, a woman of feeble understanding, who had lived in the family of the defendant as a servant, afterwards became chargeable to the town as a pauper. The overseers of the poor made a demand against the defendant for the balance claimed as her wages to be applied in her support. This demand the defendant and overseers jointly submitted to the determination of certain referees, who awarded a balance due from the defendant, which he refused to pay. In an action brought in the name of the pauper upon this award, it was held that the overseers of the poor had no authority, by virtue of their office, to bind the pauper by their submission, and that the award was, therefore, void for want of mutuality in reference. *Furbish v. Hall*, 8 Me. 315.

County Commissioners.—The county commissioners in *Nebraska* can locate public roads and erect bridges thereon only in the manner provided by law. The commissioners of *Otoe* county made a contract with one *McCann* to purchase a private bridge over the *Nemoha* river, and arbitrators were selected by the parties to appraise the same, and damages for right of way across *McCann's* land. It was held that the award was a nullity. *McCann v. Otoe County*, 9 Neb. 324.

County Court.—In *Remington v. Harrison* County Ct., 12 Bush (Ky.) 148, it was held that the County Court has the same authority as any other litigant to refer to arbitration a claim growing out of a contract for the building of a courthouse, and the contractor may maintain an action against the County Court to recover the amount of the arbitrators' award in his favor.

Probate Judge.—A probate judge suing on an administration bond cannot submit the matter to arbitration. *Thomas v. Leach*, 2 Mass. 152.

Although a reference in such case is void, the referee's report may be good *prima facie* evidence of the account due to the legatees, upon a hearing in chancery after the bond is adjudged to be forfeited. *Paine v. Ball*, 3 Mass. 235.

Prothonotary—Pennsylvania.—In *Pennsylvania*, in the case of submissions to arbitration, the prothonotary has certain duties imposed on him by statute in regard to the appointment of arbitrators.

In *Feehrer v. Rudy*, 7 W. & S. (Pa.) 183, it was held that if, under a rule to arbitrate, but one party appears to choose the arbitrators, the number must be fixed by the prothonotary, and if the number is fixed by the prothonotary and the party, it will render the award void.

In *Steele v. Herrington*, 1 Grant's Cas. (Pa.) 442, it was held that where the prothonotary records that he acted for the absent defendant in choosing arbitrators, but does not tell the particulars of how the choice was made,

them, whether they be matters of law or fact.¹

2. Who may Be an Arbitrator—*a. GENERAL RULE.*—It appears that whosoever the parties see fit to select, whether they be infants or adults, married or unmarried, men or women, reputable or disreputable, sane or insane, may be chosen as arbitrators; neither natural nor legal disabilities prevent a person from being an arbitrator, because every man has a right to select whomsoever he likes best for his judge.²

the presumption will be that it was done by him in due form and according to law. See *Withers v. Haines*, 2 Pa. St. 435.

In *Marshall v. Lowry*, 6 S. & R. (Pa.) 281, it was held that a prothonotary has no authority to appoint arbitrators for three defendants, where a notice of the time and place for appointing arbitrators has been given to only two of them.

1. Russell on Awards 115; Bac. Abr., Arb., D.; West. Symb., pt. 2, tit. Compromise, p. 164, § 21; *Armstrong v. Marshall*, 4 Dowl. 593.

Amiables Compositeurs.—In *Rolland v. Casidy*, L. R. 13 App. Cas. 770, Lord Selborne said: "It is not immaterial that by the deed of submission to arbitration the arbitrators were expressly to act as amiables compositeurs; they are characterized by the same words more than once, as 'arbitrators and amiables compositeurs.' What is the force and meaning of that expression 'amiables compositeurs' by Canadian law? We find it in the 1346th article of the Code of Civil Procedure: 'Arbitrators must hear the parties and their respective proofs, or establish default against them, and decide according to the rules of law, unless they are dispensed from so doing by the terms of the submission, or unless they have been appointed as "amiables compositeurs." That is to say, if they are amiables compositeurs, they are to be exempt, at all events, from the strictness of the obligations expressed in the previous words: 'The arbitrators must hear the parties and their respective proofs, or put them into default, and judge according to the rules of law.' * * * The distinction must have some reasonable effect given to it, and the least effect which can reasonably be given to the words is, that they dispense with the strict observance of those rules of law the nonobservance of which, as applied to awards, results in no more than irregularity."

Amicable Compounders.—The same distinction as the above prevails in *Louisiana* between arbitrators and "amicable compounders." If an amicable compounder acts without the scope of his authority, as defined by the submission, his award is void, but otherwise the aggrieved party is without remedy against his most extravagant usurpations. His award, within the scope of his authority, is conclusive, and cannot be appealed from. *In re Wallace*, 31 La. Ann. 335; *Davis v. Leeds*, 7 La. 476; *Hopkins v. Louisiana Western R. Co.*, 33 La. Ann. 1138; *Cobb v. Parham*, 4 La. Ann. 148; *Bird v. Laycock*, 7 La. Ann. 171.

In the Civil Law, there is a distinction between "arbitrator" and "arbiter"; the decision of the former was subject to correction

or reduction *ad arbitrium boni viri*. See Wood's Inst. 326.

2. Russell on Awards (6th ed.) 115; Bac. Abr., Arb., D.; Huntig v. Rolling, 8 Dowl. 879; Vin. Abr., Arb., A. 2.

It has been said that infants, lunatics, idiots, married women, and persons attainted or excommunicated could not act as arbitrators. Com. Dig., Arb., C.; West Symb., pt. 2, tit. Compromise, pp. 164, 165, §§ 23, 26.

Women.—Married women were not allowed to act as judges by the civil law. Wood's Civil Law 327, c. 1, 2, tit. 56, § 6.

But it has always been held that unmarried women may act as arbitrators. *Duchess of Suffolk's Case*, 8 Edw. 4, 1; Br. 37; Kyd on Awards 71. See *in pari materia* *Olive v. Ingram*, 2 Stra. 1114; Anonymous, 2 Ld. Raym. 1014; *Rex and Braughton's Case*, 3 Keb. 32; *Rex v. Stubbs*, 2 T. R. 395; *Buckingham's Case*, Dyer 285b; *Chorlton v. Lings*, L. R. 4 C. P. 374; *Robinson's Case*, 24 Alb. L. J. 448; *Huff v. Cook*, 44 Iowa 639; *Minor v. Happersell*, 21 Wall. (U. S.) 162.

Under the *Pennsylvania* Arbitration Act of 1836 a woman, married or single, may be chosen arbitrator. *Evans v. Ives*, 15 Phila. (Pa.) 635.

Judges of the Court.—The presiding judge in a pending cause may be chosen as arbitrator. *In re Durham County Permanent Bldg. Soc.*, L. R. 7 Ch. 45; *Davis v. Forsbee*, 34 Ala. 107; *Galloway v. Webb*, Hard. (Ky.) 326; *Hughes v. Peaslee*, 50 Pa. St. 257; *Dinsmore v. Smith*, 17 Wis. 20; *Walworth County Bank v. Farmers' L. & T. Co.*, 22 Wis. 231. See *Hopkins v. Sondouskie*, 1 Bibb (Ky.) 148; *Crane v. Hand*, 3 N. J. L. 9; *Rogers v. Woodmanse*, 3 N. J. L. 510.

Parties cannot enter into a rule of reference before a justice, and name him therein as arbitrator. *Drew v. Mulikin*, 5 N. H. 153; *Drew v. Canady*, 1 Mass. 158.

In *England* there are statutory provisions for the selection of arbitrators in certain cases. See 5 Geo. IV., c. 85, § 2; 5 Geo. IV., c. 95; 5 & 6 Will. IV., c. 76, § 114; 9 Geo. IV., c. 92, § 45; 5 & 6 Vict., c. 98, § 20; 13 & 14 Vict., c. 91, § 5.

Sheriffs.—Where a dispute has been submitted to the sheriff by the parties, such submission will be considered as in the nature of an arbitration, and the court will not set aside his decision merely because he has admitted improper evidence or rejected that which was properly admissible. *Sharp v. Dusenburg*, 2 Johns. Cas. (N. Y.) 117.

Masters of the Courts.—In *England* certain matters are to be decided by the masters of the courts, not as officers of the courts, but as

b. MUST HAVE NO INTEREST.—If an arbitrator has any personal interest in the subject-matter of the dispute, which is unknown to the parties, he is incompetent to act, and his award will be void.¹ But if such interest is known

arbitrators; as cost of arbitration under the Land Clauses Con. Act 1845. See *In re Sandback Charity Trustees and North Staffordshire R. Co.*, 3 Q. B. Div. 1; *Tennant v. Belfast*, 11 Ir. L. Rep. 290; *Owen v. London, etc.*, R. Co., 7 B. & S. 758; *In re Wraithby*, 4 H. & C. 74; *Ross v. York, etc.*, R. Co., 5 D. & L. 695; *Cruikshank v. Floating Swimming Baths Co.*, 45 L. J. N. S. C. L. 684, 1 C. P. Div. 260.

Official Referees under the Judicature Acts.—The functions of official referees appointed under the Judicature Acts in England are similar to those of common-law arbitrators, and they must be governed by the same rules. *Russell on Awards* (6th ed.) 119.

Societies.—A society may be an arbitrator. *Rathven v. Elgin*, L. R. 2 Scotch App. 535.

Stewards of Horse Races are not properly arbitrators, but they may decide disputes in regard to such races, although they may be interested in the betting. *Ellis v. Hopper*, 28 L. J. Exch. 1; *Parr v. Wintringham*, 28 L. J. Q. B. 123.

Executive Officers.—Executive officers authorized by law to examine certain claims and to report to Congress, are not arbitrators. *Ludington's Case*, 15 Ct. of Cl. 453.

Committee of Board of Trade.—Where a submission was made to the committee of a board of trade, the submission not referring to their official character, but the award was made by them "as such committee," it was held an arbitration and not a submission to them in their official capacity. *Stewart v. Waldron*, 41 Me. 486; *Wells v. Monihan*, 129 N. Y. 161; *Vaughn v. Herndon*, 91 Tenn. 64.

Public Commissioners.—Public commissioners acting under statute will be treated as arbitrators. *Boston, etc.*, R. Corp. v. *Western R. Corp.*, 14 Gray (Mass.) 253. See, as to their powers in *England*, *Atty.-Gen. v. Jackson*, 5 Hare 355.

Ministers of Governments.—Where parties to a dispute enter into an agreement to leave the matter to their respective governments, they are bound by the decision of the ministers of their governments resident in the jurisdiction in which the dispute has arisen, and such decision will be considered sufficiently proved by a letter from the consul-general of the party against whom the decision is rendered, stating what the ministers had directed him to communicate as their decision. *Gernon v. Cochran*, Bee Adm. 209.

Employee of a Party.—The differences between the parties to a contract may be submitted to an employee of one of such parties for arbitration and adjustment by agreement between them, and his decision will be final. *Howard v. Pensacola, etc.*, R. Co., 24 Fla. 560. See *Kihlberg v. U. S.*, 97 U. S. 398; *Sweeney v. U. S.*, 109 U. S. 618; *Martinsburg, etc.*, R. Co. v. *March*, 114 U. S. 549; *Moore v. Kerr*, 65 Cal. 519; *Finegan v. L'Engle*, 8 Fla. 413; *Butler v. Winona Mill Co.*, 28 Minn. 206, 41 Am. Rep. 277; *Herrick v. Belknap*, 27 Vt. 673.

1. *England*.—*Parker v. Burroughs*, Colle's Parl. Cas. 257; *Earl v. Stocker*, 2 Vern. 251.

Alabama.—*Davis v. Forshee*, 34 Ala. 107. *Connecticut*.—*Fisher v. Towner*, 14 Conn. 26. *Illinois*.—*Ætna Ins. Co. v. Stevens*, 48 Ill. 31.

Indiana.—*Bash v. Christian*, 77 Ind. 290. *Iowa*.—*Pool v. Hennessy*, 39 Iowa 192, 18 Am. Rep. 44.

Kentucky.—*Hopkins v. Sodouskie*, 1 Bibb (Ky.) 148.

Maine.—*Brown v. Leavitt*, 26 Me. 251. *Massachusetts*.—*Strong v. Strong*, 9 Cush. (Mass.) 560; *Fox v. Hazelton*, 10 Pick. (Mass.) 275; *Conrad v. Massasoit Ins. Co.*, 4 Allen (Mass.) 20; *Hicks v. McDonnell*, 99 Mass. 459.

New York.—*Combs v. Wyckoff*, 1 Cai. (N. Y.) 147; *Perry v. Moore*, 2 E. D. Smith (N. Y.) 32.

Pennsylvania.—*Monongahela Nav. Co. v. Fenlon*, 4 W. & S. (Pa.) 205.

Tennessee.—*Dougherty v. McWhorter*, 7 Yerg. (Tenn.) 239.

Vermont.—*Woodworth v. McGovern*, 52 Vt. 318.

Secret Interest Vitiates Award.—Where one of the arbitrators chosen to decide a dispute arising in a contract, is a partner of one of the parties in the subject-matter of such contract, and conceals that fact from the other party until the award has been made, the award is thereby absolutely void. *Connor v. Simpson* (Pa. 1886), 5 Cent. Rep. 280.

Where one of the arbitrators appointed under the provisions of an insurance policy, is in the employ of the insurance company, or acts solely in its interest, an award made by him will be set aside. *Bradshaw v. Agricultural Ins. Co.* (Supreme Ct.), 42 N. Y. St. Rep. 79, 16 N. Y. Supp. 639. See *Perkins v. Giles*, 53 Barb. (N. Y.) 346; *Herrick v. Blair*, 1 Johns. Ch. (N. Y.) 101; *Todd v. Barlow*, 2 Johns. Ch. (N. Y.) 551.

Where the arbitrators were not disinterested or competent men, in the sense of the terms of the submission, an award made by them, under a policy of insurance, was set aside as invalid. *Ætna Ins. Co. v. Stevens*, 48 Ill. 31. See *Baltimore, etc.*, R. Co. v. *Canton Co.*, 70 Md. 405.

In an arbitration concerning the price of gas, a rate payer and gas consumer is not a proper person to act as arbitrator. *In re Mayor, etc.*, and *B. Gas Co.*, 12 Victoria L. Rep. 682 (Australia).

But an award will not be set aside on an allegation that one of the arbitrators is an interested party, unless that fact is clearly proved. *Lloyd v. Hoskins*, 3 New Bruns. 132.

Where an application was made to set aside the decision of so-called "arbitrators" on the ground that they were interested in the dispute, it was held that although they were called "arbitrators" they were in reality a committee of advice, and that their report should be sustained. *Div. Council of Caledon v. Div.*

to them, and they do not object, his award will be held binding.¹

An arbitrator will not be disqualified where his interest is too remote and contingent to induce a reasonable suspicion that his decision will be influenced by it.²

Council of Bredasdorp, 4 Juta, Cape of Good Hope 445.

Where the arbitrators made an extraordinarily large award to a person who was insolvent and indebted to them and to their relatives, and the award was immediately assigned for their benefit, it was set aside. *Rand v. Redington*, 13 N. H. 72.

1. *Johnston v. Cheape*, 5 Dowl. 247; *Drew v. Drew*, H. L. March 8, 1855; *Russell on Awards* (6th ed.) 116; *Fox v. Hazelton*, 10 Pick. (Mass.) 275; *Monongahela Nav. Co. v. Fenlon*, 4 W. & S. (Pa.) 205; *Connor v. Simpson* (Pa. 1886), 7 Atl. Rep. 161. See *infra*, this section, *Waiver of Objections*.

Volenti Non Fit Injuria.—Where the parties bound themselves by bond to the arbitrator himself to abide his award, and afterwards objected that he was interested in making an unreasonable award in order to obtain the penalty of the bond, the objection was overruled, because the parties knew the consequences when they entered into the bond. *Owdy v. Gibbons*, Comb. 100.

The decisions of architects and engineers, although they have a known interest in the shape of a commission on the cost of construction, are binding. *Morgan v. Birnie*, 9 Boly. 672, 23 E. C. L. 414. See *Stevenson v. Watson*, 4 C. P. Div. 148; *In re Wansbeck R. Co. and Trowsdale*, L. R. I. C. P. 269.

So a shareholder in a railroad company may make a valid award between such company and a landowner whose land has been taken by the company. But such arbitrations are not to be approved of. *In re Elliott*, 2 De G. & S. 17, 12 Jur. 445.

The knowledge of the attorney of a party has been held to be the knowledge of the party himself. *Perry v. Moore*, 2 E. D. Smith (N. Y.) 32.

The rule is that a person cannot be judge in his own cause, but if an award is made by him with the consent of the other party, the courts will not set it aside because it is made in his own favor. *Matthew v. Ollerton*, 4 Mod. 226, Comb. 218; *Hunter v. Bennison*, Hardw. 43.

Where the admeasurement and decision of the engineer of a railroad company was made conclusive of the amount of work performed under a construction contract, the engineer occupied the position of an arbitrator, and the fact that he was a stockholder of the company did not render his determination invalid on the ground that he was made a judge in his own case. *Williams v. Chicago*, etc., R. Co., 112 Mo. 463. See *Ranger v. Great Western R. Co.*, 5 H. L. Cas. 88; *Martinsburg*, etc., R. Co. v. March, 114 U. S. 549; *Grant v. Savannah*, etc., R. Co., 51 Ga. 352; *Smith v. Boston*, etc., R. Co., 36 N. H. 458; *Sweet v. Morrison*, 116 N. Y. 19, 15 Am. St. Rep. 376; *Mansfield*, etc., R. Co. v. Veeder, 17 Ohio 396; *Monongahela Nav. Co. v. Fenlon*, 4 W.

& S. (Pa.) 205; *Faunce v. Burke*, 16 Pa. St. 469, 55 Am. Dec. 519; *Herrick v. Belknap*, 27 Vt. 673; *Kidwell v. Baltimore*, etc., R. Co. 11 Gratt. (Va.) 676; *Baltimore*, etc., R. Co. v. Polly, 14 Gratt. (Va.) 447.

2. *Leominster v. Fitchburg*, etc., R. Co., 7 Allen (Mass.) 38. See *Hathaway v. Crocker*, 7 Met. (Mass.) 262; *Wilson v. Concord R. Co.*, 3 Allen (Mass.) 194; *Eggleston v. Smiley*, 17 Johns. (N. Y.) 133; *Meighen v. Bank*, 25 Pa. St. 288; *Morgan v. Mather*, 2 Ves. Jr. 15. The award of an arbitrator will not be set aside because he had formerly acted as counsel in another action for the party in whose favor he makes the award, although this fact was not known to the unsuccessful party or his counsel, no intentional concealment of the fact being proved. *Goodrich v. Hulbert*, 123 Mass. 190, 25 Am. Rep. 60. And see *Cheney v. Martin*, 127 Mass. 304.

The fact that an architect has been a witness in a case between certain parties, does not disqualify him from acting as arbitrator between them in a dispute arising subsequently under a building contract. *Barclay v. Decker-hoof*, 171 Pa. St. 378.

Mere Indebtedness.—Mere indebtedness of a party to the arbitrator does not disqualify the latter; but it would be different if the amount of indebtedness were considerable, and if an award favorable to the indebted party would affect the creditor's chances of obtaining payment. *Wallis v. Carpenter*, 13 Allen (Mass.) 19; *Fisher v. Towner*, 14 Conn. 26.

Neither is mere indebtedness of the arbitrator to one of the parties a ground for disqualification. *Morgan v. Morgan*, 1 Dowl. 611; *Malmesbury R. Co. v. Budd*, 2 Ch. Div. 113; *Drew v. Drew*, H. L. March 8, 1855; *Anderson v. Burchett*, 48 Kan. 153; *Chicago*, etc., R. Co. v. Hughes, 28 Mich. 186.

The case will be different if the debt be discreditably contracted, and in relation to the subject of the reference. *Beddow v. Beddow*, 9 Ch. Div. 89.

Partisanship Vitiating Award.—In *Bash v. Christian*, 77 Ind. 290, it was held that where it was shown that one of the arbitrators acted as attorney for one of the parties, stopped the witnesses from testifying, and showed a deep interest in that party's success, the award would be set aside.

In *In re Baring and Doulton*, 61 L. J. Q. B. 704, it was held that the court would interfere to revoke the submission on account of active litigation between the arbitrator and one of the parties, although such litigation arose at a time long subsequent to the date of the submission, and in regard to matters wholly unconnected with it.

Bias of One of Several.—In *Leitch v. Miller*, 40 Mo. App. 180, the court, by Gill, J., said: "It is well established, too, that the misconduct of one of these appraisers effectually vacates the entire award, and for one good reason,

c. **MUST NOT BE BIASED.**—If an arbitrator uses any expressions which show a bias, strong prejudice, or hostile feeling towards either party, the award will be set aside, even although another arbitrator, who has joined in the award, has acted impartially.¹ So although the intention of arbitrators

among others, that it cannot be determined how far the *one* may have influenced others."

Matters Not Amounting to Bias.—An opinion formed by one of the arbitrators before hearing, but without evidence that his mind was so biased that it was not open to conviction, and where there is no imputation of unfairness, will not be sufficient to have his award set aside. *Graves v. Fisher*, 5 Me. 69, 17 Am. Dec. 203.

More intercourse of arbitrators with the parties or others, on the subject of the arbitration, is not ground for setting aside an award. *Flatter v. McDermitt*, 25 Ind. 326; *Shear v. Mosher*, 8 Ill. App. 119.

On a notice to confirm the award of three arbitrators in favor of A against a corporation, it appeared as facts that A and one of the arbitrators were familiar acquaintances; that before the submission A had honestly stated to that arbitrator the principal facts in the case, and that thereupon the arbitrator had expressed the opinion that "no commercial house could stand upon the transaction," and advised A to submit the matter to arbitration. It was held that no error of law appeared, and the award should be affirmed. *Morville v. American Tract Soc.*, 123 Mass. 129, 25 Am. Rep. 40.

An arbitrator was not disqualified where, in a question as to the amount of rent, between a lessor and a lessee, it was shown that he had five years previously expressed an opinion upon the lease favorable to the lessee. *Brush v. Fisher*, 70 Mich. 469. See *Bullman v. North British, etc., Ins. Co.*, 159 Mass. 118.

1. *Bac. Abr., Arb., K.*; *Parker v. Burroughs*, *Colle's Parl. Cas.* 257; *Ward's Case*, *cited in* 2 Atk. 155, 396; *Burton v. Knight*, 2 Vern. 514; *Earl v. Stocker*, 2 Vern. 251; *Taber v. Jenny*, 1 Sprague (U. S.) 315; *Boston Water Power Co. v. Gray*, 6 Met. (Mass.) 169; *Fox v. Hazelton*, 10 Pick. (Mass.) 275; *Strong v. Strong*, 9 Cush. (Mass.) 560; *Beattie v. Hilliard*, 55 N. H. 428; *Smith v. Cooley*, 5 Daly (N. Y.) 401; *Cleland v. Hedly*, 5 R. I. 163; *Bowen v. Steere*, 6 R. I. 251. See also *infra*, this title, *Duties of the Arbitrator—Arbitrator must Act Uprightly*.

Must be Unprejudiced.—Where an architect has assured his employer that the cost of building a church would not exceed a certain sum, he will be afterwards held incompetent to decide between such employer and the builder upon claims for extras. *Kemp v. Rose*, 1 Giff. 258. See *Kimberley v. Dick*, L. R. 13 Eq. 1; *Conrad v. Massasoit Ins. Co.*, 4 Allen (Mass.) 20.

Partisanship in an arbitrator in favor of the party selecting him will be sufficient ground for disqualification, unless both parties selected partisanship. *Wheeling Gas Co. v. Wheeling*, 5 W. Va. 448. See, as to undue bias, amounting to misbehavior, *Brown v. Green*,

7 Conn. 536; *Allen v. Ranney*, 1 Conn. 571; *Craft v. Thompson*, 51 N. H. 536.

Accepting Hospitality.—It is very improper in an arbitrator to accept hospitality from one of the parties; and if the invitation be given with the intent, or have the effect, of inducing the arbitrator to act unfairly, the court will set aside the award. *Russell on Arb.* 181; *In re Hopper*, 8 B. & S. 100; *Moseley v. Simpson*, L. R. 16 Eq. 226; *Noyes v. Gould*, 57 N. H. 20.

Where one of the arbitrators did not appear at the intended hour of an adjourned hearing, and one of the parties went to look for him, and on their way to the place of hearing treated him to a drink, it was held that the award made should be set aside on the ground of public policy, though it did not appear that they had any conversation on the subject in dispute. *Riding v. Burkert*, 8 Pa. Co. Ct. Rep. 640.

So where one of the parties to a submission, both being forbidden by the court to be present while the arbitrators were viewing the premises and establishing the boundary line in controversy between them, brought to the arbitrators, when engaged in making their examination, a luncheon of which all partook, and entertained one of them several nights at his house while engaged in his duties as arbitrator, and took another to dinner at a hotel at his expense, the award was set aside. *Robinson v. Shanks*, 118 Ind. 125.

Partiality.—Although the relief granted by an award of arbitrators is outside of the legal rights of the parties, an award in a common-law arbitration will be sustained where there is no showing of partiality on the part of the arbitrators. *McKinnis v. Freeman*, 38 Iowa 364.

An Engineer's Certificate is not rendered invalid because of a possible bias on his part in favor of the plans and specifications drawn by himself, where the provisions of the contract are that his decision shall be conclusive. *Farquhar v. Hamilton*, 20 Ont. App. 86.

Where an Arbitrator Acts from Upright Motives, the fact that his judgment was warped and biased a little because he believed that the other arbitrator leaned towards the other side, will not render the award invalid. *Silver v. Connecticut River Lumber Co.*, 40 Fed. Rep. 192.

Alderman of Municipality.—An award of arbitrators will not be set aside on the ground that one of the arbitrators, being an alderman of the city, had been active in the council in endeavoring to procure payment or arbitration of the claim which was against the city. There is nothing in such conduct which will render him incompetent as an arbitrator, and the city waived any objection to him on that ground by accepting him as one of the arbitrators. *Kane v. Fond du Lac*, 40 Wis. 495. —

is perfectly honest, yet if their acts are plainly partial, an award will be set aside.¹

d. MUST NOT BE A RELATIVE.—The fact that an arbitrator is a relative or family connection of one of the parties, may be a sufficient ground for setting aside the award.²

c. WAIVER OF OBJECTIONS.—If the parties to an arbitration know of any circumstance disqualifying the arbitrator, but yet go on with the hearing, they thereby waive such objections as may exist to his appointment.³ In order to make an objection to an arbitrator effective, it must be made as soon as the fact of his incompetency becomes known to the party objecting.⁴

Railroad Employee.—An award will not be set aside because a railroad company, one of the parties, appointed its valuator as its arbitrator. The court will not infer that such valuator was not open to conviction on the evidence before him, independent of his own opinions on value previously entertained and even expressed. *Ex p. M. & S. R. Co.*, Argus Rep. Victoria, 23 March, 1861.

The Partiality of an Umpire must be Clearly Proved before the court will set his award aside for that reason. *In re Bailey and Hart*, 9 Vict. Law Rep. 311 (Australia).

See, where the court refused to interfere, *Jackson v. Barry R.*, 2 R. 207 (1893), 1 Ch. 238; *Eckersley v. Mersey Docks, etc.*, Board, 9 R. 827 (1894), 2 Q. B. 667.

1. *Walker v. Frobisher*, 6 Ves. Jr. 70; *Wilkins v. Van Winkle*, 78 Ga. 557; *Jackson v. Roane*, 90 Ga. 669; *Moshier v. Shear*, 102 Ill. 169, 40 Am. Rep. 573; *Robinson v. Shanks*, 118 Ind. 125; *Sullivan v. Frink*, 3 Iowa 66.

See also cases cited in the preceding note, and *infra*, this title, *Duties of the Arbitrator—Arbitrator must Act Uprightly*.

An award will be set aside where some of the arbitrators previous to their selection made an *ex parte* examination of the matter afterwards submitted to them at the request of one of the parties, and when this was not known to the other parties. *Conrad v. Massasoit Ins. Co.* 4 Allen (Mass.) 20; *Smith v. Cooley*, 5 Daly (N. Y.) 401.

2. **Family Relationship** between the arbitrator and one of the parties, unknown to the other party at the time of the appointment, which arbitrator is objected to afterwards, will be a cause of disqualification. *Pool v. Hennessy*, 39 Iowa 192, 18 Am. Rep. 44; *Brown v. Leavitt*, 26 Me. 251; *Stephenson v. Oatman*, 3 Lea (Tenn.) 462. See *Alfred v. Kankakee, etc.*, R. Co., 92 Ill. 609.

Where the interest of one of the parties to a submission is transferred to a near relative of the arbitrator pending the hearing, the arbitrator becomes thereby disqualified. *Spearman v. Wilson*, 44 Ga. 473.

When Objection must be Made.—After an award is made, one of the parties to the submission may not object that one of the arbitrators was the son-in-law of the other party; the objection should have been taken in the earlier part of the proceedings. *Robb v. Brachman*, 38 Ohio St. 423.

Relationship Held Not to Avoid Award.—An award will not be set aside in the absence of proof of undue partiality and fraud on the

part of the defendant because one of the arbitrators, under a statutory submission, was a cousin of one of the parties to the submission and was his guest during the hearing, or because the arbitrators neglected to hear one of the parties sworn as to the accounts submitted by him, the other party not having required it. *McGregor v. Sprott* (Supreme Ct.), 13 N. Y. Supp. 191.

There is no prohibition, statutory or otherwise, in *Alabama*, against a person who is related to either of the parties to a pending suit, within the fourth degree of consanguinity or affinity, acting as arbitrator between them; and the fact that by the terms of the submission the arbitrators are to be chosen by the clerk of the court, does not affect or alter the rule. *Davis v. Forshee*, 34 Ala. 107; *Heydenfeldt v. Towns*, 27 Ala. 423.

3. **Waiver of Objection.**—*Anderson v. Burchett*, 48 Kan. 153; *Strong v. Strong*, 9 Cush. (Mass.) 560; *Fox v. Hazelton*, 10 Pick. (Mass.) 275; *Long v. Fitzgerald*, 97 N. Car. 39; *Monongahela Nav. Co. v. Fenlon*, 4 W. & S. (Pa.) 205; *Wheeling Gas Co. v. Wheeling*, 5 W. Va. 448; *Quebec, etc., R. Co. v. Mathieu*, 19 Can. Sup. Ct. Rep. 426. See *Northern Pac. R. Co. v. Jackman*, 6 Dakota 236.

In *Fox v. Hazelton*, 10 Pick. (Mass.) 275, the court, by Shaw, C. J., said: "If parties are content to submit questions in controversy to those who are known to have formed and expressed opinions upon the subject-matter, or who are known to have partialities and prejudices for or against the respective parties, an award made by such arbitrators is binding. * * * If the objection is known to the party before the hearing, and not then disclosed, and no exception taken, the objection must be taken to be waived, and the consent of the parties be presumed that the hearing shall proceed."

A party to a submission waives any objection that he might be entitled to make to an arbitrator on account of his relation to one of the parties by permitting the award to be made without objection after he has acquired knowledge of the facts which create the alleged incompetence. *Pearson v. Barringer*, 109 N. Car. 398. See *Davis v. Forshee*, 34 Ala. 107; *Brown v. Leavitt*, 26 Me. 251; *Noyes v. Gould*, 57 N. H. 20; *Dougherty v. McWhorter*, 7 Yerg. (Tenn.) 239.

4. **Objection must Be Prompt.**—*Fox v. Hazelton*, 10 Pick. (Mass.) 275; *Brown v. Leavitt*, 26 Me. 251; *Noyes v. Gould*, 57 N. H. 20; *Perry v. Moore*, 2 E. D. Smith (N. Y.) 32;

3. Arbitrator—How Appointed.—The arbitrators are usually appointed directly by the parties themselves,¹ but under special statutory provisions they are sometimes appointed by rule of court or by a judge.² It seems that the appointment is not perfected until the arbitrator accepts the office.³

4. Duties of the Arbitrator—*a*. ARBITRATOR MUST ACT UPRIGHTLY.—If there be sufficient reason for imputing fraud, corruption, or misconduct to the arbitrator, his award will be set aside. An arbitrator's first duty is to act uprightly and impartially between the parties.⁴ But mere suspicion of

Pearson *v.* Barringer, 109 N. Car. 398; Robb *v.* Brachman, 38 Ohio St. 423.

And this applies to cases where an objectionable arbitrator has been chosen by the attorney of one of the parties. The objecting party must make his objections known at once. *Combs v. Wyckoff*, 1 Cai. (N. Y.) 147.

When another arbitrator is substituted for one of those originally chosen under the submission, and the case is submitted by the parties, one of them cannot, after the award is made, complain that the substitution was made without his consent. *Fowler v. Jackson*, 86 Ga. 337.

1. In *England*, before the submission can be made a rule of court, the appointments of the arbitrators of both parties must be produced and verified by affidavit. See Russell on Awards (6th ed.) 594. *In re Huddersfield, etc.*, Corp. L. R. 17 Eq. 476; *Hawley v. North Staffordshire R. Co.*, 2 De G. & S. 33.

It is not necessary that the appointment of an umpire should be made a rule of court. *In re Bradshaw and East & West India Docks*, 12 Q. B. 562, 64 E. C. L. 562. But see *In re Smith and Reeves*, 5 Dowl. 513.

The recital in an award that two arbitrators had appointed a third to act, is no evidence of his appointment. *Still v. Halford*, 4 Campb. 17.

See, where the appointment of a third arbitrator was held void, *Turner v. Burt*, 24 New Bruns. 547.

Provision in Will for Appointment.—It is competent for a testator to make in his will a valid direction that in case of any difficulty arising under such will, the matter shall be submitted to the person named therein, whose decision shall be final. *Phillips's Estate*, 48 Leg. Int. (Pa.) 232, 28 W. N. C. (Pa.) 229. See *Naglee's Estate*, 52 Pa. St. 154; *Wait v. Huntington*, 40 Conn. 9; *Seagrave's Appeal*, 125 Pa. St. 362; *Bainbridge's Appeal*, 97 Pa. St. 482.

Default in Making Appointments under Agreement.—Where an agreement is entered into for the appointment of an arbitrator, under a penalty in case either party should not do so, the defaulting party is not liable for the amount, unless the agreement tendered for execution contains an appointment of an arbitrator for him. *Thackury v. Winter*, 6 Victoria L. Rep. 128 (Australia).

Arbitrator—When Appointed.—Where arbitrators are to be appointed under a contract, they are the creatures of such contract, and cannot be called into existence after the contract is determined. *In re Higgins and Wright and the Vict. Rys. Coms.*, 11 Victoria L. Rep. 140 (Australia).

2. Appointment under Statute.—See 8 & 9

Vict., c. 18, § 25; 17 & 18 Vict., c. 125, § 12; 52 & 53 Vict., c. 49, §§ 2, 5, 6.

The local statutes must be consulted in regard to such provisions as may exist for the appointment of arbitrators.

Where the conditions exist in which the court or judge "may appoint an arbitrator," under the English Arbitration Act 1889, § 5, the court cannot refuse to appoint one. The requirement of the statute is mandatory, not directory. *In re Eyre and Leicester* (1892), 1 Q. B. 136. See *Gumm v. Hallett*, L. R. 14 Eq. 555; *In re Smith and Nelson*, 25 Q. B. Div. 545.

The rule for the appointment of arbitrators must show that the record was authenticated by the seal of the court, as well as by the prothonotary. The process of the court must be authenticated by its seal. *Stegman v. Wills*, 3 Pa. Dist. Rep. 252.

Where the submission is silent, and the parties have not provided any machinery for such appointment, a judge has no authority to appoint an arbitrator under the English Arbitration Act 1889, § 5. *In re Wilson and Eastern Counties Nav., etc., Co.*, (1892) 1 Q. B. 81. But see *In re Eyre and Leicester*, (1892) 1 Q. B. 136.

Arbitrators may be chosen, and a judgment rendered on their award, when a case is pending before a justice of the peace; but a justice cannot acquire jurisdiction unless a cause is pending. The Circuit Court does not get jurisdiction of the controversy by an appeal because a justice of the peace prepares a submission to arbitrators. *Shirk v. Trainer*, 20 Ill. 301.

Where arbitrators are appointed under the provisions of a fire-insurance policy, to determine the amount of loss thereon, they are arbitrators within the provisions of the *New York Code of Civ. Pro.*, § 2374. *Bradshaw v. Agricultural Ins. Co.* (Supreme Ct.), 42 N. Y. St. Rep. 79, 16 N. Y. Supp. 639.

The court has no power under § 1 of the English Arbitration Act 1889 (52 & 53 Vict., c. 49) to compel a party to appoint an arbitrator when he has refused to do so. *In re Smith and Nelson*, 25 Q. B. Div. 545.

3. Acceptance.—*Ringland v. Lowndes*, 15 C. B. N. S. 173, 109 E. C. L. 173, 33 L. J. C. P. 25. 4. *Bac. Abr., Arb., K.*; *Com. Dig., Arb., C.*; *Russell on Awards* (6th ed.) 119; *Morgan v. Mather*, 2 Ves. Jr. 15; *Tittenson v. Peat*, 3 Atk. 529; *Clarke v. Stocken*, 2 Bing. N. Cas. 651, 29 E. C. L. 445; *Burton v. Knight*, 2 Vern. 514; *Earle v. Stocker*, 2 Vern. 251; *Emery v. Wase*, 5 Ves. Jr. 846; *Travers v. Stafford*, 2 Ves. 19; *Sturt v. Moggeridge*, 2 Tidd Pr. (9th ed.) 841; *Lonsdale v. Littledale*, 2 Ves.

misconduct will not justify the court in interfering to set aside the award.¹

b. MUST ACT AS AGENT OF BOTH PARTIES.—An arbitrator is the agent of both parties, and when there are more arbitrators than one, each is the agent of both parties, and not the special advocate of the party appointing him. Where they act as the agents of one side only, it is corrupt misconduct on their part.²

c. OATH OF ARBITRATOR—At Common Law.—An arbitrator need not be sworn at the common law.³

The Statutes of the Various States usually provide for the administration of an oath, but there is no uniformity of statutory provision, or of judicial decision, as to whether the taking of such oath is mandatory or directory. In some states, the taking of the oath is compulsory.⁴

Jr. 451; *Harvey v. Shelton*, 7 Beav. 455; *Brown v. Harper*, 54 Iowa 546. See 9 & 10 Wm. III., c. 15. See *supra*, this section, *Who may Be an Arbitrator—Must Not be Biased*.

Must Act Uprightly—Illustrations.—In *Shepherd v. Brand*, Cas. temp. Hardw. 53, where the arbitrators took money from one of the parties alone for their charges before the award was made, and without any bill being delivered, the award was set aside.

Where a private agreement was made between the arbitrator and one of the parties in regard to the subject of the reference intended to be considered in the award, although such agreement was *bona fide*, it was held to be a reason for vacating the award. *Chichester v. McIntire*, 1 Dowl. N. S. 460.

If the arbitrators buy the unascertained claims of either party, or purchase any interest in them, it will render their award void. *Blennerhassett v. Day*, 2 B. & B. 104; *Woodworth v. McGovern*, 52 Vt. 318.

An extraordinarily large award to one who was insolvent and indebted to the arbitrators or their relatives, which award was, immediately after being made, assigned to them, together with other evidence showing that the arbitrator might not have been impartial, was set aside. *Rand v. Redington*, 13 N. H. 72. See *Spearman v. Wilson*, 44 Ga. 473.

1. Mere Suspicion of Misconduct.—*Crossley v. Clay*, 5 C. B. 581, 57 E. C. L. 581.

However, the courts will always admit evidence in order to throw light upon the conduct of the arbitrator in regard to any imputation of fraud or misconduct that may be made against him. *Goodman v. Sayers*, 2 Jac. & W. 249; *Anonymous*, 2 Vern. 100.

2. Fetherstone v. Cooper, 9 Ves. Jr. 67; *Calcraft v. Roebuck*, 1 Ves. Jr. 226; *Watson v. Northumberland*, 11 Ves. Jr. 153; *Maule v. Maule*, 4 Dow 363; *Brown v. Harper*, 54 Iowa 546; *Strong v. Strong*, 9 Cush. (Mass.) 560.

Agents of Both Parties.—The acts of the arbitrators are equivalent to the acts of the parties themselves, only still more binding. A balance struck by them is the same as if it were struck by the parties, except that it is final; whereas, a settlement made by the parties themselves may be amended or explained. *Morse on Arb. and Award* 106; *Keen v. Batshore*, 1 Esp. 194; *Hays v. Hays*, 23 Wend. (N. Y.) 363; *Browning v. Wheeler*, 24 Wend. (N. Y.) 258, 35 Am. Dec. 617.

The appointment of more than one arbitrator has been considered objectionable by the courts, on account of the tendency of the arbitrators to act as advocates rather than judges where there are more than one. *Russell on Awards* (6th ed.) 222; *In re Templeman and Reed*, 9 Dowl. 962; *In re Marsh*, 16 L. J. Q. B. 330.

3. Sloan v. Smith, 3 Cal. 406; *Daggy v. Cronnelly*, 20 Ind. 474; *Forqueron v. Van Meter*, 9 Ind. 270; *Bradstreet v. Erskine*, 50 Me. 407; *Howard v. Sexton*, 4 N. Y. 157.

At Common Law Oath Not Essential.—Arbitrators need not be sworn in a common-law arbitration, unless it is required by the parties to the submission, and, if not required by them, the oath will be presumed to have been dispensed with. *Payne v. Crawford*, 97 Ala. 604. In *Duncan v. Fletcher*, 1 Ill. 323, it was held not to be necessary that the fact that the arbitrators had been sworn should appear upon the face of the award.

4. Oath—Statutes—Louisiana.—*Overton v. Alpha*, 13 La. Ann. 558; *Bethea v. Hood*, 9 La. Ann. 88.

New Jersey.—*Ford v. Potts*, 6 N. J. L. 388; *Combs v. Little*, 4 N. J. Eq. 310, 40 Am. Dec. 207; *Ruckman v. Ransom*, 35 N. J. L. 565; *Inslee v. Flagg*, 26 N. J. L. 368, 69 Am. Dec. 580; *Bowen v. Lanning*, 2 N. J. L. 130; *Reeves v. Goff*, 2 N. J. L. 133; *Parker v. Crammer*, 2 N. J. L. 253; *Little v. Silverthorne*, 3 N. J. L. 255; *Cramer v. Mathis*, 3 N. J. L. 138.

The whole proceedings are void where the arbitrators are not sworn. *Combs v. Little*, 4 N. J. Eq. 310, 40 Am. Dec. 207.

And the oath of the arbitrators cannot be waived. *Inslee v. Flagg*, 26 N. J. L. 368, 69 Am. Dec. 580.

But after an award has been executed, it cannot be set aside because the arbitrators were not sworn. *Johnson v. Ketchum*, 4 N. J. Eq. 364.

The fact of the oath need not appear upon the record. It is enough if it is stated in the award. *Swayze v. Riddle*, 3 N. J. L. 238.

Alabama.—The taking of the oath by the arbitrators upon a submission under the statute is a matter of substance. *Tuskaloosa Bridge Co. v. Jemison*, 33 Ala. 476.

It need not appear from the record that an oath was administered. *Price v. Kirby*, 1 Ala. 184; *Crook v. Chambers*, 40 Ala. 239.

In other states, the parties may agree to waive the oath or may do so by implication, but it is indispensable if it is not waived.¹

And again, in others, the oath is not required.² Under some statutes, where an oath is required, the right to waive it does not seem to have been determined.³

1. Colorado.—Hepburn *v.* Jones, 4 Colo. 98.
Illinois.—Kankakee, etc., R. Co. *v.* Alfred, 3 Ill. App. 511.

Iowa.—The oath may be waived, and waiver will be presumed where the record does not show that the arbitrators were sworn. Older *v.* Quinn, 89 Iowa 445.

In Tomlinson *v.* Hammond, 8 Iowa 40, it was held that it is not necessary that arbitrators should be sworn when an award is recommended to them for reconsideration, nor need the award after such reconsideration show upon its face that the arbitrators were sworn in the first instance. See Depew *v.* Davis, 2 Greene (Iowa) 260; McKinney *v.* Western Stage Co., 4 Iowa 420; Thompson *v.* Blanchard, 2 Iowa 44.

Where arbitrators are in fact sworn at the time of entering upon their duties, the fact that the oath was not reduced to writing and signed until after the hearing will not vitiate the award. Ogden *v.* Forney, 33 Iowa 205.

Kansas.—Russell *v.* Seery, 52 Kan. 736; Anderson *v.* Burchett, 48 Kan. 153; Weir *v.* West, 27 Kan. 650.

Missouri.—Upon a submission under the Missouri statute, the arbitrators must be sworn, and if they neglect to take the oath their award is invalid. Toler *v.* Hayden, 18 Mo. 400; Bridgman *v.* Bridgman, 23 Mo. 272; Fassett *v.* Fassett, 41 Mo. 516; Walt *v.* Huse, 38 Mo. 210. See Williams *v.* Perkins, 83 Mo. 379; unless the oath is waived by the parties; and this waiver may be express or implied from the circumstances, as where the parties proceed to a hearing without objection. Tucker *v.* Allen, 47 Mo. 488; Cochran *v.* Bartle, 91 Mo. 636; Grafton Quarry Co. *v.* McCully, 7 Mo. App. 580.

New York.—The fact that the arbitrators have not been sworn is a mere irregularity, and does not affect the validity of their proceedings. Howard *v.* Sexton, 4 N. Y. 157, 1 Den. (N. Y.) 440; Box *v.* Costello, 6 Misc. Rep. (Buffalo Super. Ct.) 415; People *v.* McGinnis, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 387. See Winship *v.* Jewett, 1 Barb. Ch. (N. Y.) 173.

The court will presume that the oath was properly administered, until the contrary is affirmatively proved. Browning *v.* Wheeler, 24 Wend. (N. Y.) 258, 35 Am. Dec. 617.

The failure of the arbitrators to take the oath is an irregularity which may be waived, but where it is not waived the court may set aside the award. Day *v.* Hammond, 57 N. Y. 479, 15 Am. Rep. 522; Terry *v.* Moore, 3 Misc. Rep. (N. Y. C. Pl.) 285; Matter of Grening, 74 Hun (N. Y.) 62; Browning *v.* Marvin, 5 Abb. N. Cas. (N. Y. Supreme Ct.) 285.

The Waiver may be Implied.—Kelsey *v.* Darrow, 22 Hun (N. Y.) 125; People *v.* McGinnis, 1 Park. Cr. Rep. (N. Y. Supreme Ct.)

387; Winship *v.* Jewett, 1 Barb. Ch. (N. Y.) 173. But see Flannery *v.* Sahagian (Supreme Ct.), 12 N. Y. Supp. 56; Cutter *v.* Cutter, 48 N. Y. Super. Ct. 470. See also, upon the subject of waiver, Matter of Vilmar, 10 Daly (N. Y.) 15; Sonneborn *v.* Lavarello, 4 Thomp. & C. (N. Y.) 536; Whalen *v.* Albany County, 6 How. Pr. (N. Y. Supreme Ct.) 278; Nason *v.* Luddington, 56 How. Pr. (N. Y. C. Pl.) 172.

Ohio.—Rice *v.* Hassenpflug, 45 Ohio St. 377. See Newcomb *v.* Wood, 97 U. S. 581, decided under the Ohio statutes.

Pennsylvania.—Graham *v.* Hamilton, 1 Binn. (Pa.) 461; Otis *v.* Northrop, 2 Miles (Pa.) 350.

Where only some of the arbitrators meet, it is not necessary that they should be sworn before they adjourn. Boone *v.* Reynolds, 1 S. & R. (Pa.) 231; Eckert *v.* Sheets, 6 S. & R. (Pa.) 275.

Texas.—In Warren *v.* Tinsley, 2 U. S. App. 507, it is held that the preliminary swearing of the arbitrators and umpire is essential to the validity of the award under Texas Rev. Stat.

The oath may, however, be waived, but where the oath was waived by the attorney of one of the parties, and it did not appear that he was authorized to do so, it was held that judgment would not be entered upon the award. Anderson *v.* Fort Worth, 83 Tex. 107.

Vermont.—Woodrow *v.* O'Conner, 28 Vt. 776.

Wisconsin.—Milwaukee County *v.* Ehlers, 45 Wis. 281; Hill *v.* Taylor, 15 Wis. 190; Pierce *v.* Kirby, 21 Wis. 124.

2. Dickerson v. Hays, 4 Blackf. (Ind.) 44; Daggy v. Cronnelly, 20 Ind. 474; Bradstreet v. Erskine, 50 Me. 407; Underwood v. McDuffee, 15 Mich. 361, 93 Am. Dec. 194.

3. Delaware.—Unless the arbitrators are duly sworn or affirmed at the commencement of the proceedings, the award is not binding upon the parties. Stewart *v.* Grier, 7 Houst. (Del.) 378. See Deputy *v.* Betts, 4 Harr. (Del.) 352.

Kentucky.—The Kentucky Civil Code, § 451, requires that the arbitrators shall take an oath before beginning the arbitration proceedings, and "that a certificate of such oath shall be returned to the court with the award." But proof of the oath may be made without such certificate. Rhodes *v.* Ward (Ky. 1895), 32 S. W. Rep. 950.

The award must contain evidence that the arbitrators were sworn. French *v.* Moseley, 1 Litt. (Ky.) 248; Lile *v.* Barnett, 2 Bibb (Ky.) 166; Jackson *v.* Steele, Sneed (Ky.) 21.

See as to the form of oath required, and the power of the officer before whom it is taken, Snyder *v.* Rouse, 1 Metc. (Ky.) 625; Shryock *v.* Morton, 2 A. K. Marsh. (Ky.) 561.

English Company's Act.—In Zelma Gold Min. Co. *v.* Hoskins, (1895) App. Cas. 100, it was held that the provision in § 113 of the English Company's Act, which requires an

No Particular Form of Oath Required.—It is not necessary that any special form of oath should be adopted, unless the statute so prescribes.¹

Oath of Umpire.—Where the arbitrators are required to be sworn, an oath must also be administered to the umpire.²

d. ARBITRATORS MUST ALL ACT TOGETHER.—(1) *General Rule.*—Where more arbitrators than one are chosen, even though a majority may decide, each must act personally in the performance of the duties of his office, as if he were sole arbitrator. All of them must be present throughout every meeting during the proceedings until the award is made, because the parties are entitled to the benefit of the judgment and influence of each one, and a neglect or refusal on the part of any one to act will render an award made by the others invalid.³

arbitrator to make a declaration before a justice, does not apply to a reference under the English Arbitration Act of 1892, § 12, but only to a voluntary arbitration which a company has submitted by writing under its common seal. *Trades and Ind. Inst. v. Murray*, 11 N. S. W. L. R. 36, was distinguished.

1. Form of Oath.—*Vaughn v. Graham*, 11 Mo. 575; *Magoon v. Whiting*, 1 Mo. 613; *Snyder v. Rouse*, 1 Metc. (Ky.) 625.

In *Browning v. Wheeler*, 24 Wend. (N. Y.) 258, 35 Am. Dec. 617, it is held that in a suit on the award it is not necessary to allege that the arbitrators have been sworn, where there is an averment that the award has been made by "qualified arbitrators."

When arbitrators are directed to be sworn before a magistrate, and one of them is a justice of the peace, he may administer the oath to the others. *In re Kenny*, 3 Nova Scotia 14.

2. Oath of Umpire.—*Frissell v. Fickes*, 27 Mo. 557. The principle upon which the decision was based is that where an umpire is to be chosen by referees, he stands in the same situation precisely as the referees themselves, both with respect to the powers to be exercised and the duties to be performed. Consequently, when he takes upon himself that character, it seems that he must proceed in the examination of the matter submitted to him, in the same manner as the arbitrators are required to do. So he must be sworn before he can hear the evidence. See *Passmore v. Pettit*, 4 Dall. (Pa.) 271.

3. Rule as to Arbitrators Acting Together.—*England.*—*In re Beck and Jackson*, 1 C. B. N. S. 695, 87 E. C. L. 695; *Morgan v. Bolt*, Q. B. 19 Jan. 1863, 1 N. R. 271; *Goodman v. Sayers*, 2 Jac. & W. 249; *Stalworth v. Inns*, 2 D. & L. 428; *In re Lord and Lord*, 5 El. & Bl. 404, 85 E. C. L. 404, 26 L. J. Q. B. 34; *In re Plews and Middleton*, 6 Q. B. 845, 51 E. C. L. 845; *Little v. Newton*, 9 Dowl. 437, 2 M. & G. 351, 40 E. C. L. 407; *Dalling v. Matchett*, Willes 215; *White v. Sharp*, 12 M. & W. 712; *Peterson v. Ayre*, 23 L. J. C. P. 129.

Canada.—*Ritchie v. Snowball*, 26 New Bruns. 258.

United States.—*Kingston v. Kincaid*, 1 Wash. (U. S.) 448; *Hobson v. M'Arthur*, 16 Pet. (U. S.) 182; *Leavitt v. Windsor Land, etc.*, Co., 54 Fed. Rep. 439, 12 U. S. App. 193.

Alabama.—*Tuskaloosa Bridge Co. v. Jemi-*

son, 33 Ala. 476; *McCrary v. Harrison*, 36 Ala. 577.

Illinois.—*Bannister v. Read*, 6 Ill. 92; *Smith v. Smith*, 28 Ill. 56; *Taylor v. Vessel Owners' Towing Co.*, 25 Ill. App. 503, 126 Ill. 250; *Citizens' Ins. Co. v. Hamilton*, 48 Ill. App. 593.

Indiana.—*Baker v. Farmbrough*, 43 Ind. 240.

Iowa.—*Cary v. Bailey*, 55 Iowa 60; *Kent v. French*, 76 Iowa 187.

Kentucky.—*Blanton v. Gale*, 6 B. Mon. (Ky.) 264; *Henderson v. Buckley*, 14 B. Mon. (Ky.) 236.

Maine.—*Cumberland v. North Yarmouth*, 4 Me. 459; *Thompson v. Mitchell*, 35 Me. 281.

Maryland.—*Harryman v. Harryman*, 43 Md. 140.

Massachusetts.—*Carpenter v. Wood*, 1 Met. (Mass.) 409; *Short v. Pratt*, 6 Mass. 496; *Maynard v. Frederick*, 7 Cush. (Mass.) 247; *Haven v. Winnisimmet Co.*, 11 Allen (Mass.) 377, 87 Am. Dec. 723; *Walker v. Melcher*, 14 Mass. 148; *Franklin Min. Co. v. Pratt*, 101 Mass. 359; *Hills v. Home Ins. Co.*, 129 Mass. 345.

Missouri.—*Bowen v. Lazalere*, 44 Mo. 383; *Shores v. Bowen*, 44 Mo. 396.

New Jersey.—*Moore v. Ewing*, 1 N. J. L. 167, 1 Am. Dec. 195; *Hoff v. Taylor*, 5 N. J. L. 957; *Barr v. Chandler*, 47 N. J. Eq. 532.

New York.—*Brower v. Kingsley*, 1 Johns. Cas. (N. Y.) 334; *McInroy v. Benedict*, 11 Johns. (N. Y.) 402; *Cope v. Gilbert*, 4 Den. (N. Y.) 347; *Green v. Miller*, 6 Johns. (N. Y.) 39, 5 Am. Dec. 184; *Harris v. Norton*, 7 Wend. (N. Y.) 534; *Ackley v. Finch*, 7 Cow. (N. Y.) 290; *Ex p. Rogers*, 7 Cow. (N. Y.) 526; *Batley v. Button*, 13 Johns. (N. Y.) 187; *People v. Walker*, 23 Barb. (N. Y.) 304; *Bulson v. Lohnes*, 29 N. Y. 291.

North Carolina.—*Norfleet v. Southall*, 3 Murph. (N. Car.) 189.

Vermont.—*Howard v. Conro*, 2 Vt. 492; *Blin v. Hay*, 2 Tyler (Vt.) 304, 4 Am. Dec. 738.

See *Shephard v. Brand*, Cas. temp. Hardw. 53; *People v. Coghill*, 47 Cal. 361.

Though Majority Award Sufficient, All must Consult.—In *Bulson v. Lohnes*, 29 N. Y. 291, it was said that where the submission is to three arbitrators, requiring the award to be signed by them, "or any two of them," at common law, two might lawfully proceed with the hearing after the third had been notified and had refused to act, it being held

(2) *Refusal of Arbitrator to Act.*—The refusal of one of the arbitrators to act operates as a revocation of the submission, unless a statute or the submission provides for a majority award, because the tribunal chosen by the parties has been so far changed that they can no longer be bound by its decision.¹ Where, however, one arbitrator refuses to act after

that under such a submission a majority could hear as well as make the award. See also *Crofoot v. Allen*, 2 Wend. (N. Y.) 494.

But now, by 2 *New York Rev. Stat.* 542, § 7, all the arbitrators must join in the hearing, although the majority may make a binding award.

Where the dispute was referred to three arbitrators, one of whom was absent from home and received no notice of, and was not present at any meeting, it was held that an award made by two only was void, although the submission contained a stipulation that an award made by a majority should be final. The court, by Field, J., said: "Although the submission provides that the award of the majority shall be final, yet all must meet in consultation upon the decision, unless, indeed, one refuses after notice to attend, because if the absent arbitrator had been present 'he might have drawn his brethren to a different opinion.'" *Doherty v. Doherty*, 148 Mass. 367, citing *Carpenter v. Wood*, 1 Met. (Mass.) 409; *Short v. Pratt*, 6 Mass. 496; *Blodgett v. Prince*, 109 Mass. 44; *Campbell v. Upton*, 113 Mass. 67; *Cumberland v. North Yarmouth*, 4 Me. 459; *Crofoot v. Allen*, 2 Wend. (N. Y.) 494.

Proof of Presence.—Where a statute provides that all the arbitrators must meet together and hear the allegations of the parties, but the award of the majority is valid, unless otherwise required by the submission, an award signed by two arbitrators only will be sustained upon parol evidence that the third arbitrator met with the others and heard the case. *Buxton v. Howard*, 38 Ind. 109. See *Schultz v. Halsey*, 3 Sandf. (N. Y.) 405.

Objection to Absence.—And where the provisions of the statute relating to arbitration require that all the arbitrators be present at each meeting, the fact that one of them was absent from one of the meetings, at which no final action was taken, cannot afterwards be objected to, if no objection was taken at the time by any of the other parties to the arbitration. His failure to attend was a mere irregularity, not jurisdictional, which might be waived by the parties. *Glass-Pendery Consol. Min. Co. v. Meyer Min. Co.*, 7 Colo. 51. See *White v. Robinson*, 60 Ill. 499; *Akridge v. Patillo*, 44 Ga. 585.

Where, under the *Georgia Code*, a dispute was submitted to arbitrators, and they and the parties had several meetings, at the first of which only two of the arbitrators were present, but no objection was made by either party at the time to the absence of the third arbitrator; on motion to make the award the judgment of the court, it was held too late to object to the award because of the absence of the third arbitrator from the first meeting, the arbitrators being unanimous in their award. *Akridge v. Patillo*, 44 Ga. 585.

An Umpire may act alone and give his decision alone. *Ingraham v. Whitmore*, 75 Ill. 24; *Underhill v. Van Cortlandt*, 2 Johns. Ch. (N. Y.) 339.

A Temporary Separation of the arbitrators has been held not to invalidate the award. *Baltes v. Bass Foundry, etc., Works*, 129 Ind. 185.

1. *Little v. Newton*, 2 M. & G. 351, 40 E. C. L. 407; *Stalworth v. Inns*, 2 D. & L. 428; *Boardman v. England*, 6 Mass. 70.

Recommitment de Novo.—The rule also applies where, after a recommitment, the arbitrators are required to hear the whole proceedings *de novo*. See *Cumberland v. North Yarmouth*, 4 Me. 459.

Refusal after Submission.—In *Carpenter v. Wood*, 1 Met. (Mass.) 409, it was said that one of the arbitrators cannot, after a submission has once been entered into, annul the submission by refusing to act. See *Phippen v. Stickney*, 3 Met. (Mass.) 384.

But this rule applies only in the case where a majority award is valid, because where an unanimous award is necessary the refusal of an arbitrator to act must annul the submission. *Little v. Newton*, 2 M. & G. 351, 40 E. C. L. 407; *Stalworth v. Inns*, 2 D. & L. 428.

In *King v. Grey*, 31 Tex. 22, it was held that where one of the three arbitrators withdrew after they had been in session a long time, and there was a presumption that before his withdrawal all the material facts had been obtained by them, the others might proceed and make their award; it would be binding on the parties, although he refused to be present. The withdrawal was held to be a simple dissent from the award made by the majority. See *Carpenter v. Wood*, 1 Met. (Mass.) 409; *Crofoot v. Allen*, 2 Wend. (N. Y.) 494.

The Refusal to Act must Be Distinct in order to be effective, and must not be set aside by subsequent attempts to take part in the proceedings. Where one of the arbitrators withdrew, but subsequently an award by the other arbitrators was sent to him, which he returned with comments, the award was set aside, the court holding that in such a case the arbitrators who made the award were bound to consult with the arbitrator who had originally withdrawn. But the court intimated that had they made their award on his withdrawal, without the subsequent consultation, it would be upheld. *In re Pering and Keymer*, 3 Ad. & El. 245, 30 E. C. L. 88.

No Set Form of Words Necessary.—But it is not necessary that it should be in any set form of words, so long as the intention is made evident. *Carpenter v. Wood*, 1 Met. (Mass.) 409.

Where a Majority Award is Sufficient by the terms of the submission, and one of the arbitrators shows by his acts, or declares, his intention to withdraw, the others may proceed

a recommitment, and the others return an identical award, it will be upheld.¹ But if it is different it will be void.² It will be invalid also if upon the recommitment the arbitrators are required to hear the whole case *de novo*, and one refuses to act.³

(3) *Presumption as to Joint Action.*—Although it does not appear on the face of the award that all the arbitrators have met, yet it will be presumed that they have met if nothing appears to the contrary.⁴ And where there is a statement to that effect in the award itself, it will be sufficient, although the award is not signed by all the arbitrators, but by some only.⁵

e. ARBITRATORS MUST ALL JOIN IN THE AWARD.—(1) *General Rule.*—All must join in private matters, unless there is an express provision to the contrary in the statute or submission under which the arbitrators act, or unless it can be inferred from the submission itself, and the surrounding circumstances, that the parties intend the contrary. Arbitration being usually a private matter, all the arbitrators must join in the award, or it is invalid.⁶

with the hearing, and their award will be upheld. *Kingston v. Kincaid*, 1 Wash. (U. S.) 448; *Kunckle v. Kunckle*, 1 Dall. (Pa.) 364; *Crofoot v. Allen*, 2 Wend. (N. Y.) 494.

It has been held that where one of the arbitrators withdraws, the others may make the award in his absence if it is competent for them to do so under the deed of submission. *McKellar v. White*, 1 New Zealand Ct. of App. 282.

And in *Glenny v. The Eglenton L. Co. Lt.*, 17 Victoria L. Rep. (Australia) 676, it was held that an award is not rendered invalid because made by two only of three arbitrators where the third had notice of the final meeting, and voluntarily remained away.

Refusal to Sign Award.—Two of the arbitrators chosen signed an award, the third refused to do so. After the arbitrators had separated, another award was drawn up by the attorney of one of the parties, and signed by the two arbitrators who had signed the first. The two awards were substantially the same, but the first was set aside, and the second award prepared by the attorney was served on the parties to the submission. It was held under these circumstances that as the first award was disregarded, and as it was the only valid one, there had in effect been no lawful and binding award made at all. *Baltes v. Bass Foundry, etc., Works*, 129 Ind. 185. See *Henderson Bridge Co. v. O'Connor*, 88 Ky. 303; *New York Lumber, etc., Co. v. Schneider*, 15 Daly (N. Y.) 15.

Pennsylvania Statute.—In Pennsylvania, by statute, when all the arbitrators do not attend at the first meeting appointed, those in attendance are empowered to appoint other arbitrators. *Stiles v. Carlisle, etc., Turnpike Road*, 10 S. & R. (Pa.) 286.

1. *Peterson v. Loring*, 1 Me. 64; *May v. Haven*, 9 Mass. 325. See *infra*, this title, *The Award—Recommitment of the Award*.

May v. Haven, 9 Mass. 325, did not overrule *Short v. Pratt*, 6 Mass. 496, which was a case where a report was recommitted and a new report returned, signed by two of the referees only, the court holding that it was invalid as not signed by all. See note to *Peterson v. Loring*, 1 Me. 67.

2. *Cary v. Bailey*, 55 Iowa 60; *Cumberland*

v. North Yarmouth, 4 Me. 459; *Boardman v. England*, 6 Miss. 70; *Walker v. Melcher*, 14 Mass. 148; *Downing v. Rugar*, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223.

It was said in *Cumberland v. North Yarmouth*, 4 Me. 459, that where an arbitrator refuses to act after a recommitment, the court could compel him by mandamus. See *Green v. Pole*, 6 Bing. 443, 19 E. C. L. 125.

3. *Cumberland v. North Yarmouth*, 4 Me. 459.

4. *Presumption.*—*Maynard v. Frederick*, 7 Cush. (Mass.) 247; *Brower v. Kingsley*, 1 Johns. Cas. (N. Y.) 334; *Yates v. Russell*, 17 Johns. (N. Y.) 461.

Where the report stated that "the subscribers" had met, but only two of them signed it, it was upheld. *Yates v. Russell*, 17 Johns. (N. Y.) 461; *Schultz v. Halsey*, 3 Sandf. (N. Y.) 405.

5. *Thompson v. Mitchell*, 35 Me. 281.

It has been held, in *Massachusetts* and *Vermont*, essential to the validity of the award that it should appear therein that all the arbitrators attended the hearings, or that they were all notified. *Short v. Pratt*, 6 Mass. 496; *Blin v. Hay*, 2 Tyler (Vt.) 304, 4 Am. Dec. 738. In the first of these cases, there was a statutory provision to that effect.

But in *New York* it has been held not necessary that the award should set out that all the arbitrators attended and heard the cause, the award having been signed by two only. *Ackley v. Finch*, 7 Cow. (N. Y.) 290.

6. *Rule as to Arbitrators Joining in the Award*—*England.*—*Grindley v. Barker*, 1 B. & P. 229; *Rex v. Whitaker*, 9 B. & C. 648, 17 E. C. L. 467; *Cortis v. Kent Water Works*, 7 B. & C. 314, 14 E. C. L. 52; *Crawshay v. Collins*, 3 Swanst. 90; *Sallows v. Girling*, Cro. Jac. 277; *Berry v. Penring*, Cro. Jac. 399; *Soulsby v. Hodgson*, 3 Burr. 1474; *Osborne v. Rugton*, Rol. Abr., Arb., 261, 262; *Berry v. Penring*, Cro. Jac. 399; *Dalling v. Matchett*, Willes 215.

United States.—*Leavitt v. Windsor Land, etc., Co.*, 54 Fed. Rep. 439.

Connecticut.—*Patterson v. Leavitt*, 4 Conn. 50, 10 Am. Dec. 98; *Nettleton v. Gridley*, 21 Conn. 531, 56 Am. Dec. 378.

Georgia.—*Smith v. Walden*, 26 Ga. 249.

It is not necessary, however, that they should all agree upon every question that arises in the proceedings. If they hear the whole cause and concur

Illinois.—Kelderhouse v. Hall, 116 Ill. 147; Godfrey v. Knobler, 44 Ill. App. 638; Bannister v. Read, 6 Ill. 92; Stose v. Heissler, 120 Ill. 433, 60 Am. Rep. 563.

Indiana.—Kile v. Chapin, 9 Ind. 150; Spencer v. Curtis, 57 Ind. 221; Byard v. Harkrider, 108 Ind. 376; Jeffersonville R. Co. v. Mounts, 7 Ind. 669; Baker v. Farmbrough, 43 Ind. 240.

Iowa.—Richards v. Holt, 61 Iowa 529.

Kentucky.—Payne v. Moore, 2 Bibb (Ky.) 163, 4 Am. Dec. 689; Patten v. Collins, Sneed (Ky.) 153.

Maine.—Knowlton v. Homer, 30 Me. 552; Hubbard v. Great Falls Mfg. Co., 80 Me. 39; Anderson v. Farnham, 34 Me. 161; Thompson v. Mitchell, 35 Me. 281.

Massachusetts.—Towne v. Jaquith, 6 Mass. 46, 4 Am. Dec. 84; Maynard v. Frederick, 7 Cush. (Mass.) 247.

Maryland.—Harryman v. Harryman, 43 Md. 140.

Michigan.—French v. Butler, 39 Mich. 79.

Mississippi.—Willis v. Higginbotham, 61 Miss. 164.

Missouri.—Sweeney v. Vaudry, 2 Mo. App. 352.

New Hampshire.—Eames v. Eames, 41 N. H. 177; Quimby v. Melvin, 28 N. H. 250.

New Jersey.—Hoffman v. Hoffman, 26 N. J. L. 175; Moore v. Ewing, 1 N. J. L. 167, 1 Am. Dec. 195; Reeves v. Goff, 2 N. J. L. 133.

New York.—Chautauqua Assembly v. Alling, 46 Hun (N. Y.) 582; Green v. Miller, 6 Johns. (N. Y.) 39, 5 Am. Dec. 184; Brower v. Kingsley, 1 Johns. Cas. (N. Y.) 334; Cope v. Gilbert, 4 Den. (N. Y.) 347; Jackson v. Gager, 5 Cow. (N. Y.) 383; Schultz v. Halsey, 3 Sandf. (N. Y.) 405; Jackson v. Gager, 5 Cow. (N. Y.) 383.

North Carolina.—Oakley v. Anderson, 93 N. Car. 108; Mackey v. Neill, 8 Jones (N. Car.) 214. See *Norfleet v. Southall*, 3 Murph. (N. Car.) 189; Mackey v. Neill, 8 Jones (N. Car.) 214.

Ohio.—Rhodes v. Baird, 16 Ohio St. 573.

Pennsylvania.—Howard v. Pollock, 1 Yeates (Pa.) 509; Tetter v. Rapesnyder, 1 Dall. (Pa.) 293; Russell v. Gray, 6 S. & R. (Pa.) 145; Welty v. Zentmyer, 4 Watts (Pa.) 75; Walters v. Pettit, 12 Pa. Co. Ct. Rep. 431, 2 Pa. Dist. Rep. 198; Weaver v. Powel, 148 Pa. St. 372.

Rhode Island.—Sherman v. Cobb, 15 R. I. 570.

South Carolina.—Leatherwood v. Woodroof, 2 Brev. (S. Car.) 380.

Tennessee.—Memphis, etc., R. Co. v. Pillow, 9 Heisk. (Tenn.) 248.

Vermont.—Blin v. Hay, 2 Tyler (Vt.) 304, 4 Am. Dec. 738.

See also *Kingston v. Kincaid*, 1 Wash. (U. S.) 448; *Cameron v. Castleberry*, 29 Ga. 495; *Kile v. Chapin*, 9 Ind. 150; *Spencer v. Curtis*, 57 Ind. 221; *Phippen v. Stickney*, 3 Met. (Mass.) 384; *Wheeling Gas Co. v. Wheeling*, 8 W. Va. 321. Compare *Black v. Pearson*, 1 McCord (S. Car.) 137. See *infra*,

this title, *The Award—The Award must Be Entire*.

Illustrations.—This principle was applied where the arbitrators jointly decided upon an award and had it drawn up by a counsellor, after which it was carried to them separately and executed at their own places of residence. *Moore v. Ewing*, 1 N. J. L. 167, 1 Am. Dec. 195; *Conrad v. Johnson*, 20 Ind. 421; *Steere v. Brownell*, 113 Ill. 415. Compare *Maynard v. Frederick*, 7 Cush. (Mass.) 247; *Blodgett v. Prince*, 109 Mass. 44; *Sperry v. Ricker*, 4 Allen (Mass.) 17.

Admissions made by a party, to one of the arbitrators, in the presence of the other arbitrators, and communicated by him to the others, cannot be taken into consideration. *Blanton v. Gale*, 6 B. Mon. (Ky.) 260.

Where, under a statute, the arbitrators must all unite in the award, a majority award will not be valid. *Bowen v. Lazalere*, 44 Mo. 383; *Shores v. Bowen*, 44 Mo. 396; *Lorenzo v. Deery*, 26 Hun (N. Y.) 447. Compare *Buxton v. Howard*, 38 Ind. 109.

Georgia Statutes.—Where an agreement to submit provided that the arbitrators should "settle, adjudicate, and pass upon" the matters in controversy "under the provisions and regulations" of the Georgia Act, March 5, 1856, which required an award to be unanimous, it was held that an award made by two out of three arbitrators under the submission was invalid, although it was made after the passing of the amending Act of 1859, which declared that the concurrence of two arbitrators was sufficient to render an award valid. *Stephens v. Hopper*, 31 Ga. 589.

New York Code.—The award of a mere majority of the arbitrators is not valid under New York Code, §§ 2366, 2371, unless the submission is in writing, subscribed by the parties, and duly acknowledged or certified, as a deed is required to be for purposes of record. *Lorenzo v. Deery*, 26 Hun (N. Y.) 447. See *Bulson v. Lohnes*, 29 N. Y. 291; *Locke v. Filley*, 14 Hun (N. Y.) 139; *Green v. Miller*, 6 Johns. (N. Y.) 39, 5 Am. Dec. 184.

Waiver of Right to Object.—Where one of the parties to an arbitration has protested against the determination of the matter in dispute by two out of three arbitrators, he does not waive such objection to their jurisdiction by appearing and making the best showing he can, where he does not withdraw the protest. *Kent v. French*, 76 Iowa 187.

Whether All must Execute at the Same Time and Place.—The rule in *England* is, that where a matter is referred to the arbitration of three persons or any two of them, the two who execute the award must do so at the same time and place and in the presence of each other; otherwise, it is not what the parties agreed to; that is, that the matter should be determined by the joint judgment of the two. *Peterson v. Ayre*, 15 C. B. 724, 80 E. C. L. 724.

It has been held that if the arbitrators all agree upon the award, but subsequently after it is drawn up, they affix their signatures

in the final award, it is enough, and an award of a mean sum will sometimes be sustained.¹

(2) *Rule in Public Matters.*—The rule is different in matters of a public character, because where persons, as a bench of judges, are appointed to discharge public duties, the decision of a majority is generally sufficient, yet then they must all act together in the proceedings prior to the judgment or award.²

(3) *When Majority Award Sufficient.*—Although the rule is that an award by a majority is void, yet where the submission so provides, or where such an intention may be gathered from it by necessary implication, such an award will be held binding. Where the submission provides for the appointment of two arbitrators, who are to choose a third to act with them, if one of the arbitrators, for any reason, stays away from the meetings, unless it be by fraud on the part of the other arbitrators or the parties, after he has received due notice, and has been given an opportunity to attend, the others may decide without him, and their award will be upheld.³

to it at different places and at different times, it will be rendered invalid by their failure to complete it in the presence of each other. *Stalworth v. Inns*, 2 D. & L. 428, 13 M. & W. 466; *Eads v. Williams*, 24 L. J. Ch. 531; *Wade v. Dowling*, 4 El. & Bl. 44, 82 E. C. L. 44; *Wright v. Graham*, 3 Exch. 131; *Anning v. Hartley*, 27 L. J. Exch. 145; *Hinton v. Mead*, 1 Jur. N. S. 46. In *Little v. Newton*, 9 Dowl. 437, an older case, the court doubted whether it was necessary that the arbitrators should affix their signatures in each other's presence, but the weight of authority is against this ruling.

In *Michigan* and *New Jersey* the same doctrine prevails, and an award, signed by the arbitrators at different times and not in each other's presence, is void. *Daniels v. Ripley*, 10 Mich. 37; *French v. Butler*, 39 Mich. 79; *Moore v. Ewing*, 1 N. J. L. 167, 1 Am. Dec. 195.

In *Massachusetts* it seems that the arbitrators need not, after coming to a final conclusion, sign the award at the same time. *Maynard v. Frederick*, 7 Cush. (Mass.) 247; *Blodgett v. Prince*, 109 Mass. 44; *Phippen v. Stickney*, 3 Met. (Mass.) 384.

1. *Campbell v. Western*, 3 Paige (N. Y.) 124; *Jackson v. Gager*, 5 Cow. (N. Y.) 383; *Bean v. Wendell*, 22 N. H. 582.

Awarding a Mean Sum.—Although arbitrators must use their own judgment in making the award, it is immaterial what means they use to come to an agreement. So where the arbitrators awarded a sum the exact mean between the sums named by several witnesses, the court assumed that the arbitrators had used their own judgment, and were convinced that their award was right. *Brown v. Belows*, 4 Pick. (Mass.) 179; *Bean v. Wendell*, 22 N. H. 582; *Campbell v. Western*, 3 Paige (N. Y.) 124.

Where two arbitrators, being unable to agree upon the sum to be reported due, agreed each to mark down a sum, and to report the average of the sums marked as their award, it was held that such an award was inherently vicious, and also that it violated the terms of a submission providing for the choosing of a third arbitrator in case the two named disagreed. *Luther v. Medbury*, 18 R. I. 141.

Differences of Opinion must be Settled Bona Fide.—It is absolutely indispensable that each arbitrator should exercise his own judgment, but nevertheless, in discussion, one may give way to the other where they differ in opinion; for, otherwise, where a difference of opinion arises, they could never agree. *Eardley v. Steer*, 4 Dowl. 423.

However, where one gives way to the other, it must be on conviction and *bona fide*, because where an arbitrator signs an award which he believes to be unjust, merely subscribing what he believes to be wrong, because another person thought it was right, such conduct will render the award invalid. *Eads v. Williams*, 24 L. J. Ch. 531.

2. **Matters of Public Nature.**—*People v. Coghill*, 47 Cal. 361; *Eames v. Eames*, 41 N. H. 177; *Downing v. Ruger*, 21 Wend. (N. Y.) 178, 34 Am. Dec. 223; *Lee v. Parry*, 4 Den. (N. Y.) 125; *Keeler v. Frost*, 22 Barb. (N. Y.) 400; *Horton v. Garrison*, 23 Barb. (N. Y.) 176; *Stewart v. Wallis*, 30 Barb. (N. Y.) 344; *Crocker v. Crane*, 21 Wend. (N. Y.) 211, 34 Am. Dec. 228; *Ex p. Rogers*, 7 Cow. (N. Y.) 526; *Sinclair v. Jackson*, 8 Cow. (N. Y.) 543; *People v. Walker*, 23 Barb. (N. Y.) 304; *Young v. Buckingham*, 5 Ohio 485; *Grindley v. Barker*, 1 B. & P. 236; *Rex v. Beeston*, 3 T. R. 594; *Rex v. Warrington*, 1 Salk. 152; *Naylor v. Sharpless*, 2 Mod. 23. See *Green v. Miller*, 6 Johns. (N. Y.) 39, 5 Am. Dec. 184; *Wheeling Gas Co. v. Wheeling*, 8 W. Va. 321.

Where the submission is of a public nature, the power in that case may be considered joint and several, and the majority may decide upon the questions submitted to them. *Patterson v. Leavitt*, 4 Conn. 50, 10 Am. Dec. 98; *Green v. Miller*, 6 Johns. (N. Y.) 39, 5 Am. Dec. 184.

Referees.—As referees are quasi-public officers, a report of a majority of them is valid. *Billington v. Sprague*, 22 Me. 34; *Wheeling Gas Co. v. Wheeling*, 8 W. Va. 353. See the title **REFEREES AND REFERENCES**.

3. *England.*—*Goodman v. Sayers*, 2 Jac. & W. 249; *Dalling v. Matchett*, Willes 215; *Barnes* 57; *In re Morphet*, 2 D. & L. 967; *In re Young and Bulman*, 13 C. B. 623, 76

f. ARBITRATORS MUST HEAR THE PARTIES IN PRESENCE OF EACH OTHER
 —(1) *General Rule.*—The arbitrators must hear the parties in each other's presence. They must hear both sides, and examine the witnesses on each side in the presence of both parties. They should receive no communication

E. C. L. 623; Moseley v. Simpson, L. R. 16 Eq. 226; Sallows v. Girling, Cro. Jac. 278.

United States.—*Kingston v. Kincaid, 1 Wash. (U. S.) 448; Kunckle v. Kunckle, 1 Dall. (U. S.) 364.*

Alabama.—*Badders v. Davis, 88 Ala. 367.*

Georgia.—*Cartledge v. Cutliff, 21 Ga. 1.*

Illinois.—*Security Live Stock Ins. Assoc. v. Briggs, 22 Ill. App. 107.*

Kentucky.—*Hewitt v. Craig, 86 Ky. 23.*

Maine.—*Cumberland v. North Yarmouth, 4 Me. 459.*

Massachusetts.—*Carpenter v. Wood, 1 Met. (Mass.) 409; Short v. Pratt, 6 Mass. 496; Walker v. Melcher, 14 Mass. 148; Sperry v. Ricker, 4 Allen (Mass.) 18; Doherty v. Doherty, 148 Mass. 367.*

Missouri.—*Hinkle v. Harris, 34 Mo. App. 223.*

New Hampshire.—*Dodge v. Brennan, 59 N. H. 138.*

New York.—*Crofoot v. Allen, 2 Wend. (N. Y.) 494; Green v. Miller, 6 Johns. (N. Y.) 39, 5 Am. Dec. 184; Schultz v. Halsey, 3 Sandf. (N. Y.) 405; Bulson v. Lohnes, 29 N. Y. 291.*

North Carolina.—*Kesler v. Kerns, 5 Jones (N. Car.) 191.*

South Carolina.—*Parnell v. Parnell, 3 Strobb. (S. Car.) 486.*

Virginia.—*Doyle v. Patterson, 84 Va. 800; Wheatley v. Martin, 6 Leigh (Va.) 62; Shipman v. Fletcher, 82 Va. 601.*

See *King v. Grey, 31 Tex. 22.*

Arbitrator cannot Dissent after Signing Award.—If one of the arbitrators dissents from the decision of the others, he must, in order to defeat the award, express this dissent before the award is made. If he unites with the others in making it, he cannot afterwards be heard to prove that he did not assent to the decision. *Jackson v. Gager, 5 Cow. (N. Y.) 383; Campbell v. Western, 3 Paige (N. Y.) 124; Cox v. Jagger, 2 Cow. (N. Y.) 638. See In re Marsh, 16 L. J. Q. B. 330.*

Objection that All did Not Join—When Made.—A party who objects to the award because it is not signed by all the arbitrators must do so at the time when the report is confirmed and judgment entered. It will be too late to raise the question afterwards. The objection will then be considered to have been waived. *Newcomb v. Wood, 97 U. S. 581; Sweeney v. Vaudry, 2 Mo. App. 352.*

The Refusal to Act must Be Express, and, after consultation, two cannot make an award without first consulting the third arbitrator. *White v. Sharp, 12 M. & W. 712; Sallows v. Girling, Cro. Jac. 277; Berry v. Perry, 3 Bulst. 62; Thomas v. Harrop, 1 Sim. & S. 524; In re Pering and Keymer, 3 Ad. & El. 245, 30 E. C. L. 88; In re Templeman and Reed, 9 Dowl. 962; Hawley v. North Staffordshire R. Co., 2 De G. & S. 33.*

The reason for the necessity of consulting where a third arbitrator is called in, is that his opinion might produce unanimity between the others, and, besides, he has a right to be consulted. See *In re Templeman and Reed, 9 Dowl. 962*, and other cases cited above.

In *McCrary v. Harrison, 36 Ala. 579*, it was held that the fact that one of the arbitrators dissented from the others was all the more reason for giving him notice of the meeting for making the award.

Two Arbitrators with Power to Call in Third on Disagreement.—Where the submission is made to two arbitrators, with a provision that a third shall be appointed by them if they cannot agree, it has been held that it is a necessary inference that the parties intended that a decision by a majority should be binding, and an award made by two was sustained. *Hobson v. McArthur, 16 Pet. (U. S.) 188; Battey v. Button, 13 Johns. (N. Y.) 187. See Frye v. Scott, 3 Cranch (C. C.) 294; Maynard v. Frederick, 7 Cush. (Mass.) 247; Carpenter v. Wood, 1 Met. (Mass.) 409; Walker v. Melcher, 14 Mass. 148; Short v. Pratt, 6 Mass. 496; Guerrant v. Smith, 48 Miss. 90; Haff v. Blossom, 5 Bosw. (N. Y.) 559; Wheeling Gas Co. v. Wheeling, 8 W. Va. 358.*

Where parties agreed to submit the matters in dispute between them to four arbitrators, with the stipulation that if they could not agree, the said arbitrators should choose a fifth man, it was held under this agreement that an award made by three of the four arbitrators was binding upon the parties, although the fourth dissented from such award, the court concluding that it was the intention of the parties that the majority should decide. *Cooley v. Dill, 1 Swan (Tenn.) 313. See Blanchard v. Murray, 15 Vt. 548; Coupland v. Anderson, 2 Call (Va.) 106; Wheatley v. Martin, 6 Leigh (Va.) 62; Bachelder v. Wallace, 1 Wash. Ter. 107; Darge v. Horicon Iron Mfg. Co., 22 Wis. 691.*

Two Arbitrators Who are to Choose Third.—Where, by the terms of the submission, two arbitrators only are appointed who are to choose a third to act with them, and an award by two is to be valid, the two originally chosen must proceed to appoint the third before they take any other steps in the proceedings. And the third so chosen must act with them, because the parties are entitled to have his opinion and judgment, as well as that of the others. A third arbitrator must not be treated as an umpire. *Peterson v. Ayre, 23 L. J. C. P. 129.*

So if a certain time is limited by the submission, within which the award must be made, or such other day as may be determined on by the arbitrators, or any two of them, the third arbitrator must be appointed before the extension is made. *Reade v. Dutton, 2 M. & W. 69; Hughes v. Garnett, cited in 2 M. & W. 69.*

from either party without letting the other know it. They should make no inquiries from the witnesses on either side, no matter how immaterial the point, after the hearing has closed. A departure from the strict rule of dealing equally with both sides will be fatal to the award.¹ Under such

Where Submission Allows Majority Award.—Where the parties agree that a majority award shall be good, an award signed by five out of seven arbitrators is good. *Thompson v. Blanchard*, 2 Iowa 44; *Wilson v. Concord R. Co.*, 3 Allen (Mass.) 194.

Where a decision of a majority of the arbitrators was permitted by the terms of the submission, an award by the majority will not be set aside merely for an excess of its amount, in the absence of fraud. *Port Huron, etc., R. Co. v. Callanan*, 61 Mich. 12.

Where the award, under the terms of the submission, could be made by a majority, and the parties have acquiesced for six years, the award will not be rendered invalid by proof that one of the three arbitrators was ignorant of a certain fact recited therein. *Betsill v. Betsill*, 30 S. Car. 505.

Where in a case pending, a reference is made to certain arbitrators by rule of court, or to a majority of them, a majority award will not be rendered invalid because other persons not named in the rule joined in and signed the award. *Carter v. Sams*, 4 Dev. & B. (N. Car.) 182. See *Soulsby v. Hodgson*, 3 Burr. 1474; *Beck v. Sargent*, 4 Taunt. 232; *Bates v. Cooke*, 9 B. & C. 407, 17 E. C. L. 407; *Lattimore v. Martin*, Add. (Pa.) 11.

In general, although a majority award is admissible under the submission, an award signed by the majority only is not good, unless the arbitrators not signing had notice of the proceedings. *Dalling v. Matchett, Willes* 215; *Crofoot v. Allen*, 2 Wend. (N. Y.) 494.

Arbitrator Absent under Belief that Power was Revoked.—In *Schultz v. Halsey*, 3 Sandf. (N. Y.) 405, an award signed by two of three arbitrators was held valid where it appeared that the third arbitrator had been present at the hearings and at the final submission of the matters in dispute, and had been absent at the signing because he thought that his power was revoked.

Arbitrators to Fix Price at Which Land shall be Conveyed.—In *Phippen v. Stickney*, 3 Met. (Mass.) 384, the court, by Dewey, J., said: "The objection is that of the three arbitrators selected by the parties, two only concurred in the award. This would constitute a valid objection to an action on an award founded on a submission at common law, there being no stipulation that a majority should decide. The question arises here, however, under different circumstances, the plaintiff founding his cause of action on the promise of the defendant to convey to him the land. In a case like the present, if it appears that the plaintiff has done all in his power to procure an award fixing the amount to be paid by him, in pursuance of the terms of the contract, we do not think that the act of any one of the persons thus selected as arbitrators in refusing to concur with his associates in fixing the sum to be paid should op-

erate to divest the rights of the plaintiff arising under this contract." This case has been characterized as peculiar, and seems to stand alone. See *Morse on Awards* 163; *Wheeling Gas Co. v. Wheeling*, 8 W. Va. 321.

Kentucky Statute.—The Gen. Stat. of Kentucky, c. 21, § 3, and the Kentucky Civil Code, § 679, provide that where an act is directed by law to be done by three or more, it may be lawfully done by a majority of them concurring. Under this law, it has been held that where a special act provided for a commission of three to arbitrate between the state and the claimant, authorizing them to make a full and final settlement, and one of the commissioners declined to act, but the other two heard the evidence and rendered an award in favor of the plaintiff, the decision of the majority was binding. *Hewitt v. Craig*, 86 Ky. 23.

Indiana—Presumption that Majority may Act.—In *Spencer v. Curtis*, 57 Ind. 221, it was held that unless the submission requires the award to be made by all the arbitrators, an award made by a majority legally appointed is valid. This case goes very far in supporting a majority award. The usual rule is, that an award by a mere majority is not valid, unless the submission so stipulates. See *Memphis, etc., R. Co. v. Pillow*, 9 Heisk. (Tenn.) 248; and the cases cited above in this note.

1. *England.*—*Dobson v. Groves*, 6 Q. B. 637, 51 E. C. L. 637; *Harvey v. Shelton*, 7 Beav. 455, 13 L. J. Ch. 466; *In re Hick*, 8 Taunt. 694, 4 E. C. L. 249; *In re Tidswell*, 33 Beav. 213; *Drew v. Leburn*, 2 Macq. 1; *In re Brook*, 16 C. B. N. S. 403, 111 E. C. L. 403; *Bache v. Billingham* (1894), 1 Q. B. 107.

United States.—*Hagner v. Musgrove*, 1 Dall. (U. S.) 83; *Chaplin v. Kirwan*, 1 Dall. (U. S.) 187.

Alabama.—*Rosenau v. Legg*, 82 Ala. 568.

Georgia.—*Jackson v. Roane*, 90 Ga. 669; *Wilkins v. Van Winkle*, 78 Ga. 557.

Iowa.—*Sullivan v. Frink*, 3 Iowa 66.

Kentucky.—*Blanton v. Gale*, 6 B. Mon. (Ky.) 260.

Maryland.—*Sisk v. Garey*, 27 Md. 401.

Massachusetts.—*Conrad v. Massasoit Ins. Co.*, 4 Allen (Mass.) 20; *Billings v. Billings*, 110 Mass. 225.

New York.—*Knowlton v. Mickles*, 29 Barb. (N. Y.) 465; *Herrick v. Blair*, 1 Johns. Ch. (N. Y.) 101; *National Bank of the Republic v. Darragh*, 30 Hun (N. Y.) 29.

North Carolina.—*Hays v. Forbes*, 112 N. Car. 845.

Rhode Island.—*Cleland v. Hedly*, 5 R. I. 163; *Wood v. Helme*, 14 R. I. 325.

Virginia.—*Tate v. Vance*, 27 Gratt. (Va.) 571.

See *In re Gregson and Armstrong*, 10 R. 408, 70 L. T. 106; *Hardy v. Fitton*, 8 R. 99; *Morgan v. Mather*, 2 Ves. Jr. 15; *Fetherstone v. Cooper*, 9 Ves. Jr. 67; *Sharpe*

circumstances, when the award of the arbitrators is set aside, the party has

v. Bickerdyke, 3 Dow 102; *McPherson v. Ross*, 9 Sess. Cas. 797; *Torrance v. Amsden*, 3 McLean (U. S.), 509; *Lutz v. Linthicum*, 8 Pet. (U. S.) 178; *Allen v. Ranney*, 1 Conn. 569; *Lynch v. Nugent*, 80 Iowa 422; *Maysville, etc., Turnpike Road Co. v. Waters*, 6 Dana (Ky.) 62; *Rice v. Wallace*, 30 Me. 252; *Small v. Trickey*, 41 Me. 507, 66 Am. Dec. 255; *Strong v. Strong*, 9 Cush. (Mass.) 574; *Rand v. Redington*, 13 N. H. 72; *Hart v. Kennedy*, 47 N. J. Eq. 51; *Elmendorf v. Harris*, 23 Wend. (N. Y.) 628, 35 Am. Dec. 587; *Peters v. Newkirk*, 6 Cow. (N. Y.) 103; *Hollingsworth v. Leiper*, 1 Dall. (Pa.) 161.

Receiving Evidence in Absence of One or Both Parties.—Receiving evidence, as affidavits, accounts, or other documents, of one party without the knowledge of the other, will avoid the award. *Passmore v. Pettit*, 4 Dall. (U. S.) 271; *Cameron v. Castleberry*, 29 Ga. 495; *Emery v. Owings*, 7 Gill (Md.) 488, 48 Am. Dec. 580; *Bassett v. Harkness*, 9 N. H. 164; *National Bank of the Republic v. Daragh*, 30 Hun (N. Y.) 29; *Cleland v. Hedly*, 5 R. I. 163; *Jenkins v. Liston*, 13 Gratt. (Va.) 535.

But where one of the arbitrators received from one of the parties a letter as to the merit of the case, after they had come to a decision, but before the award was drawn up and signed, it was held not to invalidate the award. *Johnson v. Holyoke Water Power Co.*, 107 Mass. 472.

In order to decide whether they will accept the office or not, arbitrators have, before accepting, the right to inquire into the nature of the subject-matter which they are to consider. *Campbell v. Western*, 3 Paige (N. Y.) 124.

In *Walker v. Frobisher*, 6 Ves. Jr. 70, where the arbitrator heard some witnesses in the absence of both parties and their attorneys, after the parties had agreed at his suggestion to introduce no more evidence, the award was set aside by Lord Eldon, on the ground that the evidence had been irregularly admitted, although the arbitrator swore that the evidence so heard had no influence on his decision. See *Fetherstone v. Cooper*, 9 Ves. Jr. 67.

Walker v. Frobisher, 6 Ves. Jr. 70, was *approved and followed* in *Dobson v. Groves*, 6 Q. B. 637, 51 E. C. L. 637, and *In re Plews and Middleton*, 6 Q. B. 845, 51 E. C. L. 845, and the cases of *Atkinson v. Abraham*, 1 B. & P. 175, and *Bignall v. Gale*, 2 M. & G. 830, 40 E. C. L. 648, which laid down a less stringent rule, were *disapproved*.

But in *Annis v. Hartley*, 27 L. J. Exch. 145, it was held that where no personal misconduct or gross disregard of rules could be imputed to the arbitrator, the court will refer back the award to him, although his examination of the witnesses may have been irregular.

And so questions as to items in accounts, put by the arbitrators to one of the parties in the other's absence, have been held not to

vitiating the award. *Anderson v. Wallace*, 3 Cl. & F. 26.

Or statements made by either party, in the other's absence, to accountants to whom the accounts have been referred. *Harvey v. Shelton*, 7 Beav. 455.

But in *Haigh v. Haigh*, 31 L. J. Ch. 420, where an accountant was by the submission to be employed to examine the accounts, books, and works, and to report to the arbitrator, the court reprehended his receiving explanations from one party in the absence of the other.

Partner of One of the Parties Admitted to Hearing.—Where the arbitrators excluded the parties to the dispute during the hearing, but permitted the secret partner of one of them to be present, and appointed other persons to examine the accounts and vouchers, and adopted their conclusions without examining the vouchers themselves, it was held that the award should be set aside. *Shipman v. Fletcher*, 82 Va. 601.

Hearing of One Party in Absence of Other Held Not to Vitate.—In *Innes v. Miller*, 1 Dall. (Pa.) 188, where the referees had determined on the principles of their report, but sent for one of the parties and asked him whether he would consent that a certain amount of that which had accrued after the suit had been brought should be included in the settlement, it was held that such irregularity was not sufficient to render their report void.

Matter of a Public Nature.—In *Chaplin v. Kirwan*, 1 Dall. (Pa.) 187, it was held to be "highly commendable" that the arbitrators should make inquiries abroad in regard to the price of work, or the truth of any matter which was of a public nature; the distinction being drawn between such a proceeding and examining witnesses separately, because the opposite party is entitled to cross-examine a witness. See *Peters v. Newkirk*, 6 Cow. (N. Y.) 103; *Hall v. Norwalk F. Ins. Co.*, 57 C nn. 105.

Taking Evidence of Sick Person.—It has been held that the arbitrator himself may take the evidence of a sick or infirm person, at the residence of such person. *Tillam v. Copp*, 5 C. B. 211, 57 E. C. L. 211.

Waiver and Consent.—Where one of the parties has appointed an agent for the purpose of conducting reference, and such agent consents that the opposite party shall call upon the other arbitrator alone and produce his books before him, the principal cannot object to the award on account of a private meeting between the arbitrators and such opposite party. *Hamilton v. Rankin*, 3 De G. & S. 782.

Where, upon a submission, the witnesses were examined by arbitrators in the absence of one of the parties, he will be justified in abandoning the reference and admitting a rescission of the proceedings, but if he comes on and takes part in the proceedings after he knows of such examination, it operates as a waiver of the irregularity. *Small v. Trickey*, 41 Me. 507, 66 Am. Dec. 255.

Where arbitrators have made an award in

a right to proceed on his original claim.¹

(2) *When Ex Parte Hearings Permitted.*—Notwithstanding the imperative character of the general rule, every arbitrator is authorized *virtute officii* to proceed *ex parte* for good cause. It is in his own discretion to determine when he shall exercise the power.²

After Notice Given.—The rule may be said to be that the arbitrator is not justified in proceeding *ex parte* without giving the party absentsing himself due notice, either verbally or in writing, stating clearly his intention to proceed.³

a dispute between a Friendly Society and a member, after excluding the claimant from the room during the hearing of two witnesses, the court held that such award was valid until it was set aside, and could not be appealed from under the rules of the society, which provided that "where no decision is made on the dispute within forty days of application for reference to arbitration, the member may apply to a court of summary jurisdiction." *Bache v. Billingham* (1894), 1 Q. B. 107.

An award made without hearing one of the parties is void as to him, unless he has agreed that there shall be no hearing. *Billings v. Billings*, 110 Mass. 225.

1. *Moran v. Bogert*, 16 Abb. Pr. N. S. (N. Y. Supreme Ct.) 303.

Where mutual claims for damages are submitted to arbitrators, and they consider the damages done to one party and render the award in his favor, but refuse to consider or hear evidence as to the claims of the other, such other party may pay the amount of their award, and then bring a suit upon his original claim. *Pritchard v. Daly*, 73 Ill. 523. See *infra*, this title, *The Award—Effect of the Failure of the Reference*.

2. Russell on Awards (6th ed.) 205; *Wood v. Leake*, 12 Ves. Jr. 412; *Hetley v. Hetley*, *Kyd on Awards*, p. 100. See *Nickalls v. Warren*, 6 Q. B. 615, 51 E. C. L. 615; *Bray v. English*, 1 Conn. 498; *Boring v. Boring*, 2 W. Va. 297.

Ex Parte Hearing.—It was held in *Gladwin v. Chilcote*, 9 Dowl. 550, that the arbitrator is not justified in going on with the hearing in the absence of one of the parties, unless there are very strong reasons for doing so.

It has been held, however, that circumstances may arise which will justify an arbitrator in even excluding the parties and witnesses from the hearing, and examining the witnesses themselves in their own houses. *Hewlett v. Laycock*, 2 C. & P. 574, 12 E. C. L. 271. See *Matson v. Trower*, R. & M. 17, 21 E. C. L. 371.

An arbitrator has been held justified, in a farming case, in excluding a stranger, skilled in agriculture, who was assisting the defendant's attorney in the conduct of the case. *Tillam v. Copp*, 5 C. B. 211, 57 E. C. L. 211.

But where an arbitrator excluded a son of one of the parties, and a shorthand writer, both of whom the party wished to have in attendance, such action was held to be unreasonable, and the award was set aside. *Haigh v. Haigh*, 31 L. J. Ch. 420.

Where the arbitrators, without the knowl-

edge and in the absence of the parties, after they were left alone to deliberate over their decision, called a witness to explain the evidence that he had given at the hearing, it was held that a court of equity would not grant an injunction to stay a suit upon the arbitration bond. *Herrick v. Blair*, 1 Johns. Ch. (N. Y.) 101.

In *Small v. Trickey*, 41 Me. 507, 66 Am. Dec. 255, it was held that where referees, after the hearing before them has been closed, in the absence of one of the parties, but in the other's presence, compared an account with a book of entries, this did not constitute an *ex parte* hearing, where the comparison was not charged to have been fraudulently made, and where in fact it was made solely to prevent mistake, and that the award was not rendered void thereby.

3. Russell on Awards (6th ed.) 206; *Gladwin v. Chilcote*, 9 Dowl. 550; *Scott v. Van Sandau*, 6 Q. B. 237, 51 E. C. L. 237; *Hopkins v. Sodouskie*, 1 Bibb (Ky.) 148; *Brown v. Leavitt*, 26 Me. 251. See *Shult v. Travis*, *Sneed (Ky.)* 140; *Phillips v. Travis*, *Sneed (Ky.)* 174.

Proceeding Ex Parte after Notice.—It has been held that an ordinary appointment for a meeting, with the word "peremptory" indorsed on it, was sufficient notice. *Gladwin v. Chilcote*, 9 Dowl. 550; *Dodgington v. Hudson*, 1 Bing. 384, 8 E. C. L. 559.

But if on such a notice the party fails to attend, and the arbitrator declines to proceed *ex parte*, but gives another appointment, it has been held that he must give a peremptory notice for the second meeting, or he cannot proceed *ex parte*. *Gladwin v. Chilcote*, 9 Dowl. 550.

However, it has been held in more recent cases that such peremptory notice is not necessary. Where the arbitrator, in an action against a tenant for dilapidations, appointed a meeting for a view and "to go into the reference," and the defendant was present at the view, but withdrew without saying anything, and the arbitrator went on with the hearing *ex parte*, the award was sustained. *Fryer v. Shaw*, 27 L. J. Exch. 320. See *Angus v. Smythies*, 2 F. & F. 381; *Hewitt v. Portsmouth Water Works Co.*, 10 W. R. 780.

So where a party has refused to attend on the ground that the arbitrator had admitted illegal evidence, and that his award would be void in consequence, it was held that he need not give the party absentsing himself any notice of the subsequent meetings. But generally it is more prudent to do so. *Scott v. Van Sandau*, 6 Q. B. 237, 51 E. C. L. 237; *Harcourt v. Ramsbottom*, 1 Jac. & W. 485; *In re Kyle*,

And if after such notice the party does not attend, or does not give some satisfactory reason for not attending, the arbitrator not alone may, but ought to, proceed *ex parte*.¹

g. ARBITRATORS MUST GIVE NOTICE OF THE HEARING TO BOTH PARTIES
 --(1) *Generally*—(a) *Rule in the United States*.—The rule being that each party is entitled not alone to present his own case, but to be present when the other side is being heard,² it follows that both parties are entitled to notice from the arbitrator, of the time and place of the hearings, and that such notice should give each reasonable time to prepare his case. Without such notice, the hearing is illegal, and the award void.³

2 Jur. 760; Bignall v. Gale, 2 M. & G. 830, 40 E. C. L. 648.

In Bray v. English, 1 Conn. 498, where a party had received notice of the time and place of hearing, the arbitrator was held entitled to proceed *ex parte*. See Brown v. Leavitt, 26 Me. 251.

It has been held that although an arbitration is made in accordance with the provisions of a written instrument, yet if it is had without notice to one of the parties and in his absence, it is *ex parte*, and not binding upon him. Dormoy v. Knowler, 55 Iowa 722. See Elmendorf v. Harris, 23 Wend. (N. Y.) 628, 35 Am. Dec. 587; Knowlton v. Mickles, 29 Barb. (N. Y.) 465; Jordan v. Hyatt, 3 Barb. (N. Y.) 275; Garvey v. Carey, 4 Abb. Pr. N. S. (N. Y. Super. Ct.) 159.

In Brown v. Leavitt, 26 Me. 251, where the parties agreed to submit their mutual claims to the decision of a named arbitrator "whose decision, made within one month after he has notified the parties and heard them, is to be final and binding upon the parties," without making any reference to an *ex parte* hearing, and the parties were notified and met, and a partial hearing took place when both parties were present, and then the hearing was adjourned to another day, and one of them did not attend, and a further hearing took place, it was held that he could not object to the award that the final hearing had been *ex parte*.

1. Waller v. King, 9 Mod. 63; Wood v. Leake, 12 Ves. Jr. 412; *In re* Hail and Anderson, 8 Dowl. 326; Boring v. Boring, 2 W. Va. 297.

In Harcourt v. Ramsbottom, 1 Jac. & W. 485, it was held that where one of the parties made an ineffectual attempt to revoke the submission, and refused to proceed on the ground that the arbitrator had no authority, the arbitrator might proceed *ex parte* forthwith.

English Statutes.—In *England* by Statute 3 & 4 Will. IV., c. 42, § 39, the arbitrator is authorized to proceed *ex parte* where one of the parties has made an ineffectual attempt to revoke the award, although such party does not afterwards attend the reference. See, to the same effect, in the case of Railway Companies, 22 & 23 Vict., c. 59.

2. Herrick v. Blair, 1 Johns. Ch. (N. Y.) 101; Hollingsworth v. Leiper, 1 Dall. (Pa.) 161; Hagner v. Musgrove, 1 Dall. (Pa.) 83; Chaplin v. Kirwan, 1 Dall. (Pa.) 187; Boring v. Boring, 2 W. Va. 297.

3. *Necessity of Notice—United States*.—The

Brig Armstrong v. U. S., Dev. Ct. of Cl. 22; Lutz v. Linthicum, 8 Pet. (U. S.) 178; Warren v. Tinsley, 53 Fed. Rep. 689.

Arkansas.—McFarland v. Mathis, 10 Ark. 560.

California.—Curtis v. Sacramento, 64 Cal. 102.

Connecticut.—Ranney v. Edwards, 17 Conn. 309.

Delaware.—Meredith v. Sanborn, 5 Harr. (Del.) 249.

Georgia.—Walker v. Walker, 28 Ga. 140.

Illinois.—Vessel Owners Towing Co. v. Taylor, 126 Ill. 250; Citizens Ins. Co. v. Hamilton, 48 Ill. App. 593.

Iowa.—Dormoy v. Knowler, 55 Iowa 722; Conger v. Dean, 3 Iowa 463, 66 Am. Dec. 93.

Louisiana.—Dreyfous v. Hart, 36 La. Ann. 929.

Maine.—Cobb v. Wood, 32 Me. 455; McKinney v. Page, 32 Me. 513; Brown v. Leavitt, 26 Me. 251.

Maryland.—Emery v. Owings, 7 Gill (Md.) 488, 48 Am. Dec. 580; Young v. Reynolds, 4 Md. 375; Bullitt v. Musgrave, 3 Gill (Md.) 31; Rigden v. Martin, 6 Har. & J. (Md.) 403; Selby v. Gibson, 1 Har. & J. (Md.) 362, note; Wilson v. Boor, 40 Md. 483; Bushey v. Culler, 26 Md. 534.

Massachusetts.—Conrad v. Massasoit Ins. Co., 4 Allen (Mass.) 20; Hills v. Home Ins. Co., 129 Mass. 345; Maynard v. Frederick, 7 Cush. (Mass.) 247; Crowell v. Davis, 12 Met. (Mass.) 293; Lincoln v. Taunton Copper Mfg. Co., 8 Cush. (Mass.) 415.

Minnesota.—Janney v. Goehringer, 52 Minn. 428; Schreiber v. German-American Hail Ins. Co., 43 Minn. 367; Mosness v. German-American Ins. Co., 50 Minn. 341.

Mississippi.—Upshaw v. Hargrove, 6 Smed. & M. (Miss.) 286.

Missouri.—Frissell v. Fickes, 27 Mo. 557.

New Hampshire.—Hook v. Philbrick, 23 N. H. 288; Goodall v. Cooley, 29 N. H. 48.

New York.—Linde v. Republic F. Ins. Co., 50 N. Y. Super. Ct. 362; Elmendorf v. Harris, 23 Wend. (N. Y.) 628, 35 Am. Dec. 587; Peters v. Newkirk, 6 Cow. (N. Y.) 103; Morewood v. Jewett, 2 Robt. (N. Y.) 496; Briggs v. Smith, 20 Barb. (N. Y.) 413; Day v. Hammond, 57 N. Y. 479, 15 Am. Rep. 522; Jordan v. Hyatt, 3 Barb. (N. Y.) 275; Collins v. Vanderbilt, 8 Bosw. (N. Y.) 313; Knowlton v. Mickles, 29 Barb. (N. Y.) 465.

Ohio.—Strum v. Cunningham, 3 Ohio 286.

Pennsylvania.—Share v. Becker, 8 S. & R. (Pa.) 239; Falconer v. Montgomery, 4 Dall.

Sufficiency of Notice.—In the *United States* it appears that no definite rule exists for giving notice, nor is any formal method of doing so requisite, so long as the notification is made as a fact.¹

(Pa.) 232; *Passmore v. Pettit*, 4 Dall. (Pa.) 271.
Rhode Island.—*Wood v. Helme*, 14 R. I.

325.

South Carolina.—*Shinnie v. Coil*, 1 McCord Eq. (S. Car.) 478.

Vermont.—*Webber v. Ives*, 1 Tyler (Vt.) 441.

Virginia.—*M'Cormick v. Blackford*, 4 Gratt. (Va.) 133.

Dispute with City—Notice to Mayor.—Where a dispute between a private person and the trustees of a city was submitted to arbitration, but the arbitrators gave no notice of the hearing to the mayor, the award was held void, although the trustees were present at one meeting and gave evidence in the interest of the city. *Curtis v. Sacramento*, 64 Cal. 102.

Hearing before Umpire—Notice Necessary.—In *Thomas v. West Jersey R. Co.*, 24 N. J. Eq. 567, two arbitrators, after hearing the evidence and arguments, chose an umpire to act as a third arbitrator upon their being unable to agree, and the three met without notifying the parties to the submission of the appointment of the third arbitrator, or of the time and place of their meeting, it was held that their action, although in good faith, was misconduct in the sense of the law, and that it invalidated the award. See *Graham v. Graham*, 9 Pa. St. 255, 49 Am. Dec. 557.

Consent or Waiver.—Where the trial court decided that the parties either had notice of hearing by arbitrators or waived it, such determination will not be set aside upon evidence which tends to show that both parties knew that the arbitrators were engaged in making the award, and that the intention was that they should proceed without the parties being present. *Shively v. Knoblock*, 8 Ind. App. 433.

1. *Morse Arb. and Award* 118; *Bray v. English*, 1 Conn. 498.

Notice to Attorney.—In *Rivers v. Walker*, 1 Dall. (Pa.) 81, it was held that notice of the hearing given to the attorney of a party was insufficient; that he should be served with such notice himself, unless the order of reference provides otherwise. See *Blodgett v. Prince*, 109 Mass. 44; *Shibe v. Rex*, 1 Browne (Pa.) 174; *Hottenstine v. Auten*, 43 Pa. St. 323. But in *Hill v. Hill*, 11 Smed. & M. (Miss.) 616, it was held that notice given to the attorneys of the parties is sufficient. See *Madison Ins. Co. v. Griffin*, 3 Ind. 277; *Rigden v. Martin*, 6 Har. & J. (Md.) 406; *Kyd on Awards* 95.

Misnomer in Notice.—After a notice of the time and place of their meeting is given to the parties, all the subsequent proceedings of the arbitrators are vitiated by a misnomer of the plaintiff in such notice. *Welsh v. Schall*, 1 Pa. Dist. Rep. 114, 11 Pa. Co. Ct. Rep. 30.

Notice to Mortgagee.—Where insurance is made payable to a mortgagee, but he is not entitled to the whole amount, he need not be made a party to an action, nor need he be given notice of an appraisal for damages to

the property injured. *Chandos v. American F. Ins. Co.*, 84 Wis. 184. But see *Hathaway v. Orient Ins. Co. (Supreme Ct.)*, 11 N. Y. Supp. 413; *Brown v. Roger Williams Ins. Co.*, 5 R. I. 394.

Notice to Surety.—A surety on an arbitration bond is not entitled to a notice of the hearing, *Farmer v. Stewart*, 2 N. H. 97; nor is a surety in a lease which becomes the subject of arbitration under a stipulation for arbitration in such lease, *Binse v. Wood*, 47 Barb. (N. Y.) 624.

Reasonable Notice.—The object of notice being to enable the parties to be present and present their case before a conclusion is arrived at, such notice given after the judgment of the arbitrators is formed is but an idle ceremony. *Conrad v. Massasoit Ins. Co.*, 4 Allen (Mass.) 20.

Reasonable or sufficient notice is a matter in the main which depends on the good faith and discretion of the arbitrator, and is a question of fact for the jury, and not a question of law as in the case of negotiable paper. See *Morewood v. Jewett*, 2 Robt. (N. Y.) 496; *Elmendorf v. Harris*, 23 Wend. (N. Y.) 628, 35 Am. Dec. 587; *Emerson v. Udall*, 8 Vt. 357.

Notice after Choice of Third Arbitrator.—Where two arbitrators fail to agree, and appoint a third, it is essential that notice of the time fixed for the meeting of the two original arbitrators with the third should be given to the parties, even where all the evidence in the case has been reduced to writing. *Selby v. Gibson*, 1 Har. & J. (Md.) 362, note. See *Lutz v. Linthicum*, 8 Pet. (U. S.) 165.

Presumption as to Notice.—An award need not aver notice of the hearing. *Rigden v. Martin*, 6 Har. & J. (Md.) 403; *Webber v. Ives*, 1 Tyler (Vt.) 441.

In *New York v. Butler*, 1 Barb. (N. Y.) 325, it was held that in a suit upon an award notice would be presumed although it was not averred or proved.

How Failure to Give Notice may be Availed of.—Where a suit at law is brought upon an award or on an arbitration bond, the defendant is not required to resort to equity to set the award aside on the ground of want of notice, but may plead the want of notice in defense to the action, and that, as a consequence, neither he nor his witnesses had been heard. *Elmendorf v. Harris*, 23 Wend. (N. Y.) 628, 35 Am. Dec. 587. See *Peters v. Newkirk*, 6 Cow. (N. Y.) 103; *New York v. Butler*, 1 Barb. (N. Y.) 325; *Maynard v. Frederick*, 7 Cush. (Mass.) 247; *McKinney v. Page*, 32 Me. 513; *Knowlton v. Mickles*, 29 Barb. (N. Y.) 465.

Where no notice of hearing is given as a fact, provided such failure does not appear on the face of the award, the proper way to bring the fact before the court is by motion on affidavit to set the award aside. *Lutz v. Linthicum*, 8 Pet. (U. S.) 165.

Omission of Notice.—It has been held that the omission to give such notice cannot be deemed to be a failure in the performance of the submission.¹

Failure to Meet as Appointed.—And it appears that if the arbitrators do not meet at the time and place appointed, the award will be void.²

(b) **Rule in England.**—In *England* it is in the arbitrator's discretion how he shall conduct the proceedings, the courts insisting only on his acting in accordance with principles of justice and treating both sides alike, and it does not appear to be essential to the validity of his award that he should give notice of the place and time of meeting to the parties. But upon this question there is a conflict of authority, and the decisions are not clear and precise.³

In *Maryland* the same method has been adopted in defense to an action on the award. *Young v. Reynolds*, 4 Md. 375; *Rigden v. Martin*, 6 Har. & J. (Md.) 403.

1. *Hoag v. M'Ginnis*, 22 Wend. (N. Y.) 163. In this case, the parties entered into a submission, and bound themselves in a penalty as specified damages to be paid by the party who failed to perform the award, the submission containing a stipulation that one of the parties should give the other five days' notice of the time of the meeting of the arbitrators. An action was brought for breach of the submission on the ground that the party had failed to give such notice, and it was held that the liquidated damages could not be recovered for such omission, and that, if the party was liable for the payment of such damages, they could be enforced only for not performing the award when made.

2. *Citizens Ins. Co. v. Hamilton*, 48 Ill. App. 593. See *Ingraham v. Whitmore*, 75 Ill. 24; *Alexander v. Cunningham*, 11 Ill. 511.

In *Weir v. Johnston*, 2 S. & R. (Pa.) 459, it was held that if the arbitrators did not meet on the day appointed, their subsequent proceedings will be irregular, unless the defendants approve or consent to such proceedings.

Unless the award shows upon its face that the arbitrators met at the time and place specified in the submission, it will be void in the state of *Ohio*. *Strum v. Cunningham*, 3 Ohio 286.

But in *Kimble v. Saunders*, 10 S. & R. (Pa.) 193, it was held that it is not necessary that it should appear on the proceedings that the arbitrators met upon the appointed day. It will be presumed that they did so, unless the contrary is proved. See *Stannard v. Smith*, 40 Vt. 513.

3. *Russell on Awards* (6th ed.) 176; *Tillam v. Copp*, 5 C. B. 211, 57 E. C. L. 211; *Hewlett v. Laycock*, 2 C. & P. 574, 12 E. C. L. 271; *Haigh v. Haigh*, 31 L. J. Ch. 420; *Brown v. Gurrier*, 7 New Bruns. 124; *Tittenson v. Peat*, 3 Atk. 529. See *Whatley v. Morland*, 2 Dowl. 249; *In re Salkeld and Slater*, 12 Ad. & El. 767, 40 E. C. L. 189; *Fetherstone v. Cooper*, 9 Ves. Jr. 67; *Hall v. Lawrence*, 4 T. R. 589; *Curtis v. Potts*, 3 M. & S. 146.

Want of Notice cannot be Averted by Plea.—In *Thorburn v. Barnes*, L. R. 2 C. P. 384, the arbitrators, a few hours after their appointment and without notice to one of the parties

or giving him an opportunity of being heard, made their award. In a subsequent action an attempt was made to impeach this award, whereupon Willes, J., said: "The objection is that the arbitrators gave the plaintiff no opportunity of being heard; and I am of opinion that if this objection were raised in the course of a proceeding in which it was competent to the plaintiff to raise it, and it was fairly raised, the award could not be allowed to stand. It must be admitted that the plaintiff had no opportunity of being heard upon the question of the construction of the documents which were put in; and, as at present advised, I think it is no answer to say that the result would have been the same if he had been heard. Having made these remarks, I now come to the dry question of law, viz.: whether the form in which the objection is made here is the form in which it was competent to the plaintiff to make it—whether the not having given the party an opportunity of being heard is an objection which can be raised by plea, or only a sort of misconduct of the arbitrators to be taken advantage of by motion to set aside the award. Upon the best consideration I can bring to the case, I have come to the conclusion that the latter is the only mode in which such an objection can be urged. It was certainly not put too high by Mr. Brett, when he said that it is one of the first principles of justice that no man's rights shall be adjudicated upon without giving him an opportunity of being heard in support of them. * * * If an arbitrator stood in the same position as an ordinary judge, the argument would be conclusive. But he does not. He is selected by the parties themselves, who stipulate with one another to abide by his decision. It is for this reason that an arbitrator stands in a different position from a judge, whom the litigants have no opportunity for selecting. * * * The course of reasoning and the authorities cited combine to show that such an objection cannot be taken by plea. Insufficiency or want of hearing must be urged as a ground for setting aside the award on motion, and cannot be set up as a bar to an action upon it."

The court considered the point fully settled by the prior cases of *Whitmore v. Smith*, 7 H. & N. 509; *Veale v. Warner*, 1 Saund. 327; *Braddick v. Thompson*, 8 East 344. See *Cooper v. Wandsworth Dist. Board of Works*, 14 C. B. N. S. 180, 108 E. C. L. 180, as to necessity of notice.

(2) *When Notice is Not Required.*—It is not necessary that the arbitrators should give notice to the parties of any meetings other than those at which evidence or arguments are to be heard. Notice need not be given of those meetings at which the arbitrators attend for the purposes of consultation and for making up the award. The parties ought not to be present at such meetings.¹

Notice Notwithstanding Usage.—In *Oswald v. Grey*, 24 L. J. Q. B. 69, it was held that where a usage existed for arbitrators to determine as between an outgoing and an incoming tenant the value of the away-going crop, etc., by a personal inspection of the crops and premises, without examining witnesses and without notice to the parties, such award might be good, but that no usage can justify an arbitrator in hearing one party and his witnesses only, without notice to, and in the absence of, the other.

Notice of Attendance of Counsel.—Where either party intends to be represented by counsel, he should give notice of that fact to the opposite party. *Whatley v. Morland*, 2 Dowl. 249.

But an arbitrator may refuse to hear counsel in his discretion, though such a proceeding on his part is not advisable. *In re Macqueen and Nottingham Caledonian Soc.*, 9 C. B. N. S. 793, 99 E. C. L. 793; *Collier v. Hicks*, 2 B. & Ad. 663, 22 E. C. L. 161.

See *Blodgett v. Prince*, 109 Mass. 44.

Method of Appointing Time and Place of Meeting.—It is in the arbitrator's discretion to appoint the time and place of meeting, and the parties are bound to attend to his appointment. *Fetherstone v. Cooper*, 9 Ves. Jr. 67.

The usual custom is for the party who wants to proceed with the reference to deliver the submission to the arbitrator, requesting him to appoint a meeting. They thereupon try to arrange a time which will suit all parties, and if such arrangement cannot be made, and the arbitrator must fix a time, he gives the party applying for it a written appointment, specifying the time and place at which the parties are to appear, not, however, appointing too early or too distant a day. The party who procures such written appointment should serve a copy of it on the opposite party in reasonable time. See *Russell on Awards* (6th ed.) 176, 177.

Revoking Notice.—If the time so fixed is inconvenient, or causes hardship to either party, it may be revoked in the arbitrator's discretion. *Eastham v. Tyler*, 2 Bail. Court Rep. 136. See *Newry, etc.*, R. Co. v. *Ulster R. Co.*, 2 Jur. N. S. 936, 8 De G. M. & G. 487; *Haigh v. Haigh*, 31 L. J. Ch. 420.

Time and Place of Hearing—Who Appoints.—It is the arbitrators, and not the parties, who have a right to appoint the time and place of meeting. It was so held where the Colonial Government insisted that a dispute in regard to the construction of certain works should be heard in the colony while the plaintiffs, English traders, laid the matter before the arbitrator appointed by themselves in England, who made an *ex parte* award which was sustained. *Bull Sons & Co. v. Colonial Government*, 6 Juta, Cape of Good Hope

283. See *Fetherstone v. Cooper*, 9 Ves. Jr. 67, *supra*.

Where a policy of insurance provides for submitting disputes in regard to the amount of loss to arbitration, the insurer cannot, under such policy, compel the insured to go outside of the state and submit to arbitration there. *American Cent. Ins. Co. v. Simpson*, 43 Ill. App. 98.

1. *Roloson v. Carson*, 8 Md. 208; *Zell v. Johnston*, 76 N. Car. 302; *Ormsby v. Bakewell*, 7 Ohio 98; *Miller v. Kennedy*, 3 Rand. (Va.) 2; *In re Morphett*, 2 D. & L. 967.

Notice where Submission Is by Act of Parties.—It has been held that there is a material difference between the cases where a reference to arbitrators is made under a statutory provision or is made the rule of court, and those where it is solely by an agreement of the parties, at common law; and that in the latter case, even if notice is necessary, its absence can be taken advantage of only in a court of equity. *Burroughs v. Davis*, 7 Iowa 154; *Upshaw v. Hargrove*, 6 Smed. & M. (Miss.) 286; *Hill v. Hill*, 11 Smed. & M. (Miss.) 616; *Miller v. Kennedy*, 3 Rand. (Va.) 2.

Arbitrators Viewing Premises after Hearing.—An award will not be set aside because the arbitrator went alone, after the hearing, to take another view of the premises. *Adams v. Bushey*, 60 N. H. 290. See *Straw v. Truesdale*, 59 N. H. 109.

Appraisement of Property under Inspection.—Where the question submitted to arbitrators was the appraising of the value of property under inspection, it is not such an arbitration as requires the presence of the parties when the appraisement is made; consequently, a failure to notify them of the time and place of sitting is immaterial. *James v. Schroeder*, 61 Mich. 28.

Ascertaining Indebtedness and Expense of Reorganization of Railroad Company.—The award of a trust company authorized to ascertain a railroad company's floating debt and the expense of reorganization, and to assess the amount to be paid by stockholders to entitle them to new stock, is not invalidated by the fact that it did not give notice of the times and places of gathering information as to particular items, where it would have been impossible to do so and where the stockholders were given ample opportunity to be heard on the amount of the assessment. *Gernsheim v. Central Trust Co.* (Supreme Ct.), 40 N. Y. St. Rep. 967, 16 N. Y. Supp. 127.

Recalling and Re-examining Witness.—Where, after a hearing had been ended, the arbitrator recalled one of the witnesses and examined him on a certain point as to what the original testimony had been, without notifying either party, it was held that this was not misconduct

(3) *Waiver of Notice*.—A party may waive his right to receive notice of the time and place of hearing.¹ But he must do so expressly, in order to make the waiver effective, or it must be inferred by necessary implication from his acts; the mere fact that he declares his intention not to appear, or that he does appear after the irregularity has occurred, or has not protested until after the award is made, is not necessarily a waiver.²

which would render the award invalid, as he was only called to explain his own evidence, and it did not appear that it was other than what he had stated and intended to state at first hearing. It was not an *ex parte* examination in the proper sense, such as would render the award void. *Herrick v. Blair*, 1 Johns. Ch. (N. Y.) 101. See *Innes v. Miller*, 1 Dall. (Pa.) 188; *Anderson v. Wallace*, 3 Cl. & F. 26.

Senate as Arbitrator.—It was held that when the United States Senate is made the arbitrator of a dispute between the United States and an Indian tribe, the award cannot be set aside on the ground of want of proper notice to the United States. *Choctaw Nation v. U. S.*, 119 U. S. 1.

1. *Hewlett v. Laycock*, 2 C. & P. 574, 12 E. C. L. 271; *Kingwell v. Elliott*, 7 Dowl. 423; *Pike v. Stallings*, 71 Ga. 860; *Spencer v. Curtis*, 57 Ind. 221; *Shockey v. Glasford*, 6 Dana (Ky.) 9; *Harding v. Wallace*, 8 B. Mon. (Ky.) 536; *Whitlock v. Ledford*, 82 Ky. 390; *Hix v. Sumner*, 50 Me. 290; *Wernwag v. Pawling*, 5 Gill & J. (Md.) 500, 25 Am. Dec. 317; *Duckworth v. Diggles*, 139 Mass. 51; *Hill v. Hill*, 11 Smed. & M. (Miss.) 616; *Maxfield v. Scott*, 17 Vt. 634; *Swift v. Harriman*, 30 Vt. 607; *Plumer v. Wausau Boom Co.*, 49 Wis. 449. See *infra*, this title, *Waiver of Irregularities in the Proceedings*.

Time of Objecting—Proceeding without Objection.—Where a party intends to object to an award because evidence has been taken by the arbitrator without notice being given to him, he should raise the objection at the next meeting. *Hewlett v. Laycock*, 2 C. & P. 574, 12 E. C. L. 271.

If he remains silent and afterwards attends the meetings, it will be assumed in most cases that he has waived the objection. *Drew v. Drew*, House of Lords, March 8, 1855, *cited* in Russell on Arb. (6th ed.), p. 203.

In *Kingwell v. Elliott*, 7 Dow 423, where the arbitrators received evidence improperly in the absence of both parties, but struck it out at the next meeting on objection being taken, it was held that one of the parties who afterwards proceeded with the examination of witnesses before them had waived his right to object to their award on account of the irregularity in receiving the evidence.

Where the arbitrator gave no notice to the parties of the hearing before him, it was held that as it appeared that the fact of such omission must have been known to the complainant on the trial of the cause of the award, and could have been then determined, equity would not relieve against it. *Hubbard v. Hubbard*, 61 Ill. 228. See *Chicago, etc., R. Co. v. Hughes*, 28 Mich. 186.

Failure to Allege Want of Notice.—In *Madison Ins. Co. v. Griffin*, 3 Ind. 277, where an

order was granted by a circuit court upon the plaintiff to show cause why judgment should not be rendered on the award, and he appeared to file reasons without alleging as a defense the want of notice of the award, it was held that notice was thereby admitted.

When Party's Attorney Is an Arbitrator.—Where the attorneys of the parties to the controversy were made the arbitrators by the terms of the submission, it was held that one of the parties could not afterwards object to the award on the ground that he had received no notice of the time and place of meeting. *Hill v. Hill*, 11 Smed. & M. (Miss.) 616.

Parties Present at Hearing.—Where the award recites that parties have been heard, such recital is conclusive in a court of error that the parties did appear, and thereby waived want of notice of the time and place of meeting, where the record of error shows nothing to the contrary. *Vankirk v. McKee*, 9 Pa. St. 100.

The fact that the city attorney appeared on the hearing, and argued and submitted the cause, is a waiver of notice of the time and place of hearing upon a submission to arbitration made by a city. *Kane v. Fond du Lac*, 40 Wis. 495.

Time Fixed in Presence of Parties.—Where a hearing was had in accordance with the time fixed in the presence of the parties, and one of them failed to appear at the time so specified, it was held that he could not object to the award on the ground that he had no notice of the hearing. *Box v. Costello*, 6 Misc. Rep. (Buffalo Super. Ct.) 415. See *Grimes v. Brown*, 113 N. Car. 154.

2. *Pike v. Stallings*, 71 Ga. 860; *Dickerson v. Hays*, 4 Blackf. (Ind.) 44; *Madison Ins. Co. v. Griffin*, 3 Ind. 277; *Shockey v. Glasford*, 6 Dana (Ky.) 9; *Newton v. West*, 3 Metc. (Ky.) 24; *Duckworth v. Diggles*, 139 Mass. 51; *Vankirk v. McKee*, 9 Pa. St. 100.

Facts Amounting to Waiver—Illustrations.—A party to an arbitration, upon receiving notice of time and place of the meeting of the arbitrators for a hearing, answered that it was not convenient for him to attend at that time, and offered to state his side of the question. He then stated his case, concluding with the words, "You are to decide." It was held to be a waiver of the right to a further hearing. *Page v. Ranstead*, 10 Allen (Mass.) 295. See also *Billings v. Billings*, 110 Mass. 225; *Shibe v. Rex*, 1 Browne (Pa.) 174.

And where a party to the arbitration, being present at a hearing, did not then object to a want of notice to another party interested in the matter, he could not after award rendered be heard to impeach the award on that ground. *Hubbard v. Hubbard*, 61 Ill. 228; *Plumer v. Wausau Boom Co.*, 49 Wis. 449. And see *White v. Robinson*, 60 Ill. 499.

It has been held that a party, after receiving notice, may stay away without vitiating the award.¹ And the court, without defining what would constitute a waiver, may properly submit to the jury the question whether a party has waived his right to notice.²

(4) *Arbitrators must Give Parties Time to Examine Written Evidence.*—The arbitrators are bound to give both parties reasonable and sufficient time to examine any documentary evidence that may be adduced by either side. Their duty to do so is similar to that requiring them to give notice to the parties of the time and place of hearing, and a neglect to perform it will render the award void.³

h. THE ARBITRATORS MUST HEAR ALL THE EVIDENCE.—(1) *General Rule.*—It is the duty of the arbitrator to hear all the evidence material to the matter in controversy which the parties adduce before him. A refusal on his part to admit evidence, where such evidence is necessary, is fatal to the award.⁴

Where one of the parties stated to an arbitrator that he had been advised by counsel not to appear before the umpire, and then handed a paper to the arbitrator to be laid before the umpire, this was held to constitute a waiver of the notice of hearing. *Graham v. Graham*, 9 Pa. St. 254, 49 Am. Dec. 557.

But where a party objected to evidence received in his absence, his allowing the rest of the proceedings to be carried on *ex parte* was held not to be a waiver, where it clearly appeared from the evidence that he had no intention of waiving the objection. *Haigh v. Haigh*, 31 L. J. Ch. 420.

So where witnesses were examined behind the back of one of the parties who wanted to be present, as the opportunity of setting the irregularity right was past, it was held that he had not waived his right to object, even though he knew the circumstances, merely because he had not protested before the award was made. *Dobson v. Groves*, 6 Q. B. 637, 51 E. C. L. 637.

An agreement of the plaintiff's attorney, as to the time and place of meeting, dispenses with the necessity of personal notice. *Shibe v. Rex*, 1 Browne (Pa.) 174.

A party has been held not entitled to notice of the award, when the time for making such award as originally fixed was extended while he was present. See *Scruggs v. Bibb*, 33 Ala. 481; *Mobile Bay Road Co. v. Yeind*, 29 Ala. 325; *Stein v. Burden*, 30 Ala. 270.

Where the arbitrators have failed to give notice of the hearing or to give the parties an opportunity to be present, such defect will not generally be taken as having been waived by the conduct of the parties, particularly where there is evidence which prevents the court from presuming in favor of the award. *Warren v. Tinsley*, 53 Fed. Rep. 689.

1. *Whitlock v. Ledford*, 82 Ky. 390. See *supra*, this title, *Arbitrators must Hear the Parties in Presence of Each Other—When Ex Parte Hearings Permitted.*

2. *Notice Submitted to Jury.*—*Amos v. Buck*, 75 Iowa 651.

Although as a general rule it may be necessary to submit the question of notice, as a fact, to a jury, to entitle one claiming upon an award to recover under it, it is not necessary to submit this question to them where

that necessity is avoided by an express agreement, or where the time and place of hearing before the arbitrators has been fixed by the arbitrators themselves. *Maryland, etc., R. Co. v. Porter*, 19 Md. 458.

3. *Opportunity to Inspect Writings.*—*Passmore v. Pettit*, 4 Dall. (Pa.) 271. See *Harvey v. Shelton*, 7 Beav. 455, 13 L. J. Ch. 466.

However, in *Winsor v. Griggs*, 5 Cush. (Mass.) 210, the plaintiff, after the hearing was over, told the defendant, in the arbitrator's presence, that a certain document bearing upon the case was in existence, which the defendant doubted. The parties and the arbitrator then went in search of the document, but failed to get it, and subsequently it was procured by the plaintiff, who sent it to the arbitrator. The arbitrator made his award without giving the defendant notice of the fact that the instrument had been placed in his hands, and the court sustained it on the ground that the case had been already closed, and the defendant had not expressed a wish to examine the document when it should be procured, or to be heard upon it.

4. *Morris v. Reynolds*, 2 Ld. Raym. 857; *Morgan v. Mather*, 2 Ves. Jr. 17; *Sharpe v. Bickerdyke*, 3 Dow. 102; *Nickalls v. Warren*, 6 Q. B. 615, 51 E. C. L. 615; *Johnston v. Cheape*, 2 Dowl. 247; *Milner v. Noel*, 43 Ind. 324; *Mosness v. German-American Ins. Co.*, 50 Minn. 341; *Burroughs v. Thorne*, 5 N. J. L. 895; *Halstead v. Seaman*, 82 N. Y. 27, 37 Am. Rep. 536; *Van Cortlandt v. Underhill*, 17 Johns. (N. Y.) 405, *overruling* 2 Johns. Ch. (N. Y.) 339; *Fudickar v. Guardian Mut. L. Ins. Co.*, 62 N. Y. 392; *Knowlton v. Mickles*, 29 Barb. (N. Y.) 470; *Morewood v. Jewett*, 2 Robt. (N. Y.) 498; *Com. v. La Fitte*, 2 S. & R. (Pa.) 106; *Ligon v. Ford*, 5 Munf. (Va.) 10. See *Hall v. Lawrence*, 4 T. R. 589; *Falconer v. Montgomery*, 4 Dall. (Pa.) 232.

Failure to Repair—Award without Hearing on View of Premises.—If an arbitrator to whom an action for not repairing a house has been referred makes his award on a view of the premises without calling the parties before him, the court will set aside the award, for though the premises may almost tell their own tale, yet there may be facts which ought to be inquired into, such as payments by the

(2) *Discretion of the Arbitrator.*—However, the arbitrator is entitled to

party, or excuses for not repairing. *Anonymous*, 2 Chit. Rep. 44, 18 E. C. L. 244; *Brad-dick v. Thompson*, 8 East 344; *Moran v. Bogert*, 16 Abb. Pr. N. S. (N. Y.) 303. See *Dreyfous v. Hart*, 36 La. Ann. 929; *West Jersey R. Co. v. Thomas*, 23 N. J. Eq. 431.

Award Made on Evidence of One Side Only.—An award cannot stand where the arbitrator hears only one side; and where an arbitrator heard the defendant's witnesses, and refused to hear the plaintiff's, it was decided that his award was in vain upon the ground that he ought to have taken evidence for the plaintiff, however little he thought that it would make him alter his opinion. *Phipps v. Ingram*, 3 Dowl. 669; *Oswald v. Grey*, 24 L. J. Q. B. 69; *Braddick v. Thompson*, 8 East 344.

The refusal to hear one side need not be wilful. *Sharpe v. Bickerdyke*, 3 Dow 102.

Misleading Parties into Belief that Case is Still Open.—The arbitrator should be careful not to mislead parties into a supposition that the case is still open, and then unexpectedly make the award without calling them, or giving notice that he will not examine them; or if, after declaring that he can take no further proceedings in the matter till some books of account have been examined, he makes his award without giving notice to the parties that he has found the inspection of the books unnecessary, the award will be set aside. *Earle v. Stocker*, 2 Vern. 251; *Pepper v. Gorham*, 4 Moore 148, 16 E. C. L. 365.

Party Causing Needless Delay.—Even where a party causes some needless delay, the arbitrator has no right to close the case without giving him due notice. *Dodington v. Hudson*, 1 Bing. 384, 18 E. C. L. 559; *Gladwin v. Chilcote*, 9 Dowl. 550; *Bedington v. Southall*, 4 Price 232; *Haigh v. Haigh*, 31 L. J. Ch. 420; *Fryer v. Shaw*, 27 L. J. Exch. 320; *Spettigue v. Carpenter*, 3 P. Wms. 361; *Peterson v. Ayre*, 23 L. J. C. P. 129.

Evidence to Impeach Witness's Credit.—It has been held that an arbitrator is not justified in refusing to hear evidence which goes to impeach the credit of the witness. *Ligon v. Ford*, 5 Munf. (Va.) 10.

Excluding Proper Evidence.—Illustrations.—Where the arbitrator excludes evidence which bears on the subject-matter of a submission, on the erroneous supposition that it does not, this is a mistake, not as to the admissibility of the evidence, but as to the scope of the submission, and for the latter reason it will invalidate the award. *Samuel v. Cooper*, 2 Ad. & El. 752, 29 E. C. L. 203; *Brophy v. Holmes*, 2 Moll. 1.

Where the question in dispute was a boundary line, and, by the terms of the submission, the arbitrators were to establish the line and settle all matters of difference in regard to it, and the plaintiff offered in evidence certain deeds and plots for the purpose of showing his lines, which the arbitrators refused to consider, it was held that the award should be set aside for that reason. *Hurdle v. Stallings*, 109 N. Car. 6.

In Order to Entitle a Party to Object to the

award on the ground of the rejection of material evidence adduced by him, the witnesses should be distinctly brought forward for hearing, and upon a concrete point. A party is not justified in putting an abstract question to an arbitrator, and then bringing forward evidence or refusing to do so upon his answer. *Craven v. Craven*, 7 Taunt. 644, 2 E. C. L. 643; *Grazebrook v. Davis*, 5 B. & C. 535.

Where Party Taken by Surprise.—Where one of the parties has been taken by surprise by an unexpected case set up by his opponent, and asks for time to meet it, the arbitrator should give him reasonable time for inquiring into the matter. *Solomon v. Solomon*, 28 L. J. Exch. 129.

Parties may Be Witnesses.—In *England*, under the early rules of evidence, there were many cases as to the power of the arbitrators to examine the parties themselves, but as the law now for the most part allows the parties to be witnesses in their own behalf, such cases are only of interest as illustrating the development of the rules of evidence. See Russell on Awards (6th ed.) 197; *Lloyd v. Archbowl*, 2 Taunt. 324; *Scales v. East London Water Works*, 1 Hodges 91; *Morgan v. Morgan*, 1 Dowl. 611; *Smith v. Sparrow*, 16 L. J. Q. B. 139; *Wells v. Benskin*, 9 M. & W. 45; *Keene v. Deeble*, 3 B. & C. 491, 10 E. C. L. 163; *Morgan v. Williams*, 2 Dowl. 123; *Warne v. Bryant*, 3 B. & C. 590, 10 E. C. L. 191.

In the *United States*, in most jurisdictions, the parties may be witnesses in their own behalf. *Fuller v. Wheelock*, 10 Pick. (Mass.) 137; *Hollingsworth v. Leiper*, 1 Dall. (Pa.) 161; *M'Crae v. Robeson*, 2 Murph. (N. Car.) 127; *Askew v. Kennedy*, 1 Bailey (S. Car.) 46; *Maynard v. Frederick*, 7 Cush. (Mass.) 247. See *contra*, *Eyre v. Fenimore*, 3 N. J. L. 489; *Fennimore v. Childs*, 6 N. J. L. 386; *M'Alister v. M'Alister*, 1 Wash. (Va.) 193. See the title WITNESSES.

Scope of the Evidence at Second Reference.—Evidence taken under first reference is in equity taken for the case, and not merely for the purpose of a specified trial. It stands as part of the case in all subsequent proceedings, whether before the court or referee. It is not proper for the circuit judge in making a second order of reference to direct the referee to take and report the testimony *de novo*. The testimony taken prior to the first trial is part of the proceedings to be considered on the second. *Cooke v. Pennington*, 9 S. Car. 83.

Should Hear New Evidence.—Where, in an order of reference, there is a clause empowering the court, in case the award should be disputed, to remit the matters for the consideration of the arbitrator, and the case is remitted, it is the duty of the arbitrator, in case fresh evidence should be tendered, to hear it as if the reference were original. *Nickalls v. Warren*, 6 Q. B. 615, 51 E. C. L. 615.

Arbitrator should Make Notes of the Evidence.—It is said that as a general practice the arbitrator should make notes of the evidence, so that

exercise some discretion as to the quantity of evidence that he will hear,¹ or the number of witnesses that he will examine,² and there are a number of instances in which the courts will not interfere with his discretion in admitting or refusing to hear testimony.³

(3) *Opening the Case for New Evidence.*—It is in the arbitrator's discretion whether or not he will open the case at any stage of the proceedings to admit evidence which does not operate in rebuttal, and which should have been offered in the first instance.⁴ It is also in his discretion whether he will reopen the case, after it has been closed, in order to receive further evidence.⁵

he might compare the statements of the witnesses on the direct and cross examination, and also with each other, and so that he may be able to give a full account of the proceedings before him in case any ulterior action is taken in the award. *Croomes v. Gore*, 1 H. & N. 14, 25 L. J. Exch. 267. See Russell on Awards (6th ed.) 197.

Presumption that All Evidence was Heard.—Where an award states that the arbitrators met the several parties and their counsel, after due notice, and heard their several pleas and allegations, the presumption will be that they also heard all the legal proofs offered by both parties, unless the contrary appears, although such is not stated in the award in express terms. *Leominster v. Fitchburg, etc.*, R. Co., 7 Allen (Mass.) 38.

1. *Nickalls v. Warren*, 6 Q. B. 615, 51 E. C. L. 615.

2. **Restricting Number of Witnesses.**—The arbitrator has, under some circumstances, power to limit the number of witnesses introduced. Where the question was as to the genuineness of the indorsement of a check, and the arbitrator restricted the number of witnesses, as to the handwriting, to twenty on each side, his action was sustained. *Sizer v. Burt*, 4 Den. (N. Y.) 426.

3. **Arbitrator Appointed on Account of Special Knowledge.**—When a matter is referred to experts as arbitrators, as, for instance, the value of property to be bought or let, it seems that it is no objection to their award that they did not examine witnesses, since they are intrusted by the parties, from their experience and observation, to form a judgment which shall be satisfactory. *Eads v. Williams*, 24 L. J. Ch. 531; *Caledonian R. Co. v. Lockhart*, 3 Macq. 808; *Bottomley v. Amber*, 38 L. T. N. S. 545; *Cobb v. Dolphin Mfg. Co.*, 108 N. Y. 463; *Wiberly v. Matthews*, 91 N. Y. 648; *Day v. Hammond*, 57 N. Y. 479, 15 Am. Rep. 522; *In re Backham v. Steele* (Australia), 5 Vict. L. R. 184.

Where the arbitrator himself was appointed on account of special knowledge of the subject, and one of the parties brought before him a statement of facts which he alleged to be material, but which the arbitrator rejected, after having taken all the matters alleged to be facts into consideration, and in view of his own local knowledge, the House of Lords held him justified in refusing to receive it. *Johnston v. Cheape*, 5 Dowl. 247.

Witness Absent on Long Voyage.—Where an arbitrator refused to wait for an alleged material witness, who was on a voyage to China, the court refused to interfere with his discre-

tion, and sustained the award. *Ginder v. Curtis*, 14 C. B. N. S. 723, 108 E. C. L. 723.

Discretion of Arbitrator to Visit Premises.—On a reference of a claim for builder's work done upon a house, it is within the discretion of the arbitrator to determine whether he will comply with the request of one of the parties that he should view the premises. *Munday v. Bluck*, 9 C. B. N. S. 557, 99 E. C. L. 557.

In England, Government Boards, such as railroad commissions, are held to have an absolute discretion in rejecting evidence, or in hearing witnesses behind the backs of either party, on the ground that they are responsible for their action only to Parliament. *Newry, etc., R. Co. v. Ulster R. Co.*, 2 Jur. N. S. 936, 8 De G. M. & G. 487.

Agreement that No Witnesses be Heard.—Where an oral agreement was entered into that no counsel or witnesses should be heard by the arbitrator, and one of the parties offered to introduce the testimony of a witness in his own behalf, which the arbitrators rejected, and the trial thereupon proceeded without objection until the publication of the award, it was held that an appeal in equity ought to be dismissed, which was brought to set aside the award on the ground that the witness was improperly rejected. *Bennett v. Bennett*, 25 Conn. 66.

Where it does Not Appear that Improper Evidence was Acted on.—In *Bassett v. Cunningham*, 9 Gratt. (Va.) 684, it was held that an award would not be set aside because improper evidence was admitted on the hearing, where it did not appear on the face of the award what evidence was acted on.

4. *Pearson v. Fiske*, 2 Hilt. (N. Y.) 146; *Delafield v. De Grauw*, 9 Bosw. (N. Y.) 1; *Spears v. Myers*, 6 Barb. (N. Y.) 445; *Williams v. Hayes*, 20 N. Y. 58.

5. *Ringer v. Joyce*, 1 Marsh. 404, 4 E. C. L. 344; *Bignall v. Gale*, 2 M. & G. 830, 40 E. C. L. 648; *In re Hall v. Anderton*, 8 Dowl. 326; *Larchin v. Ellis*, 11 W. R. 281; *Hemming v. Parker*, 14 W. R. 328; *Sweeney v. Vaudry*, 2 Mo. App. 352; *Williams v. Hayes*, 20 N. Y. 58; *Duguid v. Ogilvie*, 3 E. D. Smith (N. Y.) 527; *Cleveland v. Hunter*, 1 Wend. (N. Y.) 104; *Tennant v. Divine*, 24 W. Va. 387. See *Sickles v. Fort*, 12 Wend. (N. Y.) 199; *Johnson v. Gay*, 6 Cow. (N. Y.) 54; *Butler v. Bates*, 5 Hill (N. Y.) 375; *Slocum v. Watkins*, 1 Den. (N. Y.) 631; *Ex p. Rutter*, 3 Hill (N. Y.) 464; *Graves v. Blanchard*, 4 How. Pr. (N. Y. Supreme Ct.) 300; *Green v. Brown*, 3 Barb. (N. Y.) 119.

Reopening Case for New Evidence.—In *Williams v. Hayes*, 20 N. Y. 58, the court said:

(4) *Closing the Case Finally*.—But the arbitrator, after having heard all the evidence offered, and having ascertained that there is no more to be adduced, ought, in order to prevent misconception, distinctly to inform the parties that the case is closed on both sides, and that he will proceed to make his award.¹

5. Powers of the Arbitrator in the Proceedings.—*a. ARBITRATOR CONTROLS THE PROCEEDINGS*.—The mode in which the reference is to be conducted depends entirely upon the discretion of the arbitrator. The courts will not interfere, so long as he acts within his authority, and deals impartially by both parties.²

Provision as to Condition Precedent.—Where, however, the submission contains a stipulation requiring the doing of any act as a condition precedent to his entering upon the arbitration, the arbitrator should see that he complies with it before beginning the proceedings.³

"As to the offers of proof, they were made after the case had been closed by consent of all parties. The receiving of further proof was then not matter of strict legal right on the part of the party offering it. Its admission rested primarily in the discretion of the referee, and if he did not think proper to allow the proof to be made, and the Supreme Court [out of which the rule of reference issued] did not think a case made out requiring them to relieve the party, there is no remedy. [The Court of Appeals] cannot review the exercise of the discretion of the original tribunal."

In *Cooper v. Stinson*, 5 Minn. 201, the court sustained the arbitrator in opening a case after his award had been made but not delivered, in order to admit evidence which had not previously been offered, but through no culpable neglect in the party.

It is a matter of discretion with the arbitrators whether or not they will open a case for further testimony, and unless such discretion is clearly abused, its exercise is no ground for setting aside the award. *Tennant v. Divine*, 24 W. Va. 387.

An award has been set aside because the arbitrator admitted evidence after the close of the hearing. *McCausland v. Tower*, 14 New Bruns. 125.

1. *Pepper v. Gorham*, 4 Moore 148, 16 E. C. L. 365; *Peterson v. Ayre*, 23 L. J. C. P. 129; *Earl v. Stocker*, 2 Vern. 251.

Passing upon All Questions Submitted.—It has been said that the arbitrator, on a reference of "all matters in difference," before the close of the case ought, in prudence, to request the parties to put down in writing the questions on which they respectively wish him to decide. If he decides on the questions so specified, the award will be sustained; whereas, if they are not reduced to writing, and he omits deciding upon some minor matter which was in fact submitted to him, but which he passed over as of little importance, the award may be set aside. *Angus v. Redford*, 11 M. & W. 69, 2 Dowl. N. S. 735.

Interlocutory Award.—There are sometimes provisions in the submission which empower the arbitrator, before closing the case and making his award, to regulate by interlocutory award the management or enjoyment of something in dispute, as the use of a stream of water, or the like. Such awards are of a

temporary character only. *Wrightson v. Bywater*, 3 M. & W. 199; *Manser v. Heaver*, 3 B. & Ad. 295, 23 E. C. L. 73.

2. *Russell on Awards* (6th ed.) 276; *Morse Arb. and Award* 115; *Hewlett v. Laycock*, 2 C. & P. 574, 12 E. C. L. 271; *Tillam v. Copp*, 5 C. B. 211, 57 E. C. L. 211; *Haigh v. Haigh*, 31 L. J. Ch. 420. See *Knowlton v. Mickles*, 29 Barb. (N. Y.) 465.

Keeping Record of Proceedings.—An award has been sustained notwithstanding the arbitrators had omitted to keep a record of their proceedings in the manner directed by the submission. *Sweeney v. Vaudry*, 2 Mo. App. 352.

Naming Time and Place of Hearing.—He has the right to name the time and place of the hearing, if nothing in the submission indicates a contrary intention of the parties. *Bray v. English*, 1 Conn. 498; *Fetherstone v. Cooper*, 9 Ves. Jr. 67; *Nutter v. Taylor*, 78 Me. 424.

Revoking Appointment for Hearing.—And he may revoke the appointment he has given if he shall think fit. Where, for any reason, one of the parties should request him to do so, it will be in the arbitrator's discretion either to refuse the request or to rescind his appointment and to name another day. *Russell on Arb.* 177; *Eastham v. Tyler*, 2 Bail Court Rep. 136.

Placing Plaintiff's Demand before Arbitrator.—See *Kenrick v. Phillips*, 9 Dowl. 308, as to placing the particulars of the plaintiff's demand before the arbitrator, the defendant being required to do so where the plaintiff himself has not brought them before him.

In Compulsory References in England, under the Common-law Procedure Act 1854, a master or arbitrator has the same general powers in regard to the proceedings as arbitrators on references by consent. *Hodge v. Burgess*, 3 H. & N. 293, 27 L. J. Exch. 318; *Holloway v. Francis*, 9 C. B. N. S. 559, 99 E. C. L. 559. See, as to official referees under the Judicature Act, *Robinson v. Robinson*, 35 L. T. N. S. 337; *Russell on Awards* (6th ed.) 181.

3. *Spence v. Eastern Counties R. Co.*, 7 Dowl. 697. See *In re Bradshaw and East & West India Docks, etc.*, R. Co., 12 Q. B. 562, 64 E. C. L. 562; *Levick v. Epsom, etc.*, R. Co., 1 L. T. N. S. 60; *Davies v. South Staffordshire R. Co.* 21 L. J. M. C. 52, 8 &

How Arbitrator should Guide His Conduct.—In the *United States* the general rule is that where there is no statute regulating the proceedings, the arbitrator must, when a pending suit is referred by rule of court, be governed by the terms of the reference, and in other cases by the terms of the submission itself, or by the old common-law practice.¹

b. POWER TO ENFORCE THE ATTENDANCE OF WITNESSES.—Except where there is a statutory provision to that effect, an arbitrator has no power to enforce the attendance of witnesses, or to compel the production of books or documents.²

c. POWER TO ADMINISTER OATH TO WITNESSES.—At the *Common Law*, an arbitrator has no power to administer an oath to the witnesses who are brought before him.³ But the administration of an oath by him without legal authority does not invalidate the proceedings.⁴

Order Requiring Witnesses to be Sworn.—Where, however, the order of reference requires that the witnesses shall be sworn, the arbitrator cannot receive their evidence, except under oath, unless by consent of the parties.⁵

9 Vict., c. 18, § 33; c. 26, § 134; 22 & 23 Vict. c. 59, § 19.

1. Francis v. Ames, 14 Ind. 251.

The arbitrators in every proceeding should be governed by the terms and directions of the submission. Denman v. Bayless, 22 Ill. 300.

Where there is not an express agreement to the contrary, arbitrations are to be conducted upon the ordinary principle upon which other judicial inquiries are conducted. The parties to the submission are entitled to be heard by proof and argument. Hart v. Kennedy, 47 N. J. Eq. 51.

2. Tobey v. Bristol County, 3 Story (U. S.) 800; Wansel v. Southwood, 4 M. & R. 359; Hall v. Ellis, 9 Sim. 530; Webb v. Taylor, 1 D. & L. 676.

In England, where a cause was referred by judge's order, or order of nisi prius, or rule of court, a witness was always bound to attend before the arbitrator. Webb v. Taylor, 1 D. & L. 676; Russell on Awards (6th ed.) 182; Taylor on Evidence 858.

Production of Documents.—The arbitrator at the common law having no power to compel the production of documents, a provision is usually inserted in the submission or order of reference that the parties shall produce all the books, documents, etc., relating to the matter in dispute, which the arbitrator shall require, and compliance with his demand will be enforced by attachment. Arbuckle v. Price, 4 Dowl. 174.

Commission to Take Evidence.—Where a claim against a decedent's estate has been referred to arbitration, a commission to take evidence outside of the state may issue. Paddock v. Kirkham, 102 N. Y. 597.

Privilege of Witnesses.—Where the attendance is compulsory, the proceedings before an arbitrator being of a judicial character, the witnesses appearing before him are privileged from arrest *eundo, morando, et redeundo* in the same way as in a trial at law. Webb v. Taylor, 1 D. & L. 676; Randall v. Gurney, 3 B. & Ald. 252, 5 E. C. L. 271; Spence v. Stuart, 3 East 89; Ricketts v. Gurney, 7 Price 699; Moore v. Booth, 3 Ves. Jr. 350.

But if the arbitrator does not possess the compulsory power, a witness attending before

him voluntarily is not privileged. Webb v. Taylor, 1 D. & L. 676.

See further, Spencer v. Newton, 6 Ad. & El. 623, 33 E. C. L. 157. *Ex p.* Temple, 2 Ves. & B. 395; *Ex p.* Russell, 1 Rose 278, Taylor on Evidence 861; Sanford v. Chase, 3 Cow. (N. Y.) 381; Clark v. Grant, 2 Wend. (N. Y.) 257; Wright v. Judge, 41 Mich. 726. And see the title ARREST.

Statutes.—The powers of arbitrators to compel the attendance of witnesses is regulated largely by statute, and the local statutes should be consulted.

3. Street v. Rigby, 6 Ves. Jr. 815; Wellington v. Mackintosh, 2 Atk. 569; Halfhide v. Fenning, 2 Bro. C. C. 336; Tobey v. Bristol County, 3 Story (U. S.) 800; People v. Townsend, 5 How. Pr. (N. Y. Supreme Ct.) 315; Matter of Wells, 1 N. Y. Leg. Obs. 189; Large v. Passmore, 5 S. & R. (Pa.) 51.

Power of Referee to Administer Oath.—A referee may, either from the order of the court appointing him or from statutory provisions, acquire power to administer an oath or to compel the production of documents. In the absence of such statutory provision, or if the order of the court were invalid or insufficient, the administration of an oath by him would be a mere nullity. Bonner v. McPhail, 31 Barb. (N. Y.) 106; Frazer v. Phelps, 3 Sandf. (N. Y.) 741. And see Inlay v. Wikoff, 4 N. J. L. 148.

4. Large v. Passmore, 5 S. & R. (Pa.) 51.

Where an arbitrator at common law, not authorized by statute, administers an oath, the oath will be a mere nullity, and a witness under it cannot legally perjure himself. R. v. Hallett, 20 L. J. M. C. 197; Bonner v. McPhail, 31 Barb. (N. Y.) 106; Frazer v. Phelps, 3 Sandf. (N. Y.) 741; People v. Townsend, 5 How. Pr. (N. Y. Supreme Ct.) 315.

5. Ridoat v. Pye, 1 B. & P. 91; Biggs v. Hansell, 16 C. B. 562, 81 E. C. L. 562.

Parties may Waive Oath.—The parties may waive the taking of an oath if they think proper. Newcomb v. Wood, 97 U. S. 581; Pierce v. Perkins, 2 Dev. Eq. (N. Car.) 250; Large v. Passmore, 5 S. & R. (Pa.) 51.

And they will be taken to have waived the oath by not requiring that the witness should be sworn at the time of the examination.

Old Practice—Witness Sworn before Court.—In such a case, where the arbitrator had no power himself to administer the oath, the former practice was to have the witnesses sworn before a judge at chambers or in court.¹

Statutory Powers of Arbitrators.—Now, however, by statute in *England* and in most of the *United States*, the arbitrator himself is empowered to administer the oath to the witnesses.²

d. POWER TO ADMIT OR REJECT EVIDENCE—(1) *The Rule in England.*—In *England* an arbitrator cannot admit or reject evidence according to any arbitrary principle of his own; he is bound by the same rules of evidence as govern the superior courts.³

Bergh v. Pfeiffer, Hill & D. Supp. (N. Y.) 110; *Large v. Passmore*, 5 S. & R. (Pa.) 51.

In *Ridoat v. Pye*, 1 B. & P. 91, it was held that the court would not set aside an award on the ground that the witnesses had not been examined on oath, if no such objection had been made at the time of their examination.

In *Maynard v. Frederick*, 7 Cush. (Mass.) 247, it was held that silence was acquiescence and a waiver of all objections to irregularities in the proceedings.

Where the defendant objected to the evidence of a witness on the ground that he had not been sworn before a judge, but was overruled by the arbitrator, and afterwards called witnesses in answer who testified without taking oath, it was held that he had not alone waived all right to object, but that he had acquiesced in the ruling of the arbitrator. *Allen v. Francis*, 9 Jur. 691, 4 D. & L. 607, note; *Smith v. Sparrow*, 16 L. J. Q. B. 139, 4 D. & L. 604.

But in the *Matter of Wells*, 1 N. Y. Leg. Obs. 189, it was held that the objection to the competency of the arbitrator to administer the oath was not waived because it was not taken at the hearing.

Arbitrator's Discretion.—Where the provision of the submission was that the arbitrator "shall be at liberty, if he think fit, to examine the parties and their respective witnesses on oath," it is in his own discretion whether he will do so or not, even if the parties require the witnesses to be sworn. *Smith v. Goff*, 3 D. & L. 47.

But even the arbitrator himself in *England* could not insist on the witnesses being sworn where the submission was silent on the subject, before the Statute 14 & 15 Vict., c. 99, § 9, empowered him to administer an oath to them. *Caledonian R. Co. v. Lockhart*, 3 Macq. 808.

Evidence by Affidavit.—In *Banks v. Banks*, 1 Gale 46, which was a case of an ordinary reference, the submission contained the following provision: "So that the witnesses be examined on oath;" but their testimony was introduced by affidavit, and the award was set aside.

The practice in *England* was that when a cause was referred to the master by rule of court, he was not authorized to receive oral evidence, but affidavits only, unless the court specially empowered him to do so. *Noy v. Reynolds*, 4 N. & M. 483; *Russell on Awards* (6th ed.) 192.

1. 2 Archb. Pract. (7th ed.) 1227; *Russell on Awards* (6th ed.) 190.

Oath before Commissioner.—The witnesses, however, could not be sworn before a commissioner for taking affidavits, even when the submission by judge's order provided for their being sworn before a judge or before a commissioner duly authorized. *Rex v. Hanks*, 3 C. & P. 419, 14 E. C. L. 376; *Rex v. Newman*, 1 Wils. 7.

2. *England.*—Where the statute empowers the arbitrator to administer an oath, it is his duty to do so, unless it is waived by the parties. *Wakefield v. Llanelly R., etc., Co.*, 34 Beav. 245.

Where the submission contains a clause ordering that the witnesses shall be sworn before a judge or a commissioner, it does not take away the arbitrator's power conferred by statute to administer the oath; he retains a concurrent jurisdiction. *Hodsoll v. Wise*, 4 M. & W. 536, 7 Dowl. 15; *James v. Atwood*, 5 Bing. N. Cas. 628, 35 E. C. L. 255.

The method of swearing the witness in court or before a judge at chambers, which was the practice before the statutes conferred the power to administer the oath upon the arbitrators, may still be adopted, but the usual course now is to have the witnesses sworn before the arbitrator at the meeting at which they attend to give evidence, and no particular form of words is necessary in order to make the oath valid in law. *Russell on Awards* (6th ed.) 190, 191.

Provisions in United States.—For the statutory provisions in the *United States* in this particular, the statutes of the various jurisdictions will have to be consulted.

In *Wolfe v. Hyatt*, 76 Mo. 156, it was held that where the statutes require witnesses to be sworn, the arbitrator is bound to hear them only under oath, and that an award made on the evidence of an unsworn witness was invalid.

Although an arbitrator is himself unsworn, when he is a justice of the peace he is authorized by *Ohio* Rev. Stat., § 5606, to administer a valid oath to the witnesses; but it is not necessary that an arbitrator himself administer the oath to the witnesses before him. *Rice v. Hassenpflug*, 45 Ohio St. 377.

Where power is given the arbitrators by terms of the agreement to examine the parties and witnesses under oath, the agreement will be binding upon the parties. *Wellington v. Mackintosh*, 2 Atk. 569. See further, *infra*, this title, *Admission of Incompetent Witness*.

3. *Russell on Awards* (6th ed.) 207; *Atty.-Gen. v. Davison*, McClel. & Y. 160. But see

(2) *The Rule in the United States.*—In the United States the arbitrator is not bound by the strict rules of law as to the admission or rejection of evidence. He may receive the evidence of witnesses who are legally incompetent, if he thinks proper.¹

(3) *Arbitrator's Decision is Final.*—But in both countries he is the ultimate judge of the admissibility, weight, and relevancy of the evidence or the competency of the witnesses; and once he has passed upon these questions, his decision is not open to review, nor if, intending to decide rightly, he makes a mistake, will the award be set aside for that reason.²

Hagger v. Baker, 14 M. & W. 9, the practical effect of which seems to be to *overrule* *Atty.-Gen. v. Davison*, *McClell. & Y.* 160. See further, *infra*, *Arbitrator's Decision Is Final*.

1. *Shaifer v. Baker*, 38 Ga. 135; *Hooper v. Taylor*, 39 Me. 224; *Maynard v. Frederick*, 7 Cush. (Mass.) 247; *Fuller v. Wheelock*, 10 Pick. (Mass.) 135; *Fennimore v. Childs*, 6 N. J. L. 386; *Eyre v. Fenimore*, 3 N. J. L. 489; *Pike v. Gage*, 29 N. H. 461; *Chesley v. Chesley*, 10 N. H. 327; *Campbell v. Western*, 3 Paige (N. Y.) 124; *M'Crae v. Robeson*, 2 Murph. (N. Car.) 127; *Latimer v. Ridge*, 1 Binn. (Pa.) 459; *Mulder v. Cravat*, 2 Bay (S. Car.) 370; *Bassett v. Cunningham*, 9 Gratt. (Va.) 684; *Sabin v. Angell*, 44 Vt. 523.

Limitations of Rule.—He may not, however, receive evidence regarding matters which, according to law, he cannot consider, or which could not be enforced as a demand barred by the statute of limitations. *De La Riva v. Berreyesa*, 2 Cal. 195; *Pearce v. Roller*, 5 Lea (Tenn.) 485.

After a cause has been submitted to arbitration under a rule of court, and no plea of offset has been filed by the defendant, the arbitrators have no power to hear evidence relating to offsets, and if they hear such evidence, and their award is affected by it, the award will be set aside, and it being established that the arbitrators have exceeded the limits of the submission, and that the testimony improperly taken may have largely contributed to the award which was made, the court will presume that they have acted on such testimony. *Austin v. Clark*, 8 W. Va. 236. See *Swann v. Deem*, 4 W. Va. 368.

Award Subject to Court's Opinion of Competency of Witness.—In *Fuller v. Wheelock*, 10 Pick. (Mass.) 135, the court said: "We think there is no doubt that the referees might receive the testimony of an incompetent witness if, in their judgment, the justice of the case required it; but that their intention was, as expressed in their award, to found their decision upon legal and competent evidence," and, proceeding in conformity with such expressed intention of the arbitrators, the award was held void, illegal evidence having been admitted.

2. *England.*—*Hagger v. Baker*, 14 M. & W. 9; *Armstrong v. Marshall*, 4 Dowl. 593; *Wilson v. King*, 2 C. & M. 689, 2 Dowl. 638, note a; *Musselbrook v. Dunkin*, 9 Bing. 605, 23 E. C. L. 395; *Slowman v. Wiggins*, 6 C. B. 276, 60 E. C. L. 276; *Campbell v. Twemlow*, 1 Price 81; *Perriman v. Staggall*, 9 Bing. 679, 23 E. C. L. 418; *Eastern Counties R. Co. v.*

Robertson, 6 M. & G. 38, 46 E. C. L. 38; *In re Marsh*, 16 L. J. Q. B. 330.

Georgia.—*Shaifer v. Baker*, 38 Ga. 135.

Kentucky.—*Harding v. Wallace*, 8 B. Mon. (Ky.) 536.

Maine.—*Hooper v. Taylor*, 39 Me. 224.

Missouri.—*Vaughn v. Graham*, 11 Mo. 575.

New Hampshire.—*Johnson v. Noble*, 13 N. H. 286, 38 Am. Dec. 485; *Pike v. Gage*, 29 N. H. 461.

New York.—*Campbell v. Western*, 3 Paige (N. Y.) 124; *Viele v. Troy*, etc., R. Co., 21 Barb. (N. Y.) 381.

Canada.—*Webster v. Haggart*, 9 Ont. Rep. 27.

The English Cases.—It is not easy to draw the line between the English rule that the arbitrator is to be bound by legal rules of evidence, and the principle that once his decision is made, right or wrong, it will not be interfered with. In *Hagger v. Baker*, 14 M. & W. 9, where the arbitrator admitted the plaintiff's books in evidence for him, stating at the same time that he knew they were inadmissible in a trial at nisi prius, but that he was not bound by such strict rules, his award was sustained, the court saying that the most that could be said against it was that he had made a mistake in the law of evidence.

In *Anderson v. Darcy*, 18 Ves. Jr. 447, Lord Eldon intimated that if the arbitrator refused to hear evidence of the contents of a letter proved to be lost, such erroneous ruling would constitute a good objection to an application for carrying the award into execution.

But where the arbitrator refused to hear the evidence of a witness on the ground that he had no religious belief, the Court of Queen's Bench refused to interfere. *Bradlaugh v. Du Rin*, 13 Jan. 1870, W. N. 9.

Where, after an accountant employed by the arbitrators had made his report to them on the accounts, and closed them by agreement, one of the parties tendered new documents which the arbitrator refused to receive, the court, by Coleridge, J., held that this was merely a rejection of evidence, and no ground for setting the award aside. *In re Marsh*, 16 L. J. Q. B. 330. Nor will the court set aside the award because an inadmissible witness has been heard, *Symes v. Goodfellow*, 2 Bing. N. Cas. 532, 29 E. C. L. 408; or because improper evidence has been admitted, *Eastern Counties R. Co. v. Robertson*, 1 D. & L. 498, 6 M. & G. 38, 46 E. C. L. 38.

United States Cases.—In *Campbell v. Western*, 3 Paige (N. Y.) 124, it was held that it was not necessary that all the arbitrators should concur in the decision of every

Rule where Arbitrator is Officer of Court.—Where, however, the arbitrator is to be regarded as an officer of the court before whom the hearing is to be conducted on legal principles, the admission of incompetent evidence by him is a reason for setting aside the award.¹

(4) *May Refer Question to the Court.*—The arbitrator may, if he thinks proper, submit the question of the admissibility of the evidence to the court in the form of a certificate, or a case setting out the facts necessary for the opinion of the court.² Or he may report the evidence to the court, giving

question which arises during the hearing, as to the admissibility of evidence; it is sufficient if all actually hear the cause, and join in the award which is finally made. Walworth, Ch., said: "The simple question, therefore, which is presented in this case, as to the validity of the award, must be, whether a mere mistake in judgment of the arbitrators upon a legal question, as to the admissibility of a particular witness in a case admitting of some doubt, at least, is sufficient evidence of improper conduct in the arbitrators to set aside their award in a court of chancery. If such is the law of this court, then indeed is the right of parties to submit their differences to arbitrators a curse rather than a blessing. If every party who arbitrates in relation to a contested claim, to save trouble and expense, is to be subjected to a chancery suit and to several hundred dollars cost, if the arbitrators happen to err upon a doubtful question as to the admissibility of a witness, the sooner these domestic tribunals of the parties' own selection are abolished the better."

In the *Boston Water Power Co. v. Gray*, 6 Met. (Mass.) 131, the court, by Shaw, C. J., said: "In general, arbitrators have full power to decide upon questions of law and fact which directly or incidentally arise in considering and deciding the questions embraced in the submission. As incident to the decision of the questions of fact, they have power to decide all questions as to the admission and rejection of evidence, as well as the credit due to the evidence, and the inferences of fact to be drawn from it."

In *Johnson v. Noble*, 13 N. H. 286, 38 Am. Dec. 485, it was held that the decision of referees in regard to rules of evidence is conclusive where the agreement to submit includes questions of law as well as of fact.

Mistake as to Scope of Submission.—Where the arbitrator rejects evidence which bears upon some of the matters within the scope of the submission, under the mistake that such matters are not included in it, this is not a mistake as to the admissibility of evidence which the court will disregard, but a mistake as to the scope of the submission itself and a failure to decide upon all the matters submitted for which the award will be set aside. *Samuel v. Cooper*, 2 Ad. & El. 752, 29 E. C. L. 203; *Brophy v. Holmes*, 2 Moll. 1.

But receiving evidence outside the scope of the submission, as where the claims in an action of debt were submitted, and the arbitrator received evidence of damages for a breach of covenant claimed as a debt, and as recoverable in the action, will not invalidate

the award. *Faviell v. Eastern Counties R. Co.*, 2 Exch. 344.

Application to Revoke when Arbitrator in Error.—Where the arbitrator has, in the opinion of either party, erroneously admitted or rejected evidence, the party may, before the award is made, apply to the court for leave to revoke the submission, and the court, on the hearing of the application, will consider the point of law, and, in its discretion, will either grant the rule or set the arbitrator right as to the law and discharge it. *Hart v. Duke*, 32 L. J. Q. B. 55; *Robinson v. Davies*, 5 Q. B. Div. 26.

1. Arbitrator Considered as Officer of Court.—*Burroughs v. Thorne*, 5 N. J. L. 895; *Allen v. Way*, 7 Barb. (N. Y.) 585.

In *Burroughs v. Thorne*, 5 N. J. L. 895, the award was set aside because the arbitrator rejected competent evidence.

If it is evident, however, that his mind could not possibly have been influenced by incompetent evidence admitted by him, the admission will not be considered sufficient reason to set aside the award. *Spear v. Myers*, 6 Barb. (N. Y.) 445; *Learned v. Belhows*, 8 Vt. 79.

Even when acting under a rule of court, if the arbitrator is to decide according to justice rather than according to law, his award will not be set aside for the admission of evidence which could not have been received in a court of law. *Hooper v. Taylor*, 39 Me. 224; *Fuller v. Wheelock*, 10 Pick. (Mass.) 135; *Chesley v. Chesley*, 10 N. H. 327.

Party may Reserve Right to Object to Evidence.—Either of the parties may, by a stipulation in the submission, reserve the right to object to evidence as on a trial in court, and if the arbitrator admits evidence to which he has objected, he may, under this provision, move the court to have the award set aside. *Scott v. Van Sandau*, 1 Q. B. 102, 41 E. C. L. 456.

2. Atty.-Gen. v. Davison, McClel. & Y. 160; *Hooper v. Taylor*, 39 Me. 224.

By 7 & 8 Vict., c. 93, in *England* the legislature has given to arbitrators in certain cases the power to submit a special case to the superior court before making an award. *Russell on Awards* (6th ed.) 210.

See *infra*, this title, *Authority of the Arbitrator—General Rule—Arbitrator is Judge of Law and Fact—May Refer Question of Law to the Court*; also *Powers of the Arbitrator in Particular Matters—Delegation of His Authority by the Arbitrator—May Take Opinion on Question of Law*.

England—Stating a Case or Holding Jury Trial pending Reference.—Where, in the course

his decision on the alternative, according to the ruling the court may think proper to make.¹

(5) *Must Not Admit Evidence De Bene Esse or Conditionally.*—An arbitrator is not, in general, at liberty, against the objection of a party, to admit evidence *de bene esse*, or as good for the time being, on condition that he may retain or reject it when he makes up his award.² But such a ruling is not necessarily ground for setting aside the award. Nor can he first admit evidence absolutely, and afterwards throw it out at the conclusion of the case.³

of arbitration proceedings, a point of law arises which is proper to be decided by the court, or upon a question of fact which might be submitted to a jury, the parties are empowered in *England*, by 17 & 18 Vict., c. 125, § 4, to come to the court and apply for an order for the statement of a case or the trial of an issue. When the order was granted the proceedings would have to be adjourned, and the arbitrator, in making his award, was bound to adopt the decision of the court or jury. *Baggalay v. Borthwick*, 10 C. B. N. S. 61, 100 E. C. L. 61, 30 L. J. C. P. 342. See *Master v. Hamilton*, 3 Jur. N. S. 722.

It was held in *Courtauld v. Legh*, 38 L. J. Exch. 124, L. R. 4 Exch. 187, that where a case was so stated, error would not lie to the judgment of the court, as it was not a final judgment.

Now in *England* a referee, under the judicature acts, may state a case upon any question of law or set of facts for the decision of the court before the closing of the trial before him. See *Russell on Awards* (6th ed.) 213.

1. *Hooper v. Taylor*, 39 Me. 224; *Fuller v. Wheelock*, 10 Pick. (Mass.) 135.

Arbitrator must Find Facts.—In such a case, however, the arbitrator must find the facts, and report them fully and conclusively. He is not at liberty to report the evidence merely, and then leave the court to find or infer the facts from it. *Barnard v. Spofford*, 31 Me. 39.

Arbitrator need Not Report Evidence.—An arbitrator is not required to report the evidence to the court or to append copies of documents submitted to him, even when he is requested to do so by the parties. *Allen v. Miles*, 4 Harr. (Del.) 234.

However, in *Green v. Creighton*, 7 Smed. & M. (Miss.) 197, where the reference was under a *Mississippi* statute, the court held that it was necessary that he should do so.

2. **Evidence De Bene Esse.**—*Peck v. Yorks*, 47 Barb. (N. Y.) 131; *Clussman v. Merkel*, 3 Bosw. (N. Y.) 402; *Allen v. Way*, 7 Barb. (N. Y.) 585; *Brooks v. Christopher*, 5 Duer (N. Y.) 216. See *McKnight v. Dunlop*, 5 N. Y. 537, 55 Am. Dec. 370. But compare *Kerslake v. Schoonmaker*, 1 Hun (N. Y.) 436, 3 Thomp. & C. (N. Y.) 524; *Lathrop v. Bramhall*, 64 N. Y. 365; *Wright v. Reusens*, 133 N. Y. 298; and see the title REFEREES AND REFERENCES.

In *Lathrop v. Bramhall*, 64 N. Y. 365, the court reviewed the decisions cited above in this note, and limited the doctrine announced in them. *Miller, J.*, speaking for the court, said: "An important distinction exists between the reservation of the question as to the effect of evidence and a reservation as to its admissibility, and the question arises and is directly

presented by one or more of the decisions of the referee, whether the party who raises an objection to evidence offered by his adversary has a right to have such objection passed upon absolutely at the time when it was presented, and whether the refusal to do so is erroneous. We have referred to a number of decisions, mostly in the Supreme Court, which are supposed to uphold the doctrine contended for. Although the marginal notes of these cases and the dicta of some of the judges appear to sanction such a rule, a critical examination will show that it has not been decided in any of them that a judgment must necessarily be reversed when the referee receives evidence reserving his decision. * * * There are cases where it is easy to see that the admission of evidence in this form might embarrass the defense in determining to what extent testimony should be introduced in answer to that which has been admitted under such a restriction. * * * It is not apparent that any of the decisions which were reserved by the referee could have affected the rights of the defendant injuriously so as to render them liable to objection, and they, therefore, do not present any legal ground for a reversal of the judgment."

In *Wright v. Reusens*, 133 N. Y. 298, the court, by O'Brien, J., said: "The referee, without consent, reserved his decision upon certain objections made by defendant's counsel to evidence offered and upon motion to strike it from the case. In fact, these questions were reserved against the objection of the defendant's counsel. Ordinarily, such rulings furnish ground for reversal, unless the questions reserved are immaterial or of such a character that, if decided against the party raising them, the decision would constitute no sufficient ground of error."

3. *Allen v. Way*, 7 Barb. (N. Y.) 585; *Peck v. Yorks*, 47 Barb. (N. Y.) 131.

In *Peck v. Yorks*, 47 Barb. (N. Y.) 131, it was said that a party has a right to know, when evidence is received against him, whether it is to be held competent, so that he may except to its being received and conduct his case with knowledge of what is to remain in it as evidence.

And in *Allen v. Way*, 7 Barb. (N. Y.) 585, the court, by Allen, J., said: "It would be liable to great abuse if a referee or court could admit evidence in fact *de bene esse*, although professedly admitting it absolutely, and then reject it upon making a decision or report on the whole case. The rights of both parties might be prejudiced by the act of the court or referee in thus reviewing their interlocutory decisions."

But see the preceding note.

Objecting to Evidence So Admitted.—But the party who objects must object at the time when the evidence is admitted conditionally,¹ or at the close of the case; he must obtain a distinct ruling on the point, and then except to such ruling if he objects to it.²

(6) *Admission of Incompetent Witness.*—It is not clear to what extent an arbitrator may admit the evidence of persons who are in law incompetent witnesses, as parties and persons interested in the event were formerly. Such persons are now, for the most part, rendered competent by statute, and then their testimony may be admitted as of course.³ But it seems that where such witnesses are legally incompetent as a fact, and the arbitrator expresses his intention to base his decision on "legal and competent evidence," and yet admits their evidence, the award will be set aside.⁴

e. POWER TO AMEND.—The arbitrator is often vested with the power of amending the pleadings and proceedings in the hearing before him.⁵ Where the submission is of a *lis pendens*, any matters which would be legally admissible by way of amendment in the trial of the cause in court may also be admitted by the arbitrator.⁶ But his power of amendment

1. Patten v. Hunnewell, 8 Me. 19; Brooks v. Christopher, 5 Duer (N. Y.) 216. See Spear v. Myers, 6 Barb. (N. Y.) 445.

2. Brooks v. Christopher, 5 Duer (N. Y.) 216.

3. See Russell on Awards (6th ed.) 197; Fuller v. Wheelock, 10 Pick. (Mass.) 137; Maynard v. Frederick, 7 Cush. (Mass.) 247; McCrae v. Robeson, 2 Murph. (N. Car.) 127; Hollingsworth v. Leiper, 1 Dall. (Pa.) 161; Askew v. Kennedy, 1 Bailey (S. Car.) 46. And see the title WITNESSES.

4. Fuller v. Wheelock, 10 Pick. (Mass.) 135; Fowler v. Thayer, 4 Cush. (Mass.) 111.

It does not appear to have been decided whether the arbitrator has power to admit the evidence of incompetent witnesses where there is no expression of an intention on his part to base the award on "legal" evidence, and where there is no statutory provision making the evidence of persons otherwise incompetent admissible. See Campbell v. Western, 3 Paige (N. Y.) 124.

In Fowler v. Thayer, 4 Cush. (Mass.) 111, it was held that where a case is referred to arbitrators to report a statement of facts for the consideration of the court, they have no authority to admit the parties as witnesses. The court, by Shaw, C. J., said: "They are expressly limited to the duty of reporting a statement of facts, restraining them from deciding on any questions of law. It was for the purpose of presenting the case to the court on the same grounds as upon a special verdict, and a special verdict must be on strictly legal evidence. The court are of opinion that the testimony of the plaintiffs ought not to have been admitted." See also *supra*, this title, *Duties of the Arbitrator—Arbitrators must Hear All the Evidence—General Rule*, and notes; also *supra*, this section, *Arbitrator's Decision is Final*, and notes.

5. Russell on Awards (6th ed.) 210. See Knox v. Symmonds, 1 Ves. Jr. 369; Rogers v. Dallimore, 6 Taunt. 111; Kleine v. Catara, 2 Gall. (U. S.) 69; Jones v. Boston Mill Corp., 6 Pick. (Mass.) 148.

Amending Record, etc.—In Nalder v. Batts,

1 D. & L. 700, it was held that where an arbitrator had the same power of amending the record as a judge at nisi prius, he might amend a plea by altering an immaterial error in a local description.

The mistakes of arbitrators may be corrected, either by themselves or by the court. The power to correct mistakes, even in judicial proceedings, is fundamental and inherent in all tribunals. Clarion First Nat. Bank v. Brenneman, 114 Pa. St. 315.

As to the power of arbitrators to remedy defects, see Flannery v. Sahagian, 134 N. Y. 85.

Power to amend a clerical error or mistake due to accidental slip or omission is given an arbitrator by 52 & 53 Vict., c. 49, § 7.

As to the arbitrator's power to amend in *Pennsylvania*, see Rex v. Merchants' Ins. Co., 2 Phila. (Pa.) 357; Coleman v. Lukens, 3 W. & S. (Pa.) 37; Neal v. Shields, 2 P. & W. (Pa.) 300; Roop v. Brubacker, 1 Rawle (Pa.) 304; Speer v. Bidwell, 44 Pa. St. 23; Etter v. Edwards, 4 Watts (Pa.) 65; Christmas v. Thompson, 3 S. & R. (Pa.) 133; Mussina v. Hertzog, 5 Binn. (Pa.) 387; McCahan v. Reamey, 33 Pa. St. 535.

6 Submission of Pending Suit.—Merrill v. Gold, 1 Cush. (Mass.) 457; Summer v. Brown, 34 Vt. 194; Fulton v. Wiley, 32 Vt. 762; Clifford v. Richardson, 18 Vt. 620; Maxfield v. Scott, 17 Vt. 634; Waterman v. Connecticut, etc., Rivers R. Co., 30 Vt. 610, 73 Am. Dec. 326.

Merits, Not Technicalities, to Govern.—The rule is that the cause is to be heard upon the merits, without regard to the technicalities of pleadings. Coffin v. Cottle, 4 Pick. (Mass.) 454; Page v. Monks, 5 Gray (Mass.) 492; Eddy v. Sprague, 10 Vt. 216; Davis v. Campbell, 23 Vt. 236; Briggs v. Oaks, 26 Vt. 138.

In Cook v. Carpenter, 34 Vt. 121, 80 Am. Dec. 670, it was held that even where it is a "part of the submission or rule of reference that the arbitrator or referee is to be governed by the rules of law, it is (nevertheless) the cause of action which forms the basis of the submission, and not the particular form

does not extend to allowing the introduction of a new subject-matter of litigation or a new and independent cause of action.¹ And all motions to amend the pleadings or proceedings are addressed to his discretion.²

f. POWER TO ADJOURN THE HEARING.—The arbitrators may, in their discretion, adjourn the proceedings either at the request of a party or of their own will, without the consent of the parties or either of them. But the courts will inquire into the matter in order to see that the adjournment is not for an unreasonable time, and that the parties are not oppressed by it.³

of the declaration which the party has adopted, or any particular issue which may have been formed upon it; and that, therefore, the referee is not bound by the particular declaration and pleadings, but may award upon the subject-matter of the suit without regard to them."

In *Merrill v. Gold*, 1 Cush. (Mass.) 457, the court, by Shaw, Ch. J., said: "The question whether any matter is or is not within the submission is well tested by another, to-wit: whether the same matter could be introduced by way of amendment, either by varying an existing count, or filing a new one; because, if it is simply another mode of stating the same cause of action, it is admissible, otherwise not."

The courts are disposed to go to the extreme verge of liberality in allowing the largest power of amendment to the arbitrator in order to secure a determination of the real matters in dispute. *Sumner v. Brown*, 34 Vt. 194. See, *contra*, *De La Riva v. Berreyesa*, 2 Cal. 195.

In some cases it has been said that he may try the case upon its merits, and not the particular question upon which issue was joined in court. *Hicks v. Cottvill*, 25 Vt. 80; *Eddy v. Sprague*, 10 Vt. 216; *Spaulding v. Warren*, 25 Vt. 316.

In *Myers v. York, etc.*, R. Co., 2 Curt. (U. S.) 28, it was held that though the referee might not allow formal defects to be amended he might disregard them and decide upon any matter which was substantially included in the declaration.

And in the same case, *York, etc.*, R. Co. v. *Myers*, 18 How. (U. S.) 246, in the Supreme Court of the United States, where the action was for breach of covenant to pay the plaintiff, a contractor, partly in shares, and the plaintiff alleged breaches coextensive with the covenant, and the arbitrator included in his award damages for nondelivery of the shares, the award was sustained on the ground that the averments of the declaration had "this scope and operation."

The *New York Code*, § 272, gives a referee the same power of allowing amendments as is possessed by the court on the trial of the cause.

1. *Sumner v. Brown*, 34 Vt. 194; *Cook v. Carpenter*, 34 Vt. 121, 80 Am. Dec. 670.

Waiver of Right to Object.—Where an amendment has been allowed by the arbitrator, and the opposite party amends his own pleadings in order to meet it, he thereby waives any objection to the allowance of such amendment. *Secor v. Law*, 9 Bosw. (N. Y.) 163.

Allowing New Cause of Action.—And in the same case the arbitrator was permitted to

allow "a new cause of action" to be added which demanded the same sum as that already demanded in the causes of action originally alleged. *Secor v. Law*, 9 Bosw. (N. Y.) 163.

Admission of New Parties.—Where the arbitrator has been appointed under the terms of a submission which has been made a rule of court, he has no power, under his limited power of amendment in North Carolina, to add new parties. *Williams v. Justice*, 113 N. Car. 502.

Amendment of the Defense.—Where a pending suit is submitted to arbitration, if the pleadings could have been amended by the court to admit the defense offered, the same power will be extended to the arbitrator. *Van Buskirk v. Stow*, 42 Barb. (N. Y.) 9.

Claim in Offset.—Where a claim for unliquidated damages has been filed in offset, which is invalid in law, the arbitrator cannot consider it. *Harrison v. Wortham*, 8 Leigh (Va.) 296.

2. *Woodruff v. Hurson*, 32 Barb. (N. Y.) 557.

The question has been suggested whether the power of the referee extends to allowing the amendments offered, or is limited to disregarding the defects. See *Morse Arb. and Award* 210; *Myers v. York, etc.*, R. Co., 2 Curt. (U. S.) 28. But the decisions do not seem to give any satisfactory answer to the question.

3. *Bray v. English*, 1 Conn. 498; *Richardson v. Hartsfield*, 27 Ga. 528; *Brown v. Leavitt*, 26 Me. 251; *Bixby v. Whitney*, 11 Me. 62; *Ex p. Rutter*, 3 Hill (N. Y.) 464; *Sonneborn v. Lavarello*, 4 Thomp. & C. (N. Y.) 536; *Langley v. Hickman*, 1 Sandf. (N. Y.) 681; *Eckert v. Sheets*, 6 S. & R. (Pa.) 275; *Steeley v. Irvine*, 6 S. & R. (Pa.) 128.

Adjournment upon Request of Parties.—Upon a reasonable request by one of the parties for an adjournment, the arbitrator may be bound to grant the request, but the parties must show good cause for the adjournment, as where they are surprised by unexpected evidence, and want it to procure witnesses or evidence in defense. *Solomon v. Solomon*, 28 L. J. Exch. 129; *Passmore v. Pettit*, 4 Dall. (U. S.) 271; *Rickards v. Patterson*, 5 Harr. (Del.) 235; *Deputy v. Betts*, 4 Harr. (Del.) 352; *Madison Ins. Co. v. Griffin*, 3 Ind. 277; *Coryell v. Coryell*, 1 N. J. L. 411; *Forbes v. Frary*, 2 Johns. Cas. (N. Y.) 224; *Packer v. French*, Hill & D. Supp. (N. Y.) 103; *Latimer v. Ridge*, 1 Binn. (Pa.) 458.

But if a party goes voluntarily to a hearing relying on a witness of the other side, and he is surprised by the evidence of one of the witnesses, which he believes to be false, it is too

Unreasonable Refusal to Adjourn.—Where a party is deprived of an opportunity to produce material evidence, or is otherwise injured by an unreasonable refusal of the arbitrators to adjourn, the award will be set aside.¹

Notice of Adjournment.—It appears that when a party has had notice of the first meeting he cannot object to the award on the ground that he has had no notice of the adjournment.²

Record of Adjournment.—The fact that an adjournment has been made must be placed on record.³

g. POWER TO DECLINE TO GO ON WITH THE PROCEEDINGS.—Although an arbitrator has accepted the reference, and held several meetings, he may, before the case is closed, decline to continue the proceedings, and the courts have no jurisdiction over him to compel him to make an award;⁴ nor can

late for him to demand an adjournment as a matter of right in order to procure evidence to rebut such testimony. *Woodworth v. Van Buskerk*, 1 Johns. Ch. (N. Y.) 432.

An arbitration bond stipulated that the award should be made before a certain day, but provided, that in case either of the parties should, "by affected delay or otherwise," prevent the arbitrators from making their award within the time limited, then the arbitrators should be at liberty to proceed and make their award, taking such time as they should think reasonable. Before the day fixed for making the award, the arbitrators met the parties, but at the request of the defendant adjourned to a time subsequent to such date, when they again met the parties, heard the case, and made their award. It was held that the award was valid, and that the case was within the phrase "by affected delay or otherwise," as they had been prevented by the defendant from making it before the time originally fixed. *Bixby v. Whitney*, 11 Me. 62.

Discretion—Unreasonable Adjournment.—The court seldom interferes with the discretion of the arbitrators. *Ringer v. Joyce*, 1 Marsh. 404, 4 E. C. L. 344.

Where the question of alimony in a divorce suit was referred, and the arbitrator adjourned the proceedings, against the objection of the wife, from the latter part of June to the middle of October, to enable the defendant's counsel to take a trip to Europe, the delay to the plaintiff was held unreasonable. The court decided that unless the order of adjournment was vacated, the arbitrator would be removed. *Forrest v. Forrest*, 3 Bosw. (N. Y.) 650.

Where the arbitrators adjourned, against the protest of one of the parties, to hear further argument for the other party, although it was agreed that the case should be deemed closed on a previous day, it was held to be such an excess of their power that it avoided the award. *Cole v. Blunt*, 2 Bosw. (N. Y.) 116.

See, as to adjourning in order to consider the advisability of bringing forward documents produced by a witness who is not a party, *In re Maplin Sands*, 71 L. T. 594.

Whether All must Unite.—Adjournments granted by two referees, in the absence of a third, are irregular. *Jackson v. Ives*, 22 Wend. (N. Y.) 637; *Harris v. Norton*, 7 Wend. (N. Y.) 534.

In *Pennsylvania*, one arbitrator only, attending the first day of meeting, has power

to adjourn, although one of the parties is absent, and at such adjourned meeting he may appoint other arbitrators in the place of those absent, notice having been given to the absent party. *Stiles v. Carlisle, etc.*, Turnpike Road, 10 S. & R. (Pa.) 286; *Steeley v. Irvine*, 6 S. & R. (Pa.) 128.

Absence of Arbitrator—Appointment of Substitute.—In *Harrington v. Rich*, 6 Vt. 666, it was held that the absence of one of the arbitrators in Europe was sufficient proof of his inability to act, to justify the appointment of a substitute as provided for by the terms of the submission.

Adjourning to Procure Counsel.—In *Whatley v. Morland*, 2 Dowl. 249, where one of the parties had failed to give the other notice that he intended to employ counsel, it was held that the opposite party was entitled to an adjournment to enable him to procure similar professional assistance.

Statute Authorizing Adjournment from Day to Day.—In *Richardson v. Hartsfield*, 27 Ga. 528, it was held that the statutory provision providing that arbitrators might adjourn from day to day did not necessarily exclude the right to adjourn for another time, should the necessities of the case require it.

1. *Passmore v. Pettit*, 4 Dall. (Pa.) 271; *Coryell v. Coryell*, 1 N. J. L. 441; *Forbes v. Frary*, 2 Johns. Cas. (N. Y.) 224; *Whatley v. Morland*, 2 Dowl. 249.

2. *Eckert v. Sheets*, 6 S. & R. (Pa.) 275; *Boring v. Boring*, 2 W. Va. 297. See *Cook v. Carpenter*, 34 Vt. 121, 80 Am. Dec. 670.

In *Frey v. Vanlear*, 1 S. & R. (Pa.) 435, where arbitrators adjourned to a certain day, and did not then meet, but met at a later day, and then examined witnesses in the absence of the parties and without having given notice of such meeting, it was held that they were in error.

3. *Rickards v. Patterson*, 5 Harr. (Del.) 235; *Deputy v. Betts*, 4 Harr. (Del.) 352.

4. **Refusing to Go On.**—*Lewin v. Holbrook*, 11 M. & W. 110, 2 Dowl. N. S. 991; *Crawshay v. Collins*, 1 Swanst. 40; *Darbey v. Whitaker*, 4 Drew. 134; *Cooth v. Jackson*, 6 Ves. Jr. 17. See *Russell on Awards* (6th ed.) 210.

An arbitrator could be compelled to make an award by the civil law. 2 Story Eq. Jur. 680.

And arbitrators appointed under certain statutory provisions in *England* could not decline to carry out the arbitration. *Cummins v. Birckett*, 27 L. J. Exch. 216.

they require him to make his award according to a particular principle.¹

Courts Reject Applications with View to Release Arbitrator.—But though the courts have no power to compel the arbitrator to proceed when he declines, they will, as a rule, reject any application that may be made to them, with a view to prevent him from making an award.²

h. WAIVER OF IRREGULARITIES IN THE PROCEEDINGS.—Waiver being a matter of intention, the party must have a full knowledge of the irregularity which he is said to waive, otherwise there can be no waiver.³ But where there has been any irregularity in the proceedings, and the parties, by their acts as by appearing and proceeding with the arbitration, clearly show that they waive any objection on account of it, or do so expressly, such irregularity will not render the award invalid.⁴

As to the refusal of the arbitrator to act, see further, *supra*, this title, *Duties of the Arbitrator—Arbitrators must All Act Together—Refusal of Arbitrator to Act*; also, *supra*, *The Submission—Revoking the Submission—By Death, or Refusal to Act of Arbitrator*.

1. Houghton v. Bankart, 3 De G. F. & J. 16.
2. Rex v. Bardell, 5 Ad. & El. 619, 31 E. C. L. 403.

Equity will Restrain Corrupt or Incompetent Arbitrators.—But equity will interfere to restrain the arbitrator from going on with the reference, where he is guilty of corruption. *Malmesbury R. Co. v. Budd*, 2 Ch. Div. 113.

Or where he is incompetent or unfit by reason of personal interest in the subject-matter in dispute, or of direct misconduct during the proceedings. *Beddow v. Beddow*, L. R. 9 Ch. Div. 89.

Misconduct of Parties.—The court will sometimes interfere to put a stop to arbitration proceedings on account of the misconduct of the parties themselves. *Pickering v. Cape Town R. Co.*, L. R. 1 Eq. 84; *Mylne v. Dickinson*, Coop. 195. See *Maunsel v. Midland Great Western R. Co.*, 1 Hem. & M. 130; *Witt v. Corcoran*, L. R. 8 Ch. 476, note.

3. *Darnley v. London*, etc., R. Co., L. R. 2 H. L. Cas. 43; *In re Hick*, 8 Taunt. 694, 4 E. C. L. 249; *Brown v. Leavitt*, 26 Me. 251. See *Dobson v. Groves*, 6 Q. B. 637, 51 E. C. L. 637.

Attending Hearings after Irregularity—Whether Waiver.—Where an intention to waive objections does not exist, attending meetings after an irregularity has occurred does not necessarily constitute a waiver. *Haigh v. Haigh*, 31 L. J. Ch. 420.

Where a party attends meetings after an irregularity has occurred, but under protest, he does not waive his right to object to such irregularity. *Davies v. Price*, 10 W. R. 865, 34 L. J. Q. B. 8; *Ringland v. Lowndes*, 17 C. B. N. S. 514, 112 E. C. L. 514, *overruling* 15 C. B. N. S. 173, 109 E. C. L. 173; *Shonath v. Ramnath*, 35 L. J. N. S. P. C. 1.

Where a party objects to an arbitrator as interested in the matter in dispute, the objection is not waived by entering into his defense and trying to procure an award in his favor. *In re Mayor*, etc., and *B. Gas Co.*, 12 Vict. L. R. 682. See *In re Higgins*, etc., 11 Vict. L. R. 140.

But a party may waive a protest against an irregularity by proceeding with the arbitra-

tion where an intention to do so can be clearly inferred from his acts. *Christman v. Moran*, 9 Pa. St. 487.

Curing Irregularity by Rehearing.—And a rehearing before all three arbitrators cures any irregularity in the proceedings before two only, where the third arbitrator was, by mistake, first appointed as umpire and was believed to be an umpire. *Moseley v. Simpson*, L. R. 16 Eq. 226.

Failure to Object—When Not Waiver.—The fact that an insured person has not made any objection during the progress of an arbitration, does not prevent him from having the award set aside for bias and partiality of one of the arbitrators, where the knowledge of such bias was derived only from the conduct of the arbitrators in connection with the gross insufficiency of the award which was immediately repudiated. *Glover v. Rochester-German Ins. Co.*, 11 Wash. 143. See *Bradshaw v. Agricultural Ins. Co.*, 137 N. Y. 137.

Declaring on Award and on Contract Arbitrated.—An award of arbitrators is not waived where, in an action for the price of hay, plaintiffs declare upon the award in one count, and on the contract under which the hay was sold in another. *Sadler v. Olmstead*, 79 Iowa 121. See *Haslinger v. Long Island Ins. Co.*, 62 Mich. 144.

The Acceptance of the Fruits of an Award is not necessarily a waiver of a breach by the other party of a bond conditioned upon the performance of the award. *Stratton v. Mason*, 15 Pick. (Mass.) 508.

4. *England.*—*In re Salkeld and Slater*, 12 Ad. & El. 767, 40 E. C. L. 189; *Drew v. Leburn*, 2 Macq. 1; *In re Jenkins*, 1 Dowl. N. S. 276; *Bignall v. Gale*, 2 M. & G. 830, 40 E. C. L. 648; *Hewlett v. Laycock*, 2 C. & P. 574, 12 E. C. L. 271; *Morgan v. Birnie*, 9 Bing. 672, 23 E. C. L. 414; *Johnston v. Cheape*, 5 Dowl. 247; *Owdy v. Gibbons*, Comb. 100; *Kingwell v. Elliott*, 7 Dowl. 423.

Indiana.—*Madison Ins. Co. v. Griffin*, 3 Ind. 277.

Louisiana.—*Lattier v. Rachal*, 12 La. Ann. 695.

Maine.—*Brown v. Leavitt*, 26 Me. 251; *Norton v. Savage*, 10 Me. 455.

Massachusetts.—*Cutter v. Whittemore*, 10 Mass. 442; *Maynard v. Frederick*, 7 Cush. (Mass.) 247; *Fox v. Hazelton*, 10 Pick. (Mass.) 275; *Strong v. Strong*, 9 Cush. (Mass.) 560; *Cogswell v. Cameron*, 136 Mass. 518; *Haven*

After an Award is Made and Satisfied, all objections on account of irregularities in

v. Winnisimmet Co., 11 Allen (Mass.) 377, 87 Am. Dec. 723.

Missouri.—Phillips *v. Couch*, 66 Mo. 219; Valle *v. North Missouri R. Co.*, 37 Mo. 445.

New Hampshire.—Tracy *v. Herrick*, 25 N. H. 381.

New York.—Perry *v. Moore*, 2 E. D. Smith (N. Y.) 32; Fudickar *v. Guardian Mut. L. Ins. Co.*, 62 N. Y. 392; Butler *v. New York*, 1 Hill (N. Y.) 489; Terry *v. Moore*, 3 Misc. Rep. (N. Y. C. Pl.) 285.

Pennsylvania.—Brooke *v. Bannon*, 3 W. & S. (Pa.) 382; Mitchell *v. Wilhelm*, 6 Watts (Pa.) 259; Dorman *v. Pittsburgh, etc.*, Turnpike Co., 3 Watts (Pa.) 126; Browning *v. McManus*, 1 Whart. (Pa.) 177; Bemus *v. Clark*, 29 Pa. St. 251; Connor *v. Simpson* (Pa. 1886), 7 Atl. Rep. 161; Wightman *v. Pettis*, 29 Pa. St. 283.

Tennessee.—Mullins *v. Arnold*, 4 Sneed (Tenn.) 262.

West Virginia.—Mathews *v. Miller*, 25 W. Va. 817.

See further, *supra*, this title, *Duties of the Arbitrator—Arbitrators must Give Notice of the Hearing to Both Parties—Waiver of Notice*.

Execution of, and Acquiescence in, Award.—

A court of equity will not set aside an award where the party has paid the amount awarded thereby against him, and has acquiesced in it for several years. *M'Rae v. Buck*, 2 Stew. & P. (Ala.) 155; *Hite v. Hite*, 1 B. Mon. (Ky.) 177; *McDaniel v. Bell*, 3 Hayw. (Tenn.) 258. See *Steele v. Kinkle*, 3 Ala. 352; *Hoogs v. Morse*, 31 Cal. 128; *Tyler v. Stephens*, 7 Ga. 278; *Titus v. Scantling*, 4 Blackf. (Ind.) 89; *Smith v. Stewart*, 5 Ind. 220; *Forqueron v. Van Meter*, 9 Ind. 270; *Perkins v. Wing*, 10 Johns. (N. Y.) 143; *Atkinson v. Manks*, 1 Cow. (N. Y.) 691; *Sharpe v. King*, 3 Ired. Eq. (N. Car.) 402; *Picton v. Graham*, 2 DeSaus. (S. Car.) 592.

Where a defendant knew of certain objections which might be made to an award, it was held that he should take advantage of them within a reasonable time, and it was too late to object to such irregularities after the execution of the award. *Willingham v. Harrell*, 36 Ala. 583; *McCord v. Scott*, 4 Watts (Pa.) 11. See *Ledlie v. Gamble*, 35 Mo. App. 355.

After the person against whom an award has been made has given his note for the amount, it is too late to object that the arbitration was not in accordance with the provisions of the statute. *Forqueron v. Van Meter*, 9 Ind. 270. See *Miller v. Brumbaugh*, 7 Kan. 343; *Johnson v. Ketchum*, 4 N. J. Eq. 364.

Where the heirs to an estate submitted matters in dispute between them to the decision of arbitrators, and accepted an award made by such arbitrators upon the merits of the dispute, and then entered into a settlement in conformity therewith, a court of equity will not interfere to stop the settlement where no mistake or fraud is shown. *George v. Johnson*, 45 N. H. 456.

Proceeding before Improper or Incomplete Set of Arbitrators.—Where one of the parties to an

arbitration permits the hearing to go on without objection, although he knows that the arbitrator has made *ex parte* investigations, he waives the right to object to the award on account of such irregularity. *Duckworth v. Diggle*, 139 Mass. 51; *Christman v. Moran*, 9 Pa. St. 487. See *Fox v. Hazelton*, 10 Pick. (Mass.) 275; *Kent v. Charlestown*, 2 Gray (Mass.) 281.

Where an agreement to submit was to the effect that there should be three arbitrators, and the parties proceeded to a hearing before two arbitrators, without making any objection before or during the trial, this amounts to a waiver of the right to have the third arbitrator called in. *Badders v. Davis*, 88 Ala. 367.

An award cannot be excepted to because of the substitution of another umpire by the arbitrators at the request of the plaintiff, and after the first umpire chosen had been sworn, where the party objecting proceeded with the hearing without making any objection. *Fowler v. Jackson*, 86 Ga. 337.

Where parties attend the proceedings after the improper appointment of an umpire, they thereby waive all objections to such irregular appointment. *Matson v. Trower*, R. & M. 17, 21 E. C. L. 371.

Proceedings under Stipulation Excluding Proper Parties.—Where a person has entered into a submission under a rule of court, with a stipulation in the agreement that the dispute shall be decided without making certain persons who should have been parties to the suit by the rules of equity parties to the arbitration, he cannot afterwards object to the award on the ground that such parties have been omitted. *Cromwell v. Owings*, 6 Har. & J. (Md.) 10. See *Everett v. Charlestown*, 12 Allen (Mass.) 93.

Proceedings under Improperly Executed Bond.—Where an arbitration bond which purported to bind jointly and severally three persons named therein was signed by only two of them, and these two proceeded to a hearing, and an award was made against them, and the obligee sued one of them upon it, the court held that apart from the stipulation for joint liability, the two persons who had signed the bond had, by proceeding with the reference, knowing that the bond had not been signed by the third party, waived the right to object to the validity of the award. By going on with the proceedings, while at the same time having a secret intention to object to the award on the ground of the irregularity, they would have grossly deceived the opposite party by allowing him to go on and establish his case under the impression that the award, if in his favor, would not be objected to. *Cutter v. Whittemore*, 10 Mass. 442.

Waiver of Objection as to Time of Proceedings.

—Where parties attend the proceedings, they thereby waive all objection to such irregularity. *In re Hick*, 8 Taunt. 694, 4 E. C. L. 249.

Where the submission limits a certain time within which the award must be made or the arbitrators chosen, and after the time so limited has expired the parties appoint arbitrators and go on with the proceedings, they

the proceedings are thereby waived conclusively,¹ even though there was an express stipulation in the submission that there should be no waiver.

6. Authority of the Arbitrator—*a. GENERAL RULE—*(1) *Source of Authority.*—Where the authority of the arbitrator is not defined or limited by statute, or by rule of court in the case of a submission in an action pending, it is derived exclusively from the submission, and every part of it, as well as the documents referred to therein, must be taken into consideration in order to determine the extent of such authority.²

(2) *Must Not Exceed His Powers.*—If the arbitrator exceeds the powers which have been conferred on him, it will render his award void, unless the excess can be separated from the part which is within the submission.³

thereby waive all objections to the award on the ground that the stipulation as to time has not been complied with. *Montague v. Smith*, 13 Mass. 396.

In *Indiana*, where an award is returned to the Circuit Court, an objection that it has not been returned in time is waived if not made in that court. *Ellison v. Chapman*, 7 Blackf. (Ind.) 224. See *Jacobs v. Moffatt*, 3 Blackf. (Ind.) 395.

Waiver of Objection as to the Admission of Evidence or Witness.—Where parties attend the proceedings after evidence has been improperly admitted, they thereby waive all objections on account of admitting such evidence improperly. *Kingwell v. Elliott*, 7 Dowl. 423; *Hewlett v. Laycock*, 2 C. & P. 574, 12 E. C. L. 271; *Bignall v. Gale*, 2 M. & G. 830, 40 E. C. L. 648.

An objection on the ground that witnesses are not sworn, will be waived unless taken at the time. *Maynard v. Frederick*, 7 Cush. (Mass.) 247.

Waiver of Objection as to Pleading Counter-claim.—After a submission to arbitration has been made, it is too late to object that a counter-claim has been improperly pleaded. *Robbins v. Killebrew*, 95 N. Car. 19. See *Greensboro v. Scott*, 84 N. Car. 184.

Waiver of Objections to the Form of the Award.—Where the submission contained a stipulation that the award should be in a certain form, the fact that it is not as agreed upon has been held waived by a "subsequent understanding between the parties" proved by the evidence of the arbitrators. *Tracy v. Herrick*, 25 N. H. 381. See *French v. New*, 20 Barb. (N. Y.) 481.

And where a sworn copy of the award has been delivered to each party, and received without objection, a right to receive the original has been held thereby waived. *Sellick v. Addams*, 15 Johns. (N. Y.) 197; *Tracy v. Herrick*, 25 N. H. 381.

So a stipulation for a written award may be waived. *Tudor v. Scovell*, 20 N. H. 174.

Or a stipulation that an award shall be returned into court and judgment entered upon it, if the parties enter into an agreement to that effect, after the award is made. *Norton v. Savage*, 10 Me. 455.

Waiver of Departure from Terms of Submission.—When, in an appraisal of certain articles appurtenant to real estate, the arbitrators erroneously included some which were not intended to be so included by the submis-

sion, the parties showing them the articles and making no objections, it was held that the parties had thereby waived an objection to the award on the ground that the articles so valued were not included in the submission, and that other articles which were appraised were not valued. *Brown v. Bellows*, 4 Pick. (Mass.) 179.

1. *Reynolds v. Roebuck*, 37 Ala. 408; *Hoogs v. Morse*, 31 Cal. 128; *White v. Fox*, 29 Conn. 570; *Brown v. Bellows*, 4 Pick. (Mass.) 179. See *Henneigh v. Kramer*, 50 Pa. St. 530; *Williams v. Williams*, 11 Smed. & M. (Miss.) 393; *Tyler v. Stephens*, 7 Ga. 278; *Kennard v. Harris*, 2 B. & C. 801, 9 E. C. L. 249; *Culver v. Ashley*, 19 Pick. (Mass.) 300.

In *McShane v. Gray*, 13 Iowa 504, where the statute required three referees unless the parties consented that the hearing should be before a less number, and the hearing as a fact was held before one only, the parties not expressly consenting, it was held too late to object to the award on this ground after it had been made.

2. *Samways v. Eldsly*, 2 Mod. 73; *Winter v. White*, 1 Brod. & B. 350, 5 E. C. L. 112; *Walsh v. Gilmore*, 3 Har. & J. (Md.) 383, 6 Am. Dec. 502; *Boston Water Power Co. v. Gray*, 6 Met. (Mass.) 131.

Where the Submission is Made by Rule of Court, the rule itself and all the papers in the case must be considered, and where under statute, the provisions of the statute must be construed with the submission in order to determine the arbitrators' powers. See *Morse Arb. and Award*, 177.

Correspondence Resulting in Submission.—Where the submission was finally made by two letters, after a long correspondence between two merchants, the court held that the whole correspondence should be taken into consideration in order to determine what the terms of the submission really were. *Walsh v. Gilmore*, 3 Har. & J. (Md.) 383, 6 Am. Dec. 502.

3. *United States.*—*Huff v. Parker*, cited in 4 Dall. (U. S.) 285; *Lyle v. Rodgers*, 5 Wheat. (U. S.) 394.

Alabama.—*Reynolds v. Reynolds*, 15 Ala. 398.

Arkansas.—*Lee v. Onstott*, 1 Ark. 206.

California.—*White v. Arthur*, 59 Cal. 33.

Delaware.—*Stevens v. Gray*, 2 Harr. (Del.) 347; *Fountain v. Harrington*, 3 Harr. (Del.) 22.

Kentucky.—*Blanton v. Gale*, 6 B. Mon. (Ky.) 260.

Massachusetts.—*Bean v. Farnam*, 6 Pick. (Mass.) 269; *Com. v. Pejepsut Proprietors*, 7 Mass. 399; *Worthen v. Stevens*, 4 Mass. 448.

Presumption in Favor of Award.—But every reasonable presumption will be made in favor of the award, unless it is clearly proved that the arbitrator exceeded his authority.¹

Mississippi.—Gibson v. Powell, 5 Smed. & M. (Miss.) 712.

Missouri.—Squires v. Anderson, 54 Mo. 193.
New Hampshire.—Adams v. Adams, 8 N. H. 82; Johnson v. Noble, 13 N. H. 286, 38 Am. Dec. 485; Richardson v. Huggins, 23 N. H. 106.

New Jersey.—Leslie v. Leslie, 50 N. J. Eq. 103.

New York.—Schuyler v. Van Der Veer, 2 Cai. (N. Y.) 235; Brown v. Hankerson, 3 Cow. (N. Y.) 70; Wright v. Wright, 5 Cow. (N. Y.) 197; Butler v. New York, 7 Hill (N. Y.) 329; Solomons v. McKinsty, 13 Johns. (N. Y.) 27.

Pennsylvania.—Collins v. Freas, 77 Pa. St. 493.

South Carolina.—Sessions v. Barfield, 2 Bay (S. Car.) 94.

Tennessee.—Smith v. Kincaid, 7 Humph. (Tenn.) 28.

Vermont.—Howard v. Edgell, 17 Vt. 9; Cook v. Carpenter, 34 Vt. 121, 80 Am. Dec. 670.

West Virginia.—Swann v. Deem, 4 W. Va. 368; Dunlap v. Campbell, 5 W. Va. 195; Austin v. Clark, 8 W. Va. 236.

See *infra*, this title, *The Award—The Award must Be Coextensive with Terms of Submission.*

When Award Exceeding Submission Not Wholly Void.—In Richardson v. Huggins, 23 N. H. 106, where the sureties of the party against whom the award was made objected that the arbitrators had allowed a claim against him in excess of their authority, the court refused to set the award aside, because the debtor had paid the amount, and there could be no longer any claim against the sureties, saying further: "The court will look only to the award itself for the means of rejecting a claim not submitted and therefore improperly allowed, yet we have no doubt that where it appears by the same evidence which proves the allowance of a demand not submitted, that the same demand has been paid or released or in any way discharged, the award should not be set aside for that cause in case the allowance of such claim has merely the effect to increase the amount of the award against the party objecting, and the other party is satisfied. In such case the award should be held valid and effectual for the residue, just as a judgment exceeding the *ad damnum* of the writ will not be set aside for that cause in case the excess is remitted."

An award may be valid as to the matters submitted, and void as to matters decided upon by the arbitrators but not embraced in the submission. Bogan v. Daughdrill, 51 Ala. 312.

Where two persons agreed to submit the question which of the two was primarily liable on an account, to a third party, it was held that they were not bound by the award as to the items of the account. Blakely v. Frazier, 11 S. Car. 122. See *In re Wallace*, 31 La. Ann. 335.

Award in Excess of Power Absolutely Void.

Where a contract was entered into for the sale of lumber at a certain price per thousand, the quantity to be estimated by two arbitrators, one to be chosen by each party, whose estimate was to be final, it was held that the arbitrators under this agreement were not entitled to pass upon the quality of the lumber, or to regrade it and reject some included in the contract, and that their award was rendered void by doing so. Stubbings v. McGregor, 86 Wis. 248.

As to the powers of arbitrators to decide as to the quality of goods, see Cobb v. Dolphin Mfg. Co., 108 N. Y. 463.

1. Morse Arb. and Award 178; Myers v. York, etc., R. Co., 2 Curt. (U. S.) 28; Burns v. Hendrix, 54 Ala. 78; Reynolds v. Reynolds, 15 Ala. 398; Byrd v. Odem, 9 Ala. 755; Blair v. Wallace, 21 Cal. 317; Hubbard v. Firman, 29 Ill. 90; Hayes v. Forskoll, 31 Me. 112; Caton v. McTavish, 10 Gill & J. (Md.) 192; Ebert v. Ebert, 5 Md. 353; Sperry v. Ricker, 4 Allen (Mass.) 17; Hodges v. Hodges, 9 Mass. 320; Strong v. Strong, 9 Cush. (Mass.) 560; Bush v. Davis, 34 Mich. 190; Clement v. Comstock, 2 Mich. 359; Richardson v. Huggins, 23 N. H. 106; Parsons v. Aldrich, 6 N. H. 264; Byers v. Van Deusen, 5 Wend. (N. Y.) 268.

Presumption Favors Award—Illustrations.—Under a submission of all matters between A and B, the arbitrators rendered an award: "We find for A four thousand dollars, including the judgment of C, and the judgment of B against D." The court held that it was to be presumed that both parties were in some way interested in the judgments so mentioned, and that therefore they were included in the submission and award. Hays v. Miller, 12 Ind. 187.

Even where the submission could not be produced, the court held that it must be presumed "that all matters passed upon were matters of difference, and that all matters of difference were passed upon." Lamphire v. Cowan, 39 Vt. 420.

Under a general submission the arbitrators are bound to decide only those matters brought to their consideration by the parties. The presumption is that the matters decided by the arbitrators were so brought to their consideration. Sheffield v. Clark, 73 Ga. 92.

In Richardson v. Huggins, 23 N. H. 106, it was held that "the party who assails an award must clearly go farther than merely to show that the referees may have erred." The court will not intend that claims not embraced by the submission were in fact considered and decided by the arbitrators, merely because the terms of the award are broad enough to cover such claims. See Joy v. Simpson, 2 N. H. 179; Parsons v. Aldrich, 6 N. H. 264.

In Colcord v. Fletcher, 50 Me. 398, it was held that if the parties have submitted the dispute to arbitration, although the terms of the submission are indefinite, yet the arbitrators have power to determine both the amount of the claim in dispute and the validity of such

(3) *May Determine Incidental Matters.*—It has been held that the arbitrator can consider only the precise question submitted to him, that he can neither modify the question nor add other controversies to it, no matter how cognate to the matter submitted.¹ However, it is within the arbitrator's power to award in regard to all matters which are necessarily or properly incidental to, or included within, the terms of the submission. And he may give such directions as are conducive towards, or necessary for, the full carrying out of his award in regard to the matters submitted.² But he cannot

claim unless they are restricted by express terms of the submission.

1. Power Limited to the Precise Question Submitted.—Wyman v. Hammond, 55 Me. 534; Hayes v. Forskoll, 31 Me. 112; Sawyer v. Freeman, 35 Me. 542; State v. Jones, 2 Gill (Md.) 49; Culver v. Ashley, 17 Pick. (Mass.) 98; Shearer v. Handy, 22 Pick. (Mass.) 417; Brown v. Evans, 6 Allen (Mass.) 333; Gilmore v. Hubbard, 12 Cush. (Mass.) 220; Worthen v. Stevens, 4 Mass. 448; Robinson v. Moore, 17 N. H. 479; Butler v. New York, 7 Hill (N. Y.) 329; Cook v. Carpenter, 34 Vt. 121, 80 Am. Dec. 670.

Allowing Interest on Amount Found Due.—Where an award gave time for the payment of the principal sum found due, it was not avoided by the fact that the arbitrators also allowed interest from date of award. Noyes v. McLaffin, 62 Ill. 474.

Mistake as to Subject-matter.—Where by mistake the wrong steer was exhibited to the arbitrators, and the award disposed of the steer in dispute, under the mistaken impression that the exhibited steer was the one in question, the award was void. Cox v. Fay, 54 Vt. 446.

Sum Due Determined in Appraised Property.—Where it is agreed that a confessed judgment shall be released on payment of such sum as the arbitrator shall find due, his authority is only to determine the amount in money. He has no authority to award that the judgment shall be released on the payment of a certain amount of property at a certain appraise-ment. State v. Jones, 2 Gill (Md.) 49.

When Insurance "Expense" within Submission.—In Sawyer v. Freeman, 35 Me. 542, it was held that a submission concerning the "earnings and expenses" of a vessel does not authorize the arbitrators to take into consideration certain moneys paid or received by way of insurance, unless express power to do so was given to the party who made the insurance; otherwise it was not an "expense," nor are receipts from it "earnings."

Awarding Cross-demand.—A demand by a plaintiff against a defendant, when submitted to arbitration, does not justify the arbitrator in awarding upon a claim by the defendant against the plaintiff. Worthen v. Stevens, 4 Mass. 448.

Cannot Vary Question Submitted.—Where an award had been made which defined the course of a boundary line, and the true location of the line became afterwards the subject of a dispute, and was again submitted to arbitration, it was held that the arbitrator was confined to retracing the line as originally defined, and that an attempt to establish it according to his own opinion of where it really

ran was in excess of his authority. Wyman v. Hammond, 55 Me. 534.

2. Atkins v. Baldwin, 1 Stark. 209, 2 E. C. L. 86; Pascoe v. Pascoe, 3 Bing. N. Cas. 898, 32 E. C. L. 374; Harrison v. Lay, 13 C. B. N. S. 528, 106 E. C. L. 528; Beekingham v. Hunter, Rolle Abr., Arb., D. 8, p. 246; Boston Water Power Co. v. Gray, 6 Met. (Mass.) 131.

Matters and Means must Be Strictly Incidental.—However, an arbitrator's power in this respect is strictly limited to the precise question submitted, and to those means only which are absolutely necessary to carrying out his award. In a cause in which judgment had been confessed, which judgment was to be released on payment of such sum as a certain arbitrator should find to be due, it was held that the arbitrator could only determine what that sum was, but that he had no power to order the judgment to be released. State v. Jones, 2 Gill (Md.) 49.

When may Go behind a Receipt in Full.—In Maynard v. Frederick, 7 Cush. (Mass.) 247, where a receipt in full had been given by one party to the other, and the submission was of all matters in dispute between the parties arising out of their trade and dealings, with a stipulation that the award should be in full settlement of all differences arising out of such dealings from the time they began until the date of the submission, it was held that the arbitrator not only might, but was actually bound to, go behind the receipt in full.

When may Determine Equitable Claim.—Where, by the terms of the submission, the arbitrators have power to determine all matters in difference between the parties, a question in the nature of a partnership account between the parties may be included in the award, because under such a submission the arbitrators may have cognizance of equitable as well as legal claims. Stewart v. Grier, 7 Houst. (Del.) 378.

Collateral Matters Embraced in Submissions—Illustrations.—Where a controversy, growing out of an agreement signed by the administrator's decedent and others to take certain stock in a specified bank, at prices to be determined by C., and to pay for the same as required by him, was submitted to arbitrators by the administrator and the bank, it was held under this stipulation that the arbitrators were authorized to determine the liability of the administrator to the bank. Merchants Bank v. Taylor, 21 Ga. 334.

Where an agreement to submit the matter in dispute to arbitration recited that a controversy exists in relation to the settlement of the accounts between the parties and the claims of each upon the other, it was held that

lawfully go beyond the terms of the submission in order to do general justice.¹

b. ARBITRATOR IS JUDGE OF LAW AND FACT—(1) *General Rule*.—Unless the submission or the rule of court contain provisions to the contrary, the arbitrator is the sole judge of all questions of law or fact arising in the course of the arbitration.²

the arbitrators, under such a submission, might properly consider and award upon a claim for damages sustained in consequence of an eviction of one party from certain demised premises and the tortious conversion of personal property, where it appeared that these as well as other claims between the partners arose out of an agreement in writing relating to the occupation of certain premises and the cultivation of the plants therein. *Owen v. Boerum*, 23 Barb. (N. Y.) 187.

Where a reference is made to arbitration of "all matters between the parties," such reference justifies an award which declares that defendant's intestate is indebted to the plaintiff in a certain sum and which directs the canceling of two mortgages from the plaintiff which were put in evidence by the defendant, the debt secured by which was adjusted by the arbitrators. *Bryant v. Fisher*, 85 N. Car. 69.

Where, by the terms of the agreement to submit, the question to be determined was the value of a person's interest in a land contract, the arbitrators must determine the value of the land less the incumbrances upon it. *Fargo v. Reighard*, 13 Ind. App. 39.

1. Cannot Do General Justice.—Where the submission empowered the arbitrator, if he should find B in debt to A, to appraise the value of certain chattels belonging to A, which were in B's possession, and deduct their value from the indebtedness, and to appraise certain property which belonged to B, and which was to be received by A in part payment; and the award directed B to transfer more property to A than was necessary to discharge the debt, and that the balance of the value of the property so transferred should be paid by A to B; it was held bad, although the arbitrator was authorized to consider all demands between the parties, and to "estimate what was just, right and lawful between them" according to their contract, because it was not within the terms of the submission nor in pursuance of their contract that one party should be compelled to become a purchaser. *Culver v. Ashley*, 17 Pick. (Mass.) 98. See *Shearer v. Handy*, 22 Pick. (Mass.) 417; *Price v. Popkin*, 10 Ad. & El. 139, 37 E. C. L. 74; *Skipper v. Grant*, 10 C. B. N. S. 237, 100 E. C. L. 237; *Ross v. Boards*, 8 Ad. & El. 290, 35 E. C. L. 390.

2. England.—*Morgan v. Mather*, 2 Ves. Jr. 17; *Armstrong v. Marshall*, 4 Dowl. 593; *Angus v. Redford*, 11 M. & W. 69, 2 Dowl. N. S. 735; *Fuller v. Fenwick*, 3 C. B. 705, 54 E. C. L. 705; *Toby v. Lovibond*, 5 C. B. 783, 57 E. C. L. 783; *Dick v. Milligan*, 2 Ves. Jr. 23; *Perriman v. Staggall*, 9 Bing. 679, 23 E. C. L. 418; *Payne v. Massey*, 9 Moore 666, 17 E. C. L. 129; *Cramp v. Symons*, 7 Moore 434; *Sharman v. Bell*, 5 M. & S. 504; *Boutillier v. Thick*, 1 D. & R. 366, 16 E. C. L. 43; *Chace v. Westmore*, 13 East 357.

United States.—*Myers v. York*, etc., R. Co., 2 Curt. (U. S.) 28; *Kleine v. Catara*, 2 Gall. (U. S.) 61; *Burchell v. Marsh*, 17 How. (U. S.) 344; *York*, etc., R. Co. v. *Myers*, 18 How. (U. S.) 246.

Alabama.—*Bumpass v. Webb*, 4 Port. (Ala.) 65, 29 Am. Dec. 274.

Arkansas.—*Kirten v. Spears*, 44 Ark. 166.

Georgia.—*Crabtree v. Green*, 8 Ga. 8; *Forbes v. Turner*, 54 Ga. 252.

Illinois.—*Sherfy v. Graham*, 72 Ill. 158.

Indiana.—*Conrad v. Johnson*, 20 Ind. 421; *Indiana Cent. R. Co. v. Bradley*, 7 Ind. 49.

Kentucky.—*Adams v. Ringo*, 79 Ky. 211; *Baker v. Crockett*, Hard. (Ky.) 396; *Ewing v. Beauchamp*, 3 Bibb (Ky.) 41.

Maine.—*Portland Mfg. Co. v. Fox*, 18 Me. 117; *Walker v. Sanborn*, 8 Me. 288; *Frisson v. De Peiffer*, 83 Me. 71; *Brown v. Clay*, 31 Me. 518; *Whitmore v. Le Ballistier*, 35 Me. 488; *Sweetsir v. Kenney*, 32 Me. 464; *Tyler v. Dyer*, 13 Me. 41; *Hall v. Decker*, 51 Me. 31; *Smith v. Thorndike*, 8 Me. 119.

Massachusetts.—*Bigelow v. Newell*, 10 Pick. (Mass.) 348; *Ward v. American Bank*, 7 Met. (Mass.) 489; *Rundell v. La Fleur*, 6 Allen (Mass.) 480; *Fairchild v. Adams*, 11 Cush. (Mass.) 550; *Mickles v. Thayer*, 14 Allen (Mass.) 114; *Boston Water Power Co. v. Gray*, 6 Met. (Mass.) 131; *Smith v. Boston*, etc., R. Co., 16 Gray (Mass.) 521; *Jones v. Boston Mill Corp.*, 6 Pick. (Mass.) 148; *Newburyport Marine Ins. Co. v. Oliver*, 8 Mass. 402.

Michigan.—*Beam v. Macomber*, 33 Mich. 127.

Minnesota.—*Goddard v. King*, 40 Minn. 164.

Mississippi.—*Memphis*, etc., R. Co. v. *Scruggs*, 50 Miss. 284.

Missouri.—*Mitchell v. Curran*, 1 Mo. App. 453.

New Hampshire.—*Hartwell v. Pennsylvania F. Ins. Co.*, 60 N. H. 293; *Truesdale v. Straw*, 58 N. H. 216; *Pierce v. Pierce*, 60 N. H. 355; *Shepardson v. Perkins*, 58 N. H. 355; *White Mountains R. Co. v. Beane*, 39 N. H. 107; *Johnson v. Noble*, 13 N. H. 286, 38 Am. Dec. 485.

New Jersey.—*Ruckman v. Ransom*, 23 N. J. Eq. 118.

New York.—*Shepard v. Watrous*, 3 Cai. (N. Y.) 166; *Mitchell v. Bush*, 7 Cow. (N. Y.) 185; *Halstead v. Seaman*, 52 How. Pr. (N. Y. Supreme Ct.) 415; *Fudickar v. Guardian Mut. L. Ins. Co.*, 62 N. Y. 392; *Masury v. Whiton*, 111 N. Y. 679; *Price v. Brown*, 98 N. Y. 388; *Jackson v. Ambler*, 14 Johns. (N. Y.) 105; *Campbell v. Western*, 3 Paige (N. Y.) 124; *Cranston v. Kenny*, 9 Johns. (N. Y.) 212; *DeLong v. Stanton*, 9 Johns. (N. Y.) 38.

North Carolina.—*King v. Falls of Neuse Mfg. Co.*, 79 N. Car. 360; *Leach v. Harris*, 69 N. Car. 532.

Whether Arbitrator may Disregard Rules of Law.—But, although the arbitrator is the

Pennsylvania.—Liverpool, etc., Ins. Co. v. Goehring, 99 Pa. St. 13.

Rhode Island.—American Screw Co. v. Sheldon, 12 R. I. 324.

South Carolina.—Mitchell v. De Schamps, 13 Rich. Eq. (S. Car.) 9.

Vermont.—Smith v. Brandon Kaolin, etc., Co., 52 Vt. 469; Morse v. Bishop, 55 Vt. 231; Downer v. Downer, 11 Vt. 395; Hazeltine v. Smith, 3 Vt. 535; Bliss v. Rollins, 6 Vt. 529; Sabin v. Angell, 44 Vt. 523; Cutting v. Stone, 23 Vt. 571.

Virginia.—Portsmouth v. Norfolk County, 31 Gratt. (Va.) 727.

West Virginia.—Mathews v. Miller, 25 W. Va. 817.

See *infra*, this title, *The Award—Effect of the Award.*

Functions of Arbitrator—English Views.—In *England* the arbitrator has in some cases, as on a reference of an action at the trial, been looked upon as fulfilling the functions of a jury, and his award has been taken as a verdict. Angus v. Redford, 11 M. & W. 69, 2 Dowl. N. S. 735; Barrowdale v. Hitchener, 3 B. & P. 244; Lee v. Lingard, 1 East 401; Bury v. Dunn, 1 D. & L. 141. In others he is vested with the power of a judge at *nisi prius*, Caila v. Elgood, 2 D. & R. 193, 16 E. C. L. 78; sometimes with the functions of the court in bank, Allen v. Lowe, 4 Q. B. 66, 45 E. C. L. 66. The powers of the attorney-general in certain cases have been conferred upon him, Prior v. Hembrow, 8 M. & W. 873; of a master in chancery, Knox v. Symmonds, 1 Ves. Jr. 369; Cruikshank v. Floating Swimming Baths Co., 1 C. P. Div. 260; or of the lord chancellor, Pitcher v. Rigby, 9 Price 79.

As to the power of the official referee under the Judicature Act, see 36 & 37 Vict., c. 66, §§ 56, 57; and of a master under the Common Law Procedure Act 1854, Cruikshank v. Floating Swimming Baths Co., 1 C. P. Div. 260, 45 L. J. C. L. 684. See Russell on Awards (6th ed.) 121.

How Far Judges of Law.—It has been held in some cases that, although the arbitrators are the judges of matters of law, this refers only to matters in which they have exercised their judgment in regard to the law. Where they have assumed a point of law without discussion, and have erred, or after discussion have refrained from making a conclusive decision, but referred the matter to the court, the courts will inquire into the matter. Cushman v. Wooster, 45 N. H. 410. See Myers v. York, etc., R. Co., 2 Curt. (U. S.) 28; Wilby v. Phinney, 15 Mass. 116; Bean v. Wendell, 22 N. H. 582; Greenough v. Rolfe, 4 N. H. 357; Johnson v. Noble, 13 N. H. 286, 38 Am. Dec. 485; Severance v. Hilton, 32 N. H. 289. Compare U. S. v. Farragut, 22 Wall. (U. S.) 406; Smith v. Boston, etc., R. Co., 16 Gray (Mass.) 521.

Where a reference has been made under a rule of court, it confers full power upon the arbitrators to decide all controversies, questions of law or fact. Austin v. Kimball, 12 Cush. (Mass.) 485. See Ward v. American Bank, 7 Met. (Mass.) 486.

An arbitrator's construction of a contract has been held conclusive. Gueret v. Audouy, 62 L. J. Q. B. 633.

Admiral Farragut and others having filed a libel in admiralty for prizes taken before New Orleans in 1862, they and the United States agreed to refer the matter to the "final determination and award" of three arbitrators, "the award of whom shall be final upon all questions of law and fact involved," subject to appeal to the Supreme Court of the United States. An award was made accordingly and an appeal taken. It was held upon the appeal, first, that the agreement did not involve any more than an ordinary submission of all matters in dispute, that notwithstanding the expression in the agreement of submission that all questions of law in the case were not to be concluded by the award, consequently that where the award found facts it was conclusive, where it found or announced concrete propositions of law unmixed with facts its mistakes could be corrected by the court below, if any were made, and could be corrected on appeal, but where a proposition was of mixed law and fact, in which error of law could not be distinctly shown, the parties must abide by the award; second, that the award was liable, like any other award, to be set aside in the court below for such reason as would be sufficient in other courts, as for exceeding the power conferred by the submission, for manifest mistake of law, for fraud, or for any other reason for which awards are set aside in courts of law or chancery. U. S. v. Farragut, 22 Wall. (U. S.) 406.

Arbitrators' Decision Final upon Questions of Fact.—Weston v. Stuart, 11 Me. 326; Goldsmith v. Tilly, 1 Har. & J. (Md.) 361; Boston Water Power Co. v. Gray, 6 Met. (Mass.) 131; Fairchild v. Adams, 11 Cush. (Mass.) 549; DeLong v. Stanton, 9 Johns. (N. Y.) 38; Wellborn v. Simonton, 88 N. Car. 266; Bryant v. Fisher, 85 N. Car. 69.

By an agreement for purchase of locomotives, the price was to be paid on the certificate of the purchaser's engineer, and "all disputes" were to be referred to arbitration. The engineer refused his certificate. On a reference to arbitration the umpire made an award in favor of the vendors. It was held that the award was *intra vires* the arbitrator, and whether right or wrong could not be reviewed by the court. *Re An Arbitration*, 54 L. T. R. 596.

In *England*, see Morgan v. Mather, 2 Ves. Jr. 17; Baggalay v. Borthwick, 30 L. J. C. P. 342, 10 C. B. N. S. 61, 100 E. C. L. 61; Dick v. Milligan, 2 Ves. Jr. 23.

Parties are not at liberty to object to the award on account of matters arising altogether on the merits. Winter v. Lethbridge, 13 Price 533; Lancaster v. Hemington, 4 Ad. & El. 345, 31 E. C. L. 85; Hill v. Ball, 1 Dow N. S. 164; Brown v. Brown, 1 Vern. 157; Boutillier v. Thick, 1 D. & R. 366; Price v. Price, 9 Dowl. 344.

Appeal.—Neither a court of law nor of equity has any cognizance of an appeal from the

final judge of the law,¹ it is not clear whether or not he is bound to decide according to strict legal rules, or whether he may not, knowingly, make an award contrary to the law, *ex æquo et bono*, according to his own notions of equity and good conscience.²

decision of an arbitrator. *Goodman v. Sayers*, 2 Jac. & W. 249. See *Gensham v. Germain*, 11 Moore 1, 22 E. C. L. 405.

However, an appeal lies from an award of arbitrators in *Pennsylvania*. See *Morss v. Gritmann*, 10 Phila. (Pa.) 573; *Walbridge v. Barhite*, 7 Pa. Co. Ct. Rep. 353; *Penrose v. Pawling*, 8 W. & S. (Pa.) 379.

1. In *Emmerson v. Simpson*, *Law Times*, June 5, 1847, the court, by Wilde, C. J., said: "The court has no more authority to review the arbitrator's decision upon a point of law referred to him than upon a point of fact. Whatever may have been formerly the understanding, it is enough to say that in modern times the decisions are distinct and uniform, that if parties choose to refer a matter of law to an arbitrator, his decision upon the matter is final."

See *Ives v. Medcalfe*, 1 Atk. 63; *Steff v. Andrews*, 2 Madd. 6; *Evans v. Pratt*, 3 M. & G. 759, 42 E. C. L. 396; *Hodge v. Burgess*, 3 H. & N. 293, 27 L. J. Exch. 318; *In re Marsh*, 16 L. J. Q. B. 330; *Hodgkinson v. Fernie*, 27 L. J. C. P. 66, 3 C. B. N. S. 189, 91 E. C. L. 189; *Baggalay v. Borthwick*, 30 L. J. C. P. 342, 10 C. B. N. S. 61, 100 E. C. L. 61; and the cases cited in the following note.

2. See *Russell on Awards* (6th ed.) 122; *Morse Arb. and Award* 215, 216.

English Authorities.—The rule as laid down by *Russell* is "that an arbitrator, like every other judge, is bound by the rules of law, and that it is beyond his authority to award anything contrary to law." *Russell on Awards* (6th ed.) 122, citing *Aubert v. Maze*, 2 B. & P. 375; *In re Badger*, 2 B. & Ald. 691.

The presumption is that the parties intended to submit to him only the legal consequences of their engagements. *In re Badger*, 2 B. & Ald. 691; *Young v. Walter*, 9 Ves. Jr. 364; *Morgan v. Mather*, 2 Ves. Jr. 15. And, as a consequence, when the parties refer their legal rights to arbitration, the arbitrator is bound to award according to law, though if he should make a mistake it will not render the award void. *Blennerhasset v. Day*, 2 B. & B. 104.

"Legal" in the above sense includes both law and equity. See *Delver v. Barnes*, 1 Taunt. 48; *Craven v. Craven*, 7 Taunt. 644, 2 E. C. L. 644; *In re Keene and Atkinson*, Exch. April 16, 1847.

On the other hand, it has been held in *England* also that where all matters in difference have been referred, the arbitrator is not bound by rules of law and equity; that his power is greater than that of the courts to do complete justice between the parties; that he may take all moral questions into consideration and decide according to equity and good conscience. *South Sea Co. v. Bumstead*, 2 Eq. Cas. Abr. 80; *Knox v. Symmonds*, 1 Ves. Jr. 369; *Young v. Walter*, 9 Ves. Jr. 364; *Delver v. Barnes*, 1 Taunt. 48; *Hanson v. Liverseedge*, 2 Vent. 242; *Ainsley v. Goff*, B. R. 1799, Kyd on

Awards 351. See *West Symb.*, pt. 2, tit. *Compromise*, 5, 21; 2 *Story's Eq. Jur.* 675, 684; *Russell on Awards* (6th ed.) 124.

In *Fuller v. Fenwick*, 3 C. B. 705, 54 E. C. L. 705, Wilde, C. J., said that the courts would not set aside an award for a mistake in law made by the arbitrator, unless it should appear upon the face of the award that the arbitrator professed and intended to decide in accordance with law, but unintentionally and by mistake decided contrary to it. See *Ward v. American Bank*, 7 Met. (Mass.) 489.

Arbitrator Sometimes a Dictator.—In certain cases in *England* an arbitrator has been held to be a sort of dictator armed with powers greater than those of a court of justice to control the future conduct of parties, and to regulate their enjoyment of their property. *Wood v. Griffith*, 1 Swanst. 43; *Boodle v. Davies*, 3 Ad. & El. 200, 30 E. C. L. 73.

Not Bound by Rules of Practice.—Arbitrators are not bound by the rules of practice which the courts of law and equity have adopted for general convenience. *In re Badger*, 2 B. & Ald. 691.

Authorities in the United States.—In *America* the current of authority seems to be in favor of the rule that the arbitrator is not bound to govern his decision by the strict rules of law, but may decide upon principles of natural equity and conscience, *ex æquo et bono*. *Morse on Arb. and Award* 217.

United States.—*Kleine v. Catara*, 2 Gall. (U. S.) 61. But see *Torrance v. Amsden*, 3 McLean (U. S.) 509.

Alabama.—*Payne v. Crawford*, 97 Ala. 604.

Georgia.—*Forbes v. Turner*, 54 Ga. 252.

Kentucky.—*Curd v. Wallace*, 7 Dana (Ky.) 190, 32 Am. Dec. 85.

Maine.—*Tyler v. Dyer*, 13 Me. 41; *Sweet-sir v. Kenney*, 32 Me. 464.

Massachusetts.—*Boston Water Power Co. v. Gray*, 6 Met. (Mass.) 151; *Fairchild v. Adams*, 11 Cush. (Mass.) 550; *Ward v. American Bank*, 7 Met. (Mass.) 486; *Smith v. Boston, etc., R. Co.*, 16 Gray (Mass.) 521.

Michigan.—*Brush v. Fisher*, 70 Mich. 469, 14 Am. St. Rep. 510.

New Hampshire.—*Greenough v. Rolfe*, 4 N. H. 357; *Johnson v. Noble*, 13 N. H. 286, 38 Am. Dec. 485; *White Mountains R. Co. v. Beane*, 39 N. H. 107; *Cushman v. Wooster*, 45 N. H. 410.

New York.—*Cobb v. Dolphin Mfg. Co.*, 108 N. Y. 463; *Jackson v. Ambler*, 14 Johns. (N. Y.) 96; *Cranston v. Kenny*, 9 Johns. (N. Y.) 212.

North Carolina.—*Robbins v. Killebrew*, 95 N. Car. 19.

Pennsylvania.—*Hollingsworth v. Leiper*, 1 Dall. (Pa.) 161. See *Smith v. Wilkinsburg Borough*, 172 Pa. St. 121.

Tennessee.—*Jocelyn v. Donnel*, Peck (Tenn.) 274, 14 Am. Dec. 753.

Vermont.—*Hazeltine v. Smith*, 3 Vt. 535,

Admitting Extra-legal Claim or Defense.—He may, however, admit a claim or a defense which could not be enforced at law or in equity.¹

Stevens v. Pearson, 5 Vt. 503; *Bliss v. Rollins*, 6 Vt. 529; *Downer v. Downer*, 11 Vt. 395; *Remelee v. Hall*, 31 Vt. 582, 76 Am. Dec. 140. *Virginia*.—*Ross v. Overton*, 3 Call (Va.) 309, 2 Am. Dec. 552; *Smith v. Smith*, 4 Rand. (Va.) 95.

In *Kleine v. Catara*, 2 Gall. (U. S.) 70, the court, by Story, J., said: "Under a general submission, therefore, the arbitrators have rightfully a power to decide on the law and the fact, and an error in either respect ought not to be the subject of complaint by either party, for it is their own choice to be concluded by the judgment of the arbitrators. Besides, under such a general submission, the reasonable rule seems to be that the referees are not bound to award upon the mere dry principles of law applicable to the case before them. They may decide upon principles of equity and good conscience, and may make their award *ex æquo et bono*. We hold in this respect the doctrine of Lord Talbot in the South Sea Co. *v. Bumstead*, 2 Eq. Cas. Abr. 80; of Lord Thurlow in *Knox v. Symmonds*, 1 Ves. Jr. 369; of the King's Bench in *Ainsley v. Goff*, Kyd on Awards 351; and of the Common Pleas in *Delver v. Barnes*, 1 Taunt. 48."

In *Ward v. American Bank*, 7 Met. (Mass.) 486, Shaw, C. J., after laying down the general rule that the arbitrator's decision upon questions of law is final, states as follows the cases where his decision upon a point of law may be reviewed: First, when a referee, by his award, refers questions of law to the decision of the court, either declining to decide them or deciding them subject to such revision. See *Wilby v. Phinney*, 15 Mass. 116. Second, when it appears by the award itself that the referee intended to decide according to law, but mistook the law. In such case, the award is subject to correction to make it conform to the real intention of the referee. Third, when the referee, through the fraud of a party, or through mistake or inadvertence, acted upon the belief of some fact as true which was not true, and thus came to a result which, but for that fraud, mistake, or inadvertence, he would not have come to.

Intentional Decision Contrary to Law.—The court can only set aside an award for corruption, or misconduct, or a plain mistake of law or fact on the part of the arbitrators. They have no power to review and correct an award; consequently, if the arbitrators decide against the law, not by mistake but intentionally, with the direct purpose of making a just award, when the strict principles of law seem to them to work injustice, their award will not be disturbed. *West Jersey R. Co. v. Thomas*, 21 N. J. Eq. 205.

Submission to Arbitrators "Learned in the Law."—Where the terms of the submission were that all questions should be submitted to arbitrators "learned in the law," it will be presumed that the arbitrators are to decide according to the law, and where it is clear that the arbitrators intended to follow the law but misunderstood it, their award may be set aside

for mistake or error of law. *State v. Ward*, 9 Heisk. (Tenn.) 100. See *Nance v. Thompson*, 1 Sneed (Tenn.) 325; *Fain v. Headerick*, 4 Coldw. (Tenn.) 338.

Louisiana State Board of Arbitration.—In *New Orleans City, etc., R. Co. v. State Board of Arbitration*, 47 La. Ann. 874, it was held that although the State Board of Arbitration in Louisiana is not bound to follow technical rules of law and decisions, yet it is subject to the provisions of the statutes under which it was created, and bound to pursue those particular rules of law and equity without which a just decision cannot be arrived at.

A Submission for Decision "according to Law and Evidence."—Where matters are submitted to an arbitrator who is "to hear and decide the same according to the law and the evidence," it will be presumed, where he does not give the ground of his decision, that he has decided according to the law. But where he states his findings of fact and conclusions of law, it is proper for the court to determine whether the conclusions of law are warranted by the facts as found. *Galbraith v. Lunsford*, 87 Tenn. 89.

Statute of Limitations Pleaded by Administrators.—Where it is the duty of personal representatives to take advantage of the plea of the statute of limitations, it is the duty of arbitrators authorized to settle disputes "on principles of equity and justice" to accept from an administrator the plea of the statute in his favor, and for their failure to do so the award will be set aside. *Pearce v. Roller*, 5 Lea (Tenn.) 485.

Criticism of United States Authorities.—Morse on Arbitration and Award 218, referring to the older American decisions, says: "The value of the preceding decisions, as bearing upon this precise point, must be acknowledged to be somewhat diminished by the fact, which becomes obvious on an examination of the whole opinion in nearly every instance, that the court confounded this matter with the rule of finality, or more properly conclusiveness, in the decision, and treated them as substantially the same, or as though the rule of conclusiveness or finality in the decision necessarily and logically drew after it this allowance of latitude in the principles upon which that decision ought to be founded."

1. Morse Arb. and Award 221; *Wohlenberg v. Lageman*, 6 Taunt. 254; *Wood v. Hotham*, 5 M. & W. 674; *Mitchell v. Bush*, 7 Cow. (N. Y.) 185.

Construction of Contract.—Where the arbitrators are empowered by the submission to construe a contract, their decision has been held final, although they exceeded, in favor of one party, the strict provisions of the contract itself. *Porter v. Buckfield Branch R. Co.*, 32 Me. 539. See *Gueret v. Audouy*, 62 L. J. Q. B. 633.

Reforming Deed Drawn under Mistake.—And it has been held that they may, where the question in dispute is whether a deed has been drawn up on mistake, and they think it has,

Where Arbitrator is Lawyer.—It has been held that even when the parties refer the matter in controversy to a lawyer, as contradistinguished from a layman, he may disregard the law, and decide contrary to it according to his own ideas of justice.¹

(2) *His Power may be Limited by the Submission.*—The parties may limit the authority of the arbitrator, if they think proper, by stipulating in the submission that, although the award will be final as to matters of fact, it will be open to revision by the court if the arbitrator has mistaken the law.²

(3) *May Refer Question of Law to the Court.*—An arbitrator may refer a question of law to the court by reporting the point upon which he is in doubt, or by stating a case setting out the facts necessary to enable the court to arrive at a decision.³

reform it by virtue of their equitable authority, but that if they had been called upon to decide upon the construction of the deed only, they could not have altered it. *In re Keene and Atkinson*, Exch. April 16, 1847. Russell on Awards (6th ed.) 123.

Power on Submission of Pending Suit.—In *Sutton v. Dickinson*, 9 Leigh (Va.) 142, where a pending action was submitted to arbitration, it was held that the arbitrators might award to the plaintiff a larger sum than the *ad damnum* laid in the writ.

In *Smith v. Virgin*, 33 Me. 148, where a suit in equity was submitted on the pleadings, it was held that the arbitrators were not bound to accept, as the basis of their decision, the principles of law asserted in the bill.

1. Arbitrator a Lawyer.—*Jupp v. Grayson*, 1 C. M. & R. 523; *Fuller v. Fenwick*, 3 C. B. 705, 54 E. C. L. 705; *Boston Water Power Co. v. Gray*, 6 Met. (Mass.) 131; *Sanborn v. Murphy*, 50 N. H. 71.

In *Ward v. American Bank*, 7 Met. (Mass.) 489, the court, by Shaw, C. J., said: "Formerly, some distinction was made between cases where the parties had referred a case to a lawyer, and those where the arbitrator was not of the legal profession. This probably proceeded on the ground that, in the former case, the parties by selecting such an arbitrator should be presumed to have intended that he should be a judge of the law; whereas, in the latter no such specific intention should be presumed, and his decisions on such questions would be more open to inquiry. But the modern cases have tended to remove that distinction, and to consider that in all cases, by authorizing an arbitrator to judge of their respective rights, parties necessarily confer on him the power of deciding the questions of law upon which those rights depend, and, therefore, that the award shall be conclusive, with very limited exceptions."

See as to "legal" arbitrators, *Ching v. Ching*, 6 Ves. Jr. 282; *Smith v. Thorndike*, 8 Me. 119; *Bigelow v. Newell*, 10 Pick. (Mass.) 348; *Steff v. Andrews*, 2 Madd. 6; *Chace v. Westmore*, 13 East 357; *Campbell v. Twenlow*, 1 Price 81; *Price v. Hollis*, 1 M. & S. 105.

2. Restricted Powers Generally.—*Kleine v. Catara*, 2 Gall. (U. S.) 61; *Walker v. Sanborn*, 8 Me. 288; *Brown v. Clay*, 31 Me. 518; *Boston Water Power Co. v. Gray*, 6 Met. (Mass.) 166; *Bigelow v. Newell*, 10 Pick. (Mass.) 348; *Mickles v. Thayer*, 14 Allen (Mass.) 114; *Com. v. Roxbury*, 9 Gray

(Mass.) 451; *Estes v. Mansfield*, 6 Allen (Mass.) 69; *White Mountains R. Co. v. Beane*, 39 N. H. 107; *Johnson v. Noble*, 13 N. H. 286, 38 Am. Dec. 485; *Greenough v. Rolfe*, 4 N. H. 357.

Award Subject to Approval of Court.—A submission under a statute which requires the court to "approve" the award, gives the court power to inquire into the decision of the arbitrator as regards matters of law. *Allen v. Miles*, 4 Harr. (Del.) 234.

Presumption as to Arbitrator's Authority.—The parties to a controversy submitted to arbitrators may stipulate that questions of law shall be reserved for the decision of the court, but if no such reservation is made it will be presumed that they have agreed that every question, both as to law and to fact, which is necessary for the ultimate decision, is included within the authority of the arbitrators. *Lutz v. Linthicum*, 8 Pet. (U. S.) 165; *Hall v. Merriam*, 1 Root (Conn.) 197; *Walker v. Sanborn*, 8 Me. 288; *Pike v. Gage*, 29 N. H. 461; *Johns v. Stevens*, 3 Vt. 308.

3. Atty.-Gen. v. Davison, 1 McClell. & Y. 160; *Isitt v. Railway Pass. Assur. Co.*, 22 Q. B. Div. 504; *Hooper v. Taylor*, 39 Me. 224; *Barnard v. Spofford*, 31 Me. 39; *Fuller v. Wheelock*, 10 Pick. (Mass.) 135; *Kesteven v. Gooderham*, 20 U. C. Q. B. 500.

In *Knight v. Wilder*, 2 Cush. (Mass.) 199, 48 Am. Dec. 660, it was held that where arbitrators have been appointed under a rule of court they may, if they think proper, refer questions of law decided by them to the revision and adjudication of the court.

Reference Subject to Points of Law Arising on Pleadings, etc.—Where the reference was expressed to be "subject to such points of law as will properly arise on the pleadings and evidence," it was held that this rendered it imperative on the arbitrators to state for the court any legal point raised, and to distinguish, if required, the subject for which they awarded in plaintiff's favor if any legal question was raised applicable thereto. *Ross v. Bruce*, 21 U. C. C. P. 41.

Pennsylvania.—Under the Pennsylvania statute (1 Pepper & Lewis Dig., tit. Arbitration, I. 6) it has been held that referees are not authorized to find the facts specially and submit the law to the court, since the report must be good *per se* to justify the entry of a judgment upon it. *Sutton v. Horn*, 7 S. & R. (Pa.) 228.

(4) *May Waive by Implication His Right to Judge the Law.*—The arbitrator will be held to have impliedly waived his right to be final judge of the law, by giving reasons for his decision from which it may be inferred that he intended to decide according to law. In such a case, if he has mistaken the law, the court will set his award aside.¹

c. **POWERS OF THE ARBITRATOR IN PARTICULAR MATTERS**—(1) *As to the Kind of Satisfaction Awarded.*—The kind of satisfaction which the arbitrator may award depends upon his powers as determined by the submission and the nature of the dispute submitted, and, where the submission is according to a statute, upon the provisions of the statute.²

In *Connor v. Simpson*, 104 Pa. St. 440, it was held that an award at common law, wherein the arbitrator made his decision in the alternative according as the court should construe the contract out of which the dispute arose, was bad for uncertainty, and as lacking finality. The court, by Clark, J., said: "According to the theory of the plaintiff below, the parties are necessarily driven to the courts to ascertain what the award is, and a resort to the legal tribunals was precisely what the parties were seeking to avoid. An award at the common law is in the nature of a judgment, and ought to be wholly decisive, 'for if it doth not determine the matter, it becomes the cause of a new controversy.' Bac. Abr., tit. Arbitration 318."

It was further said that, although the case of *Sutton v. Horn*, 7 S. & R. (Pa.) 228, was decided under the Act of 1705, yet all that was said in that case in reference to the essential requisites of the award was applicable to an award at the common law.

The English Arbitration Act of 1889, 52 & 53 Vict., c. 49, § 19, which provides that an arbitrator shall, if so directed by the court or judge, state in the form of a special case, for the opinion of the court, any question of law arising in the course of the reference, applies to arbitrations under the English Building Society Act of 1874. *In re Knight and Tabernacle Permanent Bldg. Soc.*, (1892) 2 Q. B. 613, (1892) A. C. 298.

The jurisdiction of a court to require an arbitrator to state for its opinion a question of law arising upon a reference under the English Arbitration Act of 1889, § 19, is not ousted by the arbitrators making and signing their award on the same day, but after the order *nisi* for such statement is granted without notice of the order. *Tabernacle Permanent Bldg. Soc. v. Knight* (1892), A. C. 298. See *Wright v. Mills*, 4 H. & N. 488.

As to when an appeal lies from the decision of the high court to the court of appeals on a case stated by an arbitrator on the question submitted to him, and when not, see *Tabernacle Permanent Bldg. Soc. v. Knight* (1892), A. C. 298; *In re Kirkleatham Local Board and Stockton, etc., Water Board*, 4 R. 194, (1893) 1 Q. B. 375.

See also *In re Kent County Council and Sandgate Local Board*, (1895) 2 Q. B. 43.

1. *Kleine v. Catara*, 2 Gall. (U. S.) 61; *U. S. v. Ames*, 1 Woodb. & M. (U. S.) 76; *Boston Water Power Co. v. Gray*, 6 Met. (Mass.) 131; *Ward v. American Bank*, 7 Met. (Mass.) 486; *Fairchild v. Adams*, 11 Cush. (Mass.)

549; *Fuller v. Wheelock*, 10 Pick. (Mass.) 135; *Johnson v. Noble*, 13 N. H. 286, 38 Am. Dec. 485; *Cushman v. Wooster*, 45 N. H. 410; *Bell v. Price*, 22 N. J. L. 578; *Leach v. Harris*, 69 N. Car. 532; *Learned v. Bellows*, 8 Vt. 79; *Johns v. Stevens*, 3 Vt. 308.

Waiver must Form Part of Award.—Where arbitrators so waive their right, the waiver must be embodied in the award, or at least be contained in an instrument so closely connected with it that it properly forms a part of it. *Brown v. Clay*, 31 Me. 518; *Smith v. Boston, etc., R. Co.*, 16 Gray (Mass.) 521; *Ward v. American Bank*, 7 Met. (Mass.) 486; *Ruckman v. Ranson*, 23 N. J. Eq. 118; *Cushman v. Wooster*, 45 N. H. 410; *Fudickar v. Guardian Mut. L. Ins. Co.*, 45 How. Pr. (N. Y. Super. Ct.) 462.

Stating Reasons Not Per Se Evidence of Intent to Follow Law.—The fact that the arbitrator in the award states the reasons for his decision is not *per se* evidence that he intends to decide according to law, and so does not necessarily render his decision reviewable. He may state his reasons for some other cause; and in order to make his ruling upon a point of law subject to the correction of the court, the award must so clearly indicate the purpose of the arbitrator to decide by the strict rules of law as to justify the judicial mind in supposing that the arbitrator would have made a different award had he known that the judicial tribunals held a different view of the questions of law arising in the case from those entertained by himself. *Smith v. Boston, etc., R. Co.*, 16 Gray (Mass.) 521; *Cutting v. Stone*, 23 Vt. 571.

2. **Satisfaction must Be within the Authority Conferred.**—If the kind of satisfaction awarded be beyond the power conferred, the award is void. See *supra*, this title, *Authority of the Arbitrator in General—General Rule*.

Upon this reason should probably stand the old decision that an award that one person shall serve another for a certain number of years, is void. *Rolle Abr.*, tit. Arbitration, B. 12, p. 243. See *Russell on Arbitration* (6th ed.), p. 308, and *infra*, this title, *The Award—How Far the Award must Be Consistent and Reasonable*.

Upon this ground, and also perhaps upon the ground of public policy, stands the decision that the arbitrator has no authority to award that two persons shall intermarry together. *Bacon's Abr.*, tit. Arbitration, E. 3; *Rolle Abr.*, tit. Arbitration, I. 10, p. 252.

Illustrations of Satisfaction Awarded beyond Powers.—An arbitrator cannot award a release

(2) *No Power to Award Criminal or Illegal Act.*—An arbitrator has no power to award that an act shall be done which is contrary to the law,¹ nor

of the right to lands in satisfaction for a trespass, for a person is not to be supposed to submit more than his personal estate in satisfaction of a personal injury at common law that only could be taken in execution for it. *Rolle Abr., Arb., B. 13, p. 243.*

In a controversy regarding the goodness of the title to real estate, it was held that the arbitrator had no power to award; that one party should take the title with all faults, and that the other should indemnify him against eviction by a bond. *Ross v. Boards, 8 Ad. & El. 290, 35 E. C. L. 390.*

So in a reference of all matters in difference between a landlord and a tenant, it was held that the arbitrator had no power to award the landlord a power of distress. *Pascoe v. Pascoe, 3 Bing. N. Cas. 898, 32 E. C. L. 374.*

An arbitrator is not, as a rule, allowed to give any particular directions respecting the property in dispute, unless the submission so expressly stipulates, or unless the nature of the question requires it. An arbitrator was held to have no authority to order fixtures to be replaced and the expense paid by the landlord. *Price v. Popkin, 10 Ad. & El. 139, 37 E. C. L. 74.* Where referees are appointed by a submission before a justice of the peace, they have no jurisdiction of questions respecting the title to real estate. *Fowler v. Bigelow, 8 Mass. 1.*

Where the plaintiff entered into an agreement with an insurance company that certain goods which had been burnt, and which were entered on a specified list, might be paid for by the company at a sum stated to be their value, but that the compensation to be paid for other goods should be referred to arbitration, it was held that the arbitrator was not authorized in awarding that the plaintiff was entitled to the salvage of the goods in the specified list. *Skipper v. Grant, 10 C. B. N. S. 237, 100 E. C. L. 237.*

Performance of Specific Acts.—The arbitrator may award the performance of a particular act if it is within the submission and the authority conferred upon him. Thus an arbitrator may award that one person shall beg another's pardon as a satisfaction, but the award will be void for uncertainty if he does not specify time and place. *Glover v. Barrie, 1 Salk. 71.*

An award which directed the defendant to make submission before the mayor of a town for slanderous words spoken by the plaintiff, was held good. *Spigurnell v. Jene, 1 Sid. 12.*

In *Atkyns v. Baldwin, 1 Stark. 209, 2 E. C. L. 86,* it was held, where a contractor whose accounts could not otherwise be passed brought an action against his agent in order to compel him to verify certain vouchers, that, on a submission to arbitration, it was within the arbitrator's authority to direct the agent to verify such vouchers.

In *Beckingham v. Hunter, Rolle Abr., tit. Arbitration, D. 8, p. 246,* it was held that an arbitrator might award that a parishioner should pay the parson a yearly sum in lieu of tithes.

On a final settlement of accounts, an arbitrator may order collateral securities to be delivered up. *Harrison v. Lay, 13 C. B. N. S. 528, 106 E. C. L. 528.* See *Glover v. Barrie, 1 Salk. 71.*

Awarding a Chattel in Satisfaction.—Inasmuch as it is necessary for quieting the differences between the parties, an arbitrator is justified in awarding a sum of money as a satisfaction, and it has been held that he might award other chattels also, as a horse or a quart of wine. *Bac. Abr., Arb., E.; Parsloe v. Baily, 2 Ld. Raym. 1039, 1 Salk. 76, 60 Md. 221.*

But it has been held also that unless there is a controversy between the parties respecting a chattel, the arbitrator cannot award a chattel other than money by way of damages. *Rolle Abr., Arb., B. 10, 11, p. 143; Hemsworth v. Brian, 1 C. B. 131, 50 E. C. L. 131.*

In a submission which authorized the arbitrator to "finally settle the differences," it was held that he might, after awarding compensation to the plaintiff, direct the defendants to keep certain goods which they found in their possession. *In re Gillan and Mersey, etc., Nav. Co., 3 B. & Ad. 493, 23 E. C. L. 128.* See *Baillie v. Edinburgh Oil Gas Light Co., 3 Cl. & F. 639.*

Award of Use of Road under Parol Submission.—Where, under a parol submission, an award was made that one person should pay a certain sum of money as compensation for the future use of the other's private road, which road had been made by him partly over his own land and partly over the land of others without their permission, it was held that the submission and award were valid, as it was not the intention of the parties that a permanent right of way should be passed. Such a submission and award are not an agreement concerning an interest in land within the statute of frauds. *Mitchell v. Bush, 7 Cow. (N.Y.) 185.*

Awards as to Apprenticeships.—If an arbitrator award that an apprentice shall be assigned, the award is void. *Horne v. Blake, cited in Baxter v. Burfield, 2 Stra. 1267;* but he may award that an apprenticeship shall be put an end to. *Green v. Waring, 1 W. Bl. 475;* where all matters in difference between a master and an apprentice are submitted, the arbitrator may order the indentures of apprenticeship to be delivered up. *Bac. Abr., Arb., E.;* but when the submission is between the father of the apprentice and the master, and the apprentice is not made a party, he has no authority to order the indentures to be cancelled. *Wicks v. Cox, 11 Jur. 542.*

Nature of Satisfaction as Depending on Statute.—In *Brown v. Evans, 6 Allen (Mass.) 333,* it was held that under a statutory submission the statute whence all the arbitrators' authority was derived gave them no authority to award that one of the parties should transfer to the other a specific article of personal property, and that such an award was void. See also *Torrey v. Munroe, 119 Mass. 490.*

1. *Bac. Abr., Arb., E. 4; Eastern Union R. Co. v. Eastern Counties R. Co., 2 El. & Bl. 530, 75 E. C. L. 530.*

can an award which directs a party to commit a crime be sustained,¹ or one which orders a party to do anything which makes him a trespasser.²

(3) *Awards as to Payment of Money*—*May Fix Terms of Payment in General*.—As a rule, the arbitrator may fix the time and place of payment of the amount he finds due,³ and he may direct to whom and in what manner payment is to be made.⁴

1. Co. Litt. 206; Wood v. Griffith, 1 Swanst. 55; Bac. Abr., Arb., E. 4.

2. Bac. Abr., Arb., E. 4; Turner v. Swainson, 1 M. & W. 572. See Harris v. Curnow, 2 Chit. Rep. 594, 18 E. C. L. 429.

3. *In re Morphet*, 2 D. & L. 967; Freeman v. Bernard, 1 Salk. 69; Anonymous, 1 Keb. 92, 2 Brownl. 309; Armitage v. Walker, 2 Kay & J. 211. See Lindsay v. Direct London, etc., R. Co., 19 L. J. Q. B. 417.

Promissory Note.—He may award the giving of a promissory note by one party to the other, it being in effect an award of a payment at a future time. Booth v. Garnett, 2 Stra. 1082.

Bond or Penalty to Secure Payment.—He may require a party to execute a bond for the payment of money at a specified day, Cooke v. Whorwood, 2 Saund. 337, 1 Lev. 6; Brown v. Watson, 6 Bing. N. Cas. 118, 37 E. C. L. 307; or the payment of a penalty for not paying at the time specified, Royston v. Rydall, Rolfe Abr., Arb., H. 8, p. 250; Com. Dig., Arb., E. 15; Kockill v. Witherell, 2 Keb. 838. See Parfitt v. Chamber, L. R. 15 Eq. 36.

Payment by Instalments may be directed. Kockill v. Witherell, 2 Keb. 838.

Award of Payment on Sunday.—The award is not rendered invalid because the day upon which the payment has been directed by the arbitrator falls on Sunday. Hobdell v. Miller, 6 Bing. N. Cas. 292, 37 E. C. L. 387.

Arbitrator should Direct Payment.—In *England* unless the arbitrator directs the payment of the amount he finds due from one party to the other, the party who is liable cannot be compelled to pay by attachment. Edgell v. Dallimore, 11 Moore 541; Hopkins v. Davies, 1 C. M. & R. 846, 3 Dowl. 508; Riddell v. Sutton, 5 Bing. 200, 15 E. C. L. 416.

But the omission does not render the award void. Wilkinson v. Page, 1 Hare 276.

4. **To Whom and How Payments to be Made.**—Simmonds v. Swaine, 1 Taunt. 549. See Thirkell v. Strachan, 4 U. C. Q. B. 136; Hill v. Hill, 11 U. C. Q. B. 262; George v. Smith, 4 U. C. C. P. 291; Addison v. Corbey, 11 U. C. Q. B. 433.

Where an arbitrator, after finding a certain sum due from a party, directed him to pay or account for it to the trust estate, which, by the terms of the submission, he had to award and apportion among the parties interested, it was held that his award was bad and uncertain on the ground that he ought to have specified to whom and in what proportion the money ought to have been paid. *In re Tidswell*, 33 Beav. 213.

In disputes between a benefit building society and its members, the arbitrator may take into consideration the time when money should be paid to a member, and may award a certain time for such payment. Armitage v. Walker, 2 Kay & J. 211.

Setting off Cross-claims.—Where cross-claims or cross-actions are referred to arbitration, the arbitrator may set off one set of claims against the other, and award that the balance shall be paid by whichever party is found to be liable for it. Pennell v. Walker, 26 L. J. C. P. 9; Maloney v. Stockley, 4 M. & G. 647, 43 E. C. L. 335; Williams v. Moulds, 7 M. & W. 134. But in such a case the set-off is subject to the attorney's lien for costs. Cowell v. Betteley, 10 Bing. 432, 25 E. C. L. 186; Friges v. Adams, 4 Taunt. 632; Caddell v. Smart, 4 Dowl. 760, Reg. Gen. H. F. 2 Will. IV. 93, 3 B. & Ad. 388. But see Pringle v. Gloag, 10 Ch. Div. 676.

Directing Payments by Executors.—Where a submission contains a clause that in case a party should die it will not operate as a revocation of such submission, and pending the reference one of the parties against whom the arbitrator finds a balance dies, the arbitrator may direct the executor to pay the amount due out of the assets. Dowse v. Coxe, 3 Bing. 20, 11 E. C. L. 12; Lewin v. Holbrook, 2 Dowl. N. S. 991.

So on a reference by an executor of disputes between his testator and another party, he may direct the executor to pay out of the assets any sum which the deceased was found to be liable for. Riddell v. Sutton, 5 Bing. 200, 15 E. C. L. 416; Robson v. —, 2 Rose 50; Barry v. Rush, 1 T. R. 691. See *In re Joseph and Webster*, 1 Russ. & M. 496; Love v. Honeybourne, 4 D. & R. 814, 16 E. C. L. 222; *In re Morphet*, 2 D. & L. 967.

Payment of Money in Lieu of Dower.—In Cox v. Jagger, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522, it was held that where, in an action of dower, an award was made that an annual sum should be paid in lieu of dower, such award was valid.

Payment by Assignees of Bankrupt.—In Malcolm v. Fullarton, 2 T. R. 645, it was held that if a party by mistake pays to the assignees of a bankrupt more than he is indebted to such bankrupt's estate, the arbitrator may direct that the assignees shall repay him the excess, and is not bound to treat the party so paying as a creditor of the bankrupt to the extent of such excess and only entitled to a ratable share with the other creditors.

Payment to Wife Instead of to Husband and Wife.—Where a married woman and her husband were defendants in an action of replevin for a distress levied by her in her sole right, and, upon verdict for the plaintiffs and a submission of the whole cause to arbitration, the arbitrator directed, after having found for the defendants, that the plaintiff should pay the amount for which the distress was made to the wife alone, on objection that he should have directed payment to the husband and wife jointly his award was held good.

Interest and Damages.—It is within the discretion of the arbitrator to award the payment of interest upon sums found by him to be due,¹ and the awarding of damages is likewise within his discretion.²

Terms of Payment Fixed in Excess of Power.—If the arbitrator's power is limited only to fixing the purchase price of property, he has no right to direct that the amount so awarded by him shall be the price to be made at a future day.³ Since such a direction is not within his power, he cannot award that money shall be paid to a stranger to the submission.⁴

(4) **Power to Direct an Indemnity.**—When a provision directing an indemnity is necessary, or when power has been conferred upon the arbitrator to settle the liability of the parties with regard to debts due to third persons, he may order one of the parties to pay such debts, and to indemnify another against them.⁵

Wynne v. Wynne, 4 M. & G. 253, 43 E. C. L. 137.

1. *Higgins v. Sargent*, 2 B. & C. 348, 9 E. C. L. 101; *Devereux v. Burgwin*, 11 Ired. (N. Car.) 490.

The Right to Interest is a question of fact of which the arbitrator is sole judge, therefore he has a right to award compound interest if such has been the contract between the parties. *Morgan v. Mather*, 2 Ves. Jr. 15; *In re Morphet*, 2 D. & L. 967.

He may even allow interest contrary to the practice of the court. *In re Badger*, 2 B. & Ald. 691.

See further, *Sherry v. Oke*, 3 Dowl. 349; *Beahorn v. Wolfe*, 1 Alc. & Nap. 233; *Armistage v. Walker*, 2 Kay & J. 211.

In *Hamilton v. Wort*, 7 Blackf. (Ind.) 348, it was held that an award of a certain sum carries interest.

Where, by the terms of the submission, an arbitrator is empowered to make an award according to the principles of justice, and the award gives time for the payment of the principal sum due, the fact that it also requires the party to pay interest on such sum from the date of the award, will not render it invalid. *Noyes v. McLafin*, 62 Ill. 474.

In *Rouse v. Zeigle*, 1 Browne (Pa.) 329, it was held that where a report of referees was made in favor of the plaintiff, who filed exceptions, and the report was afterwards confirmed, the plaintiff was not entitled to interest from the time of filing the exceptions to the day of confirming the award.

2. Damages.—An award cannot be excepted to on the ground that the arbitrators awarded no damages. Damages are in the discretion of the arbitrator. *Holyoke Mach. Co. v. Franklin Paper Co.*, 97 Mass. 150; *Moore v. Gherkin*, Busb. (N. Car.) 73; *Miller v. Melchor*, 13 Ired. (N. Car.) 439; *Austin v. Snow*, 2 Dall. (Pa.) 157. The award is conclusive as to the amount of damages. *Ehrman v. Stanfield*, 80 Ala. 118.

3. *Emery v. Wase*, 8 Ves. Jr. 505.

Directing Future Payment of Damages or Rent.—It is doubtful whether an arbitrator may appoint a day or place of payment of the damages for which he directs a verdict to be entered for the plaintiff. *Rees v. Waters*, 16 M. & W. 263, 4 D. & L. 567.

Where an arbitrator made an award on a certain day, directing one of the parties to pay

to the other so much rent, which by the award itself appeared not to be due until the day after the award was made, it was held void because the rent might become extinct by eviction or surrender before it should be due. *Barnardiston v. Fowler*, 10 Mod. 204. See *Gray v. Wicker*, Rolfe Abr., Arb., B. 3, p. 242, c. 8, p. 358.

See *infra*, this title, *The Award—Performance of the Award—Time of Performance.*

4. *In re Campbell and Brown*, 2 Ont. Pr. Rep. 291.

See *infra*, this title, *Authority over Strangers to the Submission—Directing a Party to Do Act towards Stranger.*

5. Power to Direct Indemnity.—*Philips v. Knightley*, 2 Stra. 903. See *Fisher v. Pimbley*, 11 East 190, and note; *Miller v. Robe*, 3 Taunt. 461; *Brown v. Watson*, 6 Bing. N. Cas. 118, 37 E. C. L. 307; *Goddard v. Mansfield*, 19 L. J. Q. B. 395; *In re Aitken's Arbitration*, 3 Jur. N. S. 1296.

Where the matter submitted to the arbitrator was the price and terms on which the defendant should purchase an estate from the plaintiff, and he awarded that the defendant should be at liberty to use the plaintiff's name in enforcing his rights, it was said that the arbitrator might have fixed the terms on which the defendant should have indemnified the plaintiff against an action. *Round v. Hatton*, 10 M. & W. 660.

And where the arbitrator was called upon to settle the terms of the dissolution of a partnership, and he awarded the debts due to the firm to one partner and empowered him to use the other's name in bringing actions for his own sole benefit, it was said that he had power to order him to indemnify the other against liability for costs on account of the use of his name, but the court refused to hold that he was bound to do so. *Burton v. Wigley*, 1 Bing. N. Cas. 665, 27 E. C. L. 535. See *Cook v. Jenkins*, 35 Ga. 113.

General Power to Grant Indemnity.—It seems that the awarding of an indemnity is not proper, unless there is a certain degree of necessity from the nature of the case to warrant such a step. *Russell on Arbitration* (6th ed.) 428.

Where a submission involved the sufficiency of title to land, which one of the parties had agreed to sell to the other, it was held that the arbitrator had no power to award a conveyance of the property and the giving of an indemnity

(5) *Awards in Partnership Cases—Directing a Dissolution.*—In the case of a general submission of partnership affairs, an arbitrator may award a dissolution of the partnership, if the question as to whether the partnership shall be dissolved is in dispute.¹ But where such a question is submitted to him, he is not bound to order a dissolution.²

Wide Discretion Vested in Arbitrator.—Generally, he has a wide discretion in the settlement of partnership affairs.³

without determining whether the title was good or bad. *Ross v. Boards*, 8 Ad. & El. 290, 35 E. C. L. 390. See also *Fisher v. Pimbley*, 11 East 188; *Philips v. Knightley*, 2 Stra. 903; *Bonner v. Liddell*, 1 Brod. & B. 80, 5 E. C. L. 20.

1. Awarding Dissolution of Partnership.—*Green v. Waring*, 1 W. Bl. 475; *Routh v. Peach*, 3 Anst. 637; *Hutchinson v. Whitfield*, *Hayes (Ireland)* 78.

In *Joplin v. Postlethwaite*, 61 L. T. 629, it was held that the arbitrators have no power to decide whether or not the partnership shall be dissolved where the articles of partnership contain a clause referring all matters in difference between the partners to arbitration, nor can the court give them the power, as the question whether the partnership ought to be dissolved or not is one for the court itself.

See *Farrar v. Cooper*, 44 Ch. Div. 323; *Turnell v. Sanderson*, 60 L. J. Ch. 703; *Walmsley v. White*, 67 L. T. 433, 40 W. R. 675.

But in *Belfield v. Bourne*, 8 R. 61, it was held that the arbitrators had power under the terms of the submission to award a dissolution of the partnership.

When Arbitrator should Take Partnership Accounts.—In a submission of partnership affairs, if there is a dispute as to accounts, the arbitrator ought to take accounts between the partners themselves and also between them and debtors and creditors of the firms making a list of the particulars, and such list will be presumed to be accurate until the contrary is proved. *Lingood v. Eade*, 2 Atk. 501. See *In re Aitken's Arbitration*, 3 Jur. N. S. 1296; *Wood v. Wilson*, 2 C. M. & R. 241. But if there is no dispute as to the amounts, a general award is sufficient. *Wood v. Wilson*, 2 C. M. & R. 241.

Award that One Partner shall Receive Debts and Pay Liabilities.—Where the arbitrator, instead of ordering a division of the debts and credits, orders one partner to receive all the debts and to pay all the liabilities, allowing a specified sum to the other partner at the final settlement, such an award has been considered objectionable. *Ex p. Coppard*, 4 Deac. & Ch. 102; *In re Aitken's Arbitration*, 3 Jur. N. S. 1296.

Appointing a Receiver.—An arbitrator cannot appoint a receiver without a special provision to that effect in the submission. *In re Mackay*, 2 Ad. & El. 356, 29 E. C. L. 116; *Cook v. Catchpole*, 10 Jur. 1068, 34 L. J. Ch. 60. See *Lingood v. Eade*, 2 Atk. 501; *Lamphire v. Cowan*, 39 Vt. 420. And compare *Gudgell v. Pettigrew*, 26 Ill. 306.

It is said that in such a case, care should be taken in drawing up the submission to exonerate the arbitrator from liability in regard to the application of the money; otherwise, if the

person who is appointed receiver becomes insolvent, the arbitrator himself may, in some instances, become personally liable. *Lingood v. Eade*, 2 Atk. 501. But see *Anonymous*, 12 Mod. 560. And for instances in which the arbitrator is himself appointed receiver, see *Roberts v. Eberhardt*, 3 C. B. N. S. 482, 91 E. C. L. 482, in error 28 L. J. C. P. 74.

Awarding as to Partnership Stock.—As a rule, where there is a dispute as to the division of partnership lands and effects, it appears that the arbitrator should award some division where the submission empowers him to do so, and ought not to direct that one partner should purchase the other's interest in the premises. Yet, where such an award was made it was sustained, as the court held that the presumption was that some agreement to that effect had been come to, before the arbitrator, unless the contrary was shown. *Wood v. Wilson*, 2 C. M. & R. 241.

Awards Making No Allowance for Deficiency of Assets.—Where an award in a partnership case provided for an application of any surplus, if such should be found to exist, but contained no provision to meet the case of a deficiency, it was nevertheless held good, the court presuming until the contrary was shown that such a provision was unnecessary. *Wilkinson v. Page*, 1 Hare 276; *Routh v. Peach*, 3 Anst. 637.

2. *Simmonds v. Swaine*, 1 Taunt. 549.

A Mere Agreement to Arbitrate in partnership articles will not preclude a partner from bringing a bill for a dissolution, though it might be otherwise where the articles constitute a designated person the tribunal to determine certain questions which may arise or may have arisen between the partners. *Page v. Vankirk*, 1 Brews. (Pa.) 282, 6 Phila. (Pa.) 264. See *Cook v. Catchpole*, 10 Jur. 1068, 34 L. J. Ch. 60.

3. Settlement of Terms of Dissolution.—A wide discretion is given to arbitrators in awarding a settlement of the terms in which partnerships shall be dissolved. *Russell on Awards* (6th ed.) 427; *Burton v. Wigley*, 1 Bing. N. Cas. 665, 27 E. C. L. 535. See *Thirkell v. Strachan*, 4 U. C. Q. B. 136; *Crouse v. Parke*, 6 U. C. Q. B. 362; *Mulligan v. Wright*, 16 U. C. Q. B. 408; *McLean v. Kezar*, 3 U. C. C. P. 444; *Leavitt v. Comer*, 5 Cush. (Mass.) 129; *Runyon v. Brokaw*, 5 N. J. Eq. 340; *Byers v. Van Deusen*, 5 Wend. (N. Y.) 268; *Lamphire v. Cowan*, 39 Vt. 420.

Where a suit praying a dissolution and settlement of accounts was referred to arbitration, and the award only directed one partner to pay a sum of money to the other, leaving the partnership account still open, it was held that such report was not final, and could not be accepted until an award was made that the

(6) *Power to Award Conveyances.*—Where the question submitted to arbitration is one affecting the title to, or the boundaries of, real estate, an arbitrator has an inherent right to order one party to execute a conveyance to the other, because the award itself does not pass the title, and a conveyance must be made in order to render the award final.¹

Directions as to Form and Character of Conveyance.—The arbitrator should give directions as to the form and character of the conveyance,² but he need

partnership should be dissolved. *Paine v. Paine*, 15 Gray (Mass.) 299.

Award in Restraint of Trade.—Where the terms of the dissolution of a partnership were submitted to arbitration, and the award was that one partner should conduct the business for his own exclusive benefit, and that the other should not be at liberty to carry on the same business in the same town, or within thirteen miles of it, the award was upheld. *Morley v. Newman*, 5 D. & R. 317.

Awards as to the Division of Debts and Credits.—In a submission of a difference arising out of a partnership, where the arbitrators awarded how future receipts should be divided and debts paid, the court held that they did not exceed their authority. *Barrows v. Capen*, 11 Cush. (Mass.) 37.

See further, as to the arbitrators' power under a submission between partners with a view to make provision "for a full and perfect settlement of all things which are now or may be in controversy between" them, where the court held that they had full power to settle the matter in dispute relative to the partnership in such manner as they should think just, *Richardson v. Huggins*, 23 N. H. 106.

An arbitrator has no power over the debtors or creditors of a firm. See *Lamphire v. Cowan*, 39 Vt. 420; *Lingood v. Eade*, 2 Atk. 501; *Wood v. Wilson*, 2 C. M. & R. 241.

Nor is a power to divide partnership assets to be inferred from a submission of partnership disputes, nor is it necessary to exercise such a power even where it is conferred. *Hayes v. Forskoll*, 31 Me. 112.

Power to Determine What Are Partnership Effects.—In *Masters v. Gardner*, 5 Jones (N. Car.) 298, it was held that where arbitrators are chosen to settle up copartnership matters, it is for them to say what does or does not constitute a part of the partnership effects. See *Brown v. Brown*, 4 Jones (N. Car.) 126.

All Incidental Disputes.—In *Tucker v. Page*, 69 Ill. 179, it was held that where parties submitted to arbitration in general terms all matters in dispute between them in regard to their partnership affairs, the arbitrators were authorized to adjust every question in dispute arising out of the partnership transactions, however complicated, and that they were not limited to the books of the partnership accounts.

1. Russell on Awards (6th ed.) 431; *Johnson v. Wilson*, Willes 248; *Marks v. Marriot*, 1 Ld. Raym. 114; *Williams v. Warren*, 21 Ill. 541; *Loring v. Whittemore*, 13 Gray (Mass.) 228; *Penniman v. Rodman*, 13 Met. (Mass.) 382. See *Caldwell v. Dickinson*, 13 Gray (Mass.) 365; *Sellick v. Addams*, 15 Johns. (N. Y.) 197; *Munro v. Alaire*, 2 Cai. (N. Y.) 327;

DeLong v. Stanton, 9 Johns. (N. Y.) 38; *Byers v. Van Deusen*, 5 Wend. (N. Y.) 268.

Compelling Conveyance of Vested Property.—A power, however, to determine in whom the legal title exists, and to award a conveyance accordingly, is different from, and does not include, a power that one party shall transfer a title to property vested in him to another, so as to compel that other to become a purchaser. Thus, where the question was as to the title to certain lands and buildings, it was held that the arbitrator might award the lands to one and the buildings to the other, or both the land and the buildings in whole or in part to one party, but that he could not direct that one should take all the land and the buildings and should pay to the other a certain price for them. *Robinson v. Moore*, 17 N. H. 479. See *Snedekers v. Allen*, 2 N. J. L. 32.

Award need Not Set Out Boundaries.—It is not necessary that the award should set out the boundaries of the land so awarded to be conveyed, except by reference. *Snedekers v. Allen*, 2 N. J. L. 32. See *Imlay v. Wikoff*, 4 N. J. L. 148.

Where Conveyance need Not be Directed.—Where a dispute as to a boundary line was submitted to arbitration, and the parties bound themselves "to give deeds according to the award of the referees," it was considered unnecessary that the award should contain an order for the execution of a conveyance, because when the boundary line is run the obligation to make the deed is complete without the arbitrator's order. *Caldwell v. Dickinson*, 13 Gray (Mass.) 365.

Conveyance need Not be Specially Authorized.—In *Penniman v. Rodman*, 13 Met. (Mass.) 384, the court, by Wilde, J., said: "It is not necessary that the arbitrators should be specially, and in terms, authorized to direct such conveyances, if the general terms are sufficient to show that the parties intended to give them such authority."

2. *Taudy v. Taudy*, 9 Dowl. 1044; *Thinne v. Rigby*, Cro. Jac. 314; *Tipping v. Smith*, 2 Stra. 1024; *Smalley v. Blackburn R. Co.*, 2 H. & N. 158, 27 L. J. Exch. 65.

No Precise Form of Words is necessary in the direction, so long as the order that such conveyance shall be made is clearly expressed, stating the general character of the instrument. *Morse on Arb. and Award* 194. See *Tebbutt v. Ambler*, 2 Dowl. N. S. 677; *McNeil v. Magee*, 5 Mason (U. S.) 244; *Penniman v. Rodman*, 13 Met. (Mass.) 382; *Jones v. Boston Mill Corp.*, 4 Pick. (Mass.) 507, 16 Am. Dec. 358; *Kyle v. Kavanagh*, 103 Mass. 356, 4 Am. Rep. 560; *Preston v. Whitcomb*, 11 Vt. 47.

In *Atty-Gen. v. Clements*, 1 T. & R. 58, it

not draw the conveyance up himself.¹

(7) *Power to Award Releases*.—In What Cases the Power Exists.—Where all matters in difference are submitted to arbitration, the arbitrator has power to order the parties to execute mutual releases in regard to them, and this power extends to directing a release of bonds, specialties, judgments, executions, and verdicts, by virtue of which debts, sums of money, and demands are due.² But where a cause only is referred, an arbitrator has no authority to order the parties to execute mutual releases of all demands.³

Form and Particulars of Instrument.—It is not necessary for the arbitrator to point out the form of the releases, nor need the award show when they are to be executed.⁴

d. POWER TO DIRECT FUTURE ACTIONS OF THE PARTIES.—In certain cases, large discretionary power is expressly conferred upon the arbitrators by the submission, in order to enable them to direct what shall be done by the parties in the future in regard to the matters in dispute, so as to prevent recurring or continuous troubles.⁵

was said that the arbitrator, in directing the execution of a lease of certain trust estates, should be careful to see that his directions were such as the court of chancery would sanction.

1. *Tebbutt v. Ambler*, 2 Dowl. N. S. 677; *Tomlin v. Fordwich*, 5 Ad. & El. 147, 31 E. C. L. 304; *Toby v. Lovibond*, 17 L. J. C. P. 201, 12 Jur. 436, 5 C. B. 770, 57 E. C. L. 770.

Direction as to Who shall Prepare Conveyance.—It is said that the arbitrator ought to direct at whose expense the conveyance is to be prepared, and which of the parties shall prepare it, or the parties may dispute the point, and so hinder the performance of the award. *Standley v. Hemmington*, 6 Taunt. 561; *Doe v. Stillwell*, 8 Ad. & El. 645, 35 E. C. L. 480. See *Russell on Awards* (6th ed.) 432.

But in *Penniman v. Rodman*, 13 Met. (Mass.) 382, specific performance was decreed, although there was no such direction in the award.

2. *Awarding Releases*.—*Roberts v. Mariett*, 2 Saund. 190; *Cable v. Rogers*, 3 Bulst. 311. See *Hodges v. Hodges*, 5 Met. (Mass.) 205; *McNeil v. Magee*, 5 Mason (U. S.) 244; *Penniman v. Rodman*, 13 Met. (Mass.) 382; *Goodridge v. Dustin*, 5 Met. (Mass.) 363; *Bigelow v. Maynard*, 4 Cush. (Mass.) 317; *Tallman v. Tallman*, 5 Cush. (Mass.) 325; *Caldwell v. Dickinson*, 13 Gray (Mass.) 365; *French v. Richardson*, 5 Cush. (Mass.) 450.

The arbitrators may order either of the parties to the submission to execute a release to the other party, of or concerning any claim or demand constituting a portion of the subject-matter of the arbitration, or constituting the whole of such subject-matter. *Guerrant v. Smith*, 48 Miss. 90.

General Words Directing Release.—It has been held that general words in the clause of the award which directs releases will, if possible, be construed to order releases only in regard to such matters as are included in the submission. *Doe v. Richardson*, 8 Taunt. 697, 4 E. C. L. 251; *Barry v. Rush*, 1 T. R. 691; *Boyes v. Bluck*, 13 C. B. 652, 76 E. C. L. 652.

Directing Release to Date Later than Disputes Submitted.—Where a submission was made of all differences arising before a specified date, but the award directed release of all claims

arising up to a later date, the award was held good where no differences were shown to have arisen in the interval. And if a difference does arise in the interval, the award will be void only as to such difference, and will be sustained as to the rest. *Russell on Awards* (6th ed.) 430; *Bac. Abr., Arb., E. 1*; *Hill v. Thorn*, 2 Mod. 309; *Lee v. Elkins*, 12 Mod. 585; *Squire v. Grevett*, 2 Ld. Raym. 961; *Abraham v. Brandon*, 10 Mod. 201; *Stephens v. Matthews*, 1 Ld. Raym. 116; *Hooper v. Pierce*, 12 Mod. 116; *Anonymous*, 12 Mod. 8; *Pickering v. Watson*, 2 W. Bl. 1118.

Directing Release of Arbitration Bond.—Where the language of the award expressly directed a release of the arbitration bond itself, it was nevertheless construed to have meant otherwise, *Marks v. Marriot*, 1 Ld. Raym. 114; because the arbitrator has no power to order a release of such bond, *Doyley v. Burton*, 1 Ld. Raym. 533.

Directions as to Time of Executing Release.—In *Adams v. Adams*, 2 Mod. 169, an award which directed that two sums be paid at different times, and that the party who was to receive them should give one release immediately, was held bad because the execution of such release would discharge the arbitration bond, and would defeat the right to recover the second sum awarded to be paid subsequently.

But where an award directed two persons to execute "forthwith" certain conveyances to a third, and that such third person should "forthwith" execute indemnities and releases to them, it was held that the releases in the latter case should be made as soon as the first parties had, by the execution of the conveyances awarded, placed themselves in a position to demand such releases and indemnities. *Boyes v. Bluck*, 13 C. B. 652, 76 E. C. L. 652.

3. *Doe v. Richardson*, 8 Taunt. 697, 4 E. C. L. 251.

4. *Toby v. Lovibond*, 5 C. B. 770, 57 E. C. L. 770, 12 Jur. 436; *Russell on Awards* (6th ed.) 431.

5. *Taylor v. Shuttleworth*, 8 Dowl. 281. *Russell on Awards* (6th ed.) 433.

When and for What Purpose Such Power Conferred.—The object of conferring such a

Whether Discretionary.—Whether the exercise of this power is discretionary or compulsory, depends upon the terms of the submission.¹

Validity of Directions under Power.—And whether the directions given by the arbitrators under the power are valid or not, will depend upon the terms of the submission and upon the special circumstances of each case.² Where there

power is to prevent, if possible, the occurrence of future differences; and upon occasions where there is a dispute about watercourses, or about injuries of a recurring or continuous nature produced by manufacturing establishments or the like, such powers are often conferred upon the arbitrator by the terms of the submission, and he is empowered upon the application of the parties to direct how the water works or manufactories shall be conducted *in future*, but if that power is not called into exercise by the parties, but the award is made without exercising it, the award has precisely the same effect as if the submission had not contained the power, and the manufactory, or work, may still be compelled to close down by a perpetual injunction founded on the award as a decision of the legal right. *Broadbent v. Imperial Gas Co.*, 7 De G. M. & G. 436, 26 L. J. Ch. 276, 7 H. L. Cas. 600, 29 L. J. Ch. 377.

Maps or Plans.—The arbitrator ought to attach to his award, in cases where it is fitting, a map or plan in order to show precisely what he wants and directs to be done. *Johnson v. Latham*, 20 L. J. Q. B. 236.

1. Whether Discretionary.—Where the clause in the submission was, “the arbitrator to determine what he shall think fit to be done by the parties respecting the matters in dispute,” it was held that the exercise of the power was discretionary. *Angus v. Redford*, 2 Dowl. N. S. 735, 11 M. & W. 69; *Morgan v. Smith*, 1 Dowl. N. S. 617, 9 M. & W. 427.

So where the power was to direct “what, if anything, shall be done by the parties respectively,” *Nicholls v. Jones*, 6 Exch. 373.

But in other cases the power has been held to be imperative upon the arbitrator, and a failure to exercise it avoided the award. *Crump v. Adney*, 1 C. & M. 355, 3 Tyrw. 270; *Ross v. Clifton*, 9 Dowl. 356. See *Grenfell v. Edgcote*, 7 Q. B. 661, 53 E. C. L. 661.

Defective Execution of Discretionary Power.—It has been held that where the power conferred by the submission is discretionary, and the arbitrator, in the exercise of such power, gives a defective direction, the award need not be set aside. *Nicholls v. Jones*, 6 Exch. 373. But it has been held also in *Stoneheiver v. Farrar*, 6 Q. B. 730, 51 E. C. L. 730, that where an arbitrator undertook to give a specific direction, which he was free to give, but need not if he saw fit, the award was altogether void if he acted in error, with the reservation that if such erroneous direction was in excess of authority, the award would be avoided only as to the excess.

2. Directions as to Future Action Held Valid.—In the following cases, the directions given by the arbitrator in regard to the future acts of the parties were held valid: *Mays v. Cannell*, 24 L. J. C. P. 41; *Boodle v. Davies*, 3 Ad. & El. 200, 30 E. C. L. 73; *Taylor v. Shuttleworth*, 8

Dowl. 281; *Prosser v. Goringe*, 3 Taunt. 426; *Walker v. Frobisher*, 6 Ves. Jr. 70; *Lewis v. Rossiter*, 44 L. J. Exch. 136; *Round v. Hatton*, 10 M. & W. 660; *Winter v. Lethbridge*, 13 Price 533; *Miller v. DeBurgh*, 4 Exch. 809; *Eastern Union R. Co. v. Eastern Counties R. Co.* 2 El. & Bl. 530, 75 E. C. L. 530; *Boston Water Power Co. v. Gray*, 6 Met. (Mass.) 131; *Berkshire Woollen Co. v. Day*, 12 Cush. (Mass.) 128. See *Stratton v. Mason*, 15 Pick. (Mass.) 508.

Objection on Merits to Directions of Arbitrator.—In *Winter v. Lethbridge*, 13 Price 533, it was held that the court would not entertain any objections on the merits to the directions given by the arbitrator or which questioned the propriety of his decision in regard to the facts.

And in *Mays v. Cannell*, 24 L. J. C. P. 41, it was held that if any state of facts would justify the directions given by the arbitrator, the court will presume that such a state of facts existed, unless the contrary is proved, or unless the party to whom the directions were given has been misled.

Directions as to Apparatus for Measuring Water Power.—A dispute arose over a lease of water power, in which the lessee claimed that he had not his due quantity, and the lessor contended that he got more than he was entitled to. Upon a submission, the arbitrators were expressly empowered to regulate the future rights of the parties. They directed that a water gauge should be set up and maintained at the lessee's mills to measure the amount of water which should be used by such lessee, and that part of the expense of erecting and maintaining such water gauge should be borne by the lessee. The direction was held good; the court, by Shaw, C. J., said: “When power is given to provide for the accomplishment of a certain end, it carries with it, by reasonable implication, the power to direct the means by which it shall be done.” * * * Under an authority to direct how, in future, water and water power should be measured, with a view to its proper enjoyment, they had power to direct that a proper apparatus should be erected and maintained, and, as incident thereto, to direct how the expense of erecting and maintaining it, should be apportioned.” *Boston Water Power Co. v. Gray*, 6 Met. (Mass.) 131.

Directions as to Maintaining Dam.—Where an action for a nuisance was submitted to arbitrators to determine “whether the defendant's dam shall be cut down wholly or in part, and fix the height at which it shall be maintained, if it may be maintained at all, and whatever they decide shall be done under their direction,” and the award gave damages and fixed the height at which the dam might be maintained, the award was held good, and was enforced. *Berkshire Woollen Co. v. Day*, 12 Cush. (Mass.) 128. See further, *Stratton v. Mason*, 15 Pick. (Mass.) 508.

is a time limited within which only the arbitrators are empowered to give directions, an award in excess of the authority will be invalid. The fact that a power has been conferred upon them to give directions as to what shall be done in the future, does not imply or carry with it any authority to give directions in regard to similar matters or events in the past.¹

e. AUTHORITY OVER STRANGERS TO THE SUBMISSION—(1) Directing a Party to Do Act towards Stranger.—The rule is that where an arbitrator directs a party to do anything towards a mere stranger to the submission, as to pay him money, the award is so far void; and the award will be void absolutely, for want of mutuality, if the act to be done is in satisfaction of the claims of the other party to the submission, because the latter, if the award were held good, would lose his right without receiving any compensation.²

Where Act to Stranger Benefits Party.—But where the act to be done to the stranger to the submission is of direct advantage to the party entitled to receive satisfaction, the award will be sustained as mutual.³

(2) *Directing Stranger Himself to Do Act.*—Where an award contains a

Directions Held Void.—In the following cases, the directions given by the arbitrator were held void: *Prentice v. Reed*, 1 Taunt. 151; *Johnson v. Latham*, 19 L. J. Q. B. 329; *Hayward v. Phillips*, 6 Ad. & El. 119, 33 E. C. L. 21; *Hooper v. Hooper*, McClel. & Y. 509; *Price v. Popkin*, 10 Ad. & El. 139, 37 E. C. L. 74.

Uncertainty in Directions.—Where the matter complained of was the pollution of a stream, and the award directed that the defendant should take all proper and reasonable precautions for preventing the water from being rendered unfit for the use of the plaintiff, and that the refuse water from the defendant's works should be purified and cleansed by the ordinary and most approved process of filtering, the award was held void for uncertainty. See *Sharpe v. Hancock*, 7 M. & G. 354, 49 E. C. L. 354.

Power must be Specifically Given.—Unless power is specifically given to the arbitrators to give directions as to what shall be done in the future, any order in the award concerning future acts, as, for instance, in regard to the use of water power or the like, will be void. *Boynton v. Frye*, 33 Me. 216. See *Pope v. Brett*, 2 Saund. 293a, note (1); *Clement v. Durgin*, 1 Me. 300.

1. *Boston, etc., R. Corp. v. Western R. Corp.*, 14 Gray (Mass.) 253.

2. *Russell on Awards* (6th ed.) 446; *Dale v. Mottrom*, 2 Barn. 291; *In re Campbell and Brown*, 2 Ont. Pr. Rep. 291.

When Directing Act for Stranger's Benefit Avoids Only in Part.—The award will be sustained in regard to such part of it as is not concerned with strangers to the submission, if the act ordered to be done to the stranger has not been done, and the courts decide that the parties have not been prejudiced; as, where an award directed a lease for life to be made to the plaintiff, with remainder in fee to a stranger, the award was sustained as to the lease for life but held void as to the remainder in fee. *Bretton v. Prat*, Cro. Eliz. 758; *Pope v. Brett*, 2 Saund. 292. See *Alsop v. Senior*, 2 Keb. 707, 718; *Rous v. Lun*, 1 Keb. 569; *Anonymous*, 1 Leon 316.

And where a dispute as to land between the

plaintiff and the defendant was submitted, and an award was made that the plaintiff and his wife should enjoy the land, it was held void as to the wife but sustained as to the husband, the wife being a stranger to the submission. *Samon's Case*, 5 Coke 77b; *Samon v. Pit*, Rolle Abr., Arb., B. 7, p. 243. See *Bussfield v. Bussfield*, Cro. Jac. 577.

3. *Russell on Awards* (6th ed.) 447; *Dudley v. Mallery*, 3 Leon 62; *Norwich v. Norwich*, 3 Leon 62; *Gray v. Gray*, Rolle Abr., Arb., E. 6, p. 247; *Bedam v. Clerkson*, 1 Ld. Raym. 123; *Rolle Abr., Arb., E.*, p. 247. *In re Skeete*, 7 Dowl. 618; *Wood v. Thompson*, Rolle Abr., Arb., F. 11, p. 249; *Anonymous*, 1 Leon 316.

Payment to Stranger for Benefit of Party.—*In re Laing and Todd*, 13 C. B. 276, 76 E. C. L. 276, it was held that where an award directed payment to a stranger, it must appear upon the face of the award that the payment was for the benefit of a party. But see the remarks of Holt, C. J., in *Bird v. Bird*, 1 Salk. 74.

A payment ordered to be made to a stranger for the use of a party is valid, *Snook v. Hellyer*, 2 Chit. Rep. 43, 18 E. C. L. 243; and an order directing payment to an agent of a firm in trust for the partners is valid also, *Dale v. Mottram*, 2 Barn. 291; or directing payment to a party or his solicitor, *Hare v. Fleay*, 11 C. B. 472, 73 E. C. L. 472.

Direction to Pay to Arbitrator for the Use of Party.—An award directing the defendant to pay over money to one of the arbitrators to be immediately paid over by him to the plaintiff, was held good. *Adcock v. Wood*, 6 Exch. 814; *Wood v. Adcock*, 7 Exch. 468.

But where, on a reference of partnership disputes, the award directed that some of the parties should pay certain amounts found due by them to one of the arbitrators to be applied by him to the payment of certain specified debts due by the firm, the award was held void absolutely, although it appeared upon its face that such payments would be of advantage to the parties, because the arbitrators who ordered such payments had no control over the single arbitrator in regard to the proper application of the money. *In re Mackay*, 2 Ad. & El. 356, 29 E. C. L. 116.

direction that a stranger to the submission shall perform any act, such direction is void¹ unless the party in whose favor the act is to be done has power at law or in equity to compel the stranger to perform it.²

Where Party Submits to Award on Stranger's Behalf.—But where one of the parties submits to an award on behalf of a stranger, the arbitrator in such a case has full power to order an act to be done to or by the stranger, because the party becomes liable, although the stranger individually is not bound by the award.³

(3) *Directions in Regard to a Stranger's Property.*—An absolute order made by an arbitrator, which affects the property of a stranger to the submission, is void.⁴

Consent of Stranger.—However, the award may be sustained if the order is made subject to the condition that the stranger shall consent to its execution,⁵ or where there is an implied undertaking by the party directed to do the act that he will procure the consent of the stranger.⁶

1. Award against Stranger Void.—Bac. Abr., Arb., E. 4; Russell on Awards (6th ed.) 449; *Mudy v. Osam*, Litt. 30. See *Norwich v. Norwich*, 3 Leon 62; *Moore v. Bedell*, Rolle Abr., Arb., B. 5, p. 247; *Barney v. Fairchild*, Rolle Abr., Arb., E. 10, p. 248, N. 9, p. 259; *Proudfoot v. Poile*, 3 D. & L. 524; *In re Mackay*, 2 Ad. & El. 356, 29 E. C. L. 116; *Nickels v. Hancock*, 7 De G. M. & G. 300; *Lee v. Elkins*, 12 Mod. 585; *Lane v. Tanner*, cited in *Dale v. Mottram*, 2 Barn. 291; *Cooke v. Whorwood*, 2 Saund. 337; Rolle Abr., Arb., F. 2, p. 248; *Thursby v. Helbert*, Carth. 159, 1 Shaw 82; *Pits v. Wardal*, Godb. 164; *Brazill v. Isham*, 1 E. D. Smith (N. Y.) 437.

It has been held that where an arbitrator directs that a certain act shall be done by a certain person, but the order is void as *ultra vires*, the award itself is void also, either altogether or in such parts of it as are dependent on such order. Where a party to the submission was directed to procure from certain persons who were strangers to the submission a release of their rights to certain real estate, the award was held invalid, because he had no power to compel them to make such release. *Martin v. Williams*, 13 Johns. (N. Y.) 264.

Voluntary Compliance with Direction by Stranger.—But where such an order is made, if the person against whom it is directed undertakes to comply with it or performs the act called for, such performance renders the award valid. Where the question submitted related to real estate which belonged to the wife of one of the parties but not to himself, and a release of the land was ordered to be executed by him to the other party, which the wife actually executed, it was held that this voluntary compliance with the order on her part rendered the award valid which otherwise was *ultra vires*. *Smith v. Sweeny*, 35 N. Y. 291. See *Nichols v. Rensselaer County Mut. Ins. Co.*, 22 Wend. (N. Y.) 129; *Schuyler v. Van Der Veer*, 2 Cai. (N. Y.) 235; *Lee v. Elkins*, 12 Mod. 585; *Page v. Monks*, 5 Gray (Mass.) 492.

2. Where Party can Compel Performance by Stranger.—Com. Dig., Arb., E. 13; Russell on Awards (6th ed.) 450; *Phillips v. Knightley*, Fitzg. 272; *Lynch v. Clemence*, Lutw. 571; *Dudley v. Mallery*, 3 Leon 62. See *Bradsey v. Clyston*, Cro. Car. 541; Bac. Abr., Arb., E.

4; *Beckett v. Taylor*, 1 Mod. 9, 2 Keb. 546, 554; *Kirk v. Unwin*, 6 Exch. 908; *Coote v. Pooley*, Rolle Abr., Arb., E. 7, p. 247; *Anonymous*, F. Moore 3, pl. 11; Rolle Abr., Arb., F. 3, 4, pp. 248, 349; Rolle Abr., Arb., F. 7, p. 249; *Martin v. Williams*, 13 Johns. (N. Y.) 264.

It has been held that an arbitrator may order one of the parties to discharge the other from his undertaking to pay a debt to a stranger to the submission, because when the debt is paid equity will interfere to compel the stranger to give a release to the party who had undertaken to pay it. *Beckett v. Taylor*, 1 Mod. 9, 2 Keb. 546, 554.

3. Shelf v. Baily, 1 Comyns 183; *Cayhill v. Fitzgerald*, 1 Wils. 28, 58; *Adams v. Stat-ham*, 2 Lev. 235; *Bacon v. Dubarry*, 1 Ld. Raym. 246; *Browne v. Meverell*, 2 Dyer 216b.

4. Turner v. Swainson, 1 M. & W. 572; *Taverner v. Skingley*, Rolle Abr., Arb., E. 3, p. 247; *Ingram v. Milnes*, 8 East 445; *Lewis v. Rossiter*, 44 L. J. Exch. 136; *Alder v. Savill*, 5 Taunt. 454. But see *Lindsey v. Aston*, Rolle Abr., Arb., E. 2, p. 247, 2 Bulst. 38; *Anonymous*, 1 Keb. 92; Bac. Abr., Arb., E. 4.

Where a Party and a Stranger are Jointly Interested in the property about which the order is given, it will be sustained to the extent of the party's ownership, though it may be inoperative in regard to the property of the stranger. *Doddington v. Bailward*, 7 Dowl. 640.

Ownership should Appear by Award.—Arbitrators are recommended to set out upon the face of their award sufficient facts to enable the court to see that they are justified in giving directions as to the property of a stranger. Where the arbitrator awarded that the defendants were not entitled to a certain roadway, but that they should have a right to use another road which ran in a different direction, not stating over whose lands, the award was held void as not setting out that the defendants had any title to such road, and as not showing that the land over which the road was made belonged to either of the parties. *Harris v. Curnow*, 2 Chit. Rep. 594, 18 E. C. L. 429. See *Turner v. Swainson*, 1 M. & W. 572.

5. Turner v. Swainson, 1 M. & W. 572; *Angus v. Redford*, 2 Dowl. N. S. 735, 11 M. & W. 69.

6. Nicholls v. Jones, 6 Exch. 373.

f. DELEGATION OF HIS AUTHORITY BY THE ARBITRATOR—(1) General Rule—May Not Delegate His Authority.—Unless the provisions of the submission expressly authorize him to do so, an arbitrator has no power to delegate his authority to a stranger.¹ Nor can the arbitrators delegate their authority to each other.²

(2) *May Take Opinion on Question of Fact.*—Although an award is void if the arbitrators agree beforehand to be bound by the opinion of a stranger, yet they may take the opinion of a third person, and, after weighing it, accept it as their own,³ or they may admit it as evidence in order to enable them to

1. Bac. Abr., Authority, D.; Russell on Awards (6th ed.) 214; Lingood v. Eade, 2 Atk. 501; Proctor v. Williams, 29 L. J. C. P. 157, 8 C. B. N. S. 386, 98 E. C. L. 386; *In re* Eastern Counties R. Co. and Eastern Union R. Co., 3 De G. J. & S. 610; Harrington v. Edison, 11 U. C. Q. B. 114; Brown v. Bellows, 4 Pick. (Mass.) 179; Haff v. Blossom, 5 Bosw. (N. Y.) 559; Potter v. Sterrett, 24 Pa. St. 411; Russell v. Gray, 6 S. & R. (Pa.) 145; Wright v. Meyer (Tex. Civ. App. 1894), 25 S. W. Rep. 1122. See the title AGENCY, vol. I, p. 976.

Award Based on Opinion of Stranger.—If the arbitrators agree beforehand to be bound by the opinion of a stranger, without exercising their own judgment, their award will be void. Whitmore v. Smith, 5 H. & N. 824, 29 L. J. Exch. 402, in error 7 H. & N. 509, 31 L. J. Exch. 107.

Or if the arbitrator bases his award upon the opinion of a stranger, which in his own judgment is wrong, the award will be set aside. Eads v. Williams, 24 L. J. Ch. 531.

Arbitrator Calling in Lawyer to Assist Him.—An arbitrator appointed for his special skill, a legal arbitrator being objected to by the parties, cannot, against the objection of either party, call in a lawyer to assist him. Proctor v. Williams, 29 L. J. C. P. 157, 8 C. B. N. S. 386, 98 E. C. L. 386. See *In re* Tidswell, 33 Beav. 213.

Architect, when Arbitrator, cannot Delegate Powers to Partner.—Where an architect has been made the sole arbitrator between the parties to a building contract, he cannot without the consent of the parties delegate to his partner the powers conferred on him by such contract. Wright v. Meyer (Tex. Civ. App. 1894), 25 S. W. Rep. 1122.

2. **Arbitrators Delegating Authority to One Another.**—In Little v. Newton, 9 Dowl. 437, where there were three arbitrators, two merchants and a lawyer, and the questions of fact were agreed upon by them, but the merchants referred a point of law to the lawyer, and he made his award upon the question alone, and the award was subsequently executed by one of the merchants, a majority award being so far good by the terms of the submission, the court set it aside because there was no principle of law which would authorize the merchants to delegate their power to judge the law to the lawyer, and the lawyer's opinion might have been different had they consulted with him.

But where, by an agreement for the sale and purchase of property, it was provided that the price should be fixed by two appraisers, who in case of disagreement were to select a third,

and the two being unable to agree did select the third, and agreed with him that he should fix the value and that they would concur in it, but afterwards abandoned this agreement, and the three met together and examined the property, and two of them agreed on a valuation, it was held that the award was valid, as they had abandoned the improper agreement. Haff v. Blossom, 5 Bosw. (N. Y.) 559.

Delegating Powers to Court.—Neither may they delegate their powers to the court which appointed them, or provide for the settlement of a future dispute by another tribunal. Kingston v. Kincaid, 1 Wash. (U. S.) 448; Levezey v. Gorgas, 4 Dall. (U. S.) 71; Sutton v. Horn, 7 S. & R. (Pa.) 228. But see *supra*, this title, *Arbitrator Is Judge of Law and Fact—May Refer Question of Law to the Court.*

3. Soulsby v. Hodgson, 3 Burr. 1474; Anderson v. Wallace, 3 Cl. & F. 26; Brown v. Bellows, 4 Pick. (Mass.) 191. See Innis v. Miller, 24 Dall. (U. S.) 50; Vannah v. Carney, 69 Me. 221; Liverpool, etc., Ins. Co. v. Goehring, 99 Pa. St. 13.

Taking Opinion on Question of Fact.—In Emery v. Wase, 5 Ves. Jr. 846, Lord Alvanley, M. R., said: "A man may make use of the judgment of another upon whom he can depend, and the valuation of that person is his if he chooses to adopt it." And on appeal the decree was confirmed by Lord Eldon.

Where an award is made upon the judgments of the arbitrators themselves, the fact that they consulted with a third person in regard to the matter in controversy, and took his advice, will not render it invalid. Simons v. Mills, 80 Cal. 118.

Where an arbitrator has been chosen under a policy of fire insurance to determine the amount of loss, he may call in the aid of a third person skilled in a special branch embraced in the appraisal, and may give such weight as he sees fit to the estimate of such person, and he may even found his decision upon his estimate, provided he adopts it as his real judgment. Bangor Sav. Bank v. Niagara F. Ins. Co., 85 Me. 68.

Alter where he does not adopt it as his real judgment. Eads v. Williams, 24 L. J. Ch. 531; Shipman v. Fletcher, 82 Va. 601.

An award is void where it is made by an arbitrator not upon his own judgment or by reason of any investigation which he has made himself, but altogether at the instance of one of the parties to the submission. Hartford F. Ins. Co. v. Bonner Mercantile Co., 44 Fed. Rep. 151.

Taking Advice of Experts.—Arbitrators may

arrive at a just conclusion as to the facts.¹ And it appears that they need not let the parties to the submission know that they have taken such opinion.²

(3) *May Take Opinion on Question of Law.*—An arbitrator acting in good faith is justified in taking the opinion of counsel upon a point of law,³ and he may also employ professional assistance in framing his award.⁴

(4) *May Delegate a Ministerial Act.*—Although an arbitrator may not delegate his judicial functions, he is at liberty to delegate to another the performance of any act which is merely ministerial,⁵ the only difficulty being to

call in the assistance of accountants, appraisers, or other experts, but not leave the decision to such experts. They may use the opinion of such experts as evidence and adopt it as their own when they are satisfied of its accuracy. Russell on Arb. 214; Hopcraft v. Hickman, 2 Sim. & S. 130; Emery v. Wase, 5 Ves. Jr. 846; Caledonian R. Co. v. Lockhart, 3 Macq. 808; Sharp v. Nowell, 6 C. B. 253, 60 E. C. L. 253; Lingood v. Eade, 2 Atk. 501; Moore v. Barnett, 17 Ind. 349; Galloway v. Webb, Hard. (Ky.) 326.

On a reference to surveyors to settle the terms of a lease of a mine, it was held no objection to the award, that one of the surveyors did not go down into the mine, but founded his valuation on the report of a person whom he had sent down into it and upon his own knowledge of the neighborhood. Eads v. Williams, 24 L. J. Ch. 531.

Consent of Parties.—Where the parties themselves, with the arbitrator's consent, agree that the award shall be made in part upon the report of a valuer, the award will be sustained. Sharp v. Nuwell, 6 C. B. 253, 60 E. C. L. 253.

Submission Authorizing Calling In Expert.—Where the submission contains a special provision empowering the arbitrator to call in a person of skill to assist him, he must comply strictly with such provision, and is not at liberty to exercise his own discretion in taking outside opinion. Anderson v. Wallace, 3 Cl. & F. 26.

Inquiries Abroad as to Matters of Public Nature.—In Chaplin v. Kirwan, 1 Dall. (Pa.) 187, it was held that arbitrators were justified in making inquiry abroad as to the price of work, or any other matter of a public nature.

1. Matters of Skill or Science—Hearing Experts.—In Caledonian R. Co. v. Lockhart, 3 Macq. 808, Lord Wensleydale said that an arbitrator may consult men of science in every department where it becomes necessary. See Hopcraft v. Hickman, 2 Sim. & S. 130.

And where the practice of the Master of the Common Pleas was to send a surveyor to report on the work, on a compulsory reference to them of a builder's bill, the court approved of the practice, saying that the report was only to be received as evidence, and that the evidence of the parties must also be heard by the master. Gray v. Wilson, 35 L. J. N. S. C. P. 123.

So in Anderson v. Wallace, 3 Cl. & F. 26, Lord Brougham said that the proper and more regular course, and one which a professional arbitrator would have followed, would have been to examine, as a witness, the person of whose experience the arbitrators

were empowered to avail themselves according to the terms of the submission.

2. Russell on Awards (6th ed.) 217. See Caledonian R. Co. v. Lockhart, 3 Macq. 808; Anderson v. Wallace, 3 Cl. & F. 26.

3. Russell on Awards (6th ed.) 218; In re Hare, etc., 6 Bing. N. Cas. 158, 37 E. C. L. 326; Goodman v. Sayers, 2 Jac. & W. 249.

Stating Case for Opinion of Counsel.—In the latter case, two out of three arbitrators stated a case and took counsel's opinion on it, and the court held that that fact was no evidence of improper conduct, but that, on the contrary, it showed a conscientious desire to adjudicate fairly, although one of the arbitrators was unaware of it, and although it was asserted that an important fact had been erroneously stated, where it appeared that there was no concealment, and the case, with the opinion of counsel, was shown to the third arbitrator before the award was made; it further appearing that the fact alleged to be erroneously stated was correct, according to the evidence, before the arbitrators when they took the opinion, and that the party against whom the award was made had sufficient opportunity of setting forth in evidence the true state of the facts. Goodman v. Sayers, 2 Jac. & W. 249.

4. Professional Aid in Framing Award.—Russell on Awards (6th ed.) 218; Dobson v. Groves, 6 Q. B. 637, 51 E. C. L. 637; Fetherstone v. Cooper, 9 Ves. Jr. 67; Moore v. Ewing, 1 N. J. L. 167, 1 Am. Dec. 195.

Where in the submission a special provision is made giving the arbitrator power to call in professional assistance, his power in that respect ceases to be a general one arising from the necessity of the case, and he must be governed by such provision. Anderson v. Wallace, 3 Cl. & F. 26. See Proctor v. Williams, 8 C. B. N. S. 386, 98 E. C. L. 386, 29 L. J. C. P. 157.

Award Prepared by Attorney of Party.—An award will not be set aside because it is prepared by the attorney of one of the parties, though it is not desirable to employ him to do so. Ex p. Milner, 16 New Bruns. 96.

It is possible that an award may be set aside when the arbitrator, even after he has fully made up his mind upon all the points submitted to him, employs the attorney of one of the parties to prepare it. The courts "highly disapprove" of such a proceeding. In re Underwood and Bedford, etc., R. Co., 11 C. B. N. S. 442, 103 E. C. L. 442, 31 L. J. C. P. 10; Fetherstone v. Cooper, 9 Ves. Jr. 67.

5. Ministerial Acts.—Russell on Awards (6th ed.) 219; Thorp v. Cole, 2 C. M. & R. 367, 4 Dowl. 457; Harvey v. Shelton, 7 Beav. 455. In Choctaw Nation v. U. S., 119 U. S. 1, it

determine what a ministerial act is.¹

(5) *May Not Appoint a Substitute*.—Unless the submission so expressly provides, the arbitrators have no power to appoint a substitute for one of their own number who cannot or who will not act. Such an appointment rests altogether with the parties.²

7. **Power of the Arbitrator over the Costs**.—*a. RULE IN ENGLAND*.—(1) *General Rule*.—*Submission Silent as to Costs*.—When a cause alone or a cause and all matters in difference are referred to arbitration, and the submission is silent as to the costs, the arbitrator has an implied power to adjudicate respecting the costs of the cause, but not of the reference or award,³ and each party must

was held that an award of the United States Senate, made in an arbitration between the United States and the Choctaw tribe, was not invalid in not determining a certain amount, but instead of doing so referring the matter to the Secretary of the Interior, the records of whose office enabled him to have the account stated.

But where the arbitrators employed other persons to examine the accounts of the parties to the submission, and they have adopted their conclusions without examination, the award should be set aside. *Shipman v. Fletcher*, 82 Va. 601.

1. **Measurement of Land**.—The measurement of the number of acres in a field or the surface of a lake is a ministerial act. *Thorpe v. Cole*, 2 C. M. & R. 367, 4 Dowl. 457.

Taxing the Costs of the arbitration is a ministerial act also. *Sharpe v. Metropolitan Dist. R. Co.*, 4 Q. B. Div. 645, L. R. 5 App. Cas. 425.

Accounts.—Making up the accounts of a firm is ministerial. *Harvey v. Shelton*, 7 Beav. 455. So is the stating of an account. *Choctaw Nation v. U. S.*, 119 U. S. 1.

In *Moore v. Barnett*, 17 Ind. 349, it was held that where a suit is referred to arbitrators for an accounting, and the settlement of a copartnership, they may employ other persons to examine the books.

2. *Potter v. Sterrett*, 24 Pa. St. 411. See *Russell v. Gray*, 6 S. & R. (Pa.) 145.

However, where the parties appointed two referees with power, in case they should disagree, to "choose one or more with them," and they did disagree, and chose three others, and the parties approved and went on with the hearing without objection, the award was sustained. *Norton v. Savage*, 10 Me. 455. See *Matson v. Trower*, R. & M. 17, 21 E. C. L. 371; *Rison v. Berry*, 4 Rand. (Va.) 275; and *supra*, this title, *The Submission—Amending or Altering the Submission—Substitution of New Arbitrator*.

3. *Russell on Awards* (6th ed.) 382; *Firth v. Robinson*, 1 B. & C. 277, 8 E. C. L. 119; *Taylor v. Gordon*, 9 Bing. 570, 23 E. C. L. 385; *Strutt v. Rogers*, 7 Taunt. 213, 2 E. C. L. 212; *Stratton v. Green*, 8 Bing. 437, 21 E. C. L. 340; *Candler v. Fuller*, Willes 62; *Roe v. Doe*, 2 T. R. 644; *Bracher v. Cotton*, Barnes 123; *Hartnell v. Hill*, Forrest 73; *Massey v. Hall*, Rolle Abr., Arb., K. 14. But see *Carpenter v. Joynes*, 14 Pract. Reg. 45.

The Costs in the Cause are defined to be the costs incurred in the cause up to the time of

the submission, the costs of the order of reference, and of making it a rule of court, and the costs of ulterior proceedings in the cause, if any, after the award—that is, when an award and not a mere certificate is to be made. See *Russell on Awards* (6th ed.) 378, 379; *Goodall v. Ray*, 4 Dowl. 1; *Fryer v. Sturt*, 24 L. J. C. P. 154; *Edwards v. Great Western R. Co.*, 12 C. B. 419, 74 E. C. L. 419.

Where the Arbitrator has to Make a Certificate only, as he is but substituted for the jury out of court, and there is no award, but a verdict merely, all the costs of arriving at that verdict, including the costs of proceedings before the arbitrator, are costs in the cause. *Brown v. Nelson*, 13 M. & W. 397; *Mackintosh v. Blyth*, 1 Bing. 269, 8 E. C. L. 503; *Deere v. Kirkhouse*, 20 L. J. Q. B. 195.

When Costs of Reference Costs in Cause.—In some cases, even where an award is made, the costs of the reference are costs in the cause. See *Tregoning v. Attenborough*, 7 Bing. 733, 20 E. C. L. 309; *Taylor v. Gordon*, 9 Bing. 570, 23 E. C. L. 385; *Sim v. Edwards*, 25 L. J. C. P. 175, 17 C. B. 527, 84 E. C. L. 527.

The costs of the reference and award in a compulsory reference under the Common Law Procedure Act of 1854 are costs of the cause. *Forshaw v. De Wette*, L. R. 6 Exch. 200.

The Costs of Showing Cause against a rule for setting aside an award in a cause, have been held costs in the cause. *Goodall v. Ray*, 4 Dowl. 1; *Clarke v. Owen*, 2 H. & W. 324. But see *Lewis v. Harris*, 2 B. & C. 620, 9 E. C. L. 202.

Costs of the Reference.—The costs in the reference are the expenses incurred by the parties on account of the whole inquiry before the arbitrator, whether with respect to the matters in the cause or the matters out of it. *Eccles v. Blackburn*, 30 L. J. Exch. 358; *Brown v. Nelson*, 13 M. & W. 397; *Utting v. Evans*, M'Lel. 12; *Russell on Awards* (6th ed.) 379.

A power to award as to the costs of the reference gives power to award in regard to the costs of the award itself. *Walker v. Brown*, 51 L. J. Q. B. Div. 424.

The Costs of an Accountant employed by the arbitrator with the parties' consent to examine the books of the defendant and of the attendance of the plaintiff's solicitor with the accountant, may be costs of the reference. *Hawkins v. Rigby*, 29 L. J. C. P. 228, 8 C. B. N. S. 271, 98 E. C. L. 271.

Counsel's Fee is part of the costs of the

bear his own expenses of the reference, and is liable to half the costs of the award.¹

Costs to Abide Event.—Where, however, the submission contains a provision that the costs shall abide the event, the arbitrator has no control over the costs, either of the cause or the reference, and his award should be silent in regard to them.²

reference, not of the cause. *Milmore v. Freeze*, 17 New Bruns. 705.

Costs of the Award.—The costs of the award are the amount of the arbitrator's charges which are usually paid to him when the award is taken up. See Russell on Awards (6th ed.) 380; *Brazier v. Bryant*, 2 Dowl. 600; *Smith v. Troup*, 7 C. B. 762, 62 E. C. L. 762; *Threlfall v. Fanshawe*, 19 L. J. Q. B. 334; *Fitzgerald v. Graves*, 5 Taunt. 341; *Webb v. Wyatt*, 3 Jur. N. S. 496; *Barnes v. Hayward*, 1 H. & N. 742; *Sinclair v. Great Eastern R. Co.*, 39 L. J. C. P. 165, L. R. 5 C. P. 135.

Cost of Umpirage.—When an award is made by the umpire, he may charge the fees due to the arbitrators as part of the costs of the umpirage. *Ellison v. Ackroyd*, 20 L. J. Q. B. 193. See *Whitmore v. Friend*, C. P. Dec. 1855; Russell on Awards (6th ed.) 380.

1. *Taylor v. Gordon*, 9 Bing. 570, 23 E. C. L. 385; *Grove v. Cox*, 1 Taunt. 165; *Bell v. Belson*, 2 Chit. Rep. 157, 18 E. C. L. 283.

2. *Wood v. O'Kelly*, 9 East 436; *Kendrick v. Davies*, 5 Dowl. 693; *Hemsworth v. Brian*, 1 C. B. 131, 50 E. C. L. 131; *Unsted v. Kidd*, 1 Chit. Rep. 526, 18 E. C. L. 156. See *Cockburn v. Newton*, 9 Dowl. 676; *Clarke v. Owen*, 2 H. & W. 324; *Rees v. Waters*, 16 M. & W. 263, 4 D. & L. 567; *Reeves v. M'Gregor*, 9 Ad. & El. 576, 36 E. C. L. 201.

What Is the Event.—Where there is a general provision in the submission "that the costs of the cause shall abide the event of the award," a question arises as to whether the intention of the parties is that the costs shall abide the event of the award as to the cause, or as to the general event of the whole award. See Russell on Awards (6th ed.) 394; *Cooper v. Pegg*, 24 L. J. C. P. 167.

Where the costs of the cause are to abide the event of the award, and the submission is silent as to the costs of the reference, or leaves them in the arbitrators' discretion, it will be taken as intending that the costs shall abide the general event of the award as to the cause, and not the general event of the award, even when the event of the whole award is in favor of the party who fails in the action. *Lund v. Hudson*, 1 D. & L. 236; *Crosbie v. Holmes*, 3 D. & L. 566; *Highgate Archway Co. v. Nash*, 2 B. & Ald. 597; *Pearson v. Archbold*, 11 M. & W. 477; *Reynolds v. Harris*, 28 L. J. C. P. 26, 3 C. B. N. S. 267; *Matlock Gas Light Co. v. Peters*, 25 L. J. Q. B. 273, 6 El. & Bl. 215.

See further, *Langridge v. Campbell*, 2 Exch. Div. 281; *Stevens v. Chapman*, L. R. 6 Exch. 213; *In re Leeming and Fearnley*, 5 B. & Ad. 403, 27 E. C. L. 102.

Where the event upon which the costs of the cause depend is not determined, as where an award of a gross sum in favor of one party is made, such award is insufficient. *Pearson v. Archbold*, 11 M. & W. 477; *Crosbie v.*

Holmes, 3 D. & L. 566, 15 L. J. Q. B. 125; *Nicholson v. Sykes*, 9 Exch. 357. See *Taylor v. Shuttleworth*, 8 Dowl. 281; *Taylor v. Marling*, 2 M. & G. 55, 40 E. C. L. 258; *Elleman v. Williams*, 2 D. & L. 46; *Rule v. Bryde*, 1 Exch. 151; *Spain v. Cadell*, 8 M. & W. 129.

Where the declaration contains several claims, or several defenses are pleaded, it is the duty of the arbitrator to take into consideration whether he should not find for a party on certain points and against him on others, as the distribution of the costs might be materially affected by such finding. *Reynolds v. Harris*, 28 L. J. C. P. 26, 3 C. B. N. S. 267, 91 E. C. L. 267; *Gore v. Baker*, 4 El. & Bl. 470, 82 E. C. L. 470; *Kelcey v. Stupples*, 32 L. J. Exch. 6, 1 H. & C. 576; *Crawshaw v. York*, etc., R. Co., 21 L. J. Q. B. 274. See *Bradley v. Phelps*, 6 Exch. 897.

Where the Costs of the Cause and Reference

Abide the Event.—Where a cause and all matters in difference are submitted, and there is a provision that the costs of the cause and of the reference are to abide the event of the award, this will mean that they shall abide the general event of the award, and, unless everything is decided in favor of one party, each party will have to pay his own costs. Russell on Awards (6th ed.) 396; *Boodlee v. Davies*, 3 Ad. & El. 200, 30 E. C. L. 73; *Jones v. Powell*, 6 Dowl. 483; *Reynolds v. Harris*, 28 L. J. C. P. 26, 3 C. B. N. S. 267, 91 E. C. L. 267; *Gribble v. Buchanan*, 26 L. J. C. P. 24, 18 C. B. 691, 86 E. C. L. 691.

See generally the following cases: *Hemsworth v. Brian*, 1 C. B. 131, 50 E. C. L. 131; *Dunhill v. Ford*, 37 L. J. C. P. 32, L. R. 3 C. P. 36; *Woodhams v. Woodhams*, 25 L. T. N. S. 460; *Yates v. Knight*, 2 Bing. N. Cas. 277, 29 E. C. L. 335; *Anonymous*, 1 Smith 426; *Eardley v. Steer*, 2 C. M. & R. 327; *Chittenden v. Walker*, 3 Ad. & El. 691, 30 E. C. L. 186; *Reeves v. M'Gregor*, 9 Ad. & El. 576, 36 E. C. L. 201; *Jones v. Powell*, 6 Dowl. 483; *Marsack v. Webber*, 6 H. & N. 1; *Whaley v. Laing*, 5 H. & N. 480, 29 L. J. Exch. 313.

Effect of the Award.—Where, by the terms of the submission, the costs of the cause are to abide the event of the award, the costs allowed are those only which would have followed the legal event had the decision been obtained in court. Russell on Awards (6th ed.) 400; *Thomas v. Hawkes*, 1 Dowl. N. S. 346; *Summers v. Formby*, 1 B. & C. 100, 8 E. C. L. 43; *Highnam v. Hassell*, cited in *Swinglehurst v. Altham*, 3 T. R. 138; *Kelcey v. Stupples*, 32 L. J. Exch. 6, 1 H. & C. 576; *Butler v. Grubb*, cited in *Swinglehurst v. Altham*, 3 T. R. 138; *Wigens v. Cook*, 6 C. B. N. S. 784, 95 E. C. L. 784, 28 L. J. C. P. 312. See generally, where it was held that the party in whose favor the decision was made should be paid the whole costs of the suit, *Griffiths v. Thomas*, 15 L. J.

Provision Giving Arbitrator Power over Costs.—But where the submission contains an express provision giving him power over the costs, and there is nothing to limit its generality, the costs of the cause, the reference, and the award are all submitted to his award.¹

(2) **Awarding as to Costs**—When Arbitrator Makes No Award.—The arbitrator need not, unless he thinks proper, give any directions as to the costs of the cause. Where he does not, the costs follow the verdict.²

When Arbitrator should Give Specific Directions.—But if the submission states that the costs of the cause, the reference, or the award are in his discretion, he should give some direction as to each of them, or the award may be set aside for want of finality.³ And where power over the costs is given to him,

Q. B. 336, 4 D. & L. 109; Wiggins v. Cook, 28 L. J. C. P. 312, 6 C. B. N. S. 784, 95 E. C. L. 784; Jones v. Jones, 29 L. J. C. P. 151, 7 C. B. N. S. 832, 97 E. C. L. 832; Fream v. Sargent, 32 L. J. Exch. 281; Owens v. Vanhomrigh, 14 Ir. C. L. R. Q. B. 362; Reid v. Ashby, 13 C. B. 897, 76 E. C. L. 897; Cooper v. Pegg, 24 L. J. C. P. 167; Smith v. Edge, 33 L. J. Exch. 9, 2 H. & C. 659.

On Compulsory References to the Master, "costs to abide the event," the costs are held to follow the legal event. Robertson v. Sterne, 31 L. J. C. P. 362. See Smith v. Edge, 33 L. J. Exch. 9; Webb v. Sanderson, 2 H. & C. 985; Cowell v. Amman Aberdare Colliery Co., 12 L. T. N. S. 150.

Where a Defendant is Arrested for too large a sum, and the cause is submitted to arbitration, he is entitled to his costs when the arrest is decided to be without reasonable and probable cause. Summers v. Grosvenor, 2 Crompt. & M. 341; Silversides v. Bowley, 1 Moore 92, 4 E. C. L. 387; Rowe v. Rhodes, 2 Crompt. & M. 379; Summers v. Formby, 1 B. & C. 100, 8 E. C. L. 43; Reynolds v. Flower, 3 M. & S. 801; Payne v. Acton, 1 Brod. & B. 278, 5 E. C. L. 82; Watkins v. O'Gorman Mahon, 5 Dowl. 178. See Deere v. Kirkhouse, 20 L. J. Q. B. 195; Hill v. Merritt, 26 L. J. Exch. 126; Foster v. Hanson, 1 H. & N. 755; Jones v. Jehu, 5 Dowl. 130.

See further generally, Keene v. Deeble, 3 B. & C. 491, 10 E. C. L. 163; Stevens v. Russell, 1 H. & N. 752; Holder v. Raitt, 2 Ad. & El. 445, 29 E. C. L. 139; Balmain v. Lickfold, L. R. 10 C. P. 203; Turner v. Prince, 2 M. & P. 305, 17 E. C. L. 209; Thompson v. Atkinson, 6 B. & C. 193, 13 E. C. L. 140; Higginson v. Broadhurst, 1 D. & L. 490; Barnard v. Moss, 1 H. Bl. 107; Gurney v. Buller, 1 B. & Ald. 670; Pedley v. Frampton, 2 Chit. Rep. 155, 18 E. C. L. 283; Day v. Mearns, 2 Chit. Rep. 156, 18 E. C. L. 283; *Ex p.* Reynal, 16 L. J. Q. B. 304; Morris v. Bosworth, 2 El. & Bl. 213, 75 E. C. L. 213; Holden v. Newman, 13 East 161; Stooke v. Taylor, 5 Q. B. Div. 569; Cole v. Firth, 4 Exch. Div. 301; Neale v. Clarke, 4 Exch. Div. 286; Chatfield v. Sedgwick, 4 C. P. Div. 383, 4 C. P. Div. 459; Blake v. Appleyard, 3 Exch. Div. 195.

1. Strutt v. Rogers, 7 Taunt. 213, 2 E. C. L. 212; Wood v. O'Kelly, 9 East 436. See Rex v. Moate, 3 B. & Ad. 237, 23 E. C. L. 60; Bradley v. Tunstow, 1 B. & P. 34; Russell on Awards (6th ed.) 382.

And as to the arbitrator's powers over the

costs generally, see the following cases: Walker v. Brown, 51 L. J. Q. B. Div. 424; Baker v. Townsend, 7 Taunt. 422, 2 E. C. L. 421; Moore v. Watson, 36 L. J. C. P. 122; Forshaw v. DeWette, L. R. 6 Exch. 200; Bell v. Postlethwaite, 25 L. J. Q. B. 63; Leggo v. Young, 16 C. B. 626, 81 E. C. L. 626, 24 L. J. C. P. 200; Galatti v. Wakefield, 4 Exch. Div. 249; Bedwell v. Wood, 2 Q. B. Div. 626; Wimshurst v. Barrow Shipbuilding Co., 2 Q. B. Div. 335; Rex v. Justices, 1 Ad. & El. 828, 28 E. C. L. 223; West London Extension R. Co. v. Fulham Union, L. R. 5 Q. B. 361; Reg. v. Justices, L. R. 6 Q. B. 220.

Costs as Contained in Award.—Where the arbitrator is specially directed by the submission to ascertain the amount of the costs of the award, he should do so in the award. Morgan v. Smith, 1 Dowl. N. S. 617. *In re* Gillon and Mersey, etc., Nav. Co., 3 B. & Ad. 493, 23 E. C. L. 128; Barnes v. Hayward, 1 H. & N. 742. And where the submission is one over which the courts have no jurisdiction, so that the costs can be taxed by the taxing officer, the arbitrator ought to fix the amount himself, otherwise the award may be invalid or uncertain. Russell on Awards (6th ed.) 390.

Costs to Plaintiff's Agent.—The fact that the award orders the costs of the award to be paid to the solicitor or agent of the plaintiff, does not render it invalid. Parkinson v. Smith, 30 L. J. Q. B. 178.

2. Young v. Gye, 10 Moore 198, 17 E. C. L. 139; Mackintosh v. Blyth, 1 Bing. 269, 8 E. C. L. 503.

Where Arbitrator does Award Costs of the Cause.—Where the arbitrator does as a fact order one of the parties to pay the costs of the cause, the submission having given him authority to do so, the direction will give a right to such costs, and such only, as the party would, in the ordinary course of law, have been entitled to, had the matter in controversy been determined by a jury or by the court. See Russell on Awards (6th ed.) 391; Rigby v. Okell, 7 B. & C. 57, 14 E. C. L. 13; Allenby v. Proudlock, 4 Ad. & El. 326, 31 E. C. L. 78.

In Browne v. Marsden, 1 H. Bl. 223, an award that the plaintiff should be paid "the costs sustained in the action" was held not to include the costs of the reference. See Bradley v. Tunstow, 1 B. & P. 34; Rex v. Moate, 3 B. & Ad. 237, 23 E. C. L. 60.

3. See Russell on Awards (6th ed.) 385; Morgan v. Smith, 1 Dowl. N. S. 617, 9 M. & W. 427; Angus v. Redford, 2 Dowl. N. S. 735,

he may apportion them as he sees fit.¹

(3) *Where Award as to Costs Is Defective*.—Where the award is defective in the finding as to the costs, it may be sustained as to the rest if the party in whose favor it was made waives his right to costs, or allows the costs which were undisposed of, to the opposite party, so that such party cannot be prejudiced by the error of the arbitrator.²

(4) *Power to Certify for Costs*.—In England the arbitrator is sometimes empowered to certify for costs, the same authority being conferred upon him as is possessed by a judge at nisi prius, and it is advisable that provisions to that effect should be inserted in the submission; otherwise, the party entitled to them may not be able to recover full costs.³ The arbitrator, when so

11 M. & W. 69; Grenfell v. Edgcome, 7 Q. B. 661, 53 E. C. L. 661; Richardson v. Worsley, 5 Exch. 613. See Williams v. Wilson, 9 Exch. 90; *In re* Smith and Wilson, 2 Exch. 327; Morris v. Morris, 25 L. J. Q. B. 261; Fox v. Smith, 2 Wils. 267; Addison v. Gray, 2 Wils. 293; Thorp v. Cole, 4 Dowl. 457; Roulstone v. Alliance Ins. Co., L. R. 4 Ir. 547.

Discretion as to Amount of Costs.—The discretion of the arbitrator in fixing the amount of costs is practically absolute. Shepherd v. Brand, Cas. temp. Hardw. 53, 2 Barn. 463; Turner v. Rose, 1 Ld. Kenyon 393; Anonymous, 1 Chit. Rep. 38, 18 E. C. L. 22. See Winter v. Garlick, 6 Mod. 195, 1 Salk. 75; Pedley v. Goddard, 7 T. R. 73; Pratt v. Salt, Cas. temp. Hardw. 161; Tidd's Pract. (9th ed.) 832.

Where He Awards Costs Generally without specifying the amount or saying who shall tax them, they will be taxed by the officer of the court. Browne v. Marsden, 1 H. Bl. 223; Stokes v. Lewis, 2 Smith 12; Dudley v. Nettlefold, 2 Stra. 737; Thorp v. Cole, 4 Dowl. 457; Stephenson v. Browning, Barnes 56.

Costs to be Ascertained by Arbitrator.—But where the submission provides that the costs of the reference and award shall be in the arbitrator's discretion, "who shall ascertain the same," the award is void unless he fixes the amount himself, and his omission to do so cannot be supplied by the master. Morgan v. Smith, 1 Dowl. N. S. 617.

Costs as between Solicitor and Client.—At Common Law, the arbitrator, unless specially empowered, has no authority to order the costs, either of the cause or the reference, to be taxed as between attorney and client. Pratt v. Salt, Cas. temp. Hardw. 161; Broadhurst v. Darlington, 2 D. P. C. 38; Marder v. Cox, Cowp. 127; Whitehead v. Firth, 12 East 165; Browne v. Marsden, 1 H. Bl. 223; Bartle v. Musgrave, 1 Dowl. N. S. 325; Turner v. Rose, 1 Ld. Kenyon 393; Seckham v. Babb, 8 Dowl. 167.

However, in Hartnell v. Hill, Forrest 73, such an award was sustained. See further, Cowell v. Betteley, 10 Bing. 432, 25 E. C. L. 186; Figes v. Adams, 4 Taunt. 632; Caddel v. Smart, 4 Dowl. 760; Reg. Gen. H. T. 2 Wm. IV. 93, 3 B. & Ad. 388; Pringle v. Gloag, 10 Ch. Div. 676.

In Equity, where, on the reference of a suit, the costs of the suit, the reference, and the award are in the arbitrator's discretion, the arbitrator may award costs as between so-

licitor and client. Mordue v. Palmer, L. R. 6 Ch. 22.

Canada.—Where, by the submission, the costs were to be in the discretion of the arbitrator, and he said nothing as to them, the award was set aside. Tory v. Guysboro, 17 Nova Scotia 32. McDonald, C. J., *dissenting*, and holding that in such a case they should follow the award.

1. Cargey v. Aitcheson, 2 B. & C. 170, 9 E. C. L. 52; Proudfoot v. Poile, 3 D. & L. 524; *In re* Fearon and Flinn, L. R. 5 C. P. 34; Bates v. Townley, 2 Exch. 152; *In re* Young and Bulman, 13 C. B. 623, 76 E. C. L. 623; Boyes v. Bluck, 13 C. B. 669, 76 E. C. L. 669. See Finlayson v. M'Leod, 1 B. & Ald. 663.

Failure to Tax Costs before Day Named in Award for Payment.—Where the arbitrator directs the defendant to pay the plaintiff his costs on a specified day, the fact that the plaintiff has not taxed the costs does not excuse him from such payment. In such a case, it is the duty of the defendant himself to have them taxed, so that he may make the payment within the proper time. Candler v. Fuller, Willes 62; Bigland v. Skelton, 12 East 436.

2. Russell on Awards (6th ed.) 406; Morgan v. Smith, 1 Dowl. N. S. 617; England v. Davison, 9 Dowl. N. S. 1052; Smith v. Reece, 6 D. & L. 520; Taylor v. Shuttleworth, 8 Dowl. 281; *In re* Leeming and Fearnley, 5 B. & Ad. 403, 27 E. C. L. 102; Tayler v. Marling, 2 M. & G. 55, 40 E. C. L. 258.

Submission of Question of Damages—Award Defective as to Costs.—Where the matter submitted was to determine the amount of damages to be paid by the defendant, who was to pay all costs, the court ordered him to pay the damages awarded, as they could be separated from the award as to costs, which was defective, the plaintiff having made no claim for costs. Lloyd v. Spittle, 6 D. & L. 531.

3. Russell on Awards (6th ed.) 407; Swinglehurst v. Altham, 3 T. R. 138; Willis v. Osborne, 1 Chit. Rep. 183, 18 E. C. L. 62; Ward v. Mallinder, 5 East 489; Rex v. Moate, 3 B. & Ad. 237, 23 E. C. L. 60; Finlayson v. M'Leod, 1 B. & Ald. 663; Harland v. Newcastle-upon-Tyne, 39 L. J. Q. B. 69, L. R. 5 Q. B. 47; Hallen v. Smith, 7 Dowl. 394; Smith v. Haley, 27 L. T. N. S. 426; Dewan v. Swabey, 11 Ad. & El. 913, 39 E. C. L. 269.

Certificate for Costs.—The arbitrator's certificate will be of no force where such a provision is not contained in the submission, but if the

empowered, may grant or withhold the certificate in his discretion.¹

b. RULE IN THE UNITED STATES.—(1) *Generally.*—The courts of the several states are not in accord as to the power of the arbitrator over costs.

View that Arbitrator Has No Implied Power to Award Costs.—At the common law, the authorities usually concede that the arbitrator had no authority without a specific provision in the submission to award costs of the arbitration,² and this is now the rule in some states.³

cause was referred to nisi prius the judge may grant a certificate to the same effect in his discretion. *Nokes v. Frazer*, 3 Dowl. 339; *Broggref v. Hawke*, 6 Dowl. 67. See *Ivey v. Young*, 5 Dowl. 450; *Astley v. Joy*, 9 Ad. & El. 702, 36 E. C. L. 248.

But if the arbitrator had power to certify and did not do so, the judge before whom the cause came on for trial cannot then certify, because his power is transferred to the arbitrator by the submission. *Richardson v. Kensit*, 6 M. & G. 712, 46 E. C. L. 712. But see *Sharp v. Eveleigh*, 20 L. J. Exch. 282.

Although a judge may certify on the back of the record, an arbitrator cannot; he must embody the certificate in his award, because once his award is made he has no further power. *Geeve v. Gorton*, 3 D. & L. 481; *Spain v. Cadell*, 8 M. & W. 129. The same rule applies in case of a compulsory reference to a master. *Bedwell v. Wood*, 2 Q. B. Div. 626.

1. *Bury v. Dunn*, 1 D. & L. 141. See *Angus v. Redford*, 2 Dowl. N. S. 735, 11 M. & W. 69.

Order Granting Power to Certify and that Costs shall Abide Events.—Where the power of a judge to nisi prius to certify has been conferred upon an arbitrator, and the order of reference provides that the costs of the cause shall abide the event of the award, the arbitrator's power to certify seems invalid, as the parties by agreement have provided as to the costs. *Wigens v. Cook*, 28 L. J. C. P. 312, 6 C. B. N. S. 784, 95 E. C. L. 784.

English Arbitration Act of 1889.—The power given by the *English Arbitration Act of 1889*, § 2, to arbitrators to award costs, applies to all submissions, whether made before or after the commencement of the act. *In re Williams and Stepney* (1891), 2 Q. B. 257. See (1891) 1 Q. B. 700.

Under the *English Arbitration Act of 1889*, § 2, the costs of an arbitration must be included in the award itself. *In re Prebble and Robinson* [1892], 2 Q. B. 602. See *In re Knight and Tabernacle Permanent Bldg. Soc.* (1892), 2 Q. B. 613; *Patten v. West of England Iron, etc., Co.*, 13 R. 285 (1894), 2 Q. B. 159.

2. *Alling v. Munson*, 2 Conn. 691; *Gordon v. Tucker*, 6 Me. 247; *Peters v. Peirce*, 8 Mass. 398; *Vose v. How*, 13 Met. (Mass.) 243. But compare *Strang v. Ferguson*, 14 Johns. (N. Y.) 161; *Young v. Shook*, 4 Rawle (Pa.) 299.

Doctrine at Common Law.—In *Morrison v. Buchanan*, 32 Vt. 289, the court, by Redfield, C. J., said: "It is obvious, we think, from the early English cases, that at common law the arbitrator had no power over the costs of the reference unless it was expressly given in the submission. *Bussfield v. Bussfield*, Cro. Jac. 577. The reason assigned in the cases is that

it was matter subsequent to the submission, and could not therefore fairly be regarded as submitted by implication; but the power to award the costs of an action which have already accrued seems to be implied from the submission of the action, or from the submission of all controversies. *Roe v. Doe*, 2 T. R. 644, 2 Pet. Abr. 254."

The distinction here noted between the costs of the arbitration and the costs of the cause is brought out by Shaw, C. J., in *Vose v. How*, 13 Met. (Mass.) 243. The learned Chief Justice, after suggesting that the rule prevailing in some of the states that the power to award costs of arbitration is incidental, perhaps arose from a disregard of the distinction, discussed the cases as follows: "The case of *Roe v. Doe*, 2 T. R. 644, is sometimes cited to support the general proposition that an arbitrator may award costs without any express authority. And the marginal note and perhaps the report itself, being very brief, countenance that proposition. But this case is commonly cited to mark the distinction between the authority of the arbitrator over the costs of the cause, and the costs of the arbitration. *Candler v. Fuller*, Willes 62, and the note on page 64 of Mr. Durnford, one of the reporters of *Roe v. Doe* (2 T. R. 644), citing that case. This was the authority relied on in the early case in New York of *Strang v. Ferguson*, 14 Johns. (N. Y.) 161. The decision in *Alling v. Munson*, 2 Conn. 691, was not by a unanimous opinion, and was founded mainly on the ancient usage in the State of Connecticut. Such also is the usage in New Hampshire. *Spofford v. Spofford*, 10 N. H. 254. Notwithstanding the weight of these authorities, this court are disposed to abide by the rule, as they believe it has been judicially settled in this commonwealth that without special authority, arbitrators under an agreement *in pais*, where no cause is pending, have no power to award costs of arbitration."

3. *Gordon v. Tucker*, 6 Me. 247; *Walker v. Merrill*, 13 Me. 173; *Porter v. Buckfield Branch R. Co.*, 32 Me. 539; *Hanson v. Webber*, 40 Me. 194; *Peters v. Peirce*, 8 Mass. 398; *Vose v. How*, 13 Met. (Mass.) 243; *Maynard v. Frederick*, 7 Cush. (Mass.) 247; *Shirley v. Shattuck*, 4 Cush. (Mass.) 470; *Bond v. Fay*, 1 Allen (Mass.) 212; *Harrington v. Brown*, 9 Allen (Mass.) 579; *Warner v. Collins*, 135 Mass. 26; *Dundon v. Starin*, 19 Wis. 261. See *Den v. Exton*, 4 N. J. L. 197.

Massachusetts Statute.—The Massachusetts Gen. Stat., c. 147, § 11, authorizes the arbitrator to award compensation for his own services and the costs of the court, but it does not confer power upon him to award that the defendant shall pay the "lawyer's expenses" to

View that Power to Award Costs Is Incidental to Submission.—But the weight of authority is to the effect that the power of awarding the costs of arbitration is necessarily incidental to the authority conferred on the arbitrators, though not mentioned in the submission.¹

Costs Fixed by the Parties.—If the parties to the arbitration by agreement fix upon the rule which is to govern the question of costs, the arbitrators are precluded from making any order on the subject, and an order made by them under such circumstances is void.²

Submission under Statute.—When the submission is under statute, the arbitrator's power over costs of course depends upon the provisions of the statute,³

which the plaintiff has been subjected. But an error of this kind does not render the whole award void. The erroneous part may be rejected as surplusage. *Warner v. Collins*, 135 Mass. 26.

1. *California*.—*Dudley v. Thomas*, 23 Cal. 365.

Connecticut.—*Alling v. Munson*, 2 Conn. 594. See *Holcomb v. Tiffany*, 38 Conn. 271.

Delaware.—*Stewart v. Grier*, 7 Houst. (Del.) 378.

Georgia.—*Wade v. Powell*, 31 Ga. 1.

Indiana.—*Dickerson v. Tyner*, 4 Blackf. (Ind.) 253.

Missouri.—*McClure v. Shroyer*, 13 Mo. 104.

New Hampshire.—*Joy v. Simpson*, 2 N.H. 179; *Brown v. Mathes*, 5 N.H. 229; *Spofford v. Spofford*, 10 N.H. 254; *Chase v. Strain*, 15 N.H. 535; *Chapin v. Boody*, 25 N.H. 285; *Andrews v. Foster*, 42 N.H. 376.

New York.—*New York Lumber, etc., Co. v. Schnieder*, 119 N.Y. 475; *Strang v. Ferguson*, 14 Johns. (N.Y.) 161; *Cox v. Jagger*, 2 Cow. (N.Y.) 638, 14 Am. Dec. 522; *Nichols v. Rensselaer County Mut. Ins. Co.*, 22 Wend. (N.Y.) 125. But see *Matter of Vanderveer*, 4 Den. (N.Y.) 249; *Akely v. Akely*, 17 How. Pr. (N.Y. Supreme Ct.) 21.

North Carolina.—*Hoover v. Neighbors*, 64 N. Car. 429; *Oakley v. Anderson*, 93 N. Car. 108.

Pennsylvania.—*Young v. Shook*, 4 Rawle (Pa.) 302; *Hewitt v. Furman*, 16 S. & R. (Pa.) 135; *Lewis v. England*, 4 Binn. (Pa.) 5; *McLaughlin v. Scott*, 1 Binn. (Pa.) 61. But see *Buckley v. Ellmaker*, 13 S. & R. (Pa.) 78.

Vermont.—*Hawley v. Hodge*, 7 Vt. 237; *Bowman v. Downer*, 28 Vt. 532; *Burnell v. Everson*, 50 Vt. 449.

See also *Clement v. Comstock*, 2 Mich. 359.

Costs Awarded in Excess of Authority.—Where arbitrators in excess of their authority have awarded costs, the award is not necessarily vitiated. The portion relative to the costs may be stricken out, and the rest of the award sustained. *Porter v. Buckfield Branch R. Co.*, 32 Me. 539; *Hanson v. Webber*, 40 Me. 194; *Day v. Hooper*, 51 Me. 178; *Maynard v. Frederick*, 7 Cush. (Mass.) 247; *Warner v. Collins*, 135 Mass. 26; *Clement v. Comstock*, 2 Mich. 359; *Matter of Vanderveer*, 4 Den. (N.Y.) 249.

Award Silent as to Costs.—It has been held in *New Hampshire* that the arbitrator is not alone empowered to award the costs, but that it is his duty to do so, and that if the award is silent as to them, the party in whose favor

the award is made cannot recover his costs. *Chapin v. Boody*, 25 N.H. 285; *Brown v. Mathes*, 5 N.H. 229. See *Rixford v. Nye*, 20 Vt. 132.

But in *Pennsylvania*, in case the award is silent as to costs, they will be given to the winning party. *Harvey v. Snow*, 1 Yeates (Pa.) 156.

And a similar ruling has been made in *Massachusetts*. *Woolson v. Boston, etc., R. Corp.*, 103 Mass. 580.

Not Specifying Amount of Costs.—An award will not be set aside because the arbitrator failed to specify the amount of the costs. *Billington v. Sprague*, 22 Me. 34.

Failure to Tax Costs.—Although an arbitrator may be bound to tax the costs, yet the award will not be set aside for his failure to do so. The remainder of the award will be sustained, if the party who is entitled to the costs waives his claim to them. *Rixford v. Nye*, 20 Vt. 132.

2. *Cones v. Vanosdol*, 4 Ind. 248.

Authority to Award Costs Includes Costs of Arbitration.—At one time it was contended that an authority to award on the subject of costs did not include costs of arbitration, but only costs of court. *Bradley v. Tunston*, 1 B. & P. 34. Afterwards it was held to include the costs of reference. *Wood v. O'Kelly*, 9 East 436. See *Vose v. How*, 13 Met. (Mass.) 243.

Agreement that Costs shall Abide the Event.—Where a submission contained a stipulation that "costs shall be awarded to the parties who may succeed in said action, meaning to include all manner of action and actions, cause or causes of action," and the subject-matter of the submission was several different causes of action brought by two persons against each other, and the award was made in favor of one of the parties for some of the causes of action, and in favor of the other for others, it was held that the costs and the arbitrators' fees should be apportioned according to the amount that should be borne by each suit and so divided between the parties. *Morrison v. Buchanan*, 32 Vt. 289. In the same case, *Redfield, J.*, said that the power to award costs, and especially the costs of the arbitrator, is quite too important a power to be implied as an incident of the submission.

3. Where the law says that costs shall not be given, referees have no power whatever to award them. *Lewis v. England*, 4 Binn. (Pa.) 5. See *Kyd on Awards* 88.

Massachusetts.—Arbitrators appointed under a rule of court have power to hear and

and the arbitrator's authority to deal with the question of costs may be implied, although not expressly given.¹

Submission of Cause Pending.—If the submission is in or of a suit pending, the arbitrators may award the costs of the suit.²

(2) *Whether Costs Follow Award.*—The rule is that the costs can be recovered by the successful party when the award is silent in regard to them.³

award concerning costs so far as such costs are authorized by law, and to include therein the costs of reference, but not an attorney's fee at the hearing before them. *Jones v. Carter*, 8 Allen (Mass.) 431. See *Bacon v. Crandon*, 15 Pick. (Mass.) 79; *Buckland v. Conway*, 16 Mass. 396; *Woolson v. Boston*, etc., R. Corp., 103 Mass. 580; *Harden v. Harden*, 11 Gray (Mass.) 435.

Upon a submission under the provisions of the Massachusetts Rev. Stat., c. 114, if no provision concerning the costs is made in the agreement the arbitrators have no authority to award the costs of the arbitration proceedings. *Vose v. How*, 13 Met. (Mass.) 243; *Shirley v. Shattuck*, 4 Cush. (Mass.) 470.

Under this chapter of the Massachusetts Rev. Stat., the question of costs upon a submission to arbitration is exclusively within the jurisdiction of the court in which the proceeding is pending, and no exception lies to the exercise of such discretion. *Bond v. Fay*, 1 Allen (Mass.) 212.

Massachusetts Pub. Stat., c. 128, § 11 (Gen. Stat., c. 147, § 11) give the arbitrator express power to deal with the question of costs where there is no provision in respect thereto in the submission. See *Warner v. Collins*, 135 Mass. 26.

New York.—Where a statutory submission makes no provision for costs, an arbitrator has no power in New York to award that one party shall pay the costs and expenses of the other. He may award that one party shall pay the arbitrator's fees and expenses, and where he omits to make mention of the expenses the prevailing party, it seems, may tax them on entering judgment. *Matter of Vanderveer*, 4 Den. (N. Y.) 249.

Pennsylvania.—It is lawful for parties who submit a cause for arbitration under the Pennsylvania Compulsory Arbitration Act, to make by agreement fees for services performed, or expenses incurred in the case, taxable costs, although they may not be made so by statute. *Schneider v. New York*, etc., Gas, etc., Co., 98 Pa. St. 470.

Under this act, an assignee in bankruptcy may appeal from an award of arbitrators about the payment of costs, the adverse party having taken out the rule of reference. *Morss v. Gritmann*, 10 Phila. (Pa.) 573.

As to costs on appeal, see *Walbridge v. Barhite*, 7 Pa. Co. Ct. Rep. 353; *Lentz v. Stroh*, 6 S. & R. (Pa.) 34; *Holdship v. Alexander*, 13 S. & R. (Pa.) 230; *Penrose v. Pawling*, 8 W. & S. (Pa.) 379; *Muntorf v. Muntorf*, 2 Rawle (Pa.) 180. See also *Wright v. Smith*, 19 Vt. 110.

1. *Nelson v. Andrews*, 2 Mass. 164.

Award Intra Vires Binds Court.—Where the arbitrator makes an award as to costs, which is *intra vires*, it is binding upon the court.

Nelson v. Andrews, 2 Mass. 164. See *Miller v. Fisk*, 47 Ga. 270.

2. *Austin v. Snow*, 2 Dall. (U. S.) 157; *Vose v. How*, 13 Met. (Mass.) 243; *Nelson v. Andrews*, 2 Mass. 164; *Bacon v. Crandon*, 15 Pick. (Mass.) 79; *Jones v. Carter*, 8 Allen (Mass.) 431; *Brown v. Mathes*, 5 N. H. 229; *Joy v. Simpson*, 2 N. H. 179; *School Dist. No. 3 v. Aldrich*, 13 N. H. 140; *Chapin v. Boody*, 25 N. H. 285.

In *Chase v. Strain*, 15 N. H. 535, the question submitted was the value of certain work, "the subject of a suit now pending." The court held that the arbitrators might award the costs of the arbitration, but not the costs at suit, as the latter were "a substantial and distinct matter in no way involved in the question of the value of the work done."

Judgment for Plaintiff, Costs for Defendant.—The arbitrators may make their award in favor of the plaintiff, but award the costs to the defendant. *Ratliff v. Mann*, 5 Iowa 423; *Landreth v. Bass*, 12 Iowa 606; *Bacon v. Crandon*, 15 Pick. (Mass.) 79; *Whitney v. Cook*, 5 Mass. 139; *Tallman v. Tallman*, 5 Cush. (Mass.) 32; *Van Alstyne v. Wimple*, 4 Cow. (N. Y.) 547.

Court will Not Decide Mere Question of Costs.

—Where the parties to an action withdrew it from the court by mutual consent before hearing, for the purpose of settlement by arbitrators and upon certain agreed terms, one of which was that "the question of costs in the chancery suits being original cross-suits should be submitted to the chancellor," it was held that the court would not decide the mere question of costs, but would leave each party to pay his own costs. *Eastburn v. Kirk*, 2 Johns. Ch. (N. Y.) 317.

3. *Hamilton v. Wort*, 7 Blackf. (Ind.) 348; *Woolson v. Boston*, etc., R. Corp., 103 Mass. 580; *Anonymous*, 2 N. J. L. 213; *Harralson v. Pleasants*, Phil. (N. Car.) 365; *Arrington v. Battle*, 1 Law Repos. (N. Car.) 109, 2 Murph. (N. Car.) 246. See also *Cornogg v. Abraham*, 1 Yeates (Pa.) 252; *Guier v. M'Faden*, 2 Binn. (Pa.) 587; *Stuart v. Harkins*, 3 Binn. (Pa.) 321; *Lewis v. England*, 4 Binn. (Pa.) 5; *Spear v. Jamieson*, 2 S. & R. (Pa.) 530; *Bazire v. Barry*, 3 S. & R. (Pa.) 461; *Gower v. Clayton*, 6 S. & R. (Pa.) 85; *Wilkinson v. Grey*, 14 S. & R. (Pa.) 345; *Bellas v. Levy*, 2 Rawle (Pa.) 21; *Lindenburger v. Unruh*, 1 Browne (Pa.) 194; *Heath v. Atkinson*, 1 Browne (Pa.) 231; *Moffet v. Dorsey*, 2 Browne (Pa.) 24; *Coupland v. Anderson*, 2 Call (Va.) 106.

When Costs Follow Award.—In *Delaware* an award carries costs, consequently a judgment on an award exceeding five dollars and thirty-three cents, "and each party to pay his own costs," is bad in that state. *Bennum v. Dodd*, 3 Harr. (Del.) 7.

In *Den v. Exton*, 4 N. J. L. 197, it was held

(3) *Form of the Award*—*Award of Gross Sum*.—Where an arbitrator has power to award as to the costs, he need not specify the items; a gross sum is sufficient.¹

Award of Costs Simply in Suit Pending.—Where there is a suit pending, an award of costs simply, without naming any sum, is sufficient, but such an award, where no suit is pending, would be void for uncertainty.²

8. Duration of the Arbitrator's Authority—*a. WHERE TIME LIMITED BY THE SUBMISSION*.—The authority of the arbitrator begins at the time the agreement to submit is entered into.³ When the submission specifies a time within which the award must be made, the arbitrator's authority ceases at the end of the time so limited.⁴

that where the referees do not award damages or costs, each party must pay his own costs up to the time that the rule of reference was agreed upon, and after that the costs must be taxed, and the party against whom the decision was made must pay one-half.

It has been held that costs do not follow the award unless the agreement to submit contains an express provision to that effect, or unless it was an ordinary action or reference under the statute, or an arbitration under an agreement expressly authorizing costs. *Akely v. Akely*, 17 How. Pr. (N. Y. Supreme Ct.) 21.

1. Gross Sum as Costs.—*Tallman v. Tallman*, 5 Cush. (Mass.) 325; *Thoreau v. Pallies*, 5 Allen (Mass.) 354; *Hewitt v. Furman*, 16 S. & R. (Pa.) 135; *Whitney v. Cook*, 5 Mass. 139.

In such cases, a gross sum is awarded; the amount must be certain, although in case of uncertainty the court will try to ascertain the intention of the arbitrators from the award, and decide accordingly. *Hewitt v. Furman*, 16 S. & R. (Pa.) 135.

In *Woolson v. Boston, etc., R. Corp.*, 103 Mass. 580, it was held that a referee appointed by the court might award a gross sum which he may intend shall cover damages and costs.

2. Hewitt v. Furman, 16 S. & R. (Pa.) 135. See *Buckland v. Conway*, 16 Mass. 396; *Hartnell v. Hill*, *Forrest* 73.

When Award of Costs Uncertain.—Sometimes an award as to costs, defective on the ground of an uncertain direction as to the costs, will be sustained, where what is uncertain may be rendered certain by a reasonable presumption. See *Whitney v. Cook*, 5 Mass. 139.

In *School Dist. No. 3 v. Aldrich*, 13 N. H. 139, it was held that where the arbitrators awarded costs without stating the amount or without setting out the manner in which such amount is to be ascertained, that part of their award was void for uncertainty; and a declaration by one of the arbitrators in the presence of the others, made after their award had been made and published, the costs followed the award, was held not to be an award of costs.

In *Jacobs v. Moffatt*, 3 Blackf. (Ind.) 395, it was held that in *Indiana* an award as to the costs should distinctly show whether it applies to the costs in the Circuit Court, and the arbitrators should set out the costs of the witnesses examined before them and also the sum due to them for their own services. See *Cones v. Vanosdol*, 4 Ind. 248; *Moore v. Heald*, 7 Mass. 467; *Stickles v. Arnold*, 1 Gray

(Mass.) 418; *Hamilton v. Wort*, 7 Blackf. (Ind.) 348.

A direction in an award regarding costs, to pay "the taxable costs of the witnesses," was held to be sufficiently certain. *Nichols v. Rensselaer County Mut. Ins. Co.*, 22 Wend. (N. Y.) 125.

3. Russell on Awards (6th ed.) 138; *Anonymous*, *Latch* 14.

Parties must All Sign before Authority Begins.—Where there are several parties to a submission, and the accession of all is the consideration of each to enter into the agreement, the authority of the arbitrator does not begin until all have executed it. *Antram v. Chace*, 15 East 209.

Conditions Precedent.—Where there are any conditions precedent to the arbitrator's entering upon his authority he ought to see that he complies with them. *Spence v. Eastern Counties R. Co.*, 7 Dowl. 697.

The jurisdiction of a referee on a boat race does not attach until the conditions upon which the start is to be made are first complied with. *Sadler v. Smith*, 39 L. J. Q. B. 17, L. R. 5 Q. B. 40.

4. Where Time within Which Award is to be Made is Specified.—*Keller v. Sutrick*, 22 Cal. 471; *Hall v. Hall*, 3 Conn. 308; *Buntain v. Curtis*, 27 Ill. 374; *McClure v. Shroyer*, 13 Mo. 104; *Robinson v. O'Conner*, 12 Neb. 405; *White v. Kemble*, 3 N. J. L. 53; *Brower v. Kingsley*, 1 Johns. Cas. (N. Y.) 334; *Thieselin v. Rossett*, 3 Abb. Pr. N. S. (N. Y.) 54; *Smith v. Spencer*, 1 McCord Eq. (S. Car.) 92; *White v. Puryear*, 10 Yerg. (Tenn.) 441; *Rixford v. Nye*, 20 Vt. 132. See *Ryan v. Dougherty*, 30 Cal. 219; *Mott v. Anthony*, 5 Mass. 489; *Southworth v. Bradford*, 5 Mass. 524; *Brown v. Copp*, 5 N. H. 223; *Lee v. Dolan*, 39 N. J. Eq. 193.

Day for Award Fixed in Submission.—Where in the submission a day is fixed for making the award, and the time is not extended by consent of the parties, the award to be valid must be made before or on the day fixed. So where, by an agreement for the valuation of crops between an outgoing and an incoming tenant, it was provided that the valuation should be made immediately, but should be revised and examined by the valuers on the 1st of August then next, and the valuers made a valuation forthwith, and on the second day of August reexamined the crop and reduced the price previously settled, it was held that the time was of the essence of the

Consent or Waiver of Terms of Submission as to Time.—The time within which the arbitrator may act may be extended by the consent of the parties,¹ or they waive by their acts a strict compliance with the terms of the submission.²

contract, and that as the revision was not made on the first day of August, it was inoperative. *Marshall v. Powell*, 9 Q. B. 779, 58 E. C. L. 779.

But in *Shaw v. Pearce*, 4 Binn. (Pa.) 485, where the referees were required by the rule of the court to return their report to the then "next term," it was held that they might return it to any subsequent term, or to an adjourned court as part of a term. See *Cumberland v. North Yarmouth*, 4 Me. 459.

Periodical Limits.—Where an arbitrator was appointed to make a periodical assessment of damages, caused by the working of a mine, at the expiration of two months from a stated day, the limitation of time is mandatory, not directory, and he must make the assessment within a reasonable time after the two months have expired. *Stephens v. Lowe*, 9 Bing. 32, 23 E. C. L. 254.

Oral Submission.—Where the submission has been made by oral agreement, the arbitrators may make an award before the time expires, which is limited in the submission for the making and publication of their award, and before it is delivered to the parties, if the parties alter the terms of the submission and enlarge the power of the arbitrators, which it is competent for them to do. *Eveleth v. Chase*, 17 Mass. 458.

Under English Statutes.—For duration of the arbitrator's authority under the 8 & 9 Vict., c. 16, § 831, and 22 & 23 Vict., c. 59, §§ 17, 22, 23, in *England*, see those acts, and *Skerratt v. North Staffordshire R. Co.*, 17 L. J. Ch. 161; *Evans v. Lancashire, etc., R. Co.*, 1 El. & Bl. 754, 72 E. C. L. 754; *Caledonian R. Co. v. Lockhart*, 3 Macq. 808.

Where, by the provisions of an English local inclosure act, the award should be made within six years, this was held to be directory merely, and an award made nineteen years after the passing of the act was sustained. *Doe v. Mostyn*, 12 C. B. 268, 74 E. C. L. 268.

Meaning of Terms Used in Limitations of Time.—In the construction of a submission which limits the time, the word "within" is inclusive of the last day. *In re Higham v. Jessop*, 9 Dowl. 203.

When the submission is dated September 1st, and provides that the award shall be rendered within thirty days, an award rendered on the first day of October is within its terms. *Chapman v. Ewing*, 78 Ala. 403.

So the word "until" may be construed as either inclusive or exclusive, and as the maxim *ut magis res valeat quam pereat* should be applied, the arbitrator will have the whole of the day so referred to, to make his award. *Kerr v. Jeston*, 1 Dowl. N. S. 538; *Knox v. Simmonds*, 3 Bro. C. C. 358; *Dakin v. Wagner*, 3 Dowl. 535; *Rex v. Stevens*, 5 East 244. See *Withers v. Drew*, Cro. Eliz. 676.

Where the limitation of time is made simply in months, it means lunar, not calendar, months. *In re Swinford and Horn*, 6 M. & S. 226.

1. Parties may Extend Time.—The parties to the submission may either expressly or by implication extend the time for making the award. Consent to such extension is implied when the parties, after the time has elapsed, proceed with the arbitration without objecting. *Hall v. Hall*, 3 Conn. 308; *Buntain v. Curtis*, 27 Ill. 374; *Eveleth v. Chase*, 17 Mass. 458; *White v. Kemble*, 3 N. J. L. 53; *Bloomer v. Sherman*, 5 Paige (N. Y.) 575; *Smith v. Spencer*, 1 McCord Eq. (S. Car.) 92; *White v. Puryear*, 10 Yerg. (Tenn.) 441; *Mathews v. Miller*, 25 W. Va. 817.

See *supra*, this title, *The Submission—Amending or Altering the Submission—Extending the Time for Making the Award.*

Any Additional Report or Award made by referees, after their report is filed, will be disregarded, unless made by permission of the court. *Stevens v. Pearson*, 5 Vt. 503.

Time Extended by Consent—Notice of Rendering Award.—Where the time within which the award may be made is extended upon the application of one of the parties to the submission, he is not entitled, in the absence of an express stipulation to that effect, to notice of the time when the award is rendered after the extended time has once elapsed. *Scruggs v. Bibb*, 33 Ala. 481.

New York Statute.—In *Bloomer v. Sherman*, 5 Paige (N. Y.) 575, 2 Edw. Ch. (N. Y.) 452, it was held that the time for making an award under the New York Revised Statutes may be extended by an agreement not under seal, and that an award made within such extended time will be as binding as if it had been made within the time originally specified in the conditions of the bond. But an action will not lie upon the bond itself if the award is not made within the time specified in the condition of such bond. See *Trist v. De Cabezas*, 2 Robt. (N. Y.) 708; *Owen v. Boerum*, 23 Barb. (N. Y.) 187, as to the effect of new statutes upon pending submission, to which it was held they do not apply, but to future ones only.

Implied Limitation of Time.—In *People v. Townsend*, 5 How. Pr. (N. Y. Supreme Ct.) 315, where the submission did not expressly fix the time for a new award, but stipulated that the party against whom the award should be made should pay the other the amount awarded by a certain day, it was held that such agreement implied a limitation on the arbitrators' power, and that their subsequent proceeding without a written enlargement of the time was not in conformity with the submission.

2. Waiver of Irregularity as to Time.—Where the submission requires that the award should be made within a specified time, and both parties, long after the time so limited has expired, appear before the arbitrators and argue the case, they thereby waive any objection to the award on the ground that it was not made within the time specified. *Mathews v. Miller*, 25 W. Va. 817.

b. WHERE THE SUBMISSION DOES NOT LIMIT THE TIME.—Where the submission is silent as to the time within which the award shall be made, the authority of the arbitrator will endure indefinitely, unless it be revoked.¹

Arbitrator cannot Set Limit to His Own Authority.—Where no time is limited by the submission for the making of the award, the arbitrator himself has no power to fix a limit for making the award, so as to render an award made after that time void, unless express power to do so is conferred upon him by the submission.²

c. HIS AUTHORITY IS ENDED BY MAKING THE AWARD.—As soon as the award is made, the authority of the arbitrator, having once been completely exercised according to the terms of the reference, is at an end.

1. *Salter v. Yates*, 5 Dowl. 291, 2 M. & W. 67; *Curtis v. Potts*, 3 M. & S. 145; *Macdougall v. Robertson*, 2 Y. & J. 11; *Saunders v. Heaton*, 12 Ind. 20; *Small v. Thurlow*, 37 Me. 504; *Rogers v. Tatum*, 25 N. J. L. 281; *Nichols v. Rensselaer County Mut. Ins. Co.*, 22 Wend. (N. Y.) 125; *White v. Puryear*, 10 Yerg. (Tenn.) 441; *Harrington v. Rich*, 6 Vt. 666.

No Time Limited—Power Indefinite in Duration.—Where an order of reference in a *lis pendens* designates no time for the return of the report, it may continue in force for an indefinite time. *Harding v. Wallace*, 8 B. Mon. (Ky.) 536; *Tyson v. Robinson*, 3 Ired. (N. Car.) 333; *White v. Puryear*, 10 Yerg. (Tenn.) 441.

Even where the penalty bond stipulated that the penalty should be paid three months after date, the submission itself being silent as to the time of making the award, it was held that the bond did not limit the power of the arbitrator to that time. *Armstrong v. Robinson*, 5 Gill & J. (Md.) 412.

In *England*, in a reference of a cause at nisi prius, an arbitrator is not limited in making his award to the time within which the jury process is returnable, although he is practically a substitute for the jury, and his duties are merely to certify for whom and for what amount of damages the verdict is to be entered. *Salter v. Yates*, 5 Dowl. 291, 2 M. & W. 67. See *Tomes v. Hawkes*, 10 Ad. & El. 32, 37 E. C. L. 28.

Failure to Act in Reasonable Time—Remedy Therefor.—Where the arbitrator in such a case does not proceed to make his award within a reasonable time, the parties may request him to do so, and if he refuses it is a sufficient ground for the revocation of his authority. *Harding v. Wallace*, 8 B. Mon. (Ky.) 536; *Tyson v. Robinson*, 3 Ired. (N. Car.) 333; *White v. Puryear*, 10 Yerg. (Tenn.) 441. See *Rogers v. Tatum*, 25 N. J. L. 281. See also *supra*, this title, *The Submission—Revoking the Submission*.

If the delay of the arbitrator is unreasonable, the court will grant a rule to show cause why an attachment should not issue against him. *Stafford v. Heskett*, 1 Ward 71; *Brower v. Kingsley*, 1 Johns. Cas. (N. Y.) 334.

Revocation Necessary to Terminate Authority.—It has been held that a revocation is essential; that the arbitrator's authority does not terminate because an unreasonable time has elapsed without a positive revocation. Where an action of debt was brought upon an award made under a submission which was silent as to the time within which such

award was to be made, a plea that the arbitrator did not make the award within a reasonable time was overruled. *Curtis v. Potts*, 3 M. & S. 145.

Where a dispute has been referred to arbitrators, and they have the power of adding another to their number, the matter referred to them cannot be withdrawn from their jurisdiction on a refusal to make the award, unless they have refused to appoint the other referee, or have been requested to do so. *Small v. Thurlow*, 37 Me. 504.

In *Harrington v. Rich*, 6 Vt. 666, it was held that the power of the arbitrators is not determined by a neglect on their part to attend at the time and place appointed for holding the arbitration; but that they may arrange for another hearing within a reasonable time, unless they are prevented by the terms of the submission, or by an express revocation of their powers.

Three Months' Limit—England.—In *England* a three months' limit is prescribed by statute in certain cases where the submission is silent as to the time. See 17 & 18 Vict., c. 125, § 15 (Common Law Procedure Act 1854); *Watson v. Bennett*, 29 L. J. Exch. 357, 5 H. & N. 831.

It has been held that the act applies to all submissions, whether by agreement between the parties or compulsory under the act, which can be made a rule of court. *Lord v. Lee*, 9 B. & S. 269, L. R. 3 Q. B. 404; *Morris v. Morris*, 6 El. & Bl. 383, 25 L. J. Q. B. 261; *Lord v. Copper Miners Co.*, 1 Kay & J. 90, 24 L. J. Ch. 145.

The three months' limit within which the award must be made does not begin to run until the arbitrators have begun to consider the case judicially. *Baker v. Stephens*, 8 B. & S. 438.

Rule in Scotland.—In *Scotland*, when the day within which the award is to be made is not specified, but a blank space is left in the submission, it is said that the authority of the arbitrator is limited to a year from the date of the last subscription of any of the parties to the reference. *Taylor v. Grieve*, Fac. Coll. Nov. 25, 1800, cited in *Johnston v. Cheape*, 5 Dow. Parl. 256.

But a submission of the kind in *England* would be construed to give a general authority to make the award without limit of time, and would not be rendered invalid by the omission to fill up the blanks. *Macdougall v. Robertson*, 2 Y. & J., note, p. 19. See *Russell on Awards* (6th ed.) 141.

2. *In re Morphet*, 2 D. & L. 967.

Cannot Alter Award in Accordance with Changed Views.—He is not at liberty, after executing the award, to exercise a fresh judgment on the case and alter the award in any particular.¹ If he does so in fact, the alteration will be merely

1. *England*.—Winch *v.* Sanders, Cro. Jac. 584; Brown *v.* Vawser, 4 East 584; Henfree *v.* Bromley, 6 East 309; Irvine *v.* Elton, 8 East 54.

Canada.—Haydon *v.* Dunn, 2 Nova Scotia 256; Helps *v.* Roblin, 6 U. C. C. P. 52; Vanburen *v.* Bull, 19 U. C. Q. B. 633.

United States.—Bayne *v.* Morris, 1 Wall. (U. S.) 97; Talbott *v.* Hartley, 1 Cranch (C. C.) 31.

California.—Porter *v.* Scott, 7 Cal. 312; Dudley *v.* Thomas, 23 Cal. 365.

Illinois.—Smith *v.* Smith, 28 Ill. 56.

Indiana.—Indiana Cent. R. Co. *v.* Bradley, 7 Ind. 49.

Kentucky.—Lansdale *v.* Kendall, 4 Dana (Ky.) 613; Cleveland *v.* Dixon, 4 J. J. Marsh. (Ky.) 226; Fitzgerald *v.* Fitzgerald, Hard. (Ky.) 235; French *v.* Moseley, 1 Litt. (Ky.) 248.

Maine.—Boggs *v.* Whale, 59 Me. 228; Woodbury *v.* Northy, 3 Me. 85, 14 Am. Dec. 214; Thompson *v.* Mitchell, 35 Me. 281.

Massachusetts.—Clark *v.* Burt, 4 Cush. (Mass.) 396; Bigelow *v.* Maynard, 4 Cush. (Mass.) 317; Ward *v.* Gould, 5 Pick. (Mass.) 291.

New Hampshire.—Aldrich *v.* Jessiman, 8 N. H. 516.

New York.—Herbst *v.* Hagenauers, 137 N. Y. 290; Eddy *v.* London Assur. Corp., 65 Hun (N. Y.) 307; Flannery *v.* Sahagian, 134 N. Y. 85; Fallon *v.* Kelehar, 16 Hun (N. Y.) 266; Duke *v.* James, 4 N. Y. 568; New York *v.* Butler, 1 Barb. (N. Y.) 325.

North Carolina.—Patton *v.* Baird, 7 Ired. Eq. (N. Car.) 255.

Pennsylvania.—Clement *v.* Rohrabach, 15 Pa. St. 116.

Tennessee.—Butler *v.* Boyles, 10 Humph. (Tenn.) 155, 51 Am. Dec. 697.

Vermont.—Goodell *v.* Raymond, 27 Vt. 241.

West Virginia.—Rogers *v.* Corrothers, 26 W. Va. 246.

Compare Hazeltine *v.* Smith, 3 Vt. 535.

When Arbitrators' Authority Determined.—The authority of the arbitrators is determined when an award in pursuance of the submission and final in its character has been made by them, and completed by their signatures, and when it is published to the parties, and ready for delivery. Pollard *v.* Lumpkin, 6 Gratt. (Va.) 398, 52 Am. Dec. 128.

In French *v.* Moseley, 1 Litt. (Ky.) 247, it was held that the powers of the arbitrators are not finally determined until the award has been as a fact returned to the court. The fact that the award has been made out and agreed to by the arbitrators, does not put an end to their authority. See Fitzgerald *v.* Fitzgerald, Hard. (Ky.) 235.

And where arbitrators, after signing, sealing, and publishing the award, but before delivery, reconsidered it upon the objection of one of the parties interested, and reduced the amount, and again signed, sealed, and delivered it, it was held that the latter award

was the true one. Byars *v.* Thompson, 12 Leigh (Va.) 550, 37 Am. Dec. 680.

The power of an arbitrator is not terminated by the delivery to the parties of an informal statement of their conclusions. Bodge *v.* Hull, 59 Me. 225.

One Award Exhausts Authority.—One award exhausts the authority of the arbitrators, and they have no more authority to make a second award upon the same subject without the consent of the parties than they would have had to make an award without any submission; and this, although it appears that some of the arbitrators were misled, and did not intend to award as they did. Doke *v.* James, 4 N. Y. 568.

Although the second award is intended by the arbitrators as explanatory of the first, it is invalid. Aldrich *v.* Jessiman, 8 N. H. 516.

After an award has once been made of the damages to property, and has been approved by the person assured, the arbitrators cannot afterwards make an additional award in the absence of an agreement therefor. Eddy *v.* London Assur. Corp., 65 Hun (N. Y.) 307, affirmed 143 N. Y. 311.

Where First Award Set Aside as Void.—Where the award is set aside as void, it does not renew the arbitrator's authority, for, the power having been executed, it cannot be revived. Russell on Awards (6th ed.) 144; De Groot *v.* U. S., 5 Wall. (U. S.) 419; Calvert *v.* Carter, 18 Md. 73; Flannery *v.* Sahagian, 134 N. Y. 85.

But it has been held that a different rule applies where an award made under the provisions of a special statute is void because made in excess of authority, and in such a case the second award is as valid as if the first award had not been made. Great North Western R. Co. *v.* Clarence R. Co., 1 Collyer Cas. in Chan. 507.

Where Submission Directs "One or More" Awards.—Where the submission empowers or directs the arbitrator to make one or more awards, the making of one award will not terminate his authority. It endures until he has made what he intends to be his final and last award within the meaning of the submission. Dowse *v.* Cox, 9 Bing. 20, 11 E. C. L. 12; Stephens *v.* Lowe, 9 Bing. 32, 23 E. C. L. 254; Wrightson *v.* Bywater, 3 M. & W. 199.

Filling Blank and Altering Word in Award.—Where a blank in an award was subsequently filled in, and the word "lot" altered to "gore," the award was set aside. Ryland *v.* King, 12 U. C. C. P. 198.

Delivering Two Awards at Same Time.—In Green *v.* Lundy, 1 N. J. L. 497, where the arbitrators prepared two documents, each purporting to be an award, and delivered them to the parties respectively, but it was afterwards found that they differed materially, the award was held void. Their authority was determined by whichever was made first; but as both were delivered at the same time, it could not be determined

nugatory, and the award, as originally written, will stand good; his act will be like a mere spoliation by a stranger.¹

Cannot Correct Mistakes in Award.—He is so entirely *functus officio* that he cannot even correct a manifest error in the calculation of figures;² or, where the defendant is by the award directed to pay costs, substitute instead the name of the plaintiff, though such amendment be merely to make the expression of his will correspond with his original intention,³ or make a new award identical with the old one except that it contains words giving the plaintiff the costs of the reference, such words having been in the arbitrator's original draft, but omitted by accident from the fair copy which he signed as his first award.⁴

Cannot Refuse to Deliver Award to the Parties.—After an arbitrator's authority is

which was the true award, and, as both should be taken as one transaction, the difference between them rendered them invalid; and it was further held that the arbitrators could not afterwards select between them, as they had already exhausted their powers.

However, in *Schenck v. Voorhees*, 7 N. J. L. 383, where the arbitrators drew up duplicate awards, and an error was made in each in the name of one of the parties, in a certain part of it only, and on reading one of the awards by way of publication the error was detected and corrected, but was not corrected on the other, the court refused to set aside the award, because the intention of the arbitrators was clear, their mistake was evident and could be corrected without introducing parol evidence, and because the publication of the first and corrected instrument "formed a complete execution of the power," thereby terminating their authority, and the delivery of the second instrument was a "superfluous act, and *superflua non nocet*."

Statute Requiring Account to be Annexed to Report.—Where a *Pennsylvania* statute required an account to be annexed to a report of referees, but the account was not filed until the day after the filing of the report, it was held invalid, as both should have been filed together and should have constituted one document. *Clement v. Rohrabach*, 15 Pa. St. 116.

1. Arbitrator cannot Alter Award.—*Brooke v. Mitchell*, 6 M. & W. 473; *Henfree v. Bromley*, 6 East 309; *Anonymous*, Jenk. Rep. 129; *Trew v. Burton*, 1 Cromp. & M. 533. See *Schenck v. Voorhees*, 7 N. J. L. 383.

If an award has once been made and delivered, the arbitrators can in no way alter it, even to correct mistakes. But where a certificate in regard to the case has been attached to an award, it will be treated as surplusage, and will not have the effect to render the award void. *Dudley v. Thomas*, 23 Cal. 365; *Lansdale v. Kendall*, 4 Dana (Ky.) 613; *Aldrich v. Jessiman*, 8 N. H. 516; *Woodbury v. Northy*, 3 Me. 85, 14 Am. Dec. 214.

In *Fargo v. Reighard*, 13 Ind. App. 39, it was held that although arbitrators cannot change a defective award, once it is made, without a resubmission, yet where the submission gives them authority to ascertain and state a person's interest in a land contract, which does not amount to an ownership of it, a statement made by them that the property is of a certain value does not amount to an award, and they are at liberty to amend it

by making a further statement specifying the value of the person's interest in such contract.

2. Errors in Award cannot be Corrected.—*Irvine v. Elnon*, 8 East 54. See *Ward v. Dean*, 3 B. & Ad. 234, 23 E. C. L. 59; *In re Hall and Hinds*, 2 M. & G. 847, 40 E. C. L. 656; *Woodbury v. Northy*, 3 Me. 85, 14 Am. Dec. 214.

Incomplete Award cannot be Amended.—The arbitrators cannot cure an incomplete award by inserting certain items into it which should have been included when the award was made, and were left out for future consideration; and if it appears upon the face of the award, when it is published, that the arbitrators have not decided all the points submitted to them, their award is void, because it cannot be amended after it is published. *Porter v. Scott*, 7 Cal. 312.

Clerical Errors Held Capable of Correction.—But in *Hazeltine v. Smith*, 3 Vt. 535, it was held that where the referees had made an error in the calculation and discovered it before the sitting of the court to which their report was returnable, they might file a supplemental report correcting the error.

Where the agreement between the parties makes the award of the arbitrator conclusive, the arbitrator may correct any error appearing upon the face of the award after it is made, but he cannot reopen it to go into a general hearing and hear evidence upon the mere statement of the party against whom it was made that supposed errors exist. *Robinson-Rea Mfg. Co. v. Mellon*, 139 Pa. St. 257, 23 Am. St. Rep. 186.

In *Goodell v. Raymond*, 27 Vt. 241, it was held that even after the delivery of the award the arbitrator might insert the word "dollars" in the statement of the amount awarded, where its omission was merely clerical, as it was a correction which did not and could not involve a reconsideration of the merits, as a correction of an error in calculation might. See *McKinstry v. Solomons*, 2 Johns. (N. Y.) 57, 13 Johns. (N. Y.) 27; *Patton v. Baird*, 1 Ired. Eq. (N. Car.) 255; *Eaton v. Eaton*, 8 Ired. Eq. (N. Car.) 102.

3. Ward v. Dean, 3 B. & Ad. 234, 23 E. C. L. 59; *In re Hall and Hinds*, 2 M. & G. 847, 40 E. C. L. 656.

4. Mordue v. Palmer, L. R. 6 Ch. 22. See *Russell on Awards* (6th ed.) 144, from which the above general statement of the law is taken.

ended by the execution of the award, and he becomes *functus officio*, he will not be allowed to destroy its validity and effect by refusing to deliver it to the parties, or either of them.¹

9. The Arbitrator's Right to Remuneration—*a.* RULE IN ENGLAND—No Implied Promise to Remunerate Arbitrator.—It seems to be the rule in England that the appointment of a person as arbitrator does not raise an implied promise to pay him a reasonable fee for his services.²

Express Promise may be Enforced.—But where there is an express promise to pay, he can enforce it by action.³

Whether may Award Compensation to Himself.—An arbitrator is not justified in awarding a definite sum to himself as a compensation for his services,⁴ unless

1. *Thompson v. Mitchell*, 35 Me. 281. See generally, *Brown v. Vawser*, 4 East 584; *Henfree v. Bromley*, 6 East 309; *Irvine v. Elton*, 8 East 54; *Oliver v. Collings*, 11 East 367; *French v. Mosely*, 1 Litt. (Ky.) 247; *Woodbury v. Northy*, 3 Me. 85, 14 Am. Dec. 214; *Aldrich v. Jessiman*, 8 N. H. 516; *Doke v. James*, 4 N. Y. 568; *Patten v. Baird*, 7 Ired. Eq. (N. Car.) 255.

2. **Whether Promise Implied to Remunerate Arbitrator.**—Russell on Awards (6th ed.) 493; *Viramy v. Warne*, 4 Esp. 47; *Swinford v. Burn*, Gow. N. P. 5. But there are conflicting views held upon the question. See *Burroughes v. Clarke*, 1 Dowl. 48; *In re Coombs and Fernley*, 4 Exch. 839.

His remuneration is said to be in the nature of an honorarium as in the case of a barrister, a matter in the option of his employers which cannot be enforced by action. *Veitch v. Russell*, 3 Q. B. 928, 43 E. C. L. 1041.

In General, Parties Pay Arbitrator Equally.—Where, however, the parties agree to submit to an arbitrator, and there is no arrangement in the submission and no direction in the award itself as to his fees, it is generally understood that they will be paid by the parties equally. So that if one party pays the arbitrator the full amount of his fees in order to obtain the award, he may recover half the amount as paid from the other party. *Marsack v. Webber*, 6 H. & N. 1.

3. **Express Promise to Pay Fees.**—*Hoggins v. Gordon*, 3 Q. B. 466, 43 E. C. L. 822; *Hardress v. Prowd*, Sty. 465.

Where the submission contained a clause that the costs of the reference and award, including a reasonable compensation to the arbitrators, should be in their discretion, it was held to be evidence of a joint promise to pay them for their trouble; but that they could not sue upon the submission itself, as they were not parties to it. *Bates v. Townley*, 2 Exch. 152.

Enforcement of Right to Fees.—In *Hicks v. Richardson*, 1 B. & P. 93, *Eyre, C. J.*, expressed the opinion that the court will give the arbitrator a remedy for his fees by attachment against the party or parties whom the award directs to pay them, because the party is bound by the rule of court to obey the award, and, as a consequence, is bound to pay the costs of the award according to its directions.

But in *Burroughes v. Clarke*, 1 Dowl. 48, *Taunton, J.*, expressed his disapproval of this

opinion; and where all the costs had been paid to two of the arbitrators, he refused to grant the third a rule to compel the parties to pay him such a sum as would be found on taxation to be due him as compensation for his services, saying that as the whole costs had already been paid according to the direction of the award, his remedy, if any, was against the other arbitrators who had received the amount.

Where the arbitrators awarded a certain sum as due on account of their costs, and directed the amount to be paid to strangers, the court refused to grant a rule calling upon the parties to pay such sums, saying that the arbitrators cannot have judgment for their costs. *In re Laing and Todd*, 13 C. B. 276, 76 E. C. L. 276.

Counsel Employed by Arbitrator.—Where the arbitrator employs counsel to assist, he may award the expenses as costs of the award. *Threlfall v. Fanshawe*, 19 L. J. Q. B. 334. But they will not be allowed by the court when the charge for his own expenses are very high. *Galloway v. Keyworth*, 15 C. B. 229, 80 E. C. L. 229.

Special Referees under Judicature Acts.—In *England* the remuneration of special referees, under the Judicature Acts, is determined by the courts. See 36 & 37 Vict., c. 66, § 56.

4. **Awarding Fees to Himself.**—*Secombe v. Babb*, 6 M. & W. 129; *Danbuz v. Rickman*, 4 Dowl. 129; *Kendrick v. Davies*, 5 Dowl. 693. Nor can he award a definite sum to be paid into his own hands, including an indefinite sum as remuneration for himself. *Robinson v. Henderson*, 6 M. & S. 276.

Arbitrator's Fees should be Taxed with Costs.—The arbitrator will not be allowed to be judge in his own cause, and without control to fix the amount which is to be paid him for his services. The proper course is to direct which party is to pay the costs of the award, without naming a definite sum, and the officer of the court who taxes the costs will examine into the arbitrator's claim, or what the party has to pay on taking up the award, and determine as between the parties what the arbitrator ought to be allowed for his fees and charges. *George v. Lousley*, 8 East 13; *Miller v. Robe*, 3 Taunt. 461; *Fitzgerald v. Graves*, 5 Taunt. 341; *Barrett v. Parry*, 4 Taunt. 658; *Brazier v. Bryant*, 2 Dowl. 600; *Moore v. Darley*, 1 C. B. 445, 50 E. C. L. 445; *In re Coombs and Fernley*, 4 Exch. 839. See *Smith v. Troup*, 7 C. B. 762, 62 E. C. L. 762; *Threlfall v. Fanshawe*, 19 L. J. Q. B. 334;

he is expressly directed to do so by the submission.¹

Lien for Fees upon Award, etc.—But he has a lien for his reasonable fees upon the award and the submission and upon memoranda or valuations made by himself or by others for his use and guidance, but not upon documents put in as evidence,² and he may refuse to deliver up the award until his fees are paid.³

b. RULE IN THE UNITED STATES—**Right to Fees Generally Upheld.**—In the United States the decisions are not in complete accord as to the arbitrator's right to compensation; it may be said that he is always entitled to a reasonable remuneration for his services;⁴ the question is, how is it to be determined.

Barnes v. Hayward, 1 H. & N. 742; *Sinclair v. Great Eastern R. Co.*, 39 L. J. C. P. 165, 1 L. R. 5 C. P. 139; *Webb v. Wyatt*, 3 Jur. N. S. 496.

Effect of Arbitrator Awarding Himself Fees.—In *Threlfall v. Fanshawe*, 19 L. J. Q. B. 334, where the arbitrator specified the amount of his charges in the award, and ordered the defendant to pay the costs of the award, the order was enforced by attachment; Coleridge, J., holding that it was no valid objection that the arbitrator had named the amount in the award; and that if the party ordered to pay had any objection, he should have objected with reasonable diligence and procured their taxation. See *Fernley v. Branson*, 20 L. J. Q. B. 178.

But in *Parkinson v. Smith*, 30 L. J. Q. B. 178, this opinion was *dissented* from, and the court refused to compel payment under similar circumstances.

The courts will not, unless there is an affidavit that the sum is excessive, recommit an award or set it aside because the amount of the arbitrator's charges have been stated by him in the award. *Rose v. Redfern*, 10 W. R. 91.

See, where the award was sustained in a case in which the arbitrator stated in the award that he had deducted and retained to himself the costs of the award, being his own fees and charges, out of the money he had secured as receiver, although the award did not state what the amount of such fees and charges were, or which party he had charged with them, *Roberts v. Eberhardt*, 3 C. B. N. S. 482, 91 E. C. L. 482, 27 L. J. C. P. 70, *reversed* in Exch. 28 L. J. C. P. 74.

1. Submission Authorizing Award of Fees.—*Morgan v. Smith*, 1 Dowl. N. S. 617; *Barnes v. Hayward*, 1 H. & N. 742; *In re Gillon and Mersey*, etc., Nav. Co., 3 B. & Ad. 493, 23 E. C. L. 128.

2. Arbitrator's Lien on Award.—*Russell on Awards* (6th ed.) 494; *In re Coombs and Fernley*, 4 Exch. 839; *Ponsford v. Swaine*, J. & Han. 433.

3. Need Not Deliver Award until Fees Paid.—*Hicks v. Richardson*, 1 B. & P. 93; *Stokes v. Lewis*, 2 Smith 12; *Smith v. Troup*, 7 C. B. 757, 62 E. C. L. 757.

The above rule has been sanctioned by the courts in *England*, even where the party who takes up the award is not by its directions the person who is to be ultimately liable for the arbitrator's fees, because the party who takes up the award and pays such fees may recover by attachment the costs and fees which the award directs his opponent to pay. *Russell on Awards* (6th ed.) 494.

And an arbitrator or umpire appointed under the Lands Clauses Consol. Act 1845, 36 & 37 Vict., c. 66, § 56, cannot be compelled by mandamus to deliver up his award until his fees are paid, because he has a lien on such award for the amount. *Reg. v. South Devon R. Co.*, 15 Q. B. 1043, 69 E. C. L. 1043.

4. Holcomb v. Tiffany, 38 Conn. 271; *Butman v. Abbot*, 2 Me. 361; *Janes v. Southern Lumber Co.*, 153 Mass. 361; *Jones v. Carter*, 8 Allen (Mass.) 431; *Potter v. Hazard*, 11 Allen (Mass.) 187; *Vose v. How*, 13 Met. (Mass.) 243; *Hinman v. Hapgood*, 1 Den. (N. Y.) 188, 43 Am. Dec. 663; *Adams v. Stevens*, 26 Wend. (N. Y.) 455; *Ott v. Schroepel*, 3 Barb. (N. Y.) 63. *Compare* *South Scituate v. Hanover*, 9 Gray (Mass.) 420.

In *Malone v. Pittsburgh*, 14 Pa. Co. Ct. Rep. 125, it was held that arbitrators who acted under *Pennsylvania* Acts April 8, 1867, and March 28, 1870, were entitled to a reasonable compensation for their services, although there was no statute or ordinance providing for such compensation.

The Pennsylvania Statute provides that the arbitrator is entitled to a certain *per diem* for every day necessarily employed in the case (*Pepper & Lewis Dig. of Pa. Laws*, tit. Arbitration, § 59), and this includes the time of deliberation. *Hassinger v. Diver*, 2 Miles (Pa.) 411.

Arbitrator Whose Services Are Incomplete.—An arbitrator who has rendered some services contemplated by the submission will not necessarily be defeated of all right to compensation by reason of a failure to render all services expected from him, but he will be entitled to a reasonable compensation for all services actually rendered. *Goodall v. Cooley*, 29 N. H. 48.

Two Cases Referred—Compensation for One Only.—Where arbitrators tried two cases identical as to the subject-matter, and where it required no more time to investigate both cases together than it would have required to investigate one, they were held to be entitled to fees as for only one of the cases. *Butcher v. Scott*, 2 Pa. L. J. 287.

In *Girard v. Hutchinson*, 4 S. & R. (Pa.) 81, where two cases between the same parties were referred to the same arbitrators, and the subject-matter of such cases became intermixed, and it was shown that either of them might have been decided in a shorter time than that for which the arbitrators charged, they were allowed pay as if only one case had been submitted to them.

Each Party Liable for Whole Amount.—Each party is liable to the arbitrator for the whole

View that He may Settle His Fees.—It has been held that he may settle his own fees.¹

View that He may Not Award His Own Fees.—On the other hand, it has been decided that he has no power to award himself any fees for his services, unless authority to do so is expressly conferred on him by the submission.²

Where No Agreement, Court Settles Fees.—Where there is no agreement, the amount of compensation is determined by the court.³

amount of his fees, and though they may have entered into an agreement as to who shall pay, the arbitrator is not privy to such agreement or bound by it. *Young v. Starkey*, 1 Cal. 426.

Although the written submission contains a provision for the payment of the arbitrators by the parties equally, an arbitrator is entitled to recover a reasonable value of his services from the party who requested him to act. *Alexander v. Collins*, 2 Ind. App. 176.

Contribution between Parties.—If one party pays the whole amount he has his remedy against the other. Where arbitrators appointed by rule of court, with the consent of the parties, had made their report, but before the final judgment in the suit the original defendant paid them a reasonable compensation, and sued the original plaintiff therefor, in the names of the arbitrators, it was held that he was entitled to contribution. *Russell v. Page*, 147 Mass. 282.

Compensation from Organization.—Until arbitrators are organized, they are not entitled to compensation for their services, unless they are prevented from organizing by the default of both parties or of one of them, or by agreement between the parties attending. *Baker v. Hunter*, 1 Miles (Pa.) 357.

But it has been held that where arbitrators are allowed by statute compensation for each day necessarily employed by them, the right to such compensation covers any meeting which, in the performance of their duties, they are compelled to attend, although it is preliminary to actual organization as a board. *Corcoran v. Hetzel*, 9 Pa. Co. Ct. Rep. 82.

Each Arbitrator must Sue Alone.—Each arbitrator may sue alone for his compensation, and it seems he must do so. *Hinman v. Hapgood*, 1 Den. (N. Y.) 188, 43 Am. Dec. 663.

1. View that Arbitrators are Empowered to Determine Their Fees.—*Wade v. Powell*, 31 Ga. 1. See *Hinman v. Hapgood*, 1 Den. (N. Y.) 188, 43 Am. Dec. 663; *Ott v. Schroepel*, 3 Barb. (N. Y.) 63; *Devlin v. New York*, 54 How. Pr. (N. Y. C. Pl.) 68; *Burnell v. Everson*, 50 Vt. 449.

Although power is not conferred in express terms upon arbitrators to charge the fees and expenses of the arbitration by a submission to arbitration, yet the submission vests that power in them as incident to their authority. *New York Lumber, etc., Co. v. Schnieder*, 119 N. Y. 475.

May Retain Award till Fees Paid.—The arbitrator may retain the award until his fees are paid. *New York Lumber, etc., Co. v. Schnieder*, 119 N. Y. 475. See *Ott v. Schroepel*, 3 Barb. (N. Y.) 56; *Clement v. Comstock*, 2 Mich. 359; *Devlin v. New York*, 54

How. Pr. (N. Y. C. Pl.) 68. See also *supra*, this section, for English authorities to the same effect.

Fees in Excess of Those Provided by Statute—Consent of Parties Necessary.—In *Devlin v. New York*, 54 How. Pr. (N. Y. C. Pl.) 383, *reversing* 54 How. Pr. (N. Y.) 68, it was held that where one counsel refuses to assent to an agreement for the payment of more than the statutory referee's fees, the only course for the referee is to proceed with the reference at the statutory rate of compensation or else refuse to act. If a referee imposes conditions as to fees in excess of those provided by statute, which are assented to by one party but refused by the other, he is disqualified from going on with the reference.

2. Griffin v. Hadley, 8 Jones (N. Car.) 82. See *Stevens v. Brown*, 82 N. Car. 463.

No One ought to Be Judge in His Own Case.—Where arbitrators fix their compensation without the consent of the parties, and such part of the award can be separated from the rest, it will be set aside and the rest sustained. *Stevens v. Brown*, 82 N. Car. 463; *Knight v. Holden*, 104 N. Car. 107; *White v. Connelly*, 105 N. Car. 70; *Freeman v. Person*, 106 N. Car. 251.

An agreement that arbitrators may fix their own compensation is subject to the implied condition that in doing so they shall not charge unreasonably, and that the amount fixed by them is subject to the review of the court. The court may consequently, without action being brought for the purpose, determine whether such amount is reasonable or not upon motion made to confirm the award and exceptions taken to such motion on the ground of excessive charges on the part of the arbitrators. *Kelly v. Lynchburg, etc., R. Co.*, 110 N. Car. 431.

Amount of Fees where Award Void in Part.—In *Giddings v. Hadaway*, 28 Vt. 342, where part of the award was void but part was sustained, it was held that directions in the award as to fees would not be interfered with where it did not appear that the work imposed upon the arbitrators was increased by the consideration of the questions upon which the award was defective.

3. In Absence of Provision, Court Settles Fees.—*Stevens v. Brown*, 82 N. Car. 463; *Griffin v. Hadley*, 8 Jones (N. Car.) 82.

The court is the final judge of the amount to be paid the arbitrator where there is no provision in the submission for costs and expenses, therefore, although *Massachusetts Pub. Stat.*, c. 188, § 11, provides that the arbitrator may make a reasonable compensation for his services in such a case, an indorsement by the arbitrator on the

Arbitrator's Misconduct Prevents Recovery.—Where the arbitrator, by his misconduct, has rendered the award invalid, he cannot recover for his services.¹

10. The Arbitrator as a Witness—*a. GENERAL RULE*—Cannot be Compelled to Testify in Correction or Explanation of Award.—It may be stated as a general principle that the arbitrator's power ends with the award;² once made, it is a complete and final instrument, and no evidence by him, whether by affidavit or otherwise, is admissible to alter, correct, or even explain it;³ nor can he be

envelope transmitting his award, that it shall not be opened until his services are paid for, is void and of no effect. *James v. Southern Lumber Co.*, 153 Mass. 361. See *New York Lumber, etc., Co. v. Schneider*, 15 Daly (N. Y.) 15, 119 N. Y. 475.

Where the compensation of the arbitrators has not been agreed upon, the court has power to determine it, and to cut it down if it is excessive, and this in the absence of formal allegation and proof. *Kelly v. Lynchburg, etc., R. Co.*, 110 N. Car. 431.

1. *Bever v. Brown*, 56 Iowa 565, 41 Am. Rep. 118; *Sanborn v. Murphy*, 50 N. H. 65.

2. *Russell on Awards* (6th ed.) 504. See *supra*, this title, *Duration of the Arbitrator's Authority*.

Should Make Notes of Evidence Taken before Him.—As the arbitrator's evidence in regard to extrinsic matters connected with the submission is sometimes required, he should make notes of the evidence taken by him at the hearing, so as to assist his memory in regard to proceedings before him if any subsequent inquiry should arise, although he cannot be compelled to produce such notes any more than a judge to produce his minutes. *Russell on Awards* (6th ed.) 504; *Scougull v. Campbell*, 1 Chit. Rep. 283, 18 E. C. L. 82. See *Doe v. Preston*, 3 D. & L. 768.

3. *Gordon v. Mitchell*, 3 Moo. 241, 4 E. C. L. 432; *Leggo v. Young*, 16 C. B. 626, 81 E. C. L. 626, 24 L. J. C. P. 200; *Hodge v. Burgess*, 27 L. J. Exch. 318, 3 H. & N. 293; *Holgate v. Killick*, 31 L. J. Exch. 7, 7 H. & N. 418; *Dinn v. Blake*, L. R. 10 C. P. 388; *Pratt v. Hilman*, 4 B. & C. 269, 10 E. C. L. 331; *Toby v. Lovibond*, 17 L. J. C. P. 201; *Kingston v. Kincaid*, 1 Wash. (U. S.) 448; *Alexander v. McNear*, 28 Fed. Rep. 403; *Mulligan v. Perry*, 64 Ga. 567; *Cobb v. Dortch*, 52 Ga. 548; *Ward v. Gould*, 5 Pick. (Mass.) 291; *Aldrich v. Jessiman*, 8 N. H. 516; *Shiver v. Ross*, 1 Brev. (S. Car.) 293. Compare *Kent v. Elstob*, 3 East 18; *Sharman v. Bell*, 5 M. & S. 504; *Holmes v. Higgins*, 1 B. & C. 74, 8 E. C. L. 33; *Huntsman v. Nichols*, 116 Mass. 521.

The Oral Testimony of the Arbitrators themselves cannot be received on motion to enter up the award as the judgment of the court, to show errors or mistakes in their decision. *Chapman v. Ewing*, 78 Ala. 403; *Tucker v. Page*, 69 Ill. 179.

Mere Informal Statements by the Arbitrator cannot be received to explain the purport or effect of the award, although made by the chairman of the arbitrators to the parties at the time the award was published and read to them. *Caldwell v. Dickinson*, 13 Gray (Mass.) 365. See *Clark v. Burt*, 4 Cush. (Mass.) 396.

Evidence of Third Persons as to Arbitrator's Statements.—Nor can the evidence of a third person as to a statement by an arbitrator of the grounds on which he formed his opinion be admitted. The arbitrator must testify himself, where his evidence is admissible; hearsay cannot be introduced. *Hubbell v. Bissell*, 2 Allen (Mass.) 196. See *Strong v. Strong*, 9 Cush. (Mass.) 560.

A witness at the hearing is not admissible to prove that the arbitrators at the hearing mistook his meaning. *Howard v. Salter*, 1 Browne (Pa.) 90.

Testimony of Arbitrator Inadmissible in Construction of Award.—The evidence or affidavit of an arbitrator is inadmissible in construction of an award. *Ward v. Gould*, 5 Pick. (Mass.) 291.

Inadmissible to Show Mistake.—Nor can the evidence of an arbitrator be introduced to show a mistake in the award. *Newland v. Douglass*, 2 Johns. (N. Y.) 62; *Shiver v. Ross*, 1 Brev. (S. Car.) 293. But see *Pulliam v. Pensoneau*, 33 Ill. 375.

Arbitrator's Evidence to Prove Minute Facts of Hearing.—An arbitrator's evidence is inadmissible to prove minute facts of the hearing, as, for example, what evidence was laid before the arbitrators for the purpose of proving how and when a tender was made, and in what kind of money, *Wade v. Gallagher*, 1 Yeates (Pa.) 77; or to prove the particular items of a disputed account, *Bond v. Olden*, 4 Yeates (Pa.) 243; or why discount was rejected, *Shiver v. Ross*, 1 Brev. (S. Car.) 293.

Explanatory Letters Written after Award.—A letter written by an arbitrator to the plaintiff's attorney, stating that it had been his intention that the plaintiff should have all the costs of the witnesses examined before him (where the award actually directed each party to pay half the costs of the reference) was rejected by the court, saying that if the arbitrator had made a mistake they could not rectify it. *Brown v. Nelson*, 13 M. & W. 397.

Where certain previous disputes had been settled by an award, and other matters were referred to a second arbitrator, who wrote to the plaintiff's attorney the day before he made his award for the defendant, stating that he felt himself bound to make an award for the defendant, because the matter had been already determined in his favor in the previous award, and that, although he differed from the other arbitrator, yet he felt himself bound by his award, the court rejected his letter and refused to entertain the question, as the arbitrator had not raised it on the award itself, or on any paper annexed. *Williams v. Jones*, 5 M. & R. 3. See *Leggo v. Young*, 16 C. B. 626, 81 E. C. L. 626, 24 L. J. C. P. 200; *In re Keene v. Atkinson*, Exch. April 16, 1847.

compelled to state the grounds on which he made his award.¹

Evidence Admissible to Sustain, but Not Generally to Impeach, Award.—The rule is that the evidence of an arbitrator is admissible in order to sustain an award, but

But see *Pratt v. Hilman*, 4 B. & C. 269, 10 E. C. L. 331, where the award was set aside on the letter of an arbitrator. See further, *Toby v. Lovibond*, 17 L. J. C. P. 201.

Explanatory Paper with Award.—Where the arbitrator delivered with the award a paper which limited the generality of the award itself in favor of the plaintiff in ejectment to one only of the choses included in the action, the paper was rejected by the court. *Doe v. Cropper*, 10 Ad. & El. 197, 37 E. C. L. 90.

But where such an explanatory paper was made out by the arbitrator, with the consent of the parties, in order to clear up a doubtful point in the award, and the parties expressed their satisfaction after it had been made out, it was held to be a part of the determination, and that "the whole was to be taken together as making one award." *Eveleth v. Chase*, 17 Mass. 458.

Affidavit of Mistake.—In the cases of mistake in the award, the affidavit of the arbitrator is admissible, and in some cases it has been held essential, not in order to correct the award, but in order to set it aside altogether, or to enable or justify the court in sending it back to the arbitrator. See *Knox v. Symmonds*, 1 Ves. Jr. 369; *Anderson v. Darcy*, 18 Ves. Jr. 447; *Earl v. Stocker*, 2 Vern. 251; *Delver v. Barnes*, 1 Taunt. 48; *Payne v. Bailey*, 7 Moore 147; *Morgan v. Mather*, 2 Ves. Jr. 15; *Potter v. Newman*, 4 D. P. C. 504; *Wade v. Huntley*, 2 Tidd Pr. 841; *In re Robson and Railston*, 1 B. & Ad. 723; *Hardy v. Pingrose*, 1 H. & W. 185; *Rogers v. Dallimore*, 6 Taunt. 111; *Ward v. Dean*, 3 B. & Ad. 234, 23 E. C. L. 59; *Anonymous*, 2 Chit. Rep. 44, 18 E. C. L. 244; *Mills v. Bowyers*, 3 Kay & J. 66; *Fuller v. Fenwick*, 3 C. B. 705, 54 E. C. L. 705; *Graham v. Turnbull*, 44 L. J. Ch. 538; *Hodgkinson v. Fernie*, 27 L. J. C. P. 66, 3 C. B. N. S. 189, 91 E. C. L. 189; *In re Hall and Hinds*, 2 M. & G. 847, 40 E. C. L. 656; *Ashton v. Pointer*, 2 D. P. C. 651; *Phillips v. Evans*, 12 M. & W. 309, 13 L. J. Exch. 80; *Hutchinson v. Shepperton*, 13 Q. B. 955, 66 E. C. L. 955; *Whitmore v. Smith*, 31 L. J. Exch. 107, 7 H. & N. 509; *Brown v. Hellaby*, 26 L. J. N. S. Exch. 217, 1 H. & N. 729.

Arbitrator Bound by His Signature.—Once an arbitrator has signed the award, it is conclusive of the fact that he has agreed to it; his evidence is not afterwards admissible to show that it was not unanimous, and therefore void. *Campbell v. Western*, 3 Paige (N. Y.) 124; *Bigelow v. Maynard*, 4 Cush. (Mass.) 317; *Withington v. Warren*, 10 Met. (Mass.) 431.

Where the evidence of one of two arbitrators was offered to prove that in calculating a certain amount some items had been left out, which he intended should be included, it was held that it should be rejected. *Leavitt v. Comer*, 5 Cush. (Mass.) 129. See *Boston Water Power Co. v. Gray*, 6 Met. (Mass.) 131; *Withington v. Warren*, 10 Met. (Mass.) 431; *Phillips v. Evans*, 12 M. & W. 309.

1. Reasons for Decision of Arbitrator.—Although an arbitrator can hardly be said to be privileged in his judicial character, it seems that he cannot be compelled to state the grounds on which he arrived at his decision. In a case in which he was called upon by the defendant to prove such grounds in order to show that he had exceeded his authority, *Mansfield, C. J.*, told the arbitrator that he need not be examined unless he chose, and he refused to testify. On motion for a new trial and cause shown, the decision was not objected to. *Ellis v. Saltan*, cited in 4 C. & P. 327, note, 19 E. C. L. 406, note. See *Johnson v. Durant*, 4 C. & P. 327, 19 E. C. L. 406; *Anonymous*, 3 Atk. 644; *Shelling v. Farmer*, 1 Stra. 646.

But in *Brophy v. Holmes*, 2 Moll. 1, where the plaintiff filed a bill in equity complaining that no allowance had been made him in the award on account of a certain guaranty, the court said that he might have examined each of the arbitrators as to whether they had abstained from considering the guaranty on the ground that it was without the scope of their jurisdiction, or for any other cause, or whether they had as a fact considered it, and *Hort, L. C.*, stated that if the case had come before him originally, he would have directed an inquiry to examine the arbitrators on this single point.

In *Ward v. American Bank*, 7 Met. (Mass.) 486, the court, by *Shaw, C. J.*, said: "Formerly, it is believed, it was not infrequent to call upon referees to testify [to the facts and grounds upon which they had given their judgment, with the purpose of enabling the court to judge of the correctness of their inferences of fact and conclusions of law] with a view to prevent the acceptance of their report. But we think it contrary to the principle on which such references proceed, and opposed by the most recent and satisfactory decisions." See *Kingston v. Kincaid*, 1 Wash. (U. S.) 448; *Fairchild v. Adams*, 11 Cush. (Mass.) 549; *Bigelow v. Maynard*, 4 Cush. (Mass.) 317.

But see *Hale v. Huse*, 10 Gray (Mass.) 99, where the arbitrator was allowed to testify that a certain demand had not been included in his award.

As to Subject-matter of Award.—The court will not allow the arbitrators to be compelled to produce the submission, and to disclose the contents of the award or the grounds on which they arrived at their conclusion when the award has not been taken up by the parties; but they must produce the documents which were adduced in evidence, and which are in their custody, and answer whether either of the parties had requested them to consider certain accounts. *Ponsford v. Swaine*, 1 J. & Hem. 433. See *Wilson v. Hinckley*, 18 L. T. N. S. 695.

So an arbitrator may be examined on a question of fraud, or to prove that he has made his award upon a wrong subject-matter by mistake, or that he has made a mistake in law as to the principle upon which the award

that he cannot be examined as a witness to impeach it,¹ except on the ground of fraud, partiality, or corruption.²

May Be Witness at Hearing before Themselves.—Arbitrators may be witnesses at the hearing of the evidence before themselves.³

b. MAY TESTIFY AS TO THE PROCEEDINGS.—However, where no ground of etiquette interposes,⁴ the arbitrators may testify as to the proceedings in the reference, either to explain irregularities, to rebut charges of misconduct, to show under what special circumstances the meetings were held, or in what manner the award was executed, or what matters were submitted to them, or the like.⁵

is founded. *Rhys v. Dare Valley R. Co.*, 37 L. J. Ch. 719, L. R. 6 Eq. 429.

That Arbitrator did Not Know Reference Final.—In *Huntsman v. Nichols*, 116 Mass. 521, it was held that the testimony of one of the arbitrators under an oral submission, that he had "no idea that the reference was final," was admissible to show that he did not understand that the decision was intended to determine finally the rights of the parties.

Ex Post Facto Statements.—Statements made by the arbitrator after the award is made, as to the grounds upon which the decision was arrived at, are discouraged by the courts and inadmissible. The proper thing to do is to state a case if the parties, or either of them, ask for it during the reference; any statement made afterwards will not be considered. *London Dock Co. v. St. Paul's Shadwell*, 32 L. J. Q. B. 30.

Inquiring by Court as to Particular Facts.—In some cases the court, for its own information, will direct an inquiry to be made of the arbitrator as to particular facts upon which he grounded his award. In such a case, the specific points ought to be answered briefly; the arbitrator ought not to go into a general history of the case. *Morgan v. Mather*, 2 Ves. Jr. 15.

1. *In re Whiteley and Roberts' Arbitration* (1891), 1 Ch. 558; *King v. Jemison*, 33 Ala. 499; *South Carolina R. Co. v. Moore*, 28 Ga. 398, 73 Am. Dec. 778; *Stone v. Atwood*, 28 Ill. 30; *Claycomb v. Butler*, 36 Ill. 100; *Denman v. Bayless*, 22 Ill. 302; *Schmidt v. Glade*, 126 Ill. 485; *Bigelow v. Maynard*, 4 Cush. (Mass.) 317; *Withington v. Warren*, 10 Met. (Mass.) 431; *Doke v. James*, 4 N. Y. 575; *Campbell v. Western*, 3 Paige (N. Y.) 126; *Briggs v. Smith*, 20 Barb. (N. Y.) 418; *French v. New*, 20 Barb. (N. Y.) 481; *Van Cortlandt v. Underhill*, 17 Johns. (N. Y.) 405; *New York v. Butler*, 1 Barb. (N. Y.) 325; *Hill (N. Y.)* 329; *Matter of Williams and Goodrich*, 4 Den. (N. Y.) 194; *Ellmaker v. Buckley*, 16 S. & R. (Pa.) 72.

Purpose to Surrender Award Only on Condition.—The evidence of arbitrators has been held incompetent to prove that the arbitrator did not intend to surrender the award after it had been agreed upon and signed, unless the losing party should consent. *Denman v. Bayless*, 22 Ill. 300.

2. **Fraud, Corruption, or Partiality** are the only grounds upon which an award may be assailed by parol evidence of one of the arbitrators. *King v. Jemison*, 33 Ala. 499; *Strong*

v. Strong, 9 Cush. (Mass.) 560. See *Young v. Leaird*, 30 Ala. 371.

Mistake.—In *Illinois* the evidence of the arbitrator is admissible to impeach his award on the ground of mistake or fraud, although it is inadmissible in other cases; but where there are more arbitrators than one, they must all concur in certifying as to the error. *Pulliam v. Pensoneau*, 33 Ill. 375. See *Spurck v. Crook*, 19 Ill. 415.

3. **Arbitrator Giving Evidence at Hearing.**—*Graham v. Graham*, 9 Pa. St. 254, 49 Am. Dec. 557.

There is a doubt whether in such a case they are bound to testify or not. See *Ellis v. Saltan*, cited in 4 C. & P. 327, note, 19 E. C. L. 406, note.

4. **England—Etiquette as to Barristers.**—In *England*, when a barrister happens to be appointed as the arbitrator, there is an unwritten rule that he should decline to make an affidavit for the purpose either of sustaining or setting aside the award. *Russell on Awards* (6th ed.) 510; *Dobson v. Groves*, 6 Q. B. 637, 51 E. C. L. 637.

When such affidavits have been made, the courts have discountenanced them. *In re Keene v. Atkinson*, Exch. April 16, 1847, cited in *Russell on Awards* (6th ed.) 510.

For the same reason of professional etiquette, he will decline to answer any inquiries put to him by the parties. *Russell on Awards* (6th ed.) 511; *Dobson v. Groves*, 6 Q. B. 637, 51 E. C. L. 637.

5. **Testimony as to Proceedings on Reference.**—*Russell on Awards* (6th ed.) 509.

England.—*Price v. Williams*, 1 Ves. Jr. 365; *Kingwell v. Elliott*, 7 D. P. C. 423; *Cleesly v. Peese*, 8 Moo. 524; *Stalworth v. Inns*, 13 M. & W. 466; *In re Hare*, etc., 6 Bing. N. Cas. 158, 37 E. C. L. 326, 8 D. P. C. 71; *Blundell v. Brettargh*, 17 Ves. Jr. 232; *Alder v. Savill*, 5 Taunt. 454; *In re Hick*, 8 Taunt. 694, 4 E. C. L. 249; *Hawksworth v. Brammall*, 5 Myl. & C. 281.

Georgia.—*Thrasher v. Overby*, 51 Ga. 91. *Massachusetts.*—*Strong v. Strong*, 9 Cush. (Mass.) 560; *Boston Water Power Co. v. Gray*, 6 Met. (Mass.) 131; *Hale v. Huse*, 10 Gray (Mass.) 99.

Missouri.—*Valle v. North Missouri R. Co.*, 37 Mo. 445.

Nebraska.—*Hall v. Vanier*, 6 Neb. 85.

New York.—*National Bank of the Republic v. Darragh*, 30 Hun (N. Y.) 29; *Matter of Williams and Goodrich*, 4 Den. (N. Y.) 194.

North Carolina.—*Williams v. Wood*, 1 Dev. (N. Car.) 82.

c. MAY PROVE ADMISSIONS BY PARTIES AND EXTRINSIC FACTS.—The testimony of an arbitrator may be adduced to prove admissions made by the parties in the course of the proceedings, when they are not made for the purpose of buying peace, because the proceedings before him are hostile and admissions made by the parties are not confidential or made with a view to a compromise.¹ His evidence is also admissible as to extrinsic facts alluded to in the award, in order to make the award intelligible.²

11. Liability of the Arbitrator—*a. LIABILITY FOR MISCONDUCT*—**Want of Skill or Negligence.**—An action does not lie against an arbitrator for want of skill or for negligence in making his award, nor does an action lie against a *quasi*-arbitrator, as an architect, engineer, or valuer, for such a reason.³

Pennsylvania.—*Roop v. Brubacker*, 1 Rawle (Pa.) 304; *Zeigler v. Zeigler*, 2 S. & R. (Pa.) 286.

In *Buckleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418, below L. R. 3 Exch. 306, L. R. 5 Exch. 221, it was held that the arbitrator might be examined as to every matter of fact connected with the proceedings, with reference to the making of the award, so as to put the court in possession of the whole history of the suit up to the time of his making the award, and whether he took matters outside of his jurisdiction into consideration, but that he could not be examined as to the grounds of his decision, nor could his discretionary power to award compensation be inquired into; but this limitation was confined to actions at law where rules of evidence were enforced, but not to a summary application to set aside or refer back an award on the ground of mistake or misconception, because then a written statement or affidavit of the arbitrator as to the reasons upon which he acted might be admitted. See *Turner v. Goulden*, L. R. 9 C. P. 57; *Evans v. Clapp*, 123 Mass. 165, 25 Am. Rep. 52.

To Determine What Matters Submitted.—In determining what questions are concluded by the award, or whether the award is itself binding upon the parties, it often becomes necessary to show by parol evidence what took place before the arbitrator, the claims which were in controversy before him, and the matters which entered into his decision, and the arbitrator is himself a competent witness to establish these facts. *Ravee v. Farmer*, 4 T. R. 146; *Golightly v. Jellicoe*, 4 T. R. 147, note (a); *Trimingham v. Trimingham*, 4 N. & M. 786, 30 E. C. L. 405; *Martin v. Thornton*, 4 Esp. 180; *Stevens v. Gray*, 2 Harr. (Del.) 347; *Allen v. Miles*, 4 Harr. (Del.) 234; *Spurck v. Crook*, 19 Ill. 415; *Woodbury v. Northy*, 3 Me. 85, 14 Am. Dec. 214; *Hale v. Huse*, 10 Gray (Mass.) 99; *Evans v. Clapp*, 123 Mass. 165, 25 Am. Rep. 52; *Briggs v. Smith*, 20 Barb. (N. Y.) 409; *Cole v. Blunt*, 2 Bosw. (N. Y.) 116. See also *York, etc., R. Co. v. Myers*, 18 How. (U. S.) 246; *Matter of Williams and Goodrich*, 4 Den. (N. Y.) 194; *Walker v. Walker*, 1 Winst. (N. Car.) 259.

Parol Submission.—The arbitrator may testify in order to prove that a parol submission was made to him, and that the parties consented to be bound by the award, *Adams v. Bankart*, 1 C. M. & R. 681; or to show the decision under the submission, *Cady v.*

Walker, 62 Mich. 157, 4 Am. St. Rep. 834.

Evidence that Award did Not Express Intention.—Where the arbitrator asserts that the award did not express his intention, the courts will sometimes, upon such evidence, recommit it to him for amendment. *Shaw v. Pit*, W. R. 616, June 14, 1856; *Walton v. Swanage Pier Co.*, 10 W. R. 629. *In re Warner and Powell's Arbitration*, L. R. 3 Eq. 261; *Mills v. Bowyers Co.*, 3 Kay & J. 66; *Lockwood v. Smith*, 10 W. R. 628.

Evidence of Referees.—The testimony of referees may be admitted in order to identify the matters which were submitted to them, and to show that they acted upon them. *Buck v. Spofford*, 35 Me. 526. See the title **REFEREES AND REFERENCES**.

1. Admissions of Parties.—*Russell on Awards* (6th ed.) 507; *Slack v. Buchannan*, 1 Peake N. P. 5; *Doe v. Evans*, 3 C. & P. 219, 14 E. C. L. 278; *Westlake v. Collard*, cited in *Bull. N. P.* 2366; *Gregory v. Howard*, 3 Esp. 113; *Cady v. Walker*, 62 Mich. 157, 4 Am. St. Rep. 834.

The rule was laid down at one time that no admissions made by the parties would be admitted in evidence where the reference was not effective, but Lord Kenyon afterwards admitted that he had carried the rule too far, and stated that evidence of all admissions before an arbitrator should be admitted which the defendant would be obliged to make in equity, and that none should be rejected except such as were made with a view to compromise. *Slack v. Buchannan*, 1 Peake N. P. 5.

Where a master sued his servant for money had and received, and the servant offered to allow a verdict to be entered against himself, provided that his master would produce his books before an arbitrator, and it did not appear from them that the servant had been fully paid, the verdict was taken accordingly, and on the reference the arbitrator found for the servant, who thereupon brought an action against his master for maliciously holding him to bail in the former case; on the trial his counsel called for the books and proposed to examine the arbitrator to prove his case, but the court would not allow him to be examined. *Habershon v. Troby*, 3 Esp. 38. But see *Thompson v. Austen*, 2 D. & R. 358, 16 E. C. L. 94.

2. Morse Arb. and Award 564; *Robertson v. McNeil*, 12 Wend. (N. Y.) 578. See *Adams v. Ringo*, 79 Ky. 211.

3. No Liability for Want of Skill.—*Turner v.*

Partiality or Corruption.—According to the adjudications in the *United States*, an arbitrator is not liable in a civil action for a corrupt and fraudulent award.¹ But there are dicta in several *English* cases to the effect that an arbitrator in such a case is civilly liable.²

b. LIABILITY IN RESPECT OF FEES—Compelling Delivery of Award Held for Fees.—Where an arbitrator attempts to extort an exorbitant fee by refusing to give up his award until such fee is paid, it appears, according to the English decisions, that the courts have no summary jurisdiction to compel him by attachment to deliver up the award,³ nor does it appear that he is liable to an action for so wrongfully withholding it.⁴

Remedy for Excessive Fees Paid.—Neither, after such excessive fee is paid, can the court, by attachment, compel him to refund the excess.⁵ The remedy, in order to recover such excess, is by action against him for money had and received.⁶

Goulden, L. R. 9 C. P. 57; Pappa v. Rose, L. R. 7 C. P. 525; Stevenson v. Watson, 4 C. P. Div. 148; Tharsis Sulphur, etc., Co. v. Loftus, L. R. 8 C. P. 1; Scott v. Liverpool, 3 De G. & J. 334; Ranger v. Great Western R. Co., 5 H. L. Cas. 72; Bever v. Brown, 56 Iowa 565, 41 Am. Rep. 118.

An arbitrator is not liable to a contestant on the ground that an account was improperly included in the award. Phelps v. Dolan, 75 Ill. 90.

1. Jones v. Brown, 54 Iowa 74, 37 Am. Rep. 185; Hoosac Tunnel Dock, etc., Co. v. O'Brien, 137 Mass. 424, 50 Am. Rep. 323.

These cases proceed upon the ground that an arbitrator acts in a judicial or quasi-judicial capacity, and, as a judge is exempt from civil liability for any judgment given by him in the course of the administration of justice (see the title JUDGE), an arbitrator is entitled to a like protection.

2. Wills v. Maccarmick, 2 Wils. 148; Pappa v. Rose, L. R. 7 C. P. 525; Stevenson v. Watson, 4 C. P. Div. 148.

In Morris v. Reynolds, 2 Ld. Raym. 857, where the arbitrators were accused of mismanagement in refusing to hear the defendant's case, the court of Queen's Bench ordered them to attend and be examined, saying that they ought to be punished. But although gross mismanagement was proved on their part, it is not reported that they were subjected to any penalty.

Liable for Refusing to Act.—As a rule, an arbitrator is not a party to the agreement and consequently is not bound to make an award, but when he is a party he becomes liable to an action for refusing to act. Pappa v. Rose, L. R. 7 C. P. 525.

Liable for Appointing Receiver.—Where an arbitrator appoints a receiver to receive debts due a firm in a submission of partnership affairs, he may become personally liable in case the receiver becomes insolvent. Lingood v. Eade, 2 Atk. 501. But see Anonymous, 12 Mod. 560.

Where Mandamus will Lie.—Under certain statutory provisions in *England*, a mandamus will lie to compel the arbitrators to appoint an umpire. See 8 and 9 Vict., c. 16; *In re* Lord, 1 Kay & J. 90, 24 L. J. Ch. 145. Or to compel the arbitrator to assess costs. See 8 and 9 Vict., c. 18; Reg. v. Biram, 17 Q. B. 969, 79 E. C. L. 969.

3. As to Compelling Delivery of Award.—*Dossett v. Gingell*, 2 M. & G. 872, note, 40 E. C. L. 669, note.

In *Musselbrook v. Dunkin*, 9 Bing. 605, 23 E. C. L. 395, where the fee was said to be excessive, the court held that the award was not to be considered published until the arbitrator's fees had been taxed, on the ground that the award could not be held to be ready when it could not be got except by submitting to a wrongful demand.

This decision, so far as the time of publication is concerned, has been *overruled*, and though it assumes that after the taxation the arbitrator can be compelled to deliver up the award, he cannot be so compelled by attachment. See generally, *Macarthur v. Campbell*, 5 B. & Ad. 518, 27 E. C. L. 117; *Brooke v. Mitchell*, 6 M. & W. 473; *Moore v. Darley*, 1 C. B. 445, 50 E. C. L. 445; *Brazier v. Bryant*, 2 D. P. C. 757; *Dossett v. Gingell*, 2 M. & G. 870, 40 E. C. L. 668.

4. It appears that there is no express decision on this point. See *Russell on Awards* (6th ed.) 496.

5. *Dossett v. Gingell*, 2 M. & G. 872, note, 40 E. C. L. 669, note.

As to Refunding Excessive Fees.—In *Brazier v. Bryant*, 2 D. P. C. 757, 3 Moore & S. 844, the court granted a rule *nisi* calling on the arbitrator to refund what was found on taxation to be the excess. They refused to make the rule absolute, on account of lapse of time and the death of the attorney who could have explained the circumstances, but not on account of want of jurisdiction.

But *Dossett v. Gingell*, 2 M. & G. 870, 40 E. C. L. 668, which is a later case, decides that they have no summary jurisdiction.

However, as between party and party, the arbitrator's charges will be taxed on application to the court, and, if found to be excessive, they will be reduced. *Brazier v. Bryant*, 2 D. P. C. 757.

It has been held that the court has no power to compel the arbitrator to submit his charge to taxation by the master, but it will order the fees to be so taxed if the arbitrator consents. *In re* Coombs and Fernley, 4 Exch. 839.

6. Money Had and Received.—*Fernley v. Branson*, 20 L. J. Q. B. 178; *Barnes v. Hayward*, 1 H. & N. 742; *Barnes v. Braithwaite*, 2 H. & N. 569; *Dossett v. Gingell*, 2 M. & G. 872, note, 40 E. C. L. 669, note.

c. **LIABILITY AS A STAKEHOLDER.**—An arbitrator cannot be compelled to deliver up money or a chattel deposited with him as a stakeholder to abide the result of his award.¹

d. **LIABILITY IN EQUITY—For Fraud or Corruption.**—Where an arbitrator guilty of corruption or fraud is made a defendant in a bill brought to set aside the award, he has been held liable for the costs where the bill specifically prayed that relief against him.² But a decree cannot be made against him for

Where an award was set aside for a gross mistake on the part of the arbitrator, it was suggested by Tindal, C. J., that the money expended in taking up the award might be recovered from the arbitrator, the consideration for which it was paid having failed, but the point was not decided, and the judge expressly guarded himself against being supposed to have given a distinct opinion upon it. *In re Hall and Hinds*, 2 M. & G. 847, 40 E. C. L. 656. See *In re Coombs and Fernley*, 4 Exch. 839; Russell on Awards 497.

1. Money or Chattel Deposited with Arbitrator.—Russell on Awards (6th ed.) 498; Taylor v. Marling, 2 M. & G. 55, 40 E. C. L. 258; Gunton v. Nurse, 5 Moo. 259.

In *Tope v. Hockin*, 7 B. & C. 101, 14 E. C. L. 22, where a sum of money was deposited in the arbitrator's hands by a bankrupt with the consent of a creditor, who had made a claim on it, the arbitrator having been appointed to determine the amount of the claim and to pay such amount to the creditor, it was held that the assignees could not recover it all from him, but such part only as remained after he had ascertained the amount due the creditor and had paid it to him; that he was a mere channel of conveyance as to such part, and not personally liable for it.

Where an action is brought for illegally taking or detaining a personal chattel in which the defendant alleges title, and it is agreed that a verdict be taken for the plaintiff with damages the full value of such chattel, subject to a reference to arbitration, and the chattel is deposited with the arbitrator pending the award; and it is further agreed that if he awards for the plaintiff the verdict shall stand as it is, but if for the defendant then a verdict shall be entered for the defendant, and he finds that the chattel belongs to the plaintiff, he should not deliver it to him, but to the defendant after the latter has paid the damages awarded by the verdict; the legal effect of the verdict being that the plaintiff's right to the property is barred by such payment, and the property in the chattel becomes vested in the defendant. *Gunton v. Nurse*, 5 Moo. 259; *Cooper v. Shepherd*, 3 C. B. 266, 54 E. C. L. 266; *Adams v. Broughton*, 2 Stra. 1078, Andr. 18.

But it is only where the verdict gives as damages the full value of the chattel that this rule applies. *Lacon v. Barnard*, Cro. Car. 35; *Holmes v. Wilson*, 10 Ad. & El. 511, note, 37 E. C. L. 164, note.

Where the arbitrator, after such a decision, refuses to deliver up the chattel to the unsuccessful party, an action will not lie against him for an unlawful conversion. *Gunton v. Nurse*, 5 Moo. 259.

2. Liability for Fraud in Equity.—*Lingood v. Croucher*, 2 Atk. 395; *Chicot v. Lequesne*, 2 Ves. 315; *Lonsdale v. Littledale*, 2 Ves. Jr. 451; *Ward v. Periam*, cited in *Chicot v. Lequesne*, 2 Ves. 316; 1 Daniell's Chanc. Pr. 287. See *Scott v. Liverpool*, 25 L. J. Ch. 227.

Requisites of Answer Required from Arbitrators.—When charged with fraud, the arbitrators are bound to answer, showing that they are not guilty of such fraud or corruption. They cannot be allowed to plead their own award to cover their misconduct. *Lingood v. Croucher*, 2 Atk. 395; *Rybolt v. Barrell*, 2 Eden C. C. 131, 1 Daniell's Chanc. Pr. 287.

So where in a bill by a contractor against a railway company and their engineer, the certificates of the engineer being by agreement conclusive as to the amount payable by the company to the contractor, the bill alleged that the amounts mentioned in the certificates were deficient, and alleged fraud on the part of the engineer and the company, and, as evidence of the fraud, stated that certain items were of a specified value, it was held that the engineer could not protect himself by his character as arbitrator and by denying fraud generally, from answering as to the particular items specified. *Padley v. Lincoln Water Works Co.*, 2 M. & G. 68. See *M'Intosh v. Great Western R. Co.*, 2 De G. & S. 758; *Waring v. Manchester, etc., R. Co.*, 7 Hare 482, affirmed 2 Hall & T. 239.

Dismissal of Bill in Arbitrator's Favor.—When the arbitrator on the evidence is entitled to have the bill dismissed against him, he may recover his costs. *Lonsdale v. Littledale*, 2 Ves. Jr. 451; *Hamilton v. Bankin*, 3 De G. & S. 782; *Scott v. Liverpool*, 27 L. J. Ch. 641, 28 L. J. Ch. 230, 3 De G. & J. 334. See *Haigh & Haigh*, 31 L. J. Ch. 420, 1 De G. F. & J. 157.

Need Not Discover Reasons for the Award.—Arbitrators, when made parties to an action to set aside an award, cannot be compelled to state their reasons for making the award. They may plead the award itself in bar of such discovery, although it is defective in point of law. *Padley v. Lincoln Water Works Co.*, 2 M. & G. 68, Anonymous, 3 Atk. 644; *Lingood v. Croucher*, 2 Atk. 395.

Arbitrators Not Necessary Parties to Bill to Set Aside Award for Irregularities.—Where it is sought to set aside an award on account of irregularity on the part of the arbitrators, they need not be made parties, and ought not to be served with notice of motion; and if so served, and they appear, they will be entitled to their costs, if the irregularity on their part is not proved. *Moseley v. Simpson*, L. R. 16 Eq. 226.

any damages or penalty other than the costs.¹

When Interest Necessary to Make Arbitrator Defendant.—Under the old law in *England*, on a bill brought to impeach an award, the plaintiff should show some claim of interest in the defendants in the subject-matter of the suit which would make them liable, and so, if the arbitrator were made a party, he might demur to the whole bill, but not if it charged him with fraud.²

12. The Umpire.—*a.* UMPIRE AND THIRD ARBITRATOR.—An Umpire is a person chosen, either by the parties themselves, or by the arbitrators under the authority of the submission or of some statute,³ to determine alone the

1. *Steward v. East India Co.*, 2 Vern. 380. **Engineer Withholding Certificate.**—An action will lie against an engineer acting as arbitrator for fraudulently withholding his certificate without which the contractor could not recover payment, although no costs were prayed against the engineer. *Scott v. Liverpool*, 25 L. J. Ch. 227.

2. **Arbitrator as Party Defendant.**—*Steward v. East India Co.*, 2 Vern. 380; *Padley v. Lincoln Water Works Co.*, 2 M. & Gord. 68.

Where the award is impeachable for mistake or miscalculation, a bill to have it rectified should be brought against the party in whose favor it was made, not against the arbitrator. *Anonymous*, 3 Atk. 644.

Where an arbitrator accepted the office on condition that no bill in equity should be brought, and the losing party afterwards brought a bill charging corruption and partiality, the arbitrator's name was struck out as a party. *Lingood v. Croucher*, 2 Atk. 395.

But in a later case, where the submission contained a similar proviso, the court refused to give effect to it, where the arbitrator was charged with fraudulently withholding his certificate. *Scott v. Liverpool*, 25 L. J. Ch. 227.

3. **Power of Arbitrators to Appoint Umpire.**—Formerly, unless the submission made express provision for the appointment of an umpire by the arbitrators, they had no authority themselves to appoint him, but in *England*, unless the submission provides otherwise, two arbitrators are now empowered by statute to choose an umpire. *Bos v. Helsham*, L. R. 2 Exch. 72, 4 H. & C. 642; *Collins v. Collins*, 28 L. J. Ch. 184, 26 Beav. 306; *Evans v. Caddish*, 18 W. R. 723; *In re Hopper*, 8 B. & S. 100, L. R. 2 Q. B. 367; *In re Metropolitan Bldg. Act*, 4 Ch. Div. 200; *In re Lord*, 1 Kay & J. 90, 24 L. J. Ch. 145; *In re Anglo-Italian Bank and De Rosaz*, L. R. 2 Q. B. 452, L. R. 4 Q. B. 462; *In re Brazilian Submarine Tel. Co. and Western Tel. Co.*, 42 L. T. 234.

In the *United States* the arbitrators have no inherent power to appoint an umpire; they must be authorized to do so by the submission. If an umpire is appointed by them without express authority to make such appointment, his award will be a mere nullity. *McMahon v. Spinning*, 51 Ind. 187; *Royce v. McCall*, 5 Bush (Ky.) 695; *Daniel v. Daniel*, 6 Dana (Ky.) 98; *Sharp v. Lipsey*, 2 Bailey (S. Car.) 113.

Power to Appoint Proved by Parol.—However, after a written submission is entered into, it may be proved by parol that the parties agreed that the arbitrators might appoint an

umpire; and so it may be proved that a written submission to "the arbitrators now about to act," was intended to confer upon them the power to make such an appointment. *Sharp v. Lipsey*, 2 Bailey (S. Car.) 113.

Power to Appoint Given by Submission.—Where an agreement to submit contained the provision that the claims should "be referred to the final decision and arbitration of arbitrators therein named, and of an umpire, if needful," it was held that the arbitrators thus appointed were authorized to appoint an umpire in case of their disagreement. *Smith v. Morse*, 9 Wall. (U. S.) 76. See *O'Dougherty v. Fretwell*, 11 U. C. Q. B. 65.

Whether Umpire should be Called In when Majority Agree.—Where, upon a reference to four, with power to call in an umpire, an award by the majority being legal, three of the four agreed, the calling in of an umpire afterwards was held to be illegal. *Lockart v. Kidd*, 2 Mill. Const. (S. Car.) 217; *Black v. Pearson*, 1 McCord (S. Car.) 137.

Statutory Provisions.—The *Georgia* Statute 1856, § 2, provides for arbitrations composed of three arbitrators, one chosen by each party and the third by the arbitrators first chosen. It was held, where a controversy not in suit was referred to the arbitrament of two persons with power to them to choose a third as umpire, and two of them made an award without having chosen an umpire, that the award could not be made a judgment of the court under the act. *Halloran v. Bray*, 2 Ga. 422.

But where a statute which regulated the manner of submitting causes to arbitration provided that each party should choose one arbitrator, and that if the two failed to agree they should choose an umpire; and where the terms of the submission provided that each party should choose one arbitrator and they a third, all to sit and act as arbitrators; and the three so selected did sit together, and heard the parties, and made their award, it was held that the difference between the statute and the agreement was immaterial, the objection being to the form merely. *Forshey v. Galveston*, etc., R. Co., 16 Tex. 516. See *Savannah*, etc., R. Co. v. Decker, 94 Ga. 149; *Rigden v. Martin*, 6 Har. & J. (Md.) 403; *Van Cortlandt v. Underhill*, 17 Johns. (N. Y.) 405.

In *Horton v. Pool*, 40 Ala. 629, it was held that an award which states that an umpire chosen by the two arbitrators decided the matter submitted, was not in accordance with the provisions of *Alabama* Code, § 2213, which provides that the majority of the arbitrators chosen by the parties may make an award,

whole subject of dispute when the arbitrators have not been able to agree upon it.¹

although such award was signed by all the arbitrators. See *Tuskaloosa Bridge Co. v. Jemison*, 33 Ala. 476.

1. Definition of Umpire.—"An umpire is a person whom two arbitrators, appointed and duly authorized by parties, select to decide the matter in controversy, concerning which the arbitrators are unable to agree. His province is to determine the issue submitted to the arbitrators, on which they have failed to agree, and to make an award thereon which is his sole award." Bigelow, C. J., in *Haven v. Winnisimmet Co.*, 11 Allen (Mass.) 384, 87 Am. Dec. 723. See *M'Kinstry v. Solomons*, 2 Johns. (N.Y.) 57; *Bates v. Cooke*, 9 B. & C. 407, 17 E. C. L. 407; *In re Salkeld and Slater*, 12 Ad. & El. 767, 40 E. C. L. 189; *Passmore v. Pettit*, 4 Dall. (U. S.) 271.

Construction of Submission.—Where a question in dispute is referred to arbitrators with power to call in a third in case of disagreement, such third person may be deemed to be an umpire, and an award made by two in such case will be valid. But where there is an original delegation of power to third persons for a mere private purpose, all must agree, or the authority has not been pursued. *Hobson v. M'Arthur*, 16 Pet. (U. S.) 182. See *Keans v. Rankin*, 2 Bibb (Ky.) 88.

Umpire Appointed in Submission.—Sometimes an arbitrator is named in the submission, but more usually it provides that he shall be appointed by the arbitrators. Anonymous, *Jenk.* 3d Cent. Cas. 61, p. 129.

Where the submission is to the award of A and B, and D being umpire, the words will be construed liberally to mean that D is to act as umpire in case A and B do not agree. *Comyns Dig., Abr., Arb., F.; Rolle Abr., Arb., 4.*

Whether Umpire or Third Arbitrator.—As distinguished from a third arbitrator, an umpire may properly act alone and make up his decision alone. Where one of the stipulations in an agreement to submit the amount of loss to arbitration, made between an insurance company and an insured person, was that each should appoint an arbitrator, by whom the loss was to be "estimated and appraised in detail, together with a third person to be selected by them, who should act as an umpire to decide between them in matters of difference only, and that the said three persons, or any two of them, should a true return and award make, etc., it was held that the third person was an umpire, and not a third arbitrator, although his decision was not to be binding unless concurred in by one of the arbitrators. *Hartford F. Ins. Co. v. Bonner Mercantile Co.*, 44 Fed. Rep. 151, 56 Fed. Rep. 378.

"Arbitrator" Construed to Mean "Umpire."—So the power of two arbitrators to choose a third person as arbitrator, has been construed to be a power to choose an umpire. *Scudder v. Johnson*, 5 Mo. 551.

Umpire Really Arbitrator.—Where a lease contained a provision that the amount

of rent upon a renewal of the lease, which the tenant was to have upon certain terms, was to be determined by two arbitrators, one chosen by the lessor and the other by the lessee, and, in case of their disagreement, by the two arbitrators together with an umpire appointed by them, it was held that, the arbitrators appointed having failed to agree, the umpire named could not proceed to a determination alone, after the withdrawal of one of the arbitrators, and that his decision so made did not affect the tenant's rights. *Graham v. James*, 7 Robt. (N. Y.) 468.

Umpire Appointed instead of Third Arbitrator.—Where the arbitrators appoint an umpire instead of a third arbitrator, because of a misunderstanding of the provisions of the submission, and one of the parties goes on with the hearing before the umpire without objection, he will not be allowed to impeach the award because of the irregularity. *Graham v. Graham*, 12 Pa. St. 128.

Award need Not Show that Arbitrators could Not Agree.—It is not necessary to set out, in the award of an umpire, that the arbitrators could not agree. *Sprigens v. Nash*, 5 M. & S. 193; *Finney v. Miller*, 1 Bailey (S. Car.) 81.

Umpire Determines the Whole Dispute.—The function of an umpire is to determine the whole dispute, as if he had been originally appointed sole arbitrator.

United States.—*Smith v. Morse*, 9 Wall. (U. S.) 76.

Georgia.—*King v. Cook*, T. U. P. Charl. (Ga.) 286, 4 Am. Dec. 715.

Maryland.—*Rigden v. Martin*, 6 Har. & J. (Md.) 403.

Massachusetts.—*Haven v. Winnisimmet Co.*, 11 Allen (Mass.) 377, 87 Am. Dec. 723.

Missouri.—*Scudder v. Johnson*, 5 Mo. 551.

New York.—*Butler v. New York*, 1 Hill (N. Y.) 489; *Lyon v. Blossom*, 4 Duer (N. Y.) 318.

Pennsylvania.—*Boyer v. Aurand*, 2 Watts (Pa.) 74.

Tennessee.—*Shields v. Renno*, 1 Overt. (Tenn.) 313; *Mullins v. Arnold*, 4 Sneed (Tenn.) 262.

Virginia.—*Rison v. Berry*, 4 Rand. (Va.) 275; *Bassett v. Cunningham*, 9 Gratt. (Va.) 684.

Umpire should Not Act as Arbitrator.—In general, the umpire should act only in case the arbitrators disagree. Therefore, where the submission provides for the choice of an umpire in case the arbitrators disagree, an award, in making which the arbitrators and the umpire act together as if they all were arbitrators, cannot be enforced. *Royse v. McCall*, 5 Bush (Ky.) 695; *Daniel v. Daniel*, 6 Dana (Ky.) 93. See *Traverse v. Beall*, 2 Cranch (C. C.) 113. But the fact that the other arbitrators joined with the umpire in his decision will not render it invalid if it is his judgment notwithstanding, and their concurrence will be regarded as mere surplusage. *Soulsby v. Hodgson*, 1 W. Bl. 463; *King v. Cook*, T. U. P. Charl. (Ga.) 286, 4 Am. Dec. 715; *Byrne*

A Third Arbitrator is merely one more added to those originally chosen, who must act with them through the whole hearing, and decide with them also, or at least as one of a majority, in case the submission, either expressly or by implication, allows the award of a majority to be binding.¹

b. APPOINTMENT OF UMPIRE—(1) *General Rule*—*How Appointed*.—Unless the parties consent to, or acquiesce in, some other mode of appointment, the arbitrators must, by the exercise of their own judgment, concur in the choice of some one person to act as umpire. The appointment must be by choice and not by chance.² However, the parties may, with a full knowledge of all

v. Usry, 85 Ga. 219; *Frissell v. Fickes*, 27 Mo. 557; *Mullins v. Arnold*, 4 Sneed (Tenn.) 262.

Arbitrators need Not Concur.—Where two arbitrators appointed under a rule of court are empowered to choose an umpire, and they disagree and appoint an umpire to determine the whole matter, it is not necessary that they should have been sworn, or that they should concur in the award of the umpire by signing and sealing the same as required by the act of submission. *Scudder v. Johnson*, 5 Mo. 551.

In *Kelderhouse v. Hall*, 116 Ill. 147, it was held that where a submission provides for two arbitrators and an umpire, and is signed by one arbitrator only and the umpire, it is binding upon the parties, on the ground that it was the evident intention of the parties that the award of a majority should be binding. See *Savannah, etc., R. Co. v. Decker*, 94 Ga. 49; *Broadway Ins. Co. v. Doying*, 55 N. J. L. 569; *Batley v. Button*, 13 Johns. (N. Y.) 187; *Doyle v. Patterson*, 84 Va. 800; *Stiringer v. Toy*, 33 W. Va. 86.

When Arbitrators Agreeing in Part should Refer to Umpire Only Points of Difference.—The arbitrators are not justified, under the ordinary provisions which empower them to appoint an umpire, in appointing a person to be an umpire between themselves instead of between the parties. They are bound to decide on all the matters in difference, and if they cannot agree in all, the umpire should determine the whole question. *Tollitt v. Saunders*, 9 Price 612. See *Crabtree v. Green*, 8 Ga. 8.

But in *Finney v. Miller*, 1 Bailey (S. Car.) 81, it was held that the arbitrators may agree as to some out of several questions submitted for their decision, and the umpire may decide as to the remainder. See *Hall v. Lawrence*, 4 T. R. 589; *Blood v. Shine*, 2 Fla. 127.

1. *Gaffy v. Hartford Bridge Co.*, 42 Conn. 143; *Haven v. Winnisimmet Co.*, 11 Allen (Mass.) 377, 87 Am. Dec. 723; *Willis v. Higginbotham*, 61 Miss. 164; *Quay v. Westcott*, 60 Pa. St. 163; *Mullins v. Arnold*, 4 Sneed (Tenn.) 262.

Third Arbitrator Distinguished from Umpire.—The powers and duties of an umpire and those of an arbitrator are widely dissimilar. In *Lyon v. Blossom*, 4 Duer (N. Y.) 318, the court said: "The law is settled that the power to appoint an umpire must be given by express words, and that when the power given to two arbitrators, in the event of their disagreement to select a third person, is expressed in general words, the person so appointed is a joint arbitrator, and not a sole umpire."

Construction of Submission.—Where a third arbitrator is desired, there is usually a provision in the submission that the decision of a majority shall be final, and usually, where a provision exists in the submission that after a third party shall be named a majority award shall be binding, it implies that such third person is to be an arbitrator, to have and to decide with the others, although he may have been called "an umpire." *Mullins v. Arnold*, 4 Sneed (Tenn.) 262. See *Quay v. Westcott*, 60 Pa. St. 163.

Where the third person is an arbitrator, and not an umpire, there must be a decision by at least a majority of the new board. *Haven v. Winnisimmet Co.*, 11 Allen (Mass.) 377, 87 Am. Dec. 723.

In *Gaffy v. Hartford Bridge Co.*, 42 Conn. 143, where a submission to arbitration provided that each party should choose an arbitrator, and, in case they did not agree, the two so chosen to choose a third, and that the parties should be heard before said arbitrators, it was held that the third referee was a joint arbitrator, and not an umpire.

Implication of Validity of Majority Award.—An implication that the award of a majority shall be binding will not arise from an agreement that each party shall select one or two arbitrators who shall select the third or fifth. *Willis v. Higginbotham*, 61 Miss. 164; *Alexander v. Cunningham*, 111 Ill. 511.

Who shall Select Third Arbitrator.—Where, upon the sale of certain goods, it was stipulated that if the parties could not agree upon a value, each should select a merchant to assess the value, and that, if the two so chosen should not agree, a third was to be called in, it was held that in case the two persons so selected could not agree, the third should be selected by them and not by the parties. *Veal v. Willingham*, 80 Ga. 243.

Alteration of Order of Submission So as to Exclude Umpire.—Where parties to an action in open court consented by counsel to submit all differences between them to two arbitrators, and, in case such arbitrators disagreed, then to some one whom they might choose as umpire; and during the trial, before the arbitrators were chosen, an agreement was indorsed by counsel upon the order of submission, adding a third arbitrator and erasing the clause as to an umpire; it was held that an award rendered upon such submission was valid and binding on the parties. *State v. Rawson*, 25 W. Va. 23.

2. *In re Casell*, 9 B. & C. 624, 17 E. C. L. 458; *Harris v. Mitchell*, 2 Vern. 485; *Hewitt v. Penny*, Sayer 99; *Ford v. Jones*, 3 B. & Ad.

the circumstances,¹ consent that the appointment may be made by lot.²

Umpire Refusing to Act—New Appointment.—Where the person chosen refuses or neglects to act, the arbitrators may appoint another; their authority is not exhausted until it is fully executed by the making of an effectual appointment.³

248, 23 E. C. L. 61; *In re Greenwood and Titterington*, 9 Ad. & El. 699, 36 E. C. L. 247; *In re Hodson*, 7 D. P. C. 569; *Enright v. Montauk F. Ins. Co.* (Supreme Ct.), 15 N. Y. Supp. 893; *Crisp v. Love*, 65 N. Car. 126; *Graham v. Graham*, 12 Pa. St. 128.

Selection by Lot.—Where the selection is made by lot, as if the two arbitrators toss up in order to decide which shall nominate the umpire to the exclusion of the other, the appointment will be void. *Harris v. Mitchell*, 2 Vern. 485; *Hewitt v. Penny*, Sayer 99; *Wells v. Cooke*, 2 B. & Ald. 218; *Young v. Miller*, 3 B. & C. 407, 10 E. C. L. 133; *Hart v. Kennedy*, 47 N. J. Eq. 51; *Matter of Grening and Malcom*, 74 Hun (N. Y.) 62; *Bryan v. Jeffreys*, 104 N. Car. 242.

But it has been held that where each arbitrator has nominated a person to whom the other does not object, admitting that he is a proper person for the office, a choice may be made between the two so nominated, by tossing up which shall be appointed, and that the appointment so made will be sustained. *Neale v. Ledger*, 16 East 51; *Hart v. Kennedy*, 47 N. J. Eq. 51.

In the first case cited, Lord Ellenborough said that he saw no objection to a choice so made, and mentioned that the method of selecting jurors is by lot out of those who are fit to serve, and though the decision in *In re Casell*, 9 B. & C. 624, 17 E. C. L. 458, is apparently against it, it has been affirmed in several instances as good law. See *European, etc., Steam Shipping Co. v. Crosskey*, 29 L. J. C. P. 155, 8 C. B. N. S. 397, 98 E. C. L. 397; *Morgan v. Bolt*, 1 N. R. 271; *In re Hopper*, 8 B. & S. 100, L. R. 2 Q. B. 367. See *In re Casell*, 9 B. & C. 624, 17 E. C. L. 458; *In re Greenwood and Titterington*, 9 Ad. & El. 699, 36 E. C. L. 247; *Ford v. Jones*, 3 B. & Ad. 248, 23 E. C. L. 61.

Where two arbitrators tossed up for the choice of an umpire, and the one who won the toss named a person who was objected to by the other arbitrator, whereupon he abandoned his choice and proposed to toss again to see who would choose the other, and the second arbitrator would not agree to this, but contended that he had a right in his turn to choose the umpire, and then chose a person who afterwards acted, the arbitrator who had originally appointed the umpire and who had abandoned his choice having made no objection, the court held that the second appointment was good, being one of choice. *In re Vinnikum and Morgan*, 5 Jur. 72.

Parties must Concur.—Where, by the terms of the submission, the arbitrators may select an umpire, it must appear on the face of the award that the appointment of the umpire was the concurrent act of both arbitrators. *Crisp v. Love*, 65 N. Car. 126.

It will be presumed that one of the arbitra-

tors who dissented from the award consented to the selection of an umpire, where his dissent is based altogether upon other grounds. *Savannah, etc., R. Co. v. Decker*, 94 Ga. 149.

1. Knowledge of Parties Necessary.—*Wells v. Cooke*, 2 B. & Ald. 218.

Where the arbitrators merely inform the parties that they have selected an umpire, without letting them know that the appointment was made by lot, the assent of the parties to his selection gives him no binding authority. *In re Greenwood and Titterington*, 9 Ad. & El. 699, 36 E. C. L. 247.

Where an attorney assented to the choice of an umpire by lot, although he had power to bind his client, but the client was not informed of the fact that the arbitrator who lost the toss had previously personally objected to the umpire when he was originally proposed by the arbitrator who afterwards appointed him, it was held that the client was not bound by the award. *In re Jamieson and Binns*, 4 Ad. & El. 945, 31 E. C. L. 231.

2. Consent to Appointment by Lot.—*Neale v. Ledger*, 16 East 51; *In re Hodson*, 7 D. P. C. 569; *In re Tunno and Bird*, 5 B. & Ad. 188, 27 E. C. L. 107; *James v. Attwood*, 7 Scott 841; *Backhouse v. Taylor*, 20 L. J. Q. B. 233; *Knowlton v. Homer*, 30 Me. 552; *Brush v. Fisher*, 70 Mich. 469, 14 Am. St. Rep. 510; *Graham v. Graham*, 12 Pa. St. 128.

Who may Consent.—Attorneys' clerks have no power to bind the parties by consenting to the selection of an umpire by lot. *In re Hodson v. Drewry*, 7 D. P. C. 569.

But an agent or an attorney who is conducting the reference for a party has authority to bind his principal. *Backhouse v. Taylor*, 20 L. J. Q. B. 233; *Thompson v. Blythe, etc., R. Co.*, B. C. May 6, 1863.

3. Oliver v. Collings, 11 East 367; *Trippet v. Eyre*, 3 Lev. 263, 1 Show. 76, 2 Vent. 113, Palm. 289; *Coppin v. Hurnard*, 2 Saund. 129; *Cloud v. Sledge*, 1 Bailey (S. Car.) 105.

Power of Arbitrators to Make Second Appointment.—In *England* it was once doubted whether the arbitrators could make a second appointment after the first had failed. See *Reynolds v. Gray*, 1 Salk. 70, 1 Ld. Raym. 222, 12 Mod. 120. But this is no longer law, and if the appointment is made conditional upon acceptance of the office, there is no question about their power to appoint another person after the first has refused to act. *Reynolds v. Gray*, 1 Salk. 70. And if their first appointee refuses to act, they may make successive appointments until they have found a party willing to serve. *Cloud v. Sledge*, 1 Bailey (S. Car.) 105.

Effectual Appointment Not Avoided by Parties' Disapproval.—When an effectual appointment of an umpire has been made, it cannot be affected by the disapproval of the parties. *Oliver v. Collings*, 11 East 367.

(2) *Form of Appointment*.—Where the submission provides a special method, it should be closely adhered to, and generally, where the submission is in writing, the appointment ought to be in writing. Unless the submission calls for an appointment before the hearing, it is sufficient if the appointment is embodied in the award, and the arbitrators join in signing it.¹

(3) *When Appointment may be Made*.—When Appointment a Condition Precedent.—Where the appointment of an umpire is made a condition precedent to entering on the reference, the arbitrators should make the appointment before taking any steps in the proceedings, otherwise the award may be void.²

Where the Submission Contains No Special Provision as to time, the umpire may be chosen before the arbitrators enter on the hearing. They need not wait until the time limited for making the award has expired.³

1. *Oliver v. Collings*, 11 East 367; *Lord v. Lord*, 26 L. J. Q. B. 34, 5 El. & Bl. 404, 85 E. C. L. 404; *In re Hopper*, 8 B. & S. 100, 36 L. J. Q. B. 97, L. R. 2 Q. B. 367; *Elmendorf v. Harris*, 23 Wend. (N. Y.) 628, 35 Am. Dec. 587; *Sharp v. Lipsey*, 2 Bailey (S. Car.) 113. See *Rutledge v. Thornton*, 4 Taunt. 704; *Dod v. Herbert*, Sty. 459; *In re Wilts*, etc., R. Co. and Fooks, 3 Exch. 728. And compare *Rison v. Berry*, 4 Rand. (Va.) 275.

Irregularity Cured by Consent.—Any irregularity in the appointment may be cured by the consent of the parties, *Knowlton v. Homer*, 30 Me. 552; even where the appointment was without any authority at all, *Sharp v. Lipsey*, 2 Bailey (S. Car.) 113.

Arbitrators need Not Consult Parties as to Appointment.—When authorized by the submission, the arbitrators may proceed to call in an umpire without consulting the parties about their choice. *Sharp v. Lipsey*, 2 Bailey (S. Car.) 113.

Appointment at Common Law and under Statute.—At the common law an umpire may be appointed by parol. But where the submission is made under a statute, the appointment must be in writing. *Elmendorf v. Harris*, 23 Wend. (N. Y.) 628, 35 Am. Dec. 587.

Where the submission authorized the selection of an umpire in certain contingencies, but did not prescribe the method by which he was to be chosen, his appointment must be in writing as required by *New York Code Civ. Pro.*, § 2367. *Matter of Grening and Malcom*, 74 Hun (N. Y.) 62.

Construction of Submissions as to Appointments.—Where the terms of the submission provide that the third arbitrator shall be appointed by writing indorsed thereon under the hands of the arbitrator named, an award made by them is invalid where the appointment of the third arbitrator is not so indorsed. *Bryce v. Loutit*, 21 Ont. App. 100.

The submission empowered the two arbitrators originally appointed to call in either of two designated persons as umpire. One of these could not act, being absent from the place, and the other would not, whereupon the arbitrators appointed another person to act as umpire—to whom one of the parties had previously expressed an objection—and he made an award. His appointment was held to be *ultra vires*, and the award was set aside. *Ex p. Morris*, 10 New South Wales 248.

Where the submission does not clearly pro-

hibit the appointment of an umpire, it has been held that the arbitrators may appoint one, although it does provide that the award of the arbitrators specifically named and described shall be final. *In re Bailey and Hort*, 9 Vict. L. Rep. 311 (Australia).

Evidence of Umpire's Appointment.—If the award recites that the umpire has been appointed, and is signed by all the arbitrators and the umpire, it is sufficient evidence of his authority; but if it is signed by himself only, it is not sufficient evidence of the appointment. *Elmendorf v. Harris*, 23 Wend. (N. Y.) 628, 35 Am. Dec. 587. See *Knowlton v. Homer*, 30 Me. 552.

In *Rison v. Berry*, 4 Rand. (Va.) 275, it was held that although the award does not state that the umpire has been appointed, it may be proved by extrinsic evidence that the person who signed the award as umpire was in fact appointed.

2. *In re Hick*, 8 Taunt. 694, 4 E. C. L. 249; *Bright v. Durnell*, 4 D. P. C. 756.

English Statutes.—Under the provisions of certain statutes in *England* the arbitrators are required to appoint the umpire before entering on the reference. See *Reg. v. Coleridge*, 45 L. J. Q. B. Div. 649; *Skerratt v. North Staffordshire R. Co.*, 17 L. J. Ch. 161, 12 Jur. 46, 2 Ph. 475; *In re Bradshaw's Arbitration*, 12 Q. B. 562, 64 E. C. L. 562; *Holdsworth v. Wilson*, 4 B. & S. 1, 116 E. C. L. 1, 2 B. & S. 480, 110 E. C. L. 480; *Ringland v. Lowndes*, 15 C. B. N. S. 173, 109 E. C. L. 173, 17 C. B. N. S. 514, 112 E. C. L. 514.

The arbitrators have not, properly speaking, entered upon the reference by merely enlarging the time, so as to render the appointment of the umpire, after such enlargement, a nullity. *Cudliffe v. Walters*, 2 M. & Rob. 232.

3. **Appointment before Disagreement**.—*England*.—*Bates v. Cooke*, 9 B. & C. 407, 17 E. C. L. 407; *Harding v. Watts*, 15 East 556; *Rex v. Outram*, T. 29 Geo. 3, cited in 15 East 557, note (a); *Elliot v. Cheval*, 1 Lutw. 541; *Coppin v. Hurnard*, 2 Saund. 133, note; *Roe v. Doe*, 2 T. R. 644; *Doyley v. Pitslow*, E. 28 G. 2, cited in 15 East 557, note (a); *Cowell v. Waller*, 2 Barn. 154; *Jennings v. Vandeputt*, Cro. Car. 263; *Mitchel v. Harris*, 12 Mod. 512, 1 Salk. 71.

United States.—*Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83; *Lutz v. Linthicum*, 8 Pet. (U. S.) 165.

California.—*Dudley v. Thomas*, 23 Cal. 365.

Submission Limiting Time.—When, by the terms of the submission, the time within which the umpire may make his award extends beyond that limited for the making of the award by the arbitrators, they may appoint the umpire at any time before the time limited for the umpirage has expired, although their own power to award is extinct, because the power of appointing an umpire is independent of, and collateral to, that of making the award.¹

c. POWERS AND DUTIES OF THE UMPIRE.—(1) *General Rule*—**Must Use His Own Judgment.**—The umpire must use his own judgment in making his award. It is not proper for him to consider the opinions of the disagreeing arbitrators, and select the one which he thinks correct. He must consider the evidence of the whole case, and decide according to this only.²

Kentucky.—*Newton v. West*, 3 Metc. (Ky.) 24.

Maryland.—*Rigden v. Martin*, 6 Har. & J. (Md.) 403.

Massachusetts.—*Bigelow v. Maynard*, 4 Cush. (Mass.) 317.

Minnesota.—*Powers Dry Goods Co. v. Imperial F. Ins. Co.*, 48 Minn. 380.

Missouri.—*Frissell v. Fickes*, 27 Mo. 557.

New York.—*Butler v. New York*, 1 Hill (N. Y.) 489, 1 Barb. (N. Y.) 325, 7 Hill (N. Y.) 329; *Matter of Grening and Malcom*, 74 Hun (N. Y.) 62; *Van Cortlandt v. Underhill*, 17 Johns. (N. Y.) 405; *McKinstry v. Solomons*, 2 Johns. (N. Y.) 57, 13 Johns. (N. Y.) 27.

North Carolina.—*Stevens v. Brown*, 82 N. Car. 460.

South Carolina.—*Peck v. Wakely*, 2 McCord (S. Car.) 279.

Vermont.—*Woodrow v. O'Conner*, 28 Vt. 776.

West Virginia.—*Rogers v. Corrothers*, 26 W. Va. 238.

Wisconsin.—*Chandos v. American F. Ins. Co.*, 84 Wis. 184.

If the submission calls for an award on a certain day, and if the arbitrators cannot agree for an award by an umpire at a future day, they can appoint the umpire as soon as they are convinced that they cannot agree. *Richards v. Brockenbrough*, 1 Rand. (Va.) 449.

Under the same stipulations in the submission, the arbitrators may appoint the umpire, even if they have not acted at all, and his award will be valid. *McKinstry v. Solomons*, 2 Johns. (N. Y.) 57, 13 Johns. (N. Y.) 27.

Decisions Contra.—In some of the old cases, it was held that the arbitrators had no power to select the umpire until the time allowed for making the award had expired. See *Reynolds v. Gray*, 1 Salk. 70; *Beck v. Sargent*, 4 Taunt. 232.

Need Not Appear until Disagreement.—Where a submission "authorizes and directs the arbitrators to select an umpire," it means that if there should be a disagreement, the umpire should settle it. But if, under such submission, there is no disagreement, and no umpire is chosen, the award will not be bad because the arbitrators did not choose an umpire. *Rogers v. Corrothers*, 26 W. Va. 238.

In *Adams v. New York Bowery F. Ins. Co.*, 85 Iowa 6, it was held that an omission to appoint an umpire before the arbitrators entered on their duties rendered the award invalid, but in that case the submission varied materially from the terms of the policy under which the submission was made.

Effect of Early Appointment.—The appointment at such an earlier date does not invalidate the award of the arbitrators, if they should come to an agreement before the time expires at which the award was called for, and before the umpire makes his award. *Daniel v. Daniel*, 6 Dana (Ky.) 93. See *Frissell v. Fickes*, 27 Mo. 557; *Enright v. Montauk F. Ins. Co.*, 61 Hun (N. Y.) 625, 40 N. Y. St. Rep. 642.

Under some of the early *English* cases, where there was only one time limited for the award and the umpirage, and the arbitrators were to choose an umpire if they could not agree, it was held that by choosing an umpire they ended their authority, and could not again resume it; and that if they made an award after such appointment, it was null. *Twisleton v. Travers*, 2 Keb. 15; *Dunavan v. Mascall*, 1 Lev. 302; *Fyall v. Varier*, Rolle Ab. Arb., p. 3; *Danes v. Monsay*, Vin. Abr., pp. 18, 97. See *Coppin v. Hurnard*, 2 Saund. 129; *Russell on Awards* (6th ed.) 241, 242.

Umpire may Sit with Arbitrators.—It has been held that the umpire so chosen may sit with the arbitrators and hear the case and consult with them. *Butler v. New York*, 1 Hill (N. Y.) 489; *Matter of Grening and Malcom*, 74 Hun (N. Y.) 62; *Bassett v. Cunningham*, 9 Gratt. (Va.) 684; *Winteringham v. Robertson*, 27 L. J. Exch. 301. But see *Flag Lane Chapel v. Sunderland*, 5 Jur. N. S. 894.

Arbitrators' Irregularities do Not Affect Umpire's Decision.—Where the arbitrators have disagreed, the court will not take into consideration any irregular action on their part upon a motion to set aside the award of the umpire chosen by them. *Crabtree v. Green*, 8 Ga. 8.

1. *Harding v. Watts*, 15 East 556; *Watson v. Clement*, Rolle Abr., Arb., p. 5; *Adams v. Adams*, 2 Mod. 169; *Winteringham v. Robertson*, 27 L. J. Exch. 301; *Barnard v. King*, cited in 2 Keb. 16, Rolle Abr., Arb., p. 6; *Burdet v. Harris*, 3 Keb. 387; *Anonymous*, Freem. 378.

Appointing to Act in the Future.—Where the power of the arbitrators extended to the first of September, and they appointed an umpire in April, stating that his duties should not begin until the first of September following, the appointment was held good. *Johnson v. Collie*, 24 L. J. Q. B. 64.

2. *Tollit v. Saunders*, 9 Price 612; *Haven v. Winnisimmet Co.*, 11 Allen (Mass.) 377, 87 Am. Dec. 723; *Crabtree v. Green*, 8 Ga. 8;

Whether Rehearing De Novo Necessary.—The authorities are not all in accord as to whether the umpire must rehear the case *de novo*. In *England* the rule seems to be that unless the submission provides otherwise, or unless the parties consent to a different course, the umpire must hear the case *de novo*, exercising the same powers and proceeding according to the rules and upon the same principles as the arbitrators originally chosen.¹ In the *United States* some of the authorities hold that the umpire must rehear the case if either party requires him to do so, but if the party does not so require, he loses his right to the rehearing, and the umpire may make his award upon the report of the arbitrators without reëxamining any of the witnesses;² but there are other decisions to the effect that the umpire ought to rehear the case, in the absence of a special provision in the submission or the consent of the parties dispensing with a full hearing.³

Wheaton v. Crane, 27 N. J. Eq. 368; *Finney v. Miller*, 1 Bailey (S. Car.) 81.

The general rule is that he must award upon all the questions submitted as if the arbitrators had disagreed upon them all. His judgment is not bound by theirs. *Rolle Abr.*, Arb. 71; *Wicks v. Cox*, 11 Jur. 542.

1. Russell on Awards (6th ed.) 247; *In re Salkeld and Slater*, 12 Ad. & El. 767, 40 E. C. L. 189; *In re Jenkins*, 1 Dowl. N. S. 276; *Matson v. Trower*, R. & M. 17, 21 E. C. L. 371. But see *Hall v. Lawrence*, 4 T. R. 589.

Waiver by Parties of Right to Rehearing.—The parties, by their conduct, may waive the rehearing, but the waiver must be clearly made out, or the award will be set aside. *In re Salkeld and Slater*, 12 Ad. & El. 767, 40 E. C. L. 189; *In re Jenkins*, 1 Dowl. N. S. 276.

Where one of the parties knew that the case had been submitted to the umpire, and that the arbitrators had furnished him with their notes of the evidence and a statement of the claims of the parties, and that the umpire had said that if he required further information he would call a meeting, the court refused to set his award aside on the ground that it had been made without hearing the evidence, because the party, if he wanted any evidence to be heard, ought to have called upon the umpire to hear it; if he declined, the award might be set aside; but as the party had not requested him to hear any evidence, but had taken his chance of the award, he had waived his right to object to it. *In re Tunno and Bird*, 5 B. & Ad. 488, 27 E. C. L. 107; *Hall v. Lawrence*, 4 T. R. 589.

In Firth v. Howlett, 19 L. J. Q. B. 169, where there was an express agreement that the umpire should be free to make his award on the arbitrators' notes, although he refused to hear evidence which was afterwards offered to him, the court sustained the award.

Arbitrators Joining with Umpire in Award.—In *Tollit v. Saunders*, 9 Price 612, the arbitrators and the umpire joined in the award, and the arbitrators decided some points, but, not being able to agree upon another, referred it to the umpire, who decided it. The award was held bad.

But if the arbitrators, after their authority becomes extinct, join in the umpirage, it will not vitiate the award. *Beck v. Sargent*, 4 Taunt. 232; *Soulsby v. Hodgson*, 3 Burr. 1474; *Anonymous*, Bulst. 184.

In *England* an umpire, acting under the Land Clauses Consolidation Act, must hear the case *de novo*. *In re Hawley and North Staffordshire R. Co.*, 12 Jur. 389, 2 De G. & S. 33.

Usage of Merchants.—But by the usage of merchants in *England*, the arbitrators may make statement of the facts to the umpire as adduced in evidence before them. However, if one, unknown to the other, lays new evidence before the arbitrator, it will invalidate the award. *In re Brook, Delcomyn, and Badart*, 16 C. B. N. S. 403, 111 E. C. L. 403.

Cost of Umpirage.—It was held in *Ellison v. Ackroyd*, 20 L. J. Q. B. 193, that the umpire ought to charge as costs of his umpirage the fees and charges due the two arbitrators.

Where Arbitrators' Award Void.—Should the arbitrators make an award which was clearly void, as in case they should award without hearing the evidence, the courts would possibly hold that the umpire has authority to make an award under such circumstances. See *Reg. v. Grant*, 14 Q. B. 43, 68 E. C. L. 43.

2. *Ranney v. Edwards*, 17 Conn. 309; *Blood v. Shine*, 2 Fla. 127; *Kile v. Chapin*, 9 Ind. 150; *Knowlton v. Homer*, 30 Me. 552; *Graham v. Graham*, 9 Pa. St. 254, 49 Am. Dec. 557. See *Hartford F. Ins. Co. v. Bonner Mercantile Co.*, 56 Fed. Rep. 378; *Gibson v. Broadfoot*, 3 Desaus. (S. Car.) 584.

The umpire may be bound by the terms of the submission to hear all the evidence himself. *Walker v. Charleston*, Bailey Eq. (S. Car.) 443.

3. *Tater v. Jenny*, 1 Sprague (U. S.) 315; *Ingraham v. Whitmore*, 75 Ill. 24; *Daniel v. Daniel*, 6 Dana (Ky.) 93; *Haven v. Winnisimmet Co.*, 11 Allen (Mass.) 377, 87 Am. Dec. 723; *Selby v. Gibson*, 1 Har. & J. (Md.) 362, note; *Day v. Hammond*, 57 N. Y. 479, 15 Am. Rep. 522; *Matter of Grenning and Malcom*, 74 Hun (N. Y.) 62; *Falconer v. Montgomery*, 4 Dall. (Pa.) 232; *Passmore v. Pettit*, 4 Dall. (Pa.) 271. See *Byrne v. Usry*, 85 Ga. 219; *Walker v. Walker*, 28 Ga. 140; *Frissell v. Fickes*, 27 Mo. 557; *Sharp v. Lipsey*, 2 Bailey (S. Car.) 113; *Finney v. Miller*, 1 Bailey (S. Car.) 81.

A Third Arbitrator must hear the evidence. *Wheaton v. Crane*, 27 N. J. Eq. 368.

Parties may Waive Rehearing.—Of course the parties may, by consent, waive the necessity

The Umpire's Decision Final.—The award of the umpire, when properly made, is conclusive.¹

(2) *Must Give Notice of Hearing.*—When a rehearing of the case is had before the umpire, the parties are entitled to notice of the time and place of such rehearing.²

(3) *Umpire must Sign the Award.*—Where the arbitrators disagree and the umpire is called in and makes an award, he must himself sign the award, but it is not necessary for the arbitrators to sign. However, the fact that they do sign will not render the award invalid; their signatures will be rejected as surplusage, or taken as a verification of the recitals in the award.³ It has been

of the umpire's hearing all the evidence. Morse Arb. and Award 241.

In case of waiver, the umpire may use the evidence as received by the arbitrators. *Crabtree v. Green*, 8 Ga. 8; *West Jersey R. Co. v. Thomas*, 21 N. J. Eq. 205; *Day v. Hammond*, 57 N. Y. 479, 15 Am. Rep. 522; *Graham v. Graham*, 12 Pa. St. 128.

1. Conclusiveness of Award.—Where a building contract contained a stipulation that in case of a dispute between the parties thereto in respect to extra work, it should be appraised by two persons, and that if the appraisers disagreed, an umpire should decide between them, it was held that an award made by an umpire chosen under such agreement was conclusive as to the amount due for such extra work, and precluded a recovery for anything beyond the amount fixed by it. *Butler v. New York*, 1 Hill (N. Y.) 489, 1 Barb. (N. Y.) 325, 7 Hill (N. Y.) 329.

Where a covenant in a lease provides for a renewal thereof on a valuation fixed by an umpire, his award, in the absence of corruption or misconduct, is binding on the parties. *Hoffman v. DeGraaf*, 109 N. Y. 638. See *Hartford F. Ins. Co. v. Bonner Mercantile Co.*, 56 Fed. Rep. 378; *Betterton v. Adams*, 13 La. Ann. 334; *Brush v. Fisher*, 70 Mich. 469, 14 Am. St. Rep. 510.

2. England.—*Sharpe v. Bickerdyke*, 3 Dow. 102.

United States.—*Falconer v. Montgomery*, 4 Dall. (U. S.) 233; *Lutz v. Linthicum*, 8 Pet. (U. S.) 165; *Taber v. Jenny*, 1 Sprague (U. S.) 315; *Thornton v. Chapman*, 2 Cranch (C. C.) 244.

Georgia.—*Walker v. Walker*, 28 Ga. 140.

Illinois.—*Ingraham v. Whitmore*, 75 Ill. 24; *Alexander v. Cunningham*, 111 Ill. 511.

Kentucky.—*Daniel v. Daniel*, 6 Dana (Ky.) 93.

Maryland.—*Selby v. Gibson*, 1 Har. & J. (Md.) 362, note.

Massachusetts.—*Haven v. Winnisimmet Co.*, 11 Allen (Mass.) 377, 87 Am. Dec. 723.

Missouri.—*Frissell v. Fickes*, 27 Mo. 557.

New Jersey.—*West Jersey R. Co. v. Thomas*, 23 N. J. Eq. 431, 24 N. J. Eq. 567; *Wheaton v. Crane*, 27 N. J. Eq. 368.

New York.—*Peters v. Newkirk*, 6 Cow. (N. Y.) 103; *Day v. Hammond*, 57 N. Y. 479, 15 Am. Rep. 522; *Elmendorf v. Harris*, 23 Wend. (N. Y.) 628, 35 Am. Dec. 587.

Pennsylvania.—*Passmore v. Pettit*, 4 Dall. (Pa.) 271.

South Carolina.—*Small v. Courtney*, 1 Brev. (S. Car.) 205.

Tennessee.—*Mullins v. Arnold*, 4 Sneed (Tenn.) 262.

See also *Fryer v. King*, 3 Menzies (Cape of Good Hope) 160; *Grornwald v. Smith*, 3 Menzies (Cape of Good Hope) 158; *Wood v. Gilmain*, 3 Menzies (Cape of Good Hope) 159.

Compare Ranney v. Edwards, 17 Conn. 309; *Blood v. Shine*, 2 Fla. 127.

Effect of Failure to Give Notice.—Where the umpire or arbitrators proceed to hear the case *ex parte* without notice to the parties, the award is void. *Elmendorf v. Harris*, 23 Wend. (N. Y.) 628, 35 Am. Dec. 587.

Where an umpire fails to give notice to one party of the time and place of hearing, and the award is made in favor of the other, such failure will be held to amount to fraud as against the party not receiving notice, where, by the terms of the submission, the award is only to be avoided for fraud. *Walker v. Walker*, 28 Ga. 140.

Waiver of Notice.—Where the party against whom the award was given was notified that the papers were in the hands of the umpire to decide the dispute, and was asked by the umpire if he desired him to rehear the case, and replied that he did not desire it but was satisfied that the umpire should decide the matter according to the papers in his hands, it was held that the appointment of the umpire would not be set aside on the ground that such party was not notified of the time and place of making the award, and was thereby denied the right of appearing, adducing evidence, and examining witnesses. *Crabtree v. Green*, 8 Ga. 8.

Where one of the parties, after the appointment of an umpire under a general submission, stated to one of the referees that he did not intend to attend, having been so advised by counsel, and gave the referee a written statement of his claims to be laid before the umpire, which was laid before him, it was held that such party could not allege want of notice of the hearing as a defense to an action on the award. *Graham v. Graham*, 12 Pa. St. 128.

In *McHugh v. Peck*, 29 Tex. 141, it was held that under the *Texas* statutes, where arbitrators disagree and select an umpire, it is not necessary that the clerk should designate the time for the umpire to act under his appointment. See *Hooper v. Brinson*, 2 Tex. 185.

3. Signature of Umpire—England.—*Soulsby v. Hodgson*, 3 Burr. 1474, 1 W. Bl. 463; *Beck v. Sargent*, 4 Taunt. 232.

Georgia.—*King v. Cook*, T. U. P. Charl. (Ga.) 286, 4 Am. Dec. 715.

Illinois.—*McDonald v. Arnout*, 14 Ill. 58.

held, however, that when the arbitrators disagree and call in an umpire, and then adopt his opinion as their own, the umpire need not sign the award.¹

(4) *When Umpire's Authority Begins and Ends.*—**Time Limited for Making Award.**—When there is a time limited for making the award, the umpire's authority begins absolutely from that limit, whether the arbitrators have heard the case or not; the fact that they made no award shows that they did not agree.²

Indiana.—Kile v. Chapin, 9 Ind. 150.

Kentucky.—Tyler v. Webb, 10 B. Mon. (Ky.) 123.

Maryland.—Rigden v. Martin, 6 Har. & J. (Md.) 493.

Mississippi.—Jenkins v. Meagher, 46 Miss. 84.

Missouri.—Frissell v. Fickes, 27 Mo. 557.
New York.—Underhill v. Van Cortlandt, 2 Johns. Ch. (N. Y.) 339, 17 Johns. (N. Y.) 405; Jackson v. Merritt, 11 Abb. Pr. (N. Y. Supreme Ct.) 370.

Pennsylvania.—Boyer v. Aurand, 2 Watts (Pa.) 74.

Tennessee.—Shields v. Renno, 1 Overt. (Tenn.) 313; Powell v. Ford, 4 Lea (Tenn.) 278; Mullins v. Arnold, 4 Sneed (Tenn.) 262.

Virginia.—Rison v. Berry, 4 Rand. (Va.) 275.

See Daniel v. Daniel, 6 Dana (Ky.) 93; New York v. Butler, 1 Barb. (N. Y.) 323.

An award signed by the umpire alone, or by the umpire and one of the arbitrators, is good. Sheffield v. Clark, 73 Ga. 92; Stiringer v. Toy, 33 W. Va. 86.

In Powell v. Ford, 4 Lea (Tenn.) 278, it was held that where an umpire is appointed to decide matters upon which the arbitrators may disagree, but that those questions on which they do agree shall be determined by their own award, it is not necessary that he and the arbitrators should sign one award.

Where the terms of the submission were that the matters in dispute should be decided by A and B, and that if they could not agree "they were empowered to choose an umpire," it was held that an award signed by A and B and the umpire was valid and binding. King v. Cook, T. U. P. Charlt. (Ga.) 286, 4 Am. Dec. 715.

Requisites of Award.—Where an arbitration bond was given containing a condition that the obligor would abide by the award of two persons named, "and a third person to be chosen by them in case they should not agree upon an award," it was held that the award need not state why it was signed by three arbitrators, nor that the third person was appointed in writing, nor that the two arbitrators originally chosen had disagreed before they appointed the third. These facts might be proved by parol. Frye v. Scott, 3 Cranch (C. C.) 294.

In Rison v. Berry, 4 Rand. (Va.) 275, it was held that although the award did not state that the third person who had signed had been selected by the arbitrators as *umpire*, yet such fact might be proved by other evidence. It was held also that the award was good, although such third party was a stranger.

Where the terms of the submission do not

require it, the umpire is not bound to report an account. Graham v. Graham, 12 Pa. St. 128.

1. *In re* Cayley and McMullen, 3 U. C. Q. B. 124.

2. **Where Arbitrators' Time for Making Award is Limited.**—Lumley v. Hutton, Rolle Abr., Arb., p. 1; Com. Dig., Arb., F.; Doddington v. Bailward, 7 D. P. C. 640. See 52 and 53 Vict., c. 49, § 2.

Where there is a time limited within which both the arbitrators and the umpire must make the award, but the time set for the umpire is prolonged beyond that given to the arbitrators, the authority of the umpire will begin before the time limited for the arbitrators making their award has expired, if they disagree; and upon such disagreement he may proceed at once with the reference, and his award will be binding. But if the arbitrators, after their disagreement but before the time limited for their award has expired, resume their authority and make an award, such award is binding, and that made by the umpire becomes a nullity. Smailes v. Wright, 3 M. & S. 559; Sprigens v. Nash, 5 M. & S. 193; Dare v. Chase, 2 Show. 164; Cowell v. Waller, 2 Barn. 154.

Same Time Limited for Umpirage and Award.

—It has been held in some of the early *English* cases that if the submission names the umpire and fixes the same day as the limit for both the award and the umpirage, the appointment of the umpire is altogether void, and that a decision made by him would be a nullity, even if the arbitrators made no award. Other cases are to the effect that, under such circumstances, an award by the umpire might be good, where the arbitrators had disagreed, or where some event, such as the death of one, made it impossible that they could agree. See Russell on Awards (6th ed.) 241; Coppin v. Hurnard, 2 Saund. 129, 1 Lev. 285, T. Raym. 187; Anonymous, 2 Vern. 100; Barber v. Giles, Rolle Abr., Arb., p. 2; Barnard v. King, Vin. Abr., Arb., p. 6; Mitchell v. Harris, 1 Salk. 71.

Whether Umpire can Have Concurrent Jurisdiction.—The umpire has not in any case a concurrent jurisdiction absolutely, but only conditionally, and in some of the cases the courts have apprehended a difficulty in allowing the umpire to have a concurrent jurisdiction with the arbitrators in any case, whether conditionally or otherwise, on the ground of the confusion that might be caused by two awards, and have therefore held the appointment of the umpire void when the same day was limited for the award and the umpirage. Smailes v. Wright, 3 M. & S. 559; Russell on Awards (6th ed.) 241.

Where Arbitrators Award on Part.—Where the arbitrators make an award upon part of

Where No Time is Limited for making the award, the umpire's authority begins when the arbitrators disagree.¹

Time Limited for Umpirage.—Where the submission specifies a day within which the umpire must make his award, his authority expires with the time limited,² unless the time so limited be enlarged.³

Award by Umpire before Arbitrator's Time for Award Expires.—Where an award is made by an umpire before the day appointed for the arbitrators to make their award, this will not render his award invalid.⁴

III. THE AWARD—1. **Defined.**—The judgment of the arbitrators, and also the paper on which it is written, are called an "award."⁵

the matters submitted to them, within the time limited, the umpire cannot decide upon the rest unless he is specially authorized, because, as a rule, his authority springs into existence only in case the arbitrators fail to make an award before a certain day, and then his function is to decide the whole dispute. Rolle Abr., Arb. 7, 8; Year Book 39 Hen. VI. 11.

1. No Time Limited—Authority Begins when Arbitrators Disagree.—Com. Dig., Arb., F.; Winteringham v. Robertson, 27 L. J. Exch. 301.

Before the umpire is justified in interfering on account of the disagreement of the arbitrators, there must be such a difference of opinion between them as renders the making of their award hopeless. Cudliffe v. Walters, 2 M. & Rob. 232. See Doddington v. Bailward, 7 D. P. C. 640; Middleton v. Chambers, Vin. Abr., Arb., p. 17; *In re Tunno and Bird*, 5 B. & Ad. 488, 27 E. C. L. 107.

A disagreement sufficient to call the umpire's authority into existence may arise before all the evidence is heard. *In re Tunno and Bird*, 5 B. & Ad. 488, 27 E. C. L. 107.

Extending Time to Keep Authority Alive.—Where the submission gives both the umpire and the arbitrators power to enlarge the time, and the arbitrators extend their time beyond the day originally limited for the umpire to make his award, the umpire may, within the time limited for himself, extend his own time, although there has been no disagreement between the arbitrators before he makes such extension, and he must so extend his time in order to keep his authority alive. In this way, the umpire's authority may begin before there has been any disagreement between the arbitrators. *Doddington v. Bailward*, 7 D. P. C. 640.

Where, by the terms of the submission, the umpire is to determine those matters only upon which the arbitrators cannot agree, his enlargement of time does not give more time to the arbitrators to make their award on the matters which they did not refer to the umpire. *Lang v. Brown*, House of Lords, May 8, 1855.

The Word "Disagreement" is properly construed to mean nonagreement. *Doddington v. Bailward*, 7 D. P. C. 640; *Middleton v. Chambers*, Vin. Abr., Arb., p. 17.

Umpire Joining Arbitrators before Disagreement.—An award is not vitiated because an umpire joins therein, where the arbitrators have not disagreed. *Ritchie v. Snowball*, 26 New Bruns. 258.

2. *Trew v. Burton*, 1 Crompt. & M. 533; *In re Salkeld and Slater*, 12 Ad. & El. 767, 40 E. C. L. 189.

3. *Bowen v. Williams*, 3 Exch. 93; *Johnson v. Collie*, 24 L. J. Q. B. 64.

In England the Court or Judge can Extend the Time under the provisions of 3 and 4 Will. IV., c. 42, § 39; and as to the English statutory provisions respecting the beginning and termination of the arbitrator's authority, see *Ward v. Great North of England R. Co.*, M. T. 1847; *Skerratt v. North Staffordshire R. Co.*, 17 L. J. Ch. 161, 12 Jur. 46, 2 Ph. 475; *In re Bradshaw's Arbitration*, 12 Q. B. 562, 64 E. C. L. 562; *In re Pullen and Liverpool*, 51 L. J. Q. B. Div. 285; *Ringland v. Lowndes*, 17 C. B. N. S. 514, 112 E. C. L. 514, 33 L. J. C. P. 337; *Kellett v. Local Board of Health*, 34 L. J. Q. B. 87.

4. *Richards v. Brockenbrough*, 1 Rand. (Va.) 449. See *Taylor v. Nicolson*, 1 Hen. & M. (Va.) 67; *Beck v. Sargent*, 4 Taunt. 232; *Elliott v. Cheval*, 1 Lutw. 541; *Jennings v. Vandeputt*, Cro. Car. 263; *Fyall v. Varier*, 1 Rolle Abr., Arb., p. 3; *Twisleton v. Travers*, 1 Lev. 174; *Donovan v. Maschall*, 1 Mod. 274; *Mitchel v. Harris*, 1 Ld. Raym. 671.

5. Definition of Award.—*Bouvier's Inst.*, § 2496.

Award, from the French *à garde*, perhaps because it is imposed on both parties to be observed by them. The judgment given or the determination made by an arbitrator or arbitrators is termed an *award*. Tomlins. Law Dict., tit. Award.

Nature of the Award.—In *Johnson v. Maxey*, 43 Ala. 521, it was said that "an award for the payment of money, like a judgment, is, in a very limited and restricted sense, a contract, and, like a judgment, it contains no promise of the party to pay."

Decisions Held Awards.—In *Pleasants v. Ross*, 1 Wash. (Va.) 156, 1 Am. Dec. 449, after the court of chancery had directed an issue in a civil case, and the parties waived trial by jury and submitted the question before the court to five persons mutually chosen by them, agreeing that their report should be certified in lieu of a verdict, it was held that the court must consider such report as an award of arbitrators, to be governed by the same rules and principles which prevail in the case of awards. See, where the decision of the court itself was held to be an award, *Canadian Pac. R. Co. v. Fleming*, 22 Can. Sup. Ct. 33.

In *Dickinson v. Chesapeake, etc.*, R. Co., 7 W. Va. 390, it was held that where three

2. Formal Requisites of Award—*a. AWARD—HOW MADE—(1) General Rule: Directions of Submission Must be Followed.*—Where the submission directs that certain requisites shall be complied with by the arbitrators in making their award, they must follow such directions strictly, or the award will be invalid.¹

persons were chosen to fix the value of lands, their certificate of valuation was an award, and that they could not be considered otherwise than arbitrators.

In *Chorpenning's Case*, 3 Ct. of Cl. 140, it was held that when an act of Congress requires the postmaster-general "to adjust and settle" a claim for postal services "as shown by the affidavits and proofs on file in the House of Representatives," and where the affidavits and proofs referred to contained no specific statements, but a mass of testimony from which the facts might be deduced as ordinary evidence, so that the duty of the officer required something more than a mere calculation and involved an exercise of judicial discretion, his finding was a final and conclusive award, and could not be corrected or reviewed in the Court of Claims. Where a public officer has been required by Congress to "adjust and settle" a claim, as shown by certain "affidavits and proofs" which involve the exercise of a judicial discretion, his decision is final and conclusive, but it has not been determined by the Court of Claims whether such an adjustment is to be termed the award of an arbitrator, or the decision of a special tribunal clothed with a special jurisdiction. No decision has yet been rendered against the government or any such award. See *Carmick and Ramsey's Case*, 2 Ct. of Cl. 126; *Meade's Case*, 2 Ct. of Cl. 226; *Riley's Case*, 1 Ct. of Cl. 299. *Casey, C. J., dissented, citing Kelly v. Crawford*, 5 Wall. (U. S.) 790.

In *Robbins v. Clark*, 129 Mass. 145, it was held that where a person agrees with another to pay for a certain article if he accomplishes a particular result, the test to be made by a third person, the decision of such third person is in the nature of an award, and evidence is admissible to show that his decision was erroneous.

Decisions Held Not to Be Awards.—Where, under a private act of Congress directing him to examine and report upon a certain claim, a quartermaster-general made a report recommending payment of some of the items of the claim, it was held that this report was not an award because there was no submission, either by the claimant or the government, of their disputed rights, to the final decision of such official. *Nutt v. U. S.*, 23 Ct. of Cl. 68.

Where the return of the arbitrators shows the items appraised, their cost, and the damage done them, and has a footing on each page indicating the cost and damages, but no totals, and where it makes no reference to the value of the goods before the fire, it is a mere invoice and does not amount to an award. *St. Paul F. & M. Ins. Co. v. Gotthelf*, 35 Neb. 351.

An account stated by an auditor of the treasury and approved by the first comptroller, under the provisions of the *United States Rev. Stat.*, § 270, providing for appeals to such

comptroller, which showed a balance due to a mail contractor, was held not to constitute an award. *Mississippi Cent. R. Co. v. U. S.*, 23 Ct. of Cl. 27.

Where by law certain executive officers are authorized to examine certain classes of claims and report upon them, such reports to be submitted to Congress for consideration, the officers do not act as arbitrators, nor even in a quasi-judicial character, but simply as accounting officers, and the final examination of the question investigated by them is with Congress. *Ludington's Case*, 15 Ct. of Cl. 453.

Where a paper drawn up by the arbitrator read: "As a result the arbitrator decides that B. has no claim on S., and that the amount stipulated as being due should be paid by B. to S.," and was signed by him but not acknowledged as required by *New York Code of Civil Procedure*, § 2372, it was held that this document in form and manner was merely an opinion, and not an award upon which a judgment could be entered, and that its delivery to one of the parties would not deprive the arbitrator of authority to make an award in due form afterwards. *Beach v. Sterne*, 67 Hun (N. Y.) 341, affirmed in 143 N. Y. 634.

In *Harris v. Bradshaw*, 18 Johns. (N. Y.) 26, where an action of assumpsit was referred to three persons by consent, who made a report under a rule of court, it was held that the court ought to have given judgment on such report, but that the plaintiff could not treat it as an award and sue on it.

Where a claim against the estate of a deceased person was referred under the statute, but it appeared upon the hearing before the referee that some of the items were not referable, and the parties thereupon entered into an oral agreement that the referee should decide upon those matters, it was held that this agreement on their part did not change the proceedings into an arbitration, so that an action might be maintained upon the referee's report as upon an award. *Hovey v. Hovey*, 46 Hun (N. Y.) 71.

Where arbitrators are empowered by the terms of submission to consider and determine a party's interest in a land contract, which it is conceded does not amount to an ownership of the property, a statement by them of the value of the property is not an award, and consequently they are at liberty to make a further statement as to the value of the party's interest. *Fargo v. Reighard*, 13 Ind. App. 39.

1. Award must Conform to Directions of Submission—*England.*—*Denton v. Legge* (1895), W. N. 46.

Arkansas.—*Lee v. Onstott*, 1 Ark. 206.

Connecticut.—*Gates v. Treat*, 25 Conn. 71; *Waller v. Shannon*, 44 Conn. 480.

Georgia.—*Savannah, etc., R. Co. v. Decker*, 94 Ga. 149.

Indiana.—*Conrad v. Johnson*, 20 Ind. 421.

Verbal Condition.—But an award is not rendered void because of non-compliance with a verbal condition, because that would be to vary and

Kentucky.—McCullough v. Myers, Hard. (Ky.) 206.

Louisiana.—Donovan v. Owen, 10 La. Ann. 463; Penny v. Carl, 10 La. Ann. 202.

Massachusetts.—Day v. Laffin, 6 Met. (Mass.) 280; Bean v. Farnan, 6 Pick. (Mass.) 269; Montague v. Smith, 13 Mass. 396; Caldwell v. Dickinson, 13 Gray (Mass.) 365.

Michigan.—Sawtells v. Howard (Mich. 1895), 62 N. W. Rep. 156.

Mississippi.—Gibson v. Powell, 5 Smed. & M. (Miss.) 712.

Missouri.—Newman v. Labeaume, 9 Mo. 30.

New Hampshire.—Adams v. Adams, 8 N. H. 82; Johnson v. Noble, 13 N. H. 286, 38 Am. Dec. 485; Tudor v. Scovell, 20 N. H. 174.

New York.—New York v. Butler, 1 Barb. (N. Y.) 325; Gidley v. Gidley, 65 N. Y. 169; Bloomer v. Sherman, 2 Edw. Ch. (N. Y.) 452, 5 Paige (N. Y.) 575; Solomons v. M'Kinstry, 13 Johns (N. Y.) 27; Pratt v. Hackett, 6 Johns. (N. Y.) 14; Stanton v. Henry, 11 Johns. (N. Y.) 133; Allen v. Galpin, 9 Barb. (N. Y.) 246; Buck v. Wadsworth, 1 Hill (N. Y.) 321; Efner v. Shaw, 2 Wend. (N. Y.) 567.

North Carolina.—Cheek v. Davidson, 1 Ired. Eq. (N. Car.) 68.

Pennsylvania.—Shoemaker v. Meyer, 4 S. & R. (Pa.) 452; Fobes v. Backus, 1 Grant's Cas. (Pa.) 393; McCracken v. Clarke, 31 Pa. St. 498; Coleman v. Lukens, 4 Whart. (Pa.) 347.

Rhode Island.—Sherman v. Cobb, 15 R. I. 570.

Tennessee.—Palmer v. Van Wyck, 92 Tenn. 397.

Wisconsin.—McFarlane v. Cushman, 19 Wis. 357.

Award in Writing and under Hand of Arbitrator.—Where the submission provides that the award is to be in writing under the hand of the arbitrator, the award must be under the arbitrator's hand as well as in writing. Everard v. Paterson, 6 Taunt. 625; Thompson v. Mitchell, 35 Me. 281.

When Required to Be in Writing under Hand and Seal, a written award only is not sufficient. Henderson v. Williamson, 1 Stra. 116; Thaire v. Thaire, 2 Rolle 243, Palm. 112; Sallows v. Girling, Cro. Jac. 278, note; Stanton v. Henry, 11 Johns. (N. Y.) 133.

Requirement that Award be Indented.—So where the submission required that the award should be indented, as well as under hand and seal, it was set aside for not being indented. Hinton v. Cray, 3 Keb. 512.

But such technical nicety was afterwards overruled as absurd. Gatcliffe v. Dunn, Barnes 55.

Amount of Rent to be Indorsed on Lease.—Where the question to be determined was the amount of rent to be reserved in a lease, and the submission directed that the finding should be indorsed on the lease, but the award was written on a separate piece of paper and fastened onto the lease by a wafer, it was held

for this reason to be invalid. Montague v. Smith, 13 Mass. 396.

Where View Directed.—Where the agreement to submit contains a stipulation that the arbitrators shall view the premises, a third person called in by them, as empowered by the submission, is bound by such stipulation, and an award made without a view of the premises by such third person is invalid, and does not bind the parties. Palmer v. Van Wyck, 92 Tenn. 397.

Attesting Witness.—If the submission requires that there be a subscribing witness to the award, the award will be void if not so witnessed, and the defect cannot be remedied after the award has been delivered, although the time within which it may be made has not expired. Bloomer v. Sherman, 5 Paige (N. Y.) 575; Buck v. Wadsworth, 1 Hill (N. Y.) 321; Pratt v. Hackett, 6 Johns. (N. Y.) 14.

Ambiguous Stipulation.—In Foster v. Durant, 2 Cush. (Mass.) 544, upon an agreement to extend time, it was stipulated: "It is further agreed by the parties that the report of referees shall be deemed and taken to have been made in due season if made at and during the session of the Court of Common Pleas to be holden at said B. on the first Tuesday of April next, it being agreed that the award be made to said court, judgment to be entered and execution to issue accordingly." Assuming this clause to be conditional, which is doubtful, the court, by Shaw, C. J., said that it was "plainly a condition subsequent, and did not impair, limit, or suspend the authority of the arbitrators." Nor did it take effect until they had "finished their duties." Once the award was made, it was binding without the judgment of the court, unless the clause cited required it. But as the court could "have no jurisdiction and could render no effectual judgment," and the award made to the court "would therefore have been a useless or idle act," it followed that the neglect to return the award to the court was a matter of no moment, and did not render the award void.

Directions as to Publication and Delivery.—If the submission directs that the award must be published before a certain time, such direction must be carried out. Pratt v. Hackett, 6 Johns. (N. Y.) 14. See Perkins v. Wing, to Johns. (N. Y.) 143. So if the award is to be made within a time limited, it is invalid if not made until after such time has expired. Brown v. Copp, 5 N. H. 223.

Recommitment for Correction of Clerical Error—Corrected Award.—But where the submission provided that the agreement to submit should be void unless the award was made before October 1, and the award was made and delivered before that date, but afterwards, upon an affidavit by the arbitrators stating that they had made a clerical error in failing to deduct an item, the court ordered the award to be recommitment to them, and they corrected and redelivered it, it was held that the award as corrected was not a new award, nor was it void because

add to the written submission.¹

Formal Defects.—And there are a variety of circumstances under which formal defects in awards will be disregarded, and where departure from the strict requirements of the submission will not render them void.²

Oral Award.—If the submission does not expressly direct, or the law require, the award to be in writing, an oral award is sufficient.³

the redelivery was after October 1. *Henley v. Menefee*, 10 W. Va. 771.

Necessity of a Seal.—Where the award is required to be under seal by the terms of the submission, unless there is a seal affixed to it it is void. *Price v. Thomas*, 4 Md. 514; *McCullough v. Myers*, Hard. (Ky.) 209.

And where the submission bond contained a proviso that the award should be in writing under the hands and seals of the arbitrators, and the award was in writing but without a seal, it was held to be void. *Sallows v. Girling*, Cro. Jac. 278, note; *Stanton v. Henry*, 11 Johns. (N. Y.) 133; *Rea v. Gibbons*, 7 S. & R. (Pa.) 204.

In *Forrer v. Coffman*, 23 Gratt. (Va.) 871, where, by the terms of the submission, the award was to be sealed, it was held that the award was not rendered invalid because the arbitrators did not seal it in the first instance, but delivered it without sealing to the counsel for the plaintiff, who returned it to them asking them to affix seals, which they did and then redelivered it, all of which was done within the time limited by the terms of the submission.

In *Cheney v. Gates*, 12 Vt. 565, the submission required that the award should be under seal, and the arbitrators executed an award and affixed thereto only one seal at the left hand of the signatures, and it was held sufficient. See *Peate v. Ongly*, 1 Comyns 197; *Bradford v. Randall*, 5 Pick. (Mass.) 496.

Statutes.—An award need not necessarily be under seal because the submission is under seal. It is not necessary at any time that an award should be under seal, unless it is so required by the terms of the submission or by statute. *White v. Fox*, 29 Conn. 570; *Crabtree v. Green*, 8 Ga. 8. See *Graham v. Hamilton*, 1 Binn. (Pa.) 461; *McAdams v. Stilwell*, 13 Pa. St. 90; *Owen v. Boerum*, 23 Barb. (N. Y.) 187.

The requirement of the *Alabama* statute that the arbitrators shall seal their award is directory, not mandatory. Consequently where the arbitrators recited that the award was under their hands and seals, this was held to be sufficient, although no seals were affixed in fact. *Price v. Kirby*, 1 Ala. 184.

It is not necessary that an award which settles a disputed boundary line should be under seal. *Stewart v. Cass*, 16 Vt. 663, 42 Am. Dec. 534.

1. **Noncompliance with Verbal Condition.**—*Payne v. Crawford* (Ala. 1892), 10 So. Rep. 911.

2. **Formal Defects—Immaterial Departures from Submission.**—*Emery v. Hitchcock*, 12 Wend. (N. Y.) 156; *Smith v. Sweeny*, 35 N. Y. 291; *Holyoke Mach. Co. v. Franklin Paper Co.*, 97 Mass. 150; *Schenck v. Voorhees*, 7 N. J. L. 383; *Brown v. Scott*, 1 Dall. (U. S.) 145; *Groff v. Musser*, 3 S. & R. (Pa.) 262; *Com. v. Maris*,

4 S. & R. (Pa.) 81; *Geary v. Cunningham*, 10 S. & R. (Pa.) 230; *Wilkinson v. Sitton*, 54 Ga. 71; *Spofford v. Spofford*, 10 N. H. 254; *Hamlin v. Duke*, 28 Mo. 166; *Saunders v. Heaton*, 12 Ind. 20; *Dalrymple v. Whitingham*, 26 Vt. 345; *Byars v. Thompson*, 12 Leigh (Va.) 550, 37 Am. Dec. 680.

Failure to Keep Record in Manner Prescribed.—In *Sweeney v. Vaudry*, 2 Mo. App. 352, it was held that the award would be sustained, although the arbitrators had omitted to keep a record of their proceedings in the manner prescribed by the submission, which required them to enter in a proper book a summary of the controversy and the grounds of their award.

Unsigned Indorsement.—But where an agreement to submit contained an unsigned indorsement giving certain instructions to the arbitrators, it was held that it did not form part of the agreement so as to render the award void for failing to comply with the instructions contained in it. *Enright v. Montauk F. Ins. Co.* (Supreme Ct.), 15 N. Y. Supp. 893.

3. **Oral Award where Neither Submission nor Statute Requires Writing—England.**—*Rawling v. Wood*, Barnes 54; *Hanson v. Liversedge*, 2 Vent. 242, Carth. 156; *Cocks v. Macclefield*, 2 Dyer 218b; *Bailey v. Lechmere*, 1 Esp. 377; *Oates v. Bromil*, 1 Salk. 75.

Maine.—*Philbrick v. Preble*, 18 Me. 255, 36 Am. Dec. 718; *Thompson v. Mitchell*, 35 Me. 281.

New Hampshire.—*Jones v. Dewey*, 17 N. H. 596.

New York.—*Valentine v. Valentine*, 2 Barb. Ch. (N. Y.) 430; *Owen v. Boerum*, 23 Barb. (N. Y.) 187.

Pennsylvania.—*McManus v. McCulloch*, 6 Watts (Pa.) 357; *Gay v. Waltman*, 89 Pa. St. 453.

Vermont.—*Akely v. Akely*, 16 Vt. 450; *Smith v. Bullock*, 16 Vt. 592; *Marsh v. Packer*, 20 Vt. 198.

See *McKnight v. McCullough*, 21 Iowa 111; *Donnell v. Lee*, 58 Mo. App. 288; *Heist v. Kohler*, 10 Lan. L. Rev. (Pa.) 140; *Goodell v. Raymond*, 27 Vt. 241; *Mathews v. Miller*, 25 W. Va. 817.

It has been said that where the submission is in writing, the award must be in writing. *Kyd on Awards* 74.

But in *Marsh v. Packer*, 20 Vt. 198, this statement was dissented from. See *White v. Fox*, 29 Conn. 570; *Goodell v. Raymond*, 27 Vt. 241; *Crabtree v. Green*, 8 Ga. 8.

In *England*, at the present time, an oral award is rarely valid, unless it is made under an oral submission. *Russell on Awards* (6th ed.) 253; *Cable v. Rogers*, 3 Bulst. 311.

Oral Awards Are Always Objectionable.—The courts disapprove of them, both in *America* and *England*. See *Russell on Awards* (6th ed.) 253; *Morse Arb. and Award* 256.

Where there is no submission there can be no award.¹

(2) *Under the Statutes*.—Where the submission is a statutory one, the award ought to comply strictly with the statutory requirements, otherwise it cannot be sustained as a statutory award, though it may possibly be good at common law.²

(3) *Form of the Award*.—It is not necessary that the award should be expressed in technical terms,³ nor is any special form of words required.⁴

It seems that an award made of a prize by a committee appointed to decide who is entitled to it need not be in writing. *Jenkins v. Knipe*, 11 Vict. L. Rep. 269 (Australia).

When Award must Be in Writing.—When the award determines the title to real estate or to any interest therein, it must be in writing. *Philbrick v. Preble*, 18 Me. 255, 36 Am. Dec. 718. See *Smith v. Bullock*, 16 Vt. 592; *Akely v. Akely*, 16 Vt. 450.

Oral Award as to Boundary Lines.—However, where the matter to be determined is the location of boundary lines, an oral award is binding, where it has been accepted by the parties and the lines are run according to it. *Jones v. Dewey*, 17 N. H. 596; *Sawyer v. Fellows*, 6 N. H. 107, 25 Am. Dec. 452; *Orr v. Hadley*, 36 N. H. 575; *Eaton v. Rice*, 8 N. H. 378; *Jackson v. Gager*, 5 Cow. (N. Y.) 383; *Jackson v. Dysling*, 2 Cai. (N. Y.) 198; *Shelton v. Alcox*, 11 Conn. 240. See *Gove v. Richardson*, 4 Me. 327.

Where a Landlord and a Tenant Entered into a Verbal Agreement to submit their differences to arbitration, and the arbitrators, under such agreement, made an oral award with which each expressed his satisfaction and with which the tenant complied, it was held that the landlord was bound by such award. *Skrable v. Pryne* (Iowa 1895), 62 N. W. Rep. 21.

Part Oral, Part Written.—Where the award was required to be in writing by the terms of the submission, and there was a written award as to part and an oral award as to the remainder of the matters submitted, it was held that such awards were insufficient. *Tudor v. Scovell*, 20 N. H. 171.

In *Copeland v. Wading River Reservoir Co.*, 105 Mass. 397, it was held that an award relative to the right to flow land, made partly under an oral agreement, was not binding on the parties. See *Walters v. Morgan*, 2 Cox 369; *French v. New*, 28 N. Y. 147.

Oral Award under Written Submission.—Where a sealed submission to arbitration has been entered into, which requires a written award to be made, and subsequently the parties enter into a verbal agreement to accept a verbal award, which the arbitrator accordingly makes, this changes the submission to a verbal one, and if the matters involved are such as cannot be determined by a parol arbitration, the award is altogether void. *French v. New*, 2 Abb. App. Dec. (N. Y.) 209. See *Walters v. Morgan*, 2 Cox 369; *McMullen v. Mayo*, 8 Smed. & M. (Miss.) 298; *Mayo v. Chiles*, 3 T. B. Mon. (Ky.) 258; *Suydam v. Jones*, 10 Wend. (N. Y.) 184, 25 Am. Dec. 552.

1. *Williams v. Williams*, 11 Smed. & M. (Miss.) 399. See *Hand v. Columbus*, 4 Smed.

& M. (Miss.) 203; *Gibson v. Powell*, 5 Smed. & M. (Miss.) 712.

2. **Statutory Submission—Award to Conform Strictly to Statute**—*Alabama*.—Byrd v. Odem, 9 Ala. 755.

Arkansas.—Collins v. Karatopsky, 36 Ark. 316.

California.—Williams v. Walton, 9 Cal. 146; *Kreiss v. Hotaling*, 96 Cal. 617.

Illinois.—Eisenmeyer v. Sauter, 77 Ill. 515.

Iowa.—Higgins v. Kinneady, 20 Iowa 474; *Thornton v. McCormick*, 75 Iowa 285.

Michigan.—Galloway v. Gibson, 51 Mich. 135.

Nebraska.—Tynan v. Tate, 3 Neb. 388.

Nevada.—Steel v. Steel, 1 Nev. 27.

Ohio.—Strum v. Cunningham, 3 Ohio 286.

Pennsylvania.—Climenson v. Climenson, 163 Pa. St. 451.

Wisconsin.—Darling v. Darling, 16 Wis. 644.

Award to be "Inclosed and Sealed and Transmitted to the Court."—Where, however, the statute and the submission both required that the award should be "inclosed and sealed and transmitted to the court," but the award was in fact handed by one of the arbitrators to the clerk of the court, the award was sustained on the ground that the obvious purposes of the statute were complied with. *Higgins v. Kinneady*, 20 Iowa 474.

By the Provision of Certain English Statutes, an award must be in writing, and this requisite is compulsory. See 17 and 16 Vict., c. 125, § 15; 8 and 9 Vict., c. 18, § 33; 8 and 9 Vict., c. 20, § 134; 22 and 23 Vict., c. 59, § 24.

Attestation.—Where the statute requires the attestation of the award, an award signed by three arbitrators, the signatures of two of whom only were attested, was upheld, the submission providing that the award of two would be binding. *Ott v. Schroepel*, 5 N. Y. 482. See also *Tucker v. Allen*, 47 Mo. 488.

3. **Technical Terms Unnecessary.**—*Eardley v. Steer*, 4 D. P. C. 423. See *Whitehead v. Tattersall*, 1 Ad. & El. 491, 28 E. C. L. 127; *Lock v. Vulliamy*, 5 B. & Ad. 600, 27 E. C. L. 135.

4. **No Particular Form of Words Necessary.**—*Ott v. Schroepel*, 5 N. Y. 482; *Platt v. Smith*, 14 Johns. (N. Y.) 368; *Gulley v. Macy*, 89 N. Car. 343.

Illustrations.—An award which stated: "I am of opinion that A is entitled to claim of B," etc., was held sufficient. *Matson v. Trower*, R. & M. 17, 21 E. C. L. 371.

Where the parties submitted the matter in dispute to a professional man upon the construction of an act of Parliament, his award, being positive in itself, was held binding, although he advised that the printed statute should be compared with the parliamentary roll before the matter was finally settled, as he

Nor are introductory recitals essential; when true they are for the most part immaterial,¹ and when false they neither enlarge the arbitrator's

was inclined to believe that there had been a misprint. *Price v. Hollis*, 1 M. & S. 105.

Where the arbitrator certifies that he "finds" a certain amount to be the cost of proposed repairs, this has been held sufficient. *Whitehead v. Tattersall*, 1 Ad. & El. 491, 28 E. C. L. 127.

But where the arbitrator wrote a letter to the parties stating that "to meet the circumstances of the case in a liberal manner, I propose that B should pay A," this was held void because he did not decide that A was entitled to anything, but merely recommended that a certain sum should be given to him. *Lock v. Vulliamy*, 2 N. & M. 336, 5 B. & Ad. 600, 27 E. C. L. 135.

In *Smith v. Hartley*, 10 C. B. 800, 70 E. C. L. 800, where the arbitrator made an award in the plaintiff's favor, and requested the defendant to pay the balance, it was held that such request amounted to an order to pay.

Certificate Instead of Award—England.—Sometimes on a reference at nisi prius in England the arbitrator is directed or empowered to express his decision in a certificate addressed to the officer of the court. The expense of the stamp required on the award in England is thereby saved. *Salter v. Yeates*, 5 D. P. C. 291.

Where the question submitted to the arbitrator is to determine how much, if at all, the amount for which a verdict has been taken is to be reduced, his decision is a certificate, although in terms it is an award. *Sim v. Edwards*, 25 L. J. C. P. 175, 17 C. B. 527, 84 E. C. L. 527.

Awards by Promissory Notes.—Where a parol agreement was entered into to submit a dispute, and each party made his promissory note and placed it in the hands of the arbitrators, under an agreement that the arbitrators should hand the note of the party against whom they had decided, to the other, the court said: "The note in question may be regarded as the award of the arbitrators. It was conditional, when made and put into their hands, to become consummated by their decision of the matter submitted, and by such decision it has become absolute for the payment of the money awarded to the plaintiff." *Shephard v. Watrous*, 3 Cai. (N. Y.) 166. See *Page v. Pendergast*, 2 N. H. 233; *Bathey v. Button*, 13 Johns. (N. Y.) 187.

But if the award itself should in such a case prove to be invalid, an action cannot be maintained upon a note so deposited. *Towne v. Jaquith*, 6 Mass. 46, 4 Am. Dec. 84. See also *Day v. Lafin*, 6 Met. (Mass.) 280; *Bathey v. Button*, 13 Johns. (N. Y.) 187.

If the stipulation in the submission is for an award to be made by means of the note of the losing party, the award must be made accordingly, or it will be void. *Allen v. Galpin*, 9 Barb. (N. Y.) 246.

For decisions held to be awards and those held not to be awards, see *supra*, this title, *The Award—Defined*.

1. Introductory Recitals.—Russell on Awards (6th ed.) 262; *Boots v. Canine*, 94 Ind. 408; *Houghton v. Burroughs*, 18 N. H. 499; *Rixford v. Nye*, 20 Vt. 132; *Rigdon v. Martin*, 6 Har. & J. (Md.) 403; *Upshaw v. Hargrove*, 6 Smed. & M. (Miss.) 286; *Hoffman v. Hoffman*, 26 N. J. L. 175; *Rogers v. Tatum*, 25 N. J. L. 281.

The Arbitrator need Not Recite His Authority, nor that the time had been enlarged, although the award appears to have been made after the time limited. *Baker v. Hunter*, 16 L. J. Exch. 203, 16 M. & W. 672; *George v. Lousley*, 8 East 13.

Although the Viewing of Certain Premises was Made a Condition Precedent to the arbitrator's entering on the hearing, it was held that a failure to recite that he had taken such view was unimportant. *Spence v. Eastern Counties R. Co.*, 7 D. P. C. 697.

A Recital that the Parties were Heard is not necessary. *Houghton v. Burroughs*, 18 N. H. 499; *Warner v. Collins*, 135 Mass. 26.

Or that All the Arbitrators Were Present.—*Rixford v. Nye*, 20 Vt. 132.

Or that All the Legal Evidence was Admitted. *Leominster v. Fitchburg, etc.*, R. Co., 7 Allen (Mass.) 38.

However, It Is Advisable that the Award should Contain a Verbatim Recital of such part of the submission or order of reference as contains the arbitrator's authority to make the award and specifies the subject-matter in which it is to be made, in case it should be afterwards necessary, to explain the award, to show the nature and extent of the arbitrator's authority, and that he has fully performed his duty. Russell on Awards (6th ed.) 262.

Recital as to Powers Not Exercised.—It is not advisable that the arbitrator should recite such parts of the submission as confer powers on him which he does not exercise, or those which more especially affect the parties. *King v. Bowen*, 8 M. & W. 625.

Recital that Award was Prepared by Solicitor.—Nor is it advisable to recite that an award has been prepared by a solicitor, when such solicitor was authorized to prepare it, though such recital is immaterial. *Baker v. Cotterill*, 18 L. J. Q. B. 345.

Recital of Matters in Dispute.—The award need not recite what the matters in difference are. *Smith v. Hartley*, 10 C. B. 800, 70 E. C. L. 800. Though it may be advisable to do so in some cases where questions are likely to arise afterwards as to what matters actually were in difference at the time of the submission, because, if the award recites and disposes of them, it is a conclusive defense to an action subsequently brought for the same matters. *In re Brown and Craydon Canal Co.*, 9 Ad. & El. 522, 36 E. C. L. 188; *King v. Bowen*, 8 M. & W. 625. See *Angus v. Redford*, 11 M. & W. 69, 2 Dowl. N. S. 735.

Where an Award Purported to Recite Certain Matters of Record, it was held that such recital was of no weight to prove that the facts so recited were really matters of record. *Hall v. Little*, 11 Tex. 404.

authority¹ nor do they invalidate his award.² But the arbitrator cannot be too careful in expressing his decision clearly and with precise exactness.³

(4) *What Award Must, and Need Not, State.*—The Award must contain the Actual Decision of the arbitrators, but the grounds upon which they have arrived at their decision, or the principles on which they base it, need not and ought not to be set out. Their duty is best discharged by a simple statement of the results of their investigations.⁴

When Fact of Decision need Not be Recited.—The arbitrators need not state in the award that they have decided the questions submitted to them, if the fact appears upon the face of the award itself,⁵ or if it can be inferred

It is Not Necessary that the Award should Set Out the Evidence, nor can the parties bring it before the court. *Powell v. Riley*, 15 Lea (Tenn.) 153.

1. *Price v. Popkin*, 10 Ad. & El. 139, 37 E. C. L. 74; *Diblee v. Best*, 11 Johns. (N. Y.) 103; *Adams v. Adams*, 2 Mod. 169.

2. **False Recitals in Award.**—*Watkins v. Phillpotts*, McClel. & Y. 393; *Thames Iron Works, etc., Co. v. Reg.*, 20 L. T. 318; *Baker v. Hunter*, 16 M. & W. 672; *Diblee v. Best*, 11 Johns. (N. Y.) 103.

As to Appointment of Umpire.—Where the umpire was chosen by the arbitrators, a recital that he was appointed by the parties did not affect the award. *Adams v. Adams*, 2 Mod. 169, Vin. Abr., Arb. (note 2) 3.

A Misrecital of the Date of the Submission is immaterial. *Dale v. Dawson*, 2 Keb. 878, 1 Vent. 184; *Ingram v. Webb*, 1 Rolle 362.

If the Subject-matter of the Dispute is Falsely Recited, it is immaterial. *Paull v. Paull*, 2 Crompt. & M. 235, 2 D. P. C. 340; *Kynaston v. Jones*, Styles 97.

As to Name or Number of Arbitrators—Extension of Time.—So an award is not rendered invalid by a mistake in a recital of the Christian name of one of the arbitrators who had appointed the umpire, *Trew v. Burton*, 1 Crompt. & M. 533; or where it recited that it was made by three, and was executed by only two, *White v. Sharp*, 12 M. & W. 712, 1 D. & L. 1039, *overruling* *Thomas v. Harrop*, 1 Sim. & S. 524; or by a misrecital of the extent of an enlargement of the time, so that the award appeared to be made too late, *Addison v. Spittle*, 6 D. & L. 531.

Other Illustrations.—In *Harlow v. Read*, 3 D. & L. 203, where the arbitrators appointed an umpire, who was to decide in case they should disagree, and in their award recited that they had “considered the decision of the umpire,” whereas there had been no disagreement and, consequently, no consultation of the umpire, it was held that the misrecital did not invalidate the award.

In *Caldwell v. Dickinson*, 13 Gray (Mass.) 365, A and B submitted by bond a dispute as to a boundary line, to arbitration. Another controversy in regard to a boundary line between B and C had been submitted to the same arbitrators immediately before. The arbitrators, in their award under the submission between A and B, recited that A and B of the one part, and C of the other, had entered into a submission, etc. But, as a fact, they determined the line between A and B, and said nothing as to the line between B and C,

and the court held that the misrecital did not render the award invalid.

However, in *Christie v. Hamlet*, 2 M. & P. 316, 5 Bing. 195, 15 E. C. L. 414, which was a case of a reference by judges’ order, where the award recited that the submission had been by order of nisi prius, the Court of Common Pleas held that the award was a nullity, but said that the plaintiff had his remedy by action.

But in *Baker v. Hunter*, 16 M. & W. 672, 16 L. J. Exch. 203, Parke, B., said that *Christie v. Hamlet*, 2 M. & P. 316, above, was decided “rather rapidly,” and could not be taken as authority.

3. Award should be Clearly Expressed.—*Stonehewer v. Farrar*, 9 Jur. 203; *Spooner v. Payne*, 16 L. J. C. P. 225.

Variance between Submission and Award.—An award is not rendered void because the subjects submitted are described by different names in the submission and in the award; it will be enough if it clearly appears that the same thing was intended by both. *Munroe v. Alaire*, 2 Cai. (N. Y.) 320. See *Schuyler v. VanDerVeer*, 2 Cai. (N. Y.) 235.

4. Award must contain the Decision, but Not the Grounds Thereof.—*Lamphire v. Cowan*, 39 Vt. 420; *Patterson v. Baird*, 7 Ired. Eq. (N. Car.) 255; *Blossom v. Van Amringe*, 63 N. Car. 65; *Clanton v. Price*, 90 N. Car. 96; *King v. Falls of Neuse Mfg. Co.*, 79 N. Car. 360; *Pickens v. Miller*, 83 N. Car. 543; *Brewer v. Bain*, 60 Ala. 161; *In re Curtis*, 64 Conn. 501. See *McCracken v. Gregory*, 4 Blackf. (Ind.) 128.

In *Stewart v. Cass*, 16 Vt. 663, 42 Am. Dec. 534, it was held that the statement of the grounds of their decision, inserted by the arbitrators in the award, did not render it invalid. It was not an act in excess of the terms of the submission, and the “only effect that it can have upon the award is to furnish the means of testing its accuracy.”

See *infra*, this title, *Mistake in the Award—Where the Award Sets Out the Reasons of the Decision*.

5. *Morse Arb. and Award* 253.

Where a dispute about the ownership of a certain tract of land and alleged trespass on such land was submitted, the arbitrators awarded and determined “that the ‘north line,’ so called, between A and B, shall be the line established.” A bill for the specific performance of the award was demurred to on the ground, among other things, that the award did not determine whether a trespass had been committed, whether there was a

from it by necessary implication.¹

Where Award need Not Order Release of Rights.—The award need not order a release of rights where the submission provides for such release, or where the award itself is a bar to the legal enforcement of such rights, or where it extinguishes them.²

Nor need It Direct a Discontinuance of the Cause, where the submission is in a *lis pendens*, because the submission operates as such.³

Separate Award upon Different Items.—Nor need the arbitrators award separately upon the different items of an account, unless the submission so requires; an award of the gross sum is sufficient.⁴

wrongful withholding, or whether damages should be paid. The court, however, held that the real matter in dispute was the boundary, and, that having been defined, that "the award, in the opinion of the court, decides the matters submitted to the arbitrators, and is final and complete." *Caldwell v. Dickinson*, 13 Gray (Mass.) 365.

1. Decision by Implication.—*Buckland v. Conway*, 16 Mass. 396; *Stickles v. Arnold*, 1 Gray (Mass.) 418; *Rixford v. Nye*, 20 Vt. 132; *Hartwell v. Hill*, *Forrest* 73; *Lamphire v. Cowan*, 39 Vt. 420.

In these cases, the legal implication arose from the awarding of costs to one of the parties without giving any further directions as to the matters in difference, the inference being that the award upon such matters was in favor of the party to whom the costs were to be paid. See further, *Hodges v. Raymond*, 9 Mass. 316; *Hawks v. Crofton*, 2 Burr. 698.

In *Hanson v. Webber*, 40 Me. 194, where the dispute was in regard to the ownership of certain oxen sold by A to B and claimed by C, and the arbitrators directed that A should pay a certain sum to B and another sum to C, without giving any direction as to who was or who should become the owner of the oxen, it was held that by implication the ownership was in A. "It is certainly to be inferred that the ownership of the oxen was adjudged to be in him, and B and C, having the consideration of the same, have no rights in the oxen themselves."

2. When Award need Not Order Release of Rights.—*Cox v. Jagger*, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522; *Spofford v. Spofford*, 10 N. H. 254; *Purdy v. Delavan*, 1 Cai. (N. Y.) 320; *Sellick v. Addams*, 15 Johns. (N. Y.) 197; *Shepard v. Ryers*, 15 Johns. (N. Y.) 497. See *Weed v. Ellis*, 3 Cai. (N. Y.) 253; *Armstrong v. Masten*, 11 Johns. (N. Y.) 189; *Birmingham v. Kirwan*, 2 Sch. & Lef. 450; *Gosling v. Warburton*, Cro. Eliz. 128; *Turney v. Sturges*, 1 Dyer 91a; *Van Orden v. Van Orden*, 10 Johns. (N. Y.) 30. See *supra*, this title, *Powers of the Arbitrator in Particular Matters—Power to Award Releases*.

3. Submission in Pending Suit—Award need Not Direct Discontinuance.—In *Rixford v. Nye*, 20 Vt. 132, it was held that "the legal effect of the submission, and the making an award pursuant to the submission, was to put an end to the suit."

But a discontinuance will not be effected without a direct order, unless the submission is entered into between the parties to the suit, and the award is good as between them, and

finally disposes of the cause of action. *Vosburgh v. Bame*, 14 Johns. (N. Y.) 302.

Sometimes, according to the *English* cases, a cause will be finally settled without deciding it in favor of either of the parties, "though this is rarely the case, and never when costs abide the event of the cause and are to be taxed by the officer of the court." *Russell on Awards* (6th ed.) 343.

An award that all suits now pending between the parties shall cease, determines the suits finally. The meaning of such an award is that the suit shall cease absolutely forever; the right of action is gone, because the remedy is taken away; the party is not merely nonsuited so that he can begin over again. *Simon v. Gravi*, 1 Salk. 74; *Knight v. Burton*, 1 Salk. 75; *Lord v. Hawkins*, 2 H. & N. 55.

In *Tipping v. Smith*, 2 Stra. 1024, however, where the arbitrators directed that all manner of proceedings, if any, depending at law should be no further prosecuted, it was held that this did not effect a discontinuance so as to prevent the plaintiff from bringing a suit if he had not brought one, or, if he had, from discontinuing that which he had brought and bringing a new one.

Award of Stet Processus.—An award that each party shall pay his own costs, and that the actions shall be discontinued, is final and valid, and is in effect an award of a *stet processus*. *Blanchard v. Lilley*, 9 East 497; *Gray v. Gray*, Cro. Jac. 525.

When Discontinuance Not Allowed.—When an arbitrator has been appointed to state a special case, and he has found nearly all the facts in favor of the defendant, the plaintiff will not be allowed to discontinue the action. *Stahlschmidt v. Walford*, 4 Q. B. Div. 217.

Award of Nonsuit.—Before the Judicature Act of 1875, in *England*, an award of a nonsuit was invalid, as not determining the matters in difference in the cause. *Knight v. Burton*, 1 Salk. 75; *Wild v. Holt*, 9 M. & W. 161.

Order XLI., Rule 6, under the act, says: "Any judgment of nonsuit, unless the court or a judge otherwise directs, shall have the same effect as a judgment upon the merits for the defendant," which would seem to make an award of nonsuit final. See *Russell on Awards* (6th ed.) 343.

4. Separate Award upon Different Items of Account—England.—*Wrightson v. Bywater*, 3 M. & W. 199.

United States.—*Karthaus v. Ferrer*, 1 Pet. (U. S.) 222; *Myers v. York*, etc., R. Co., 2

Findings of Fact and of Law—Evidence.—The cases differ as to whether the findings of fact and the conclusions of law should be stated separately in the award.¹ But the arbitrators are not bound to make the evidence a part of their award, even though they should be requested to do so.²

(5) *Waiver of Requirements of the Submission.*—The parties may, by express agreement or by their acts, waive a strict compliance with the directions of the submission.³

b. PUBLICATION OF THE AWARD.—Where the Submission So Requires, an award, in order to be valid, must be published.⁴

Curt. (U. S.) 28; Carnochan v. Christie, 11 Wheat. (U. S.) 446.

Maine.—Vannah v. Carney, 69 Me. 221.

Massachusetts.—Bigelow v. Maynard, 4 Cush. (Mass.) 317; Shirley v. Shattuck, 4 Cush. (Mass.) 470; Strong v. Strong, 9 Cush. (Mass.) 560.

Nebraska.—Sides v. Brendlinger, 14 Neb. 491.

New York.—Emery v. Hitchcock, 12 Wend. (N. Y.) 156.

Texas.—Gill v. Bickel (Tex. Civ. App. 1895), 30 S. W. Rep. 919.

Vermont.—Lamphire v. Cowan, 39 Vt. 420.

Wisconsin.—Darge v. Horicon Iron Mfg. Co., 22 Wis. 691; Call v. Ballard, 65 Wis. 187. See also Dalrymple v. Whittingham, 26 Vt. 345; Nuxner v. Blair, 1 Vict. L. Rep. (Australia) 191.

Under a General Submission of All Demands, an award of a gross sum due from one party to the other, without further direction or specification, is enough. Spofford v. Spofford, 10 N. H. 254; Shirley v. Shattuck, 4 Cush. (Mass.) 470; Strong v. Strong, 9 Cush. (Mass.) 560.

But where the Submission Requires a Separate Finding of the amount due by each to the other, an award of a gross sum as a balance due by one only would be void. Houston v. Pollard, 9 Met. (Mass.) 164.

Or where a Legal Necessity Arises for Making a Separate Award, as to determine the right to costs, the arbitrator must decide separately. Rule v. Bryde, 1 Exch. 151; Whitworth v. Hulse, L. R. 1 Exch. 251, 35 L. J. Exch. 149.

Award on Each Item Good.—However, an award upon each item separately can never be void. In Kendrick v. Tarbell, 26 Vt. 416, the court, by Redfield, C. J., said: "If the arbitrators made a separate award upon each matter submitted, without stating the final balance, giving to each party the balance coming in his favor, we do not think this such a departure from the submission as to be fatal to the award. If the defendant had withheld his portion of the award, it might have been proper enough for the plaintiff to have judgment on that portion in his favor. But as this judgment is for the final balance, there can be no possible objection to it on this ground." But where a gross sum is awarded, and it appears that the award was founded in part upon matters not submitted, the whole award will be held void. Thrasher v. Haynes, 2 N. H. 429. See Lee v. Elkins, 12 Mod. 587; Peters v. Peirce, 8 Mass. 399; Samon v. Pitt, Cro. Eliz. 432; Bullock v. Bergman, 46 Md. 270; Dodds v. Hakes, 114 N. Y. 260.

Where an agreement has been entered into for general submission of "the matters in controversy" between the parties, an award of a specified sum as due from one party to another is sufficient upon its face. Brewer v. Bain, 60 Ala. 153.

1. How Findings of Fact and Conclusions of Law should be Stated.—The rule in Nebraska is that the findings of fact and the conclusions of law must be stated separately in an award. Westover v. Armstrong, 24 Neb. 391. See Murry v. Mills, 1 Neb. 456; Graves v. Scoville, 17 Neb. 593; Weirich v. Cook, 39 Mich. 134.

In Keener v. Goodson, 89 N. Car. 273, it was held that arbitrators are not bound to find facts, or to state them separately from their conclusions of law. See Lusk v. Clayton, 70 N. Car. 184; Pickens v. Miller, 83 N. Car. 543.

In McKnight v. McCullough, 21 Iowa 111, it was held that arbitrators are not required, like referees, to make separate statement of the facts found by them and the conclusions of law based upon such facts.

There need be no finding by the arbitrators of the facts upon which their award is based, where the agreement to submit contained no stipulation to that effect. Arbitrators do not act improperly in the legal sense because they have omitted some detail in their award which neither the submission nor the law makes it imperative on them to observe. In re Curtis, 64 Conn. 501.

See Sutton v. Horn, 7 S. & R. (Pa.) 228, where it was held that referees appointed under the Pennsylvania Act of 1705 are not authorized to find the facts specially and submit the law to the court. The report must be good *per se* to justify the entry of a judgment under it.

2. Evidence need Not be Made Part of Award.—Allen v. Miles, 4 Harr. (Del.) 234; Powell v. Riley, 15 Lea (Tenn.) 153.

3. Waiver of Requirements of Submission.—McCullough v. Myers, Hard. (Ky.) 206; Tudor v. Scovell, 20 N. H. 174; Sellick v. Addams, 15 Johns. (N. Y.) 197; Perkins v. Wing, 10 Johns. (N. Y.) 143; Buck v. Wadsworth, 1 Hill (N. Y.) 321; French v. New, 2 Abb. App. Dec. (N. Y.) 209; Schultz v. Halsey, 3 Sandf. (N. Y.) 405. See McKenna v. Lyle, 155 Pa. St. 599, 32 W. N. C. 349; Gidley v. Gidley, 65 N. Y. 169; Boughton v. Seamans, 9 Hun (N. Y.) 392.

4. Publication of Award—General Rule.—Parsons v. Aldrich, 6 N. H. 264; Denman v. Bayless, 22 Ill. 300.

Where the submission required that the

What Constitutes Publication—As to Its Validity.—So far as its validity is concerned, it will be deemed published as soon as the arbitrator has done some act by which he becomes *functus officio*, and has declared his final decision, and can no longer change it.¹

award should be published *utrique partium* by a certain day, and the parties were the plaintiff on one side and several defendants on the other, but the award was made and published to the plaintiff and one of the defendants only, it was held that this was not a sufficient publication, and that the plaintiff could not recover on the award. *Huntgate v. Mease*, Cro. Eliz. 885, 5 Coke 103, Moore 642.

At the Common Law, it is unnecessary to serve a copy of the award on the parties to the arbitration. *Carson v. Earlywine*, 14 Ind. 256; *Boots v. Canine*, 58 Ind. 450.

Indiana.—No notice of the award need be given where the agreement to submit is not brought within the provisions of *Indiana Rev. Stat.* 1894, § 842, and where there is no provision in the agreement itself that notice of the award shall be given to the parties. The parties are bound to take notice thereof. *Fargo v. Reighard*, 13 Ind. App. 39. See *Russell v. Smith*, 87 Ind. 457.

1. What Constitutes Publication.—*Russell on Awards* (6th ed.) 253, 254; *Henfree v. Bromley*, 6 East 309; *Macarthur v. Campbell*, 5 B. & Ad. 518, 27 E. C. L. 117. See *Thompson v. Mitchell*, 35 Me. 281; *Knowlton v. Homer*, 30 Me. 552; *Rixford v. Nye*, 20 Vt. 132; *Pollard v. Lumpkin*, 6 Gratt. (Va.) 398, 52 Am. Dec. 128.

Where there are Several Arbitrators the award must be signed by the requisite number, or it will not be published. *Little v. Newton*, 2 M. & G. 351, 40 E. C. L. 407.

Award Attested by and Read to Witnesses.—Where the arbitrator executed the award in the presence of witnesses who attested it, and to whom it was read over at the time, but the plaintiff died on the following morning without having had notice that it was read, it was held that the award was made and published in the lifetime of the plaintiff, and could not be set aside as published after his death. The court so held, although the plaintiff's attorney received a note from the arbitrator two hours after the plaintiff's death stating that he was about to declare his award, and requesting him to attend at his office the same evening. *Brooke v. Mitchell*, 6 M. & W. 473.

Formal Notification.—Provision for a publication of the award in the submission is said not to imply a formal notification to the parties. *Hunt v. Wilson*, 6 N. H. 36.

The Delivery of a Copy of the Award is considered a publication. *Low v. Nolte*, 16 Ill. 475.

The Delivery of the Award to the Prevailing Party, who gives notice to the other party and demands payment, is a sufficient publication. *Knowlton v. Homer*, 30 Me. 552; *Rixford v. Nye*, 20 Vt. 132.

An Award which is to be Returned into Court is published by reading and filing it in court. *Den v. Curtis*, 6 N. J. L. 415.

When the Submission is Silent about the time when the award is to be made, notice of award must be given to both parties. *Francis v. Ames*, 14 Ind. 251.

When an Award is Required to Be under Seal, a written notice to the parties of its contents is a publication. *Morse v. Stoddard*, 28 Vt. 445.

Where Parties Witness Proceedings.—The question was about a boundary line, and the arbitrator fixed the line with the assistance of the parties. It was held that no further publication was necessary. *Jones v. Dewey*, 17 N. H. 596.

Amendment Not Communicated to Parties.—Where copies of an award were delivered to the parties, but the arbitrator told them verbally that a correction might possibly have to be made in a boundary line upon consultation with the surveyor, and he kept the original award for that purpose and afterwards made the correction and said nothing further about it to the parties, the court held that the written award had not been published. *Caldwell v. Dickinson*, 13 Gray (Mass.) 365.

Notice that Award is Ready upon Payment of Arbitrator's Fees.—In *Musselbrook v. Dunkin*, 9 Bing. 605, 23 E. C. L. 395, the arbitrator made a claim for exorbitant fees, and the court held that the award was not to be considered published until the arbitrator's charges had been taxed by the officer of the court, as it could not be considered ready when it could only be procured by submitting to a wrongful demand, but said at the same time that the requirement that an award should be published was "satisfied by the award's having been made and notice having been given to the parties that it is within their reach on payment of just and reasonable expenses."

Award Executed in Duplicate.—In *Plummer v. Morrill*, 48 Me. 184, it was held that where an award is executed in duplicate and delivered to the parties, it is thereby published.

Award Read to Parties by One of the Arbitrators.—Where an arbitration bond contains a stipulation that the award shall be written, published, and delivered on a certain day, this stipulation is sufficiently complied with, if the award is made, signed, and delivered to one of the arbitrators before that day, and by him read to the parties. *Rundell v. La Fleur*, 6 Allen (Mass.) 480. See *Perkins v. Wing*, 10 Johns. (N. Y.) 143.

But where two arbitrators had signed their award and handed it to a clerk to copy, intending to sign the copy and send it to the absent party, and the other party, being informed as to terms of the award, called the attention of the arbitrators to errors in it, and they thereupon refused to take any further proceedings in the matter, it was held that there was no publication. *Williams v. Rumbough*, 5 Lea (Tenn.) 606.

Where an Arbitrator Stated the Conclusion that He had Arrived at, in regard to the matters

What Constitutes Publication—As to Time for Setting Aside Award.—So far, however, as concerns the time within which an application to have the award set aside must be made, such time begins to run not from the date of the publication of the award itself, but from the time of its publication to the parties.¹

Publication on the Sabbath.—The general rule is that the validity of an award is not affected by the fact of its publication on Sunday;² but in *New York* this circumstance invalidates the award.³

c. DELIVERY OF THE AWARD—Ready for Delivery.—Usually, the requirement of the submission is that the award shall be ready to be delivered by a certain day, and the court will hold that it is ready to be delivered if it is made by that day.⁴ But in order to render it valid, it need not be actually delivered

submitted to his decision, saying that he had mislaid a part of his judgment containing the reasons of his decision, it was held that this was a publication of the award and binding on the parties. *Milner v. Luttrell*, 18 New Bruns. 87.

Computation of Time.—Where the agreement to submit, made on September 25th, stipulated that the award should be published within ten days, it was held a sufficient compliance with such provision that the award was written, signed, and witnessed on October 4th following. *McClure v. Shroyer*, 13 Mo. 104.

1. Russell on Awards (6th ed.) 255; MacArthur v. Campbell, 5 B. & Ad. 518, 27 E. C. L. 117; Brooke v. Mitchell, 6 M. & W. 475; Moore v. Darley, 1 C. B. 445, 50 E. C. L. 445.

In *New York* it has been held that an award takes effect from the time it is ready for delivery, and the parties are notified that it is made. *New York Lumber, etc., Co. v. Schnieder*, 119 N. Y. 475.

2. **Publication of Award on Sunday.**—The giving of notice of an award on Sunday is valid, such an act being ministerial in its nature. *Kiger v. Coats*, 18 Ind. 153.

In *Sargeant v. Bretts*, 21 Vt. 99, where the parties submitted their differences to arbitration, and the arbitrators met on Saturday and heard the parties, and continued their hearing until midnight, and then remained together until they had made their award, which they published to the parties, who still remained together, between one and three o'clock on Sunday morning, it was held that the award was not void, and that the successful party might maintain an action upon it.

In a subsequent case in the same state, where the facts were almost identical, a like conclusion was reached. *Blood v. Bates*, 31 Vt. 147.

3. In *New York* an award made on Sunday is void. *Story v. Elliot*, 8 Cow. (N. Y.) 27, 18 Am. Dec. 423.

But where the parties to a controversy submitted to arbitration, their witnesses, and the arbitrators were all of the Jewish persuasion, and the meeting of the arbitrators was held on Sunday, and the award was on that day drawn up and signed, but was dated the day following, and was not until then delivered to the parties, the award was adjudged valid. *Isaacs v. Beth Hamedash Soc.*, 1 Hilt. (N. Y.) 469. Here the court said: "The case of *Story v. Elliot*, 8 Cow. (N. Y.) 27, 18 Am. Dec. 423, would have been in point if the arbitrators had published it on Sunday. In

that case, the publication of an award was regarded as equivalent to the giving of judgment, which cannot be done on Sunday." See generally the title SUNDAY.

4. **Delivery of the Award—When Award Deemed Ready for Delivery.**—Russell on Awards (6th ed.) 255; Veale v. Warner, 1 Saund. 327a, note; Bradsey v. Clyston, Cro. Car. 541; Joyce v. Haines, Hard. 399; Robison v. Calwood, 6 Mod. 82, 2 Ld. Raym. 989; Garret v. Weeden, 1 Lev. 133; Marks v. Marriott, 1 Ld. Raym. 114; Wilson v. Wilson, cited in 1 Saund. 327a, note (3); Freeman v. Bernard, 1 Ld. Raym. 247; Boots v. Canine, 58 Ind. 450; Rundell v. La Fleur, 6 Allen (Mass.) 480; Houghton v. Burroughs, 18 N. H. 499; Crawford v. Orr, 84 N. Car. 246; Martin v. McCormick, 34 N. J. L. 23; Bloomer v. Sherman, 5 Paige (N. Y.) 575.

Illustrations.—Where a submission required an award to be ready at a certain date, and it was not called for until the day after, when it was delivered, bearing the date of delivery, the court held that it was no objection to the award that the day of its date was a day later than that named, it not being demanded before that time. *Owen v. Boerum*, 23 Barb. (N. Y.) 187.

A submission required that the award should be made and ready for delivery in ninety days. It was held that if the award was ready to be delivered on payment of the arbitrator's fees within the time, it was within the provision of the submission. *Willard v. Bickford*, 39 N. H. 536.

Where the submission does not require the arbitrator to deliver the award, both parties are bound to take notice of it, and the party suing on it need not give the other notice of the execution of the award. *Houghton v. Burroughs*, 18 N. H. 499. Compare *Woodbury v. Northy*, 3 Me. 85, 14 Am. Dec. 214; *Wright v. Smith*, 19 Vt. 110.

Where One Party Fails to Demand a Copy, he cannot defeat the award by showing that if he had demanded a copy within the time it would not have been ready for him. *Burnap v. Losey*, 1 Lans. (N. Y.) 111.

Where there Is No Provision to That Effect in the Agreement to submit, it is not necessary that a copy of the award should be delivered to the parties where the parties were present when it was signed, and understood its provisions. *Crawford v. Orr*, 84 N. Car. 246.

Parties Not Claiming under the Award.—It seems that the arbitrators are not bound to

by the day stated, provided it is ready to be delivered by that day.¹

Delivery by Day Specified.—However, if the submission directs that it shall be delivered to the parties by a specified day, it must be actually delivered by that day, or it is invalid,² unless the parties waive such delivery.³

In a Common-law Arbitration a delivery of the award is not necessary when no time is fixed within which the award must be made.⁴

keep copies of the award for delivery to others than the parties who claim under it, although the condition of the bond requires the award to be ready for delivery. *Houghton v. Burroughs*, 18 N. H. 499.

1. *Brown v. Vawser*, 4 East 584; *Henfree v. Bromley*, 6 East 309; *Byars v. Thompson*, 12 Leigh (Va.) 558, 37 Am. Dec. 680. See *Goldsborough v. McWilliams*, 2 Cranch (C. C.) 401.

Where the Arbitrators Refused to Deliver an Award to the defendant, on the ground that it was not stamped, the request having been made by him on the last day limited; on action brought subsequently on the arbitration bond for the nonperformance of the award, it was held that the action could not be maintained, as the award was invalid, not having been ready to be delivered within the appointed time. *Wilson v. Wilson*, cited in 1 Saund. 327*a*, note (3).

2. **Requirement for Delivery by Day Specified.**—*Russell on Awards* (6th ed.) 256; *Goldsborough v. McWilliams*, 2 Cranch (C. C.) 401; *Masterson v. Kidwell*, 2 Cranch (C. C.) 669; *Flatter v. McDermott*, 15 Ind. 389; *Conrad v. Johnson*, 25 Ind. 487.

So it has been held that the award must be delivered at the time and place specified in the submission. *Bussfield v. Bussfield*, Cro. Jac. 578.

What Constitutes a Delivery.—A valid delivery is effected by handing a copy of the award to a sixteen-year-old son of one of the parties, who was standing near the house, and in charge of it, and who carried the document into the house on receiving it. *Conrad v. Johnson*, 25 Ind. 487.

An award cannot be objected to on the ground that the arbitrators delivered it to the clerk directly instead of sending it by mail or otherwise. *Rigden v. Martin*, 6 Har. & J. (Md.) 403. See *Upshaw v. Hargrove*, 6 Smed. & M. (Miss.) 286.

Possession Evidence of Delivery.—Possession of an award by one of the parties to the submission is *prima facie* evidence that it was delivered to him by the arbitrators, and unless it is shown to be not sufficient and complete, or is otherwise explained away, it will render a subsequent award made by the arbitrators void. *Lansdale v. Kendall*, 4 Dana (Ky.) 613.

To Whom to be Delivered.—Usually, in *England*, after the award has been made ready, the arbitrator retains it in his possession until his fees and charges are paid. And if the unsuccessful party comes to take up the award, the custom is to give him the unsigned copy, while the award itself is kept for the party in whose favor it was made. *Hicks v. Richardson*, 1 B. & P. 93. See *Russell*

on Awards (6th ed.) 256, 8 and 9 Vict., c. 18, § 35.

The usual practice in the *United States* is to deliver the award to the party who derives a title or right of action under it. *Houghton v. Burroughs*, 18 N. H. 499; *Buck v. Wadsworth*, 1 Hill (N. Y.) 321; *Pratt v. Hackett*, 6 Johns. (N. Y.) 14.

Delivery of Oral Award.—In *Oates v. Bromell*, 6 Mod. 160, 6 Mod. 176, on the first hearing there was a doubt as to whether an oral award was capable of delivery, but upon another hearing the court held: "Upon great consideration, notwithstanding the late case in the Common Pleas, a parol award is capable of a delivery, viz., a declaration of it to the parties, or either of them, if they desire it; and that being so, as soon as the arbitrators have agreed on the award it is ready to be delivered."

3. **Waiver of Delivery.**—*Perkins v. Wing*, 10 Johns. (N. Y.) 143. See *Coulter v. Coulter*, 81 Ind. 542; *Sellick v. Addams*, 15 Johns. (N. Y.) 197; *Gidley v. Bidley*, 65 N. Y. 169; *Houghton v. Burroughs*, 18 N. H. 499; *Buck v. Wadsworth*, 1 Hill (N. Y.) 321; *Boughton v. Seamans*, 9 Hun (N. Y.) 392; *Schultz v. Halsey*, 3 Sandf. (N. Y.) 405; *Pratt v. Hackett*, 6 Johns. (N. Y.) 14.

Illustrations of Waiver.—Where, by the terms of an arbitration bond, the arbitrators are required to seal up their award when completed, and retain it until the first day of a certain term of court, beginning six weeks after the date of the bond, the statutory right of the parties to a copy of the award, and to service of notice thereof within fifteen days after the award is made, must be regarded as waived. *Marsh v. Curtis*, 71 Ind. 377.

In *Sellick v. Addams*, 15 Johns. (N. Y.) 197, it was held that where sworn copies of the award were delivered by arbitrators to the parties, and received by them without making any objection, this must be deemed a waiver on their part of their right to receive the original award.

Where the terms of the submission provided that the award should be indented under the hands and seals of the arbitrators, and ready to be published and delivered to the parties, etc., it was held that, although one paper only containing the award was delivered and signed, yet, as that was left by agreement of the parties in the hands of one of the arbitrators, for the benefit of all the parties, this complied sufficiently with the terms of the submission. *Tracy v. Herrick*, 25 N. H. 381.

4. *New York Lumber, etc., Co. v. Schneider* (C. Pl.), 1 N. Y. Supp. 441, 15 Daly (N. Y.) 15.

Payment of Fees.—Nor is an arbitrator required by law to deliver an award until he has been paid his fee.¹

Delivery of Award in Duplicate.—Where the requirement was that the award was to be delivered to “the parties,” and it was delivered to the prevailing party only, it was held that the other party not having waived his right to a counterpart, and none having been prepared for him, the award was a nullity.²

d. SIGNING THE AWARD.—A Written Award which is Not Signed by the arbitrator is not binding on the parties, unless they accept it.³

And where there Are Several Arbitrators, it is essential that they should all sign the award at the same time and in each other's presence.⁴

Signing on Day Other than that Agreed upon.—But an award is not rendered void because the arbitrators do not sign it on the day upon which it was agreed that they should do so.⁵

e. RETURN OF THE AWARD INTO COURT.—Where statutory provisions exist for the return of the award into court, or where the submission so requires, the award must be returned into court within the time fixed by the submission, or the court has no jurisdiction over it.⁶ But where the submission

1. Payment of Arbitrators' Fees.—Arbitrators may refuse to deliver the award until their fees are paid. *Ott v. Schroepel*, 3 Barb. (N. Y.) 56.

See *supra*, this title, *The Arbitrator's Right to Remuneration*.

2. Delivery of Award in Duplicate.—*Buck v. Wadsworth*, 1 Hill (N. Y.) 321. To the same effect is *Pratt v. Hackett*, 6 Johns. (N. Y.) 14.

But where the submission contained a condition that the award “shall be made in writing, signed by the arbitrators, and ready to be delivered to the parties, or to such of them as shall demand the same,” etc., it was held sufficient that the arbitrators had prepared, signed, and sealed a single award within the time specified; and that it was not necessary that the arbitrators should prepare a duplicate award until it was demanded. *Martin v. McCormick*, 34 N. J. L. 23.

In *England* it has been held that where the submission directed that the award should be delivered to either party, there must be delivery to both parties. *Parker v. Parker*, Cro. Eliz. 448; *Block v. Palgrave*, Cro. Eliz. 797. Compare *Cocks v. Macclefield*, 2 Dyer 218b.

3. Award Not Signed.—*State v. Gurnee*, 14 Kan. 111.

4. Several Arbitrators—Signing Award.—*Wade v. Dowling*, 4 El. & Bl. 44, 82 E. C. L. 44; *Anning v. Hartley*, 27 L. J. Exch. 145; *Stalworth v. Inns*, 2 D. & L. 428; *Little v. Newton*, 2 M. & G. 351, 40 E. C. L. 407; *Security Live Stock Ins. Assoc. v. Briggs*, 22 Ill. App. 107.

In *Tuskaloosa Bridge Co. v. Jemison*, 33 Ala. 476, it was held that the provisions of *Alabama Code*, §§ 2712, 2722, were sufficiently complied with if a majority of the arbitrators signed the award.

Where an award by the arbitrators upon the matters on which they agree is contemplated by the submission, and a separate award by the umpire upon those matters on which the arbitrators differ, it is not necessary that the arbitrators and the umpire should sign one award. *Powell v. Ford*, 4 Lea (Tenn.) 278.

Award Separately Signed.—In *Moore v. Ewing*, 1 N. J. L. 167, where, after the arbitrators had agreed on their award, they adjourned for the purpose of having it drawn up in the proper form, and did not meet again pursuant to the adjournment, but their award was drawn up by the counsel, and carried to the arbitrators separately, and signed by them separately, it was held that this separate execution of the power rendered the award void. It was further held that an award could not be objected to on the ground that it is drawn up by the counsel of the successful party.

In *French v. Butler*, 39 Mich. 79, it was held that an award signed by two of three arbitrators in the presence of each other, but not in the presence of the third, and afterwards signed by the third at a different time and place in the presence of only one of the others, is void. See *Daniels v. Ripley*, 10 Mich. 237.

But in *Steere v. Brownell*, 113 Ill. 415, it was held not to be essential to the validity of an award that it should be signed by the arbitrators at the same time and place, if it was signed after the work was done and expressed their conclusion. See *Conrad v. Johnson*, 20 Ind. 421.

5. Richardson v. Hartsfield, 27 Ga. 528

6. Return of Award into Court—Statutes.—*Bent v. Erie Tel., etc., Co.*, 144 Mass. 165.

Second Award.—Where an award which has been made and returned into court within one year, in accordance with an agreement entered into before a justice of the peace, is re-committed to the arbitrators by the court, a second award may be accepted and enforced, although not returned into court until after the expiration of a year from the date of the submission. *Sperry v. Ricker*, 4 Allen (Mass.) 17; *McClure v. Shroyer*, 13 Mo. 104.

Justice of Peace—Iowa.—Where, by the agreement of the parties, an award is returned to the justice of peace for judgment, it is not thereby rendered void, although the District Court is the more proper tribunal. *King v. Hampton*, 4 Greene (Iowa) 401.

is not under the statute, nor made a rule of court, and there is no agreement between the parties to that effect, it is not necessary that the award should be returned into court, although the matters submitted were at the time involved in pending suits.¹

3. The Award must Be Coextensive with Terms of Submission—*a. MUST DECIDE ALL MATTERS SUBMITTED—*(1) *General Rule.*—The rule is, that the award must be coextensive with the terms of the submission. In other words, the arbitrator must consider and decide all matters submitted, in order to make a final settlement of the subject-matter of the arbitration. If the award disposes of some matters only, it will be void.²

Evidence of Time of the Return.—The evidence of one of the arbitrators is admissible to show that the award had been returned to the clerk of the District Court within the time specified in the submission, where the clerk has omitted to make the usual indorsement on the arbitration papers left with him to be filed. *Young v. Dugan*, 1 *Greene* (Iowa) 152.

Pennsylvania.—The fact that the arbitrators have failed to file their award in the prothonotary's office within seven days, does not render the award invalid, but they forfeit their pay by omitting to do so. *Boone v. Reynolds*, 1 *S. & R.* (Pa.) 231.

Tennessee.—Where, by the terms of the submission, no time is limited for the making of the award, but the arbitrators are desired to do so at the earliest practicable moment, an award need not be filed within the time prescribed by the *Tennessee Code*, § 3441. *Powell v. Ford*, 4 *Lea* (Tenn.) 278. See *White v. Puryear*, 10 *Yerg.* (Tenn.) 441.

Illinois.—Although the *Illinois* statute requires the arbitrators to return their award to the next term of the court, their powers do not expire at that time. It is their duty to proceed afterwards, and their award made subsequently to the expiration of said term will be binding. *Evans v. Hitchcock*, 26 *Ill.* 295.

Massachusetts.—By *Massachusetts Stat.* 1885, c. 384, § 2, it is provided that the Superior Court "shall be always open in every county, and there shall be no longer any terms thereof," and that "any business of the courts may be transacted at any time." *Massachusetts Pub. Stat.*, c. 168, §§ 8 and 9, provide that the award of arbitrators may be inclosed and sealed and "transmitted to the court," and that it may be returned "at any term or session of the court held within the time limited in the submission." It was held, under these enactments, that a proper return of the award is made to the court by a transmission of the award to the clerk of the Superior Court at any time within the period limited in the submission. *James v. Southern Lumber Co.*, 153 *Mass.* 361.

The *Pub. Stat.*, c. 188, § 8, of this state, relating to arbitrators, provides that "the award shall be delivered by one of the arbitrators to the court designated in the agreement, or shall be inclosed and sealed by the arbitrators and transmitted to the court, and shall remain sealed until opened by the clerk." Under this provision, it was held that the award inclosed in a sealed envelope and sent by mail addressed to "Joseph A.

Willard, Esq., Clerk Superior Court, Boston," but without anything in writing upon it setting out its contents, was, when sent to him, transmitted to the court within the meaning of the statute. *Morrell v. Old Colony R. Co.*, 158 *Mass.* 69. See *James v. Southern Lumber Co.*, 153 *Mass.* 361.

Wisconsin.—The "publication of the award" contemplated by the *Wisconsin Rev. Stat.*, § 3554, is the filing of the submission and award in the clerk's office of the court designated in the submission for the action of the court thereon, by setting aside and vacating it, on motion, or by confirming it and rendering judgment thereon, as the case may be. Until they are both so filed and before the court, there is no such publication as would enable the court to act thereon for any purpose. *Russell v. Clark*, 60 *Wis.* 284.

1. *Willingham v. Harrell*, 36 *Ala.* 583.

2. **All the Matters Submitted must be Decided.**—*England.*—*Ross v. Boards*, 8 *Ad. & El.* 290, 35 *E. C. L.* 390; *In re Rider and Fisher*, 3 *Bing. N. Cas.* 874, 32 *E. C. L.* 363; *Stone v. Philipps*, 4 *Bing. N. Cas.* 37, 33 *E. C. L.* 274; *Hide v. Petit*, 1 *Cas. in Ch.* 185; *Harrison v. Creswick*, 13 *C. B.* 399, 76 *E. C. L.* 399; *Anonymous*, 2 *Dyer* 242a; *Mitchell v. Staveley*, 16 *East* 58; *Turner v. Turner*, 3 *Russ.* 494; *Simmonds v. Swaine*, 1 *Taunt.* 554.

Canada.—*McGreevy v. Reg.*, 19 *Can. Sup. Ct. Rep.* 180; *Atkinson v. Potts*, 10 *New Bruns.* 262.

United States.—*James v. Thurston*, 1 *Cliff. (U. S.)* 367; *Carnochan v. Christie*, 11 *Wheat. (U. S.)* 446.

California.—*Porter v. Scott*, 7 *Cal.* 312; *Muldrow v. Norris*, 12 *Cal.* 331.

Connecticut.—*Waller v. Shannon*, 44 *Conn.* 480.

Illinois.—*Buntain v. Curtis*, 27 *Ill.* 374; *Steere v. Brownell*, 113 *Ill.* 415; *Busse v. Agnew*, 10 *Ill. App.* 527.

Iowa.—*McGregor, etc., R. Co. v. Sioux City, etc., R. Co.*, 49 *Iowa* 604.

Maine.—*McNear v. Bailey*, 18 *Me.* 251.

Maryland.—*Archer v. Williamson*, 2 *Har. & G. (Md.)* 62.

Massachusetts.—*Edwards v. Stevens*, 3 *Allen (Mass.)* 315; *Paine v. Paine*, 15 *Gray (Mass.)* 299; *Houston v. Pollard*, 9 *Met. (Mass.)* 164; *Parker v. Clarke*, 104 *Mass.* 431; *Rollins v. Townsend*, 118 *Mass.* 224; *Boston, etc., R. Corp. v. Nashua, etc., R. Corp.*, 139 *Mass.* 463.

Michigan.—*Sawtells v. Howard* (*Mich.* 1895), 62 *N. W. Rep.* 156.

New Hampshire.—*Johnson v. Noble*, 13 *N.*

Determination by Implication.—It seems that although the award does not, in

H. 286, 38 Am. Dec. 485; *Varney v. Brewster*, 14 N. H. 49; *Tudor v. Scovell*, 20 N. H. 171; *Davis v. Dyer*, 54 N. H. 146.

New Jersey.—*Richards v. Drinker*, 6 N. J. L. 307; *Harker v. Hough*, 7 N. J. L. 428.

New York.—*Wright v. Wright*, 5 Cow. (N. Y.) 197; *Jackson v. Ambler*, 14 Johns. (N. Y.) 96; *Ott v. Schroepel*, 5 N. Y. 482; *Jones v. Welwood*, 71 N. Y. 208.

North Carolina.—*Blackledge v. Simpson*, 2 Hayw. (N. Car.) 30, 2 Am. Dec. 614.

Pennsylvania.—*Johnson v. Blackbill*, 1 Pa. St. 364; *Scott v. Barnes*, 7 Pa. St. 134.

Tennessee.—*Gooch v. McKnight*, 10 Humph. (Tenn.) 229.

Vermont.—*Akely v. Akely*, 16 Vt. 450; *Smith v. Potter*, 27 Vt. 304, 65 Am. Dec. 198; *Morse v. Hale*, 27 Vt. 660; *Johnson v. Worden*, 47 Vt. 457; *Young v. Kinney*, 48 Vt. 22.

Virginia.—*Coupland v. Anderson*, 2 Call (Va.) 106.

West Virginia.—*Dunlap v. Campbell*, 5 W. Va. 195; *Bean v. Bean*, 25 W. Va. 604.

Wisconsin.—*Pettibone v. Perkins*, 6 Wis. 416; *Dundon v. Starin*, 19 Wis. 261; *Dogge v. Northwestern Nat. Ins. Co.*, 49 Wis. 501.

See also *Ravee v. Farmer*, 4 T. R. 146; *Edwards v. Stevens*, 1 Allen (Mass.) 315; *Webster v. Lee*, 5 Mass. 334; *King v. Savory*, 8 Cush. (Mass.) 309; *Hodges v. Hodges*, 9 Mass. 320; *Badger v. Titcomb*, 15 Pick. (Mass.) 409, 26 Am. Dec. 611. *Compare Pearce v. McIntyre*, 29 Mo. 423.

Ita Quod Clause.—Under the early cases, the rule, both at law and in equity, was that unless the submission was made conditional by the clause "*ita quod arbitrium fiat de præmissis*" (so that the award be made of and concerning the premises) an award upon one matter only was good, but that where such a condition was inserted in the submission the award was void unless it determined all the matters brought before the arbitrator. *Wrightson v. Bywater*, 3 M. & W. 199; *Dowse v. Cox*, 3 Bing. 20, 11 E. C. L. 12; *Ormelade v. Coke*, Cro. Jac. 354; *Baspoles Case*, 8 Coke 97b; *Hide v. Cooth*, 2 Vern. 109; *Bean v. Newbury*, 1 Lev. 139; *Randall v. Randall*, 7 East 81; *Payne v. Cook*, cited in *Simmonds v. Swaine*, 1 Taunt. 548.

In *Simmonds v. Swaine*, 1 Taunt. 554, *Chambre, J.*, said: "In the case of *Payne v. Cook*, adjudged many years since in the Exchequer Chamber, many points relating to awards were to be decided on, and amongst others this general doctrine was strongly laid down, that as there was no clause in the submission providing that the award should be made on all the points submitted, if the matters omitted were not necessarily dependent on, and connected with, the other points, the award should be sustained."

The rule is expressed in the syllabus as follows: If it be not a condition of the submission that the award shall be made on all the points submitted, an award determining some of the points only, is good, provided that the omission of the others does not destroy the equipoise of considerations.

But even where the *ita quod* clause was left out, where the submission ran, "so as the said award," or "so as the same award," it was held that the condition attached, and that the award would be void unless all matters submitted were disposed of. *Cockson v. Ogle*, 1 Lutw. 550; *Risden v. Inglet*, Cro. Eliz. 838. See *Ott v. Schroepel*, 5 N. Y. 482; *Wright v. Wright*, 5 Cow. (N. Y.) 197. And although the *ita quod* clause is not now usually inserted in submissions, where it is it retains its full force. *Ott v. Schroepel*, 5 N. Y. 482.

Where a general submission has been made, an award which determines only part of the matter submitted, is void. The omitting to insert an *ita quod* clause in such submission does not make the award valid. *Jones v. Welwood*, 71 N. Y. 208.

Intention of the Parties Governs.—The question to be considered, in order to determine whether the award is void as having failed to decide upon some of the matters submitted, is, what was the intention of the parties. *Wrightson v. Bywater*, 3 M. & W. 199; *Bradford v. Bryan*, Willes 268; *Birks v. Trippet*, 1 Saund. 32; *Bowes v. Fernie*, 4 Myl. & C. 150.

All parts of the submission must be considered, in order to arrive at the intention of the parties. But if the submission empowers the arbitrator to make more awards than one, the fact that it also contains an *ita quod* clause will not make the award invalid because it decides upon one subject only; for the reason that, although the parties gave the arbitrator the power to decide all matters in difference, they did not make it a condition to the validity of his decision on one subject that all the matters in difference should be decided by him. *Wrightson v. Bywater*, 3 M. & W. 199; *Dowse v. Cox*, 3 Bing. 20, 11 E. C. L. 12. See *Biddell v. Dowse*, 6 B. & C. 255, 13 E. C. L. 164, 9 D. & R. 404.

In considering the general principles in *Wrightson v. Bywater*, 3 M. & W. 199, *Baron Parke* said: "The question, therefore, is reduced to this: whether, under this reference, it is necessary to the validity of any award to be made pursuant to it, that it should decide all the matters in dispute. And this is a mere question of construction, for there is no rule of law requiring it; its necessity arises from the contract of the parties."

Expressly Excepting a Point.—Where the arbitrator, under a general submission, expressly excepts one point, stating that he has not decided it, and giving liberty to one of the parties to prosecute it if he thinks fit, the award is void absolutely, as it shows upon its face that the arbitrator has not done his duty. *Bradford v. Bryan*, Willes 268.

Where the arbitrators stated in their award that they had not decided in regard to a claim to an annuity, because they believed themselves precluded from doing so by a chancery suit then pending in regard to it, the award was held void, as the reason for their not deciding was untenable. *Bowes v. Fernie*, 4

terms, decide each matter submitted, it will as a general rule be valid if it

Myl. & C. 150. See *Browne v. Meverell*, 2 Dyer 216b.

Refusing to Decide.—Where the arbitrators expressly refuse to decide some of the matters referred to them, their award is void if the submission contains an *ita quod* clause. *Richards v. Drinker*, 6 N. J. L. 307; *Hooker v. Hough*, 7 N. J. L. 428; *Smith v. Potter*, 27 Vt. 304, 65 Am. Dec. 198.

Certain Awards Held Void.—Where the question submitted was whether a partnership had existed, and the award was that if a partnership ever had existed it was ended by consent on a certain day, it was held invalid. *Bhear v. Harradine*, 7 Exch. 269. One of the matters in difference being the defendant's right to an indemnity, which the award did not determine, the award was set aside. *Wilkinson v. Page*, 1 Hare 276. See *Mitchell v. Staveley*, 16 East 58.

Where the arbitrators recite that certain claims were made by the plaintiff, but award that they were not matters in difference in the cause, and that, as a consequence, they have not taken them into account, the court will, however, inquire as to whether they are or not, and if they find that they come within the scope of the submission, the award will be set aside. *Samuel v. Cooper*, 2 Ad. & El. 752, 29 E. C. L. 203. See *Brophy v. Holmes*, 2 Molloy 1.

Where several specific matters in difference are recited in the award, but it contains no direct adjudication as to one of them, and the award cannot be construed to have determined it, as where all actions and controversies had to be decided, and also the rent to be paid to the plaintiff had to be determined, but the award contained no direction as to such rent, it was held altogether void for that reason. *Randall v. Randall*, 7 East 81.

Where the submission required that the arbitrators should award in regard to alleged defects in a building, and determine what sums were due for extra work and omissions, but the award was silent as to the defects, it was held invalid. *In re Rider and Fisher*, 3 Bing. N. Cas. 874, 32 E. C. L. 363.

In *Sallows v. Girling*, Cro. Jac. 277, it was held that an award would be deemed void, no matter how good it was on its face, if it were proved to the satisfaction of the court, by plea or affidavit, that one of the matters submitted had not been decided.

So where an action of ejectment was included in the matters in difference which were submitted, but the award was silent in regard to it, on this being shown by affidavit the award was set aside. *Stone v. Phillips*, 4 Bing. N. Cas. 37, 33 E. C. L. 274.

Where a demand is made by one party before the arbitrator, and is admitted to be due by the other, the award must include it in the determination of the ultimate amount due, or it will be void. *In re Robson v. Railston*, 1 B. & Ad. 723, 20 E. C. L. 483. But where a claim so brought forward is abandoned, it need not be considered in making the award. *Bird v. Cooper*, 4 Dowl. 148.

Illustrations of Awards Held Good.—An award that all suits and actions should cease, determining at the same time all matters submitted, except concerning a certain bond, which was to remain in full force, was held good because the finding in regard to the bond could not be considered as having omitted it from the award. *Berry v. Penring*, Cro. Jac. 399.

Where the award directed a release of all actions and debts, except certain bonds made for the performance of former awards, this was held good, being in effect an award that the bonds should remain in full force. *Sallows v. Girling*, Cro. Jac. 277.

In *Harding v. Forshaw*, 1 M. & W. 415, all matters in difference having been submitted, the award decided that the plaintiff had no cause of action, and stated further that it was not intended to exclude him from the receipt of a certain commission to which he would afterwards be entitled under a certain agreement. The award was objected to, on the ground that the arbitrator had not settled the point about the commission, but it was upheld because it had decided that there was nothing then due under the agreement, and the arbitrator was empowered to decide only upon matters in difference up to the date of the submission. See *Cockburn v. Newton*, 2 M. & G. 899, 40 E. C. L. 682.

Upon a dissolution of partnership, the partners submitted to arbitration all matters in dispute between them, both as partners and as individuals, and the award was made concerning partnership matters only. It was held that it could not be objected to on the ground that the arbitrators had not determined all the matters submitted to them, unless it was also proved that there were, as a fact, individual demands in dispute between the partners. It was also held that if one of the arbitrators signed the award under a mistake as to the allowance of a credit of one of the parties, which was in fact omitted, this was not sufficient ground to invalidate the award. *Leavitt v. Comer*, 5 Cush. (Mass.) 129. See *Karthus v. Ferrer*, 1 Pet. (U. S.) 227.

Where the question submitted to the arbitrators was whether a pew legally "belongs to the estate of the testatrix or those claiming under her," or to a third person, and the award was that it "belonged to and was the property of" the testatrix "at the time of her decease," it was held that this award followed the terms of the submission with sufficient exactness. *Spear v. Hooper*, 22 Pick. (Mass.) 144.

Where the parties to the submission were A on one side and B and C on the other, an award that B should pay A a sum of money was good as against B, whatever objection the other parties might have to it as omitting to state anything as to C's liability. *Wood v. Adcock*, 7 Exch. 468. But see *Rees v. Waters*, 16 M. & W. 263.

If several specific matters are submitted, and the award appears upon its face to determine them all, it is not necessary that it should

includes and determines them by necessary implication.¹

Right of Parties to Withdraw Part of the Matters Submitted.—The parties may withdraw from the consideration of the arbitrators any part of the matter submitted, at any time after the submission has been entered into, and before the award is made.²

decide each individually, unless there is some demand that cannot otherwise be determined. *Dolbier v. Wing*, 3 Me. 421; *In re Brown and Croydon Canal Co.*, 9 Ad. & El. 522, 36 E. C. L. 188; *Ott v. Schroepel*, 5 N. Y. 482; *Cargey v. Aitcheson*, 2 B. & C. 170, 9 E. C. L. 52; *Gray v. Gwennap*, 1 B. & Ald. 106; *Wrightson v. Bywater*, 3 M. & W. 199. But see *Houston v. Pollard*, 9 Met. (Mass.) 164; *In re Rider and Fisher*, 3 Bing. N. Cas. 874, 32 E. C. L. 363; *Wood v. Auburn*, etc., R. Co., 8 N. Y. 160.

Where the submission authorizes the arbitrators to find the damages caused by flowage of land, and also damages as compensation for future injury resulting from a perpetual right to flow the land, an award of a gross sum is sufficient. *Darge v. Horicon Iron Mfg. Co.*, 22 Wis. 691.

The arbitrator need only decide the main question submitted; he is not required to award upon incidental or collateral matters. *In re Keene and Atkinson*, Exch. April 16, 1847, cited in Russell on Awards (6th ed.) 268. See *Richards v. Drinker*, 6 N. J. L. 307; *Harker v. Hough*, 7 N. J. L. 428; *Giddings v. Hadaway*, 28 Vt. 342.

Where there are various distinct claims and separate items of account or damages on both sides, an award of a final balance is enough to sustain the award. *Emery v. Hitchcock*, 12 Wend. (N. Y.) 156; *Cornochan v. Christie*, 11 Wheat. (U. S.) 446; *Bigelow v. Maynard*, 4 Cush. (Mass.) 317; *Gill v. Bickel* (Tex. Civ. App. 1895), 30 S. W. Rep. 919.

So an award of a specific sum under a general submission, as a balance due by one party to the other, is binding. *Strong v. Strong*, 9 Cush. (Mass.) 560; *Shirley v. Shattuck*, 4 Cush. (Mass.) 470.

Trifling Omission Not Fatal.—The omission of trifling matters in the award will not avoid it. So where the arbitrators were to divide and dispose of firm assets as they should think proper, and they omitted to dispose of a few small articles of little value, the award was held to be valid. *Backus v. Fobes*, 20 N. Y. 204. See *Skralbe v. Pryne* (Iowa 1895), 62 N. W. Rep. 21.

Award of Mutual Releases.—In a general submission of all matters in difference, if the award orders the plaintiff to be paid a stated sum, and directs mutual and general releases to be executed by him and the defendant, it is final, although it does not expressly decide certain points submitted, as the liability of the parties on bills of exchange, or in an action between them, because the award of general releases will be held to have included the particular matters in dispute, as the releases would finally determine them. *Birks v. Tripet*, 1 Saund. 32; *Wharton v. King*, 2 B. & Ad. 528, 22 E. C. L. 130; *Addison v. Gray*, 2 Wils. 293.

But where the arbitrator stated in the award that he had refused to pass upon some of the matters submitted, for a reason which the court held untenable, the fact that he directed the parties to execute mutual general releases did not cure the defect, because if the award were not set aside, the general releases would prevent the party from enforcing the claims which the arbitrator had not passed upon, and consequently the award was held void. *Bowes v. Fernie*, 4 Myl. & C. 150. See *Wilkinson v. Page*, 1 Hare 276.

1. Award Good if Matters Decided by Necessary Implication.—*Georgia.*—*Crabtree v. Green*, 8 Ga. 8.

Indiana.—*McCullough v. McCullough*, 12 Ind. 487.

Kentucky.—*Shackelford v. Purket*, 2 A. K. Marsh. (Ky.) 435, 12 Am. Dec. 422.

Maine.—*Dolbier v. Wing*, 3 Me. 421; *Hammond v. Deehan*, 78 Me. 399.

Massachusetts.—*Stickles v. Arnold*, 1 Gray (Mass.) 418; *Buckland v. Conway*, 16 Mass. 396; *Harden v. Harden*, 11 Gray (Mass.) 435; *Mickles v. Thayer*, 14 Allen (Mass.) 114; *Bigelow v. Maynard*, 4 Cush. (Mass.) 317; *Sohier v. Easterbrook*, 5 Allen (Mass.) 311; *Holyoke Mach. Co. v. Franklin Paper Co.*, 97 Mass. 150.

New Jersey.—*Smith v. Demarest*, 8 N. J. L. 195.

New York.—*Wood v. Auburn*, etc. R. Co., 8 N. Y. 160.

North Carolina.—*Blackledge v. Simpson*, 2 Hayw. (N. Car.) 30, 2 Am. Dec. 614.

Vermont.—*Rixford v. Nye*, 20 Vt. 132; *Hicks v. Gleason*, 20 Vt. 139; *Lamphire v. Cowan*, 39 Vt. 420; *Bowman v. Downer*, 28 Vt. 532.

See also *Blair v. Wallace*, 21 Cal. 320; *Spear v. Hooper*, 22 Pick. (Mass.) 144; *Solomons v. M'Kinstry*, 13 Johns. (N. Y.) 27.

2. Withdrawal of Matters from Consideration of Arbitrator.—*Varney v. Brewster*, 14 N. H. 49; *Bird v. Cooper*, 4 Dowl. 148; *Ballance v. Underhill*, 4 Ill. 453. See *Milner v. Turner*, 4 T. B. Mon. (Ky.) 240; *Gibson v. Powell*, 5 Smed. & M. (Miss.) 712.

The Withdrawal must be Made Specifically.—A demand will not be considered as withdrawn, because it is not disputed or denied by the party against whom it is made. *In re Robson v. Railston*, 1 B. & Ad. 723, 20 E. C. L. 483.

Effect of Withdrawal.—The parties are afterwards precluded from objecting to the award because such matters have not been decided upon. *Page v. Foster*, 7 N. H. 392; *Brewer v. Bain*, 60 Ala. 153.

The arbitrators must decide upon all the matters submitted to them, in order to render their award valid, but if, after the submission has been entered into, some portion of the claims included in it have been withdrawn, by an agreement between the parties, from the

Omission to Pass upon Certain Matters—Vacating Award—Prejudice.—An award will not be set aside in equity on account of an omission by the arbitrators to act upon part of the matters submitted, unless the omission shall have injured the complainant.¹

(2) *Must Decide as to All Parties.*—An award must not alone decide as to all matters submitted, but it must decide respecting all the parties to the submission, or it is void.²

(3) *Need Decide Only Matters Presented to the Arbitrators.*—If the arbitrator awards upon all the questions actually presented to him and brought to his notice, although others have been submitted to which his attention has not been drawn, the award will be sustained, even when it contains an *ita quod* clause.³

Duty of Parties to Present Their Claims.—It is the duty of each party to a general submission to bring all his claims against the other before the arbitrators, and his failure to do so will not prevent the award from being a bar to an action upon any such claim.⁴ So it has been held that where parties refer disputed matters to arbitration, and either neglects to bring before the arbitrators any claim he may have against the other, which is within the terms of the submission, he thereby forfeits his claim.⁵

(4) *Presumption that All Matters Submitted are Decided.*—The inclination of the courts is always to sustain an award, and every reasonable intendment and presumption will be made in favor of its being a final determination of all the matters submitted. Consequently, it will be presumed, where there is no evidence to the contrary, that all matters and claims presented by either party, as to their mutual difference, were considered by the arbitrators in arriving at their award.⁶ The award will

consideration of the arbitrators, and an award is then published by the arbitrators with the consent of the parties, which embraces only the claims that remain after the others have been withdrawn, the award so made will be valid. *Varney v. Brewster*, 14 N. H. 49.

Form of Withdrawal.—Where the submission is under seal, such withdrawal cannot, however, be made by parol. *Howard v. Cooper*, 1 Hill (N. Y.) 44.

1. **Failure to Decide Some of the Matters—When Award Set Aside.**—*Davy v. Faw*, 7 Cranch (U. S.) 171; *Warfield v. Holbrook*, 20 Pick. (Mass.) 531.

2. **Award must Decide as to All Parties.**—Russell on Awards (6th ed.) 274, Com. Dig., Arb., E. 5; *Harris v. Paynter*, Rolle Abr., Arb., O. 8, p. 261.

3. *England.*—*Middleton v. Weeks*, Cro. Jac. 200; *In re Keene and Atkinson*, Exch. April 16 (1847); *Hawksworth v. Brammall*, 5 Myl. & C. 281; *Rees v. Waters*, 16 M. & W. 263, 4 D. & L. 567; *Elsom v. Rolfe*, 2 Smith 459. *United States.*—*Karthauss v. Ferrer*, 1 Pet. (U. S.) 222.

California.—*Muldrow v. Norris*, 12 Cal. 331.

Illinois.—*Ballance v. Underhill*, 4 Ill. 453.

Maine.—*McNear v. Bailey*, 18 Me. 251.

Massachusetts.—*Hodges v. Hodges*, 9 Mass. 320; *Warfield v. Holbrook*, 20 Pick. (Mass.) 535.

New Hampshire.—*Page v. Foster*, 7 N. H. 393; *Varney v. Brewster*, 14 N. H. 49.

New York.—*Ott v. Schroepel*, 5 N. Y. 482; *Jones v. Welwood*, 71 N. Y. 208.

Pennsylvania.—*Hewitt v. Furman*, 16 S. & R. (Pa.) 135.

Vermont.—*Young v. Kinney*, 48 Vt. 22.

Wisconsin.—*Chandos v. American F. Ins. Co.*, 84 Wis. 189.

4. *Owen v. Boerum*, 23 Barb. (N. Y.) 187. See also *infra*, this title, *Effect of the Award*.

5. *Stipp v. Washington Hall Co.*, 5 Blackf. (Ind.) 473. See *Grayson v. Meredith*, 17 Ind. 357; *McCullough v. McCullough*, 12 Ind. 487.

6. **Presumptions in Favor of the Award—England.**—*Doe v. Horner*, 8 Ad. & El. 235, 35 E. C. L. 382; *Day v. Bonnin*, 3 Bing. N. Cas. 219, 32 E. C. L. 91; *Hawkins v. Colclough*, 1 Burr. 275; *Harrison v. Creswick*, 13 C. B. 399, 76 E. C. L. 399; *Wyatt v. Curnell*, 1 Dowl. N. S. 327; *Ingram v. Milnes*, 8 East 445; *Stonehewer v. Farrar*, 9 Jur. 203; *Bowes v. Fernie*, 4 Myl. & C. 150; *Baspoles Case*, 8 Coke 97b; *Wood v. Griffith*, 1 Swanst. 43.

United States.—*Faw v. Davy*, 1 Cranch (C. C.) 440; *Karthauss v. Ferrer*, 1 Pet. (U. S.) 222; *Kleine v. Catara*, 2 Gall. (U. S.) 61. *Alabama.*—*Strong v. Beroujon*, 18 Ala. 168.

California.—*Porter v. Scott*, 7 Cal. 312.

Illinois.—*Hadaway v. Kelly*, 78 Ill. 286; *Darst v. Collier*, 86 Ill. 96.

Indiana.—*McCullough v. McCullough*, 12 Ind. 487; *Baltes v. Bass Foundry, etc.*, Works, 129 Ind. 185.

Maine.—*Dolbier v. Wing*, 3 Me. 421; *McNear v. Bailey*, 18 Me. 251; *Hayes v. Forskoll*, 31 Me. 112.

Maryland.—*Caton v. McTavish*, 10 Gill & J. (Md.) 192.

Massachusetts.—*Sperry v. Ricker*, 4 Allen (Mass.) 17; *Thoreau v. Pallies*, 5 Allen (Mass.)

not be avoided, unless it is clearly shown that the matters submitted have

354; *Leavitt v. Comer*, 5 Cush. (Mass.) 129; *Tallman v. Tallman*, 5 Cush. (Mass.) 325; *Strong v. Strong*, 9 Cush. (Mass.) 560; *Hodges v. Hodges*, 9 Mass. 320; *Holyoke Mach. Co. v. Franklin Paper Co.*, 97 Mass. 150; *Gaylord v. Norton*, 130 Mass. 74.

New Hampshire.—*Parsons v. Aldrich*, 6 N. H. 264; *Furber v. Chamberlain*, 29 N. H. 405; *Ford v. Burleigh*, 60 N. H. 278.

New Jersey.—*Leslie v. Leslie*, 50 N. J. Eq. 103.

New York.—*Wright v. Wright*, 5 Cow. (N. Y.) 197; *M'Kinstry v. Solomons*, 2 Johns. (N. Y.) 57; *Harris v. Wilson*, 1 Wend. (N. Y.) 511; *Ott v. Schroepfel*, 5 N. Y. 482; *New York Lumber, etc., Co. v. Schnieder*, 119 N. Y. 475; *Moorewood v. Jewett*, 2 Robt. (N. Y.) 496.

Ohio.—*Rice v. Hassenpflug*, 45 Ohio St. 377.

Pennsylvania.—*Harvey v. Snow*, 1 Yeates (Pa.) 156; *Hewitt v. Furman*, 16 S. & R. (Pa.) 135.

Tennessee.—*Dougherty v. McWhorter*, 7 Yerg. (Tenn.) 239.

Vermont.—*Bowman v. Downer*, 28 Vt. 532; *Young v. Kinney*, 48 Vt. 22; *Hathaway v. Hagan*, 59 Vt. 75.

Virginia.—*Clarke v. Reins*, 12 Gratt. (Va.) 98; *Pollock v. Sutherland*, 25 Gratt. (Va.) 78.

Wisconsin.—*Call v. Ballard*, 65 Wis. 187. See also *Sohier v. Easterbrook*, 5 Allen (Mass.) 311; *Harden v. Harden*, 11 Gray (Mass.) 435.

The Rule of Construction is that where the award purports to be made *de præmissis*—"of and concerning the premises," on the matters stated in the submission, if the directions of the award are large and general enough to apply as a comprehensive decision of all the different specific matters submitted, the award will be taken *prima facie* to be a decision of all such matters, and of nothing more; while, if the adjudication of the award applies in terms to a particular matter only, although the submission is of all matters in difference, the award will be presumed good until it is proved that there were other matters submitted to the arbitrator to which such limited adjudication will not apply. *Russell on Awards* (6th ed.) 276; *Knight v. Burton*, 6 Mod. 231; *Veale v. Warner*, 1 Saund. 324, note; *Risden v. Inglet*, Cro. Eliz. 838; *Baspole's Case*, 8 Coke 97b; *Bradford v. Bryan*, Wiles 268; *Rolle Abr.*, Arb., L. 256; *Middleton v. Weeks*, Cro. Jac. 200; *Dolbier v. Wing*, 3 Me. 421; *Lamphire v. Cowan*, 39 Vt. 420.

Award must be Construed Reasonably.—There is, however, a limit to the extent to which favorable presumptions will be indulged in in favor of the award. It must be construed reasonably. Its meaning cannot be forced, nor will an effect be given to it contrary to the obvious meaning and intent of the arbitrators. Where an award stated that several debts were due by the parties jointly, and found also that "all outstanding debts for cattle, if any such, are joint," it was held that the specific debts named could not be construed

as all due for cattle; and also that it could not be presumed that there were no debts due for cattle because none had been specifically found, and consequently the award could not be sustained. *Patton v. Baird*, 7 Ired. Eq. (N. Car.) 255.

So in *Stonehewer v. Farrar*, 9 Jur. 203, *Coleridge, J.*, said: "There are many expressions in the cases as to the manner in which the court ought to construe awards, which appear to me to be often used with too much strength. Awards are to be construed sensibly, as all other instruments."

It is not necessary, under modern decisions, that an award should profess to be made of and concerning the premises, or that it should state in terms that the arbitrators decided upon every matter in difference; if it appears upon its face to be an award on all the matters submitted, it will be sustained. *In re Brown and Croydon Canal Co.*, 9 Ad. & El. 522, 36 E. C. L. 188.

An award in which the arbitrator says: "Having considered the allegations of the parties and the evidence touching the matters in difference, I award," will be presumed to have finally disposed of all matters in difference until the contrary is shown. *Craven v. Craven*, 7 Taunt. 644, 2 E. C. L. 644; *Baspole's Case*, 8 Coke 97b; *Bradford v. Bryan*, Wiles 268, *Rolle Ab. Arb. L.*, p. 256; *Middleton v. Weeks*, Cro. Jac. 200; *Risden v. Inglet*, Cro. Eliz. 838.

Even where the award is not of and concerning the premises, the presumption is in its favor. *King v. Bowen*, 8 M. & W. 625.

But where the matter submitted was the determination of the price of certain canals and bogs, and the arbitrator directed that one party should pay to the other a specified sum of money, the award was set aside as not showing that the arbitrator had determined all the matters submitted to him. *Richards v. Browne*, 9 Ir. C. L. Rep. 199.

Illustrations.—Where the award purports to be "in full of and for all matters submitted," it will be presumed that it covered all the matters presented to the arbitrators. *Bowman v. Downer*, 28 Vt. 532.

An arbitrator stated his conclusion in his award, and added: "In arriving at this result, I have excluded every claim, including those for intoxicating liquors, submitted by said parties, except the following, which I have allowed." It was held that the meaning of the award was that the arbitrator disallowed the claims stated to have been excluded in arriving at the result. *Hammond v. Dehan*, 78 Me. 399.

So where a submission was of all actions, real and personal, and the award is only of actions personal, it will be good. It will be presumed that no actions real were pending between the parties. *Kyd on Awards* 172; *Karthauss v. Ferrer*, 1 Pet. (U. S.) 222; *Kleine v. Catara*, 2 Gall. (U. S.) 61; *Horrel v. M'Alexander*, 3 Rand. (Va.) 94.

Where the arbitrators in their award make no mention of one item of charge claimed by

not been determined by the arbitrators.¹

Conclusiveness.—At the same time, even if the award states in the most distinct manner that all matters have been decided, it is not conclusive; the objecting party may show that some specific matter has been submitted and presented to the arbitrators, and that they have failed to determine it.²

The Burden of Proof rests upon the party so objecting.³

b. MUST NOT DECIDE MATTERS WHICH WERE NOT SUBMITTED—(1) *General Rule.*—An award must be confined to the matters submitted for decision. Where it decides upon matters which are without the terms of the submission, it is absolutely void, unless that part which is without the terms of the submission can be eliminated without defeating the intention of the parties.⁴ Where, however, the part which is within the terms of the

one of the parties, although all matters embraced in the action were submitted to them, they will be taken to have disallowed it. *Long v. Fitzgerald*, 97 N. Car. 39. See also *Engleman v. Engleman*, 1 Dana (Ky.) 437.

In *Lamphire v. Cowan*, 39 Vt. 420, where the submission embraced "all matters of difference between the parties," it was held that where there was no proof to the contrary, from the award or otherwise, it would be presumed that all matters decided on by the arbitrators were matters of difference, and that all the matters of difference were determined by them.

Award for Costs Only.—In some cases the award will be sustained, although it does not, in terms, dispose even of the main question submitted, but leaves it to be inferred by implication, as where it gives no decision, but an award of costs, from which the necessary conclusion is that a final disposition of the whole question submitted has been made in favor of the party to whom the costs were awarded. *Buckland v. Conway*, 16 Mass. 396; *Stickles v. Arnold*, 1 Gray (Mass.) 418; *Hodges v. Raymond*, 9 Mass. 316; *Hicks v. Gleason*, 20 Vt. 139; *Rixford v. Nye*, 20 Vt. 132; *Lamphire v. Cowan*, 39 Vt. 420; *Traquair v. Redinger*, 4 Yeates (Pa.) 282; *Purdy v. Delavan*, 1 Cai. (N. Y.) 304; *Hanson v. Webber*, 40 Me. 194.

In *Sears v. Vincent*, 8 Allen (Mass.) 507, on a submission of a suit for damages, an award that one of the parties should pay all the costs of the suit pending in the court from which the reference had its origin, was held by necessary implication to mean that he should recover no damages.

1. Failure of Arbitrators to Decide All Matters must be Clearly Shown.—*Kyd on Awards* 177; *Caldwell* 105; *R. v. St. Katherine's Dock Co.*, 1 N. & M. 121; *Baspole's Case*, 8 Coke 98; *Ingram v. Milnes*, 8 East 445.

A Party Who Seeks to Impeach an Award on the ground that the arbitrators have not decided all the matters included in the submission, must prove that fact affirmatively before the award will be set aside. *Strong v. Strong*, 9 Cush. (Mass.) 560; *Tallman v. Tallman*, 5 Cush. (Mass.) 325; *Karthauss v. Ferrer*, 1 Pet. (U. S.) 222.

Although an Award Contains Less than was Submitted to the arbitrators, it will be held good where there is no proof that matters submitted, but not included in the award,

were brought before the arbitrators. *Ott v. Schroepel*, 5 N. Y. 482. See *Ingram v. Milnes*, 8 East 445; *Baspole's Case*, 8 Coke 97b.

2. Mitchell v. Staveley, 16 East 58; *Randall v. Randall*, 7 East 81.

3. Burden of Proof.—*Sperry v. Ricker*, 4 Allen (Mass.) 17; *Leavitt v. Comer*, 5 Cush. (Mass.) 129; *Strong v. Strong*, 9 Cush. (Mass.) 560; *Tallman v. Tallman*, 5 Cush. (Mass.) 325; *Fiske v. South Wilbraham Mfg. Co.*, 7 Allen (Mass.) 476; *Hayes v. Forskoll*, 31 Me. 112; *Kendrick v. Tarbell*, 26 Vt. 416; *Rixford v. Nye*, 20 Vt. 132; *Lamphire v. Cowan*, 39 Vt. 420; *Parsons v. Aldrich*, 6 N. H. 264; *Jackson v. Ambler*, 14 Johns. (N. Y.) 96; *Case v. Ferris*, 2 Hill (N. Y.) 75; *Henrickson v. Reinback*, 33 Ill. 299; *Gonsales v. Deavens*, 2 Yeates (Pa.) 539.

Parol Evidence is admissible to prove that matters included in the submission were presented to the arbitrators, and not determined by them. *McNear v. Bailey*, 18 Me. 251; *Mitchell v. Staveley*, 16 East 58.

In *Hawksworth v. Brammall*, 5 Myl. & C. 281, where a bill in equity was brought, seeking specific performance of an award for the dissolution of a partnership, the arbitrators themselves were permitted to give evidence as to what was presented to them for determination, and whether or not they had decided all the matters referred.

4. Award must be Confined to Matters Submitted—*England.*—*Henderson v. Williamson*, 1 Stra. 116; *Hooper v. Balfour*, 62 L. T. Rep. 646.

United States.—*Lyle v. Rodgers*, 5 Wheat. (U. S.) 394; *De Groot v. U. S.*, 5 Wall. (U. S.) 419; *Gilman v. Brown*, 1 Mason (U. S.) 191.

Alabama.—*Reynolds v. Reynolds*, 15 Ala. 398.

Arkansas.—*Lee v. Onstott*, 1 Ark. 206.

California.—*White v. Arthur*, 59 Cal. 33.

Delaware.—*Stevens v. Gray*, 2 Harr. (Del.) 347; *Fountain v. Harrington*, 3 Harr. (Del.) 22; *Meredith v. Sanborn*, 5 Harr. (Del.) 249.

Georgia.—*Richardson v. Payne*, 55 Ga. 167.

Illinois.—*Glade v. Schmidt*, 20 Ill. App. 157.

Iowa.—*Lynch v. Nugent*, 80 Iowa 422; *Amos v. Buck*, 75 Iowa 651.

Kentucky.—*Curd v. Wallace*, 7 Dana (Ky.) 190, 32 Am. Dec. 85; *Carson v. Carson*, 1 Metc. (Ky.) 434; *Carmack v. Grant*, 5 Litt. (Ky.) 32; *Brown v. Warnock*, 5 Dana (Ky.) 492.

submission can be separated from that which is without, it will be sustained.¹

Louisiana.—*In re Wallace*, 31 La. Ann. 335.
Maine.—*Hayes v. Forskoll*, 31 Me. 112; *Black v. Hickey*, 48 Me. 545; *Wyman v. Hammond*, 55 Me. 534; *Merrill v. Gardner*, 40 Me. 232; *Boynnton v. Frye*, 33 Me. 216; *Sawyer v. Freeman*, 35 Me. 542; *Walker v. Simpson*, 80 Me. 143; *Littlefield v. Smith*, 74 Me. 387.

Maryland.—*Armstrong v. Robinson*, 5 Gill & J. (Md.) 412; *Ebert v. Ebert*, 5 Md. 353; *Bullitt v. Musgrave*, 3 Gill (Md.) 31; *Walsh v. Gilmor*, 3 Har. & J. (Md.) 383, 6 Am. Dec. 503.

Massachusetts.—*Bean v. Farnam*, 6 Pick. (Mass.) 269; *Culver v. Ashley*, 17 Pick. (Mass.) 98; *Shearer v. Handy*, 22 Pick. (Mass.) 417; *Hubbell v. Bissell*, 13 Gray (Mass.) 299; *Com. v. Pejepsut Proprietors*, 7 Mass. 398; *French v. Richardson*, 5 Cush. (Mass.) 450; *Ellis v. Ridgeway*, 1 Allen (Mass.) 501.

Michigan.—*Sawtells v. Howard* (Mich. 1895), 62 N. W. Rep. 156.

Mississippi.—*Gibson v. Powell*, 5 Smed. & M. (Miss.) 712.

Missouri.—*Frissell v. Fickes*, 27 Mo. 557.
New Hampshire.—*Tracy v. Herrick*, 25 N. H. 381; *Adams v. Adams*, 8 N. H. 82; *Cheshire Bank v. Robinson*, 2 N. H. 126; *Rand v. Redington*, 13 N. H. 72, 38 Am. Dec. 475; *Thrasher v. Haynes*, 2 N. H. 429.

New Jersey.—*Hazen v. Addis*, 14 N. J. L. 333; *Young v. Young*, 6 N. J. Eq. 450; *Leslie v. Leslie*, 52 N. J. Eq. 332; *Den v. Taylor*, 3 N. J. L. 440; *Lee v. Dolan*, 39 N. J. Eq. 193.

New York.—*Ott v. Schroepel*, 7 Barb. (N. Y.) 431; *Allen v. Galpin*, 9 Barb. (N. Y.) 246; *Borrowe v. Milbank*, 5 Abb. Pr. (N. Y. Super. Ct.) 28; *Pratt v. Hackett*, 6 Johns. (N. Y.) 16; *Solomons v. McKinsty*, 13 Johns. (N. Y.) 237; *Schuyler v. Van Der Veer*, 2 Cai. (N. Y.) 235; *Brown v. Hankerson*, 3 Cow. (N. Y.) 70; *Wright v. Wright*, 5 Cow. (N. Y.) 197; *Cox v. Jagger*, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522; *Shrump v. Parfitt*, 84 Hun (N. Y.) 341; *Cooke v. Odd Fellows' Fraternal Union*, 49 Hun (N. Y.) 23; *Masury v. Whiton*, 111 N. Y. 679; *New York v. Butler*, 1 Barb. (N. Y.) 325; *Leach v. Weeks*, 2 Abb. Pr. N. S. (N. Y. Supreme Ct.) 269.

North Carolina.—*Brown v. Brown*, 4 Jones (N. Car.) 123; *Duncan v. Duncan*, 1 Ired. (N. Car.) 466; *Cullifer v. Gilliam*, 9 Ired. (N. Car.) 126; *Oneal v. Butler*, 3 Dev. (N. Car.) 94; *Waugh v. Mitchell*, 1 Dev. & B. Eq. (N. Car.) 510.

Pennsylvania.—*Huff v. Parker*, cited in 4 Dall. (Pa.) 285, 3 Yeates (Pa.) 567; *Collins v. Freas*, 77 Pa. St. 493; *Buckley v. Ellmaker*, 13 S. & R. (Pa.) 71; *South v. South*, 70 Pa. St. 195; *Montgomery v. Patterson*, 13 S. & R. (Pa.) 150; *Biggs v. Funk*, 5 Watts (Pa.) 478; *Stewart v. Abrams*, 7 Watts (Pa.) 448; *Drhew v. Altoona*, 121 Pa. St. 401.

Rhode Island.—*Sweet v. Mathewson*, 1 R. I. 420.

South Carolina.—*Wooden v. Little*, 3 McCord (S. Car.) 487; *Brown v. Davis*, 2 Brev. (S. Car.) 468; *Perkins v. Kershaw*, 1 Hill's

Eq. (S. Car.) 344; *Sessions v. Barfield*, 2 Bay (S. Car.) 94.

Tennessee.—*Smith v. Kincaid*, 7 Humph. (Tenn.) 28; *Palmer v. Van Wyck*, 92 Tenn. 397.

Texas.—*Fortune v. Killebrew*, 86 Tex. 172.
Vermont.—*Howard v. Edgell*, 17 Vt. 9; *Cook v. Carpenter*, 34 Vt. 121; *Stewart v. Cass*, 16 Vt. 663, 42 Am. Dec. 534.

Virginia.—*Sutton v. Dickinson*, 9 Leigh (Va.) 142; *Morris v. Morris*, 9 Gratt. (Va.) 637; *Macon v. Crump*, 1 Call (Va.) 575; *Hollingsworth v. Lupton*, 4 Munf. (Va.) 114.

West Virginia.—*Dunlap v. Campbell*, 5 W. Va. 195.

See *supra*, this title, *Authority of the Arbitrator—General Rule*.

When Award of Gross Sum Void.—In *Bullock v. Bergman*, 46 Md. 270, an award for a lump sum was set aside for embracing matters not within the terms of the submission, and because it contained nothing to show how the invalid part could be separated from the rest.

An award will be rendered void where the arbitrators exceed their jurisdiction by allowing damages upon a question which has not been submitted to them, and rendering their award in a lump sum. *Dodds v. Hakes* (Ct. App.), 23 N. Y. St. Rep. 192, 114 N. Y. 260.

Recommendations Foreign to Question Submitted.—Where the arbitrators stepped somewhat aside to render some unsolicited service by way of promoting harmony, and decided some questions not submitted and gave some advice unasked, and in this respect exceeded their authority, it was held that as these decisions and recommendations were entirely foreign to the questions submitted, and of such a nature that they could not have affected the result as to the matters submitted, they did not vitiate the arbitration. *Lynch v. Nugent*, 80 Iowa 422. See also *Doane College v. Lanhan*, 26 Neb. 421.

When Question for the Jury.—Where both the submission and the award are oral, it is a question for the jury to decide what was submitted and what was decided in the award. *Torrence v. Graham*, 1 Dev. & B. (N. Car.) 284. See *Burns v. Hendrix*, 54 Ala. 78.

Disallowing Set-off.—Where, in a suit pending, a reference was made to arbitration of all matters of difference between the parties in that suit, and the defendant in such suit had filed in set-off a matter which was not the proper subject of set-off, it was held that the arbitrator was right in disallowing it. *Harrison v. Wortham*, 8 Leigh (Va.) 296.

Action of Court where Award a Nullity.—Where an award assumes to decide a matter over which the arbitrator has no jurisdiction, it is a nullity, and, as a rule, where an award is a nullity the court will not interfere to set it aside, but will leave the parties to their other remedies. *Graham v. The Vict. R. Common*, 19 Vict. L. Rep. 522; *In re Higgins*, etc., 11 Vict. L. Rep. 140 (Australia).

1. See *infra*, this title, *An Award in Part Bad may Be Good in Part*.

Award Containing Explanations, etc.—An award is not rendered invalid because of its having an explanation added to it of a matter upon which the arbitrators did not act, and which was not embraced within the terms of the submission.¹

Scope of General Submission.—Nor are the arbitrators limited in their award to matters in issue between the parties as individuals; they may, under a general submission, pass upon matters in controversy between them as guardians or trustees.²

(2) **Presumption that Outside Matters are Not Decided.**—As the presumption is that the award has determined all the matters submitted, so it will be presumed that it does not pass upon matters which were not submitted, and the onus of proving that it includes extrinsic matters rests upon the party who seeks to impeach it for that reason.³

1. *Stipp v. Washington Hall Co.*, 5 Blackf. (Ind.) 16.

2. **General Submission.**—As where the submission was of "all accounts and other matters respecting property of every nature whatever," *King v. Cook*, T. U. P. Charl. (Ga.) 286, 4 Am. Dec. 715; and so where, in a controversy between guardian and ward, "all matters and things growing out of, or connected with, such guardianship," are submitted to arbitration, the arbitrators do not exceed their authority by canceling in their award a note given by the ward to the guardian in his individual character, for money received from him. *Overby v. Thrasher*, 47 Ga. 10.

3. **Presumption that Extrinsic Matters are Not Decided.**—*Alabama.*—*Reynolds v. Reynolds*, 15 Ala. 398.

California.—*Blair v. Wallace*, 21 Cal. 317.

Illinois.—*Hubbard v. Firman*, 29 Ill. 90.

Maryland.—*Caton v. McTavish*, 10 Gill & J. (Md.) 192; *Ebert v. Ebert*, 5 Md. 353; *State v. Stewart*, 12 Gill & J. (Md.) 456.

Massachusetts.—*Sperry v. Ricker*, 4 Allen (Mass.) 17.

Michigan.—*Clement v. Comstock*, 2 Mich. 359.

New York.—*Byers v. Van Deusen*, 5 Wend. (N. Y.) 268.

See also *Chapin v. Boody*, 25 N. H. 285; *Joy v. Simpson*, 2 N. H. 179; *Parsons v. Aldrich*, 6 N. H. 264; *Richardson v. Huggins*, 23 N. H. 106; *Hill v. Hill*, 11 Smed. & M. (Miss.) 616; *M'Kinstry v. Solomons*, 2 Johns. (N. Y.) 57, affirmed in 13 Johns. (N. Y.) 27; *Armstrong v. Armstrongs*, 1 Leigh (Va.) 491; *Richards v. Brockenbrough*, 1 Rand. (Va.) 449; *Bassett v. Cunningham*, 9 Gratt. (Va.) 684.

Want of Technical Precision in Language of Award.—An award, although expressed in such general terms as to include all disputes, may be restricted in its operation to the particular disputes submitted, and it will be presumed, where it is not clearly shown that the arbitrators have passed upon matters which were not submitted to them—although their language, from a want of technical precision, may be too general—that they performed nothing but their duty. Where the submission was of a dispute in regard to the boundary lines of certain real estate and trespasses alleged to have been committed thereon, and the award decided the matters so submitted, and added a general direction that "all ac-

tions, controversies, etc., between the parties touching the premises" should cease, the force of this direction was restricted to the matters actually submitted, and the award was held not to have exceeded the scope of the submission. *Joy v. Simpson*, 2 N. H. 179.

Where Some Only of Several Suits in Regard to Title were Submitted, and the award directed all suits to cease, it was held that it would be construed as referring to those suits only which had been submitted. *Ingraham v. Webb*, 1 Rolle 362; *Webb v. Ingram*, Cro. Jac. 663.

"All Demands"—*Massachusetts Statute.*—Where the parties enter into an agreement to submit "all demands" between them, under *Massachusetts Gen. Stat.*, c. 147, §§ 1 and 2, and the arbitrators made an award that one of the parties should recover a specified amount from the other, and that the same should be in full satisfaction of all matters submitted, the presumption of law is, where there is no proof to the contrary, that the arbitrators considered only such demands as might be properly the subject of arbitration under the statute. *Fiske v. South Wilbraham Mfg. Co.*, 7 Allen (Mass.) 476.

Every Fair Presumption will be Made in Order to Sustain an Award where the objection made to it is that it is without the terms of the submission, and if such presumption would bring the award within the terms of the submission, it must be sustained. *Pollock v. Sutherlin*, 25 Gratt. (Va.) 78.

The Degree of Proof Necessary.—Where the submission was of the debts, controversies, and accounts of a partnership, and the award was objected to on the ground that certain joint and several notes had been improperly taken into consideration and declared upon by the arbitrators, it was held that it was impossible from the mere form of the notes to say what the relationship between the parties in regard to them actually was. They might have been notes of the firm. The court further held that it could not "presume against the award of the arbitrators; that matters which have been laid before them, and have been considered and determined by them as partnership claims, are not matters included in the submission, merely because they are such that they may not have been properly included in the award. The party who assails an award must clearly go further than

(3) *Waiver, Acquiescence, Consent.*—Where an award has been acquiesced in for a long time, it will not be set aside, even though the arbitrators have exceeded their authority,¹ and an award in excess of authority will be binding on the party who accepts from the other party performance of his part of it.²

Oral Agreement to Add to Written Submission.—So if the parties to a written submission enter into an oral agreement upon a trial before the arbitrators to submit matters not included in the written submission, and the arbitrators try the matters so submitted by the consent of the parties, and make their award, neither party can afterwards object that the award exceeded the terms of the written submission.³

(4) *Who may Object.*—Where the arbitrators make an award in regard to some particular in which they have not been authorized by the submission, the party in whose favor the award was made cannot object to it for that reason.⁴

4. **An Award in Part Bad may Be Good in Part**—*a. GENERAL RULE.*—Although an award is in part bad, yet if the principal part⁵ is good, and the bad portion is clearly and wholly separable from, and independent of, the good part, the latter will be sustained, and the former will be rejected as surplusage.⁶

merely to show that the referees may have erred." *Richardson v. Huggins*, 23 N. H. 106.

1. *Effect of Acquiescence or Ratification.*—In construing the terms of the submission, the court held that if the arbitrators exceeded their authority the award would be set aside wholly or *pro tanto*, but that this cannot be done after the award has been acquiesced in or carried into effect. *McDaniel v. Bell*, 3 Hayw. (Tenn.) 258.

Where the arbitrators have decided upon matters which were not submitted to them, and which cannot be separated from the matters which were submitted, the award will be altogether void, unless it is subsequently ratified by the parties. *Bullitt v. Musgrave*, 3 Gill (Md.) 31.

Third Parties.—Where the parties themselves acquiesce in an award, a third person cannot object to it on the ground that it did not comply with the terms of the submission. *Penniman v. Patchin*, 6 Vt. 325.

2. *Culver v. Ashley*, 19 Pick. (Mass.) 300. See *infra*, this title, *Ratification and Repudiation of the Award*.

3. *Woods v. Page*, 37 Vt. 252.

4. *Galvin v. Thompson*, 13 Me. 367; *Boston v. Brazer*, 11 Mass. 447; *Macon v. Crump*, 1 Call (Va.) 575. See note 1, p. 736, *supra*.

5. *When Principal Part of Award Bad.*—In *Thorp v. Cole*, 4 Dowl. 457, where a submission was entered into between certain farmers and the church wardens upon a dispute as to the poor rate, the matters submitted being the validity of the rate, the payment of the costs of preparing an appeal to the sessions in regard to it and the costs of the reference, and the arbitrators awarded upon each, yet the court held that the principal question, the validity of the rate, could not be submitted to arbitration, and that consequently upon that part the award was void, and as it was the main point in dispute, it could not be disregarded, and therefore the whole award was void. From which it may be gathered that even when the different parts of the

award are clearly separable, the separation will not be allowed if the award as to the principal point in dispute is to be rejected.

The general rule as given in Russell is, "If, notwithstanding some portion of the award is clearly void, the remaining part contain a final and certain determination of every question submitted, the valid portion may frequently be maintained as the award, though the void part be rejected," Russell on Awards (6th ed.) 331, citing *Stone v. Philipps*, 4 Bing. N. Cas. 37, 33 E. C. L. 274; *Buckleuch v. Metropolitan Board of Works*, L. R. 5. Exch. 229; which would imply that all matters submitted must be decided. But it appears that this is not an indispensable condition to the application of the rule, unless the submission itself is inseparable by reason of containing the clause, *ita quod arbitrium fiat de præmissis*, or otherwise.

In *Auriol v. Smith*, 1 T. & R. 121, it was said that an award might be "good in part and bad in part, where the submission was clearly capable of being separated."

In *McNear v. Bailey*, 18 Me. 251, it was held that if the submission, either expressly or by implication, contains the *ita quod* clause, the validity of the award being thereby made expressly conditional upon the decision of all the matters submitted, the whole award will be rendered void if any one part of it is invalid. See *Gordon v. Tucker*, 6 Me. 255; *Bacon v. Wilber*, 1 Cow. (N. Y.) 117; *Giddings v. Hadaway*, 28 Vt. 342; *Nichols v. Rensselaer County Mut. Ins. Co.*, 22 Wend. (N. Y.) 125.

6. **When Good and Bad Parts of Award Separable.**—Russell on Awards (6th ed.) 331.

England.—*Wharton v. King*, 2 B. & Ad. 528, 22 E. C. L. 130; *Aitcheson v. Cargay*, 2 Bing. 199, 9 E. C. L. 380; *Stone v. Philipps*, 4 Bing. N. Cas. 37, 33 E. C. L. 274; *Harrison v. Lay*, C. P. 12 Feb. 1863, N. R. 437; *Nickels v. Hancock*, 7 De G. M. & G. 300; *Morgan v. Smith*, 1 Dowl. N. S. 617; *Tandy v. Tandy*, 9 Dowl. 1044; *England v. Davison*, 9

The part of an award which is allowed to stand after the invalid part has been set aside, must appear to have been affected in no way by the departure of the arbitrators from the terms of the submission.¹

Arbitrators Exceeding Their Authority.—The circumstances under which an award is most usually held separable, arise when part of it is in excess of the arbitrator's authority. The portion which is in excess under such circumstances, must not constitute a consideration or recompense for any of the directions of the award in regard to the matters within the authority of the arbitrator.²

Dowl. 1052; Buccleuch v. Metropolitan Board of Works, L. R. 5 Exch. 229; Martham v. Jemx, 1 Ld. Raym. 114; Pinkny v. Bullock, cited in 3 Lev. 413; Bargrave v. Atkins, 3 Lev. 413; Addison v. Spittle, 18 L. J. Q. B. 151; Watkins v. Phillpotts, McClel. & Y. 393; Caledonian R. Co. v. Lockhart, 3 Macq. 808; Furlong v. Thornigold, 12 Mod. 533; Auriol v. Smith, 1 T. & R. 121; Simmonds v. Swaine, 1 Taunt. 549; Doe v. Richardson, 8 Taunt. 697, 4 E. C. L. 251; Candler v. Fuller, Willes 62; Storke v. DeSmeth, Willes 66; Fox v. Smith, 2 Wils. 267. See also Thinne v. Rigby, Cro. Jac. 314; Pope v. Brett, 2 Saund. 293b; Wills v. Maccarmick, 2 Wils. 148; Addison v. Gray, 2 Wils. 293.

United States.—Wise v. Geiger, 1 Cranch (C. C.) 92; McCormick v. Gray, 13 How. (U. S.) 26; DeGroot v. U. S., 5 Wall. (U. S.) 419.

Alabama.—Reynolds v. Reynolds, 15 Ala. 398; Bogan v. Daughdrill, 51 Ala. 312. See also Strong v. Beroujon, 18 Ala. 169.

California.—Muldrow v. Norris, 2 Cal. 74, 56 Am. Dec. 313; Williams v. Walton, 9 Cal. 146.

Connecticut.—Parmelee v. Allen, 32 Conn. 115.

Georgia.—Walker v. Walker, 28 Ga. 140; Richardson v. Payne, 55 Ga. 167.

Illinois.—Stearns v. Cope, 109 Ill. 340.

Indiana.—Carson v. Earlywine, 14 Ind. 256.

Kentucky.—Galloway v. Webb, Hard. (Ky.) 326; Carson v. Carson, 1 Metc. (Ky.) 434; Adams v. Ringo, 79 Ky. 217.

Maine.—Clement v. Durgin, 1 Me. 300; Gordon v. Tucker, 6 Me. 247; Philbrick v. Preble, 18 Me. 255, 36 Am. Dec. 718; Banks v. Adams, 23 Me. 259; Orcutt v. Butler, 42 Me. 83; Day v. Hooper, 51 Me. 178; Rawson v. Hall, 56 Me. 142; Stanwood v. Mitchell, 59 Me. 121.

Maryland.—Ebert v. Ebert, 5 Md. 353; Cromwell v. Owings, 6 Har. & J. (Md.) 10; Caton v. McTavish, 10 Gill & J. (Md.) 192; Garitee v. Carter, 16 Md. 309; Bullock v. Bergman, 46 Md. 270.

Massachusetts.—Sears v. Vincent, 8 Allen (Mass.) 507; Peters v. Peirce, 8 Mass. 399; Harrington v. Brown, 9 Allen (Mass.) 579; Barrows v. Capen, 11 Cush. (Mass.) 37; Gilmore v. Hubbard, 12 Cush. (Mass.) 220; Dickey v. Sleeper, 13 Mass. 244; Skillings v. Coolidge, 14 Mass. 43; Shearer v. Handy, 22 Pick. (Mass.) 417; Warner v. Collins, 135 Mass. 26.

Mississippi.—Gibson v. Powell, 5 Smed. & M. (Miss.) 712.

New Hampshire.—Chase v. Strain, 15 N. H. 535; Tracy v. Herrick, 25 N. H. 381. See

also Whitcher v. Whitcher, 49 N. H. 179, 6 Am. Rep. 486.

New Jersey.—Hoagland v. Veghte, 23 N. J. L. 92; Rogers v. Tatum, 25 N. J. L. 281.

New York.—Harrington v. Higham, 15 Barb. (N. Y.) 524; Schuyler v. Van Der Veer, 2 Cai. (N. Y.) 235; Bacon v. Wilber, 1 Cow. (N. Y.) 117; Cox v. Jagger, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522; Keep v. Keep, 17 Hun (N. Y.) 152; Shrump v. Parfitt, 84 Hun (N. Y.) 341; Martin v. Williams, 13 Johns. (N. Y.) 264; Doke v. James, 4 N. Y. 568; McBride v. Hagan, 1 Wend. (N. Y.) 326; Nichols v. Rensselaer County Mut. Ins. Co., 22 Wend. (N. Y.) 125. See also Stanley v. Chappell, 8 Cow. (N. Y.) 235; Jackson v. Ambler, 14 Johns. (N. Y.) 96.

North Carolina.—Blossom v. Van Amringe, 63 N. Car. 65; Stevens v. Brown, 82 N. Car. 460. See also Cowan v. McNeely, 10 Ired. (N. Car.) 5.

Pennsylvania.—Babb v. Stromberg, 14 Pa. St. 397; Wynn v. Bellas, 34 Pa. St. 160; South v. South, 70 Pa. St. 195.

South Carolina.—Gibson v. Broadfoot, 3 Desaus. (S. Car.) 11; Cohen v. Habenicht, 14 Rich. Eq. (S. Car.) 31; McCall v. McCall, 36 S. Car. 80.

Vermont.—Rixford v. Nye, 20 Vt. 132; Hartland v. Henry, 44 Vt. 593.

Virginia.—Taylor v. Nicolson, 1 Hen. & M. (Va.) 67; Moore v. Luckess, 23 Gratt. (Va.) 160.

Wisconsin.—Darling v. Darling, 16 Wis. 644.

An award may be good in part and bad in part, where the subject is clearly capable of being separated, but not where all the matters are within the submission and the award is on the face of it entire. Auriol v. Smith, 1 T. & R. 121.

Court may Take Time to Consider Award Part Bad.—Where the award appears to be in part void, although good in part, it has been held that the court may hold it for some time under advisement to see whether certain expected evidence cannot be produced which will sustain it as a whole. Dennis v. Barber, 4 Binn. (Pa.) 484.

Special Finding.—A general award is not rendered invalid by a special finding outside of the authority of the arbitrator, where the two things are distinct and separable. Littlefield v. Waterhouse, 83 Me. 307.

1. McCormick v. Gray, 13 How. (U. S.) 26; Wise v. Geiger, 1 Cranch (C. C.) 92.

2. Alabama.—Reynolds v. Reynolds, 15 Ala. 398.

Maine.—Banks v. Adams, 23 Me. 259; Boynton v. Frye, 33 Me. 216; Orcutt v. Butler, 42 Me. 83.

And where the Award Directs Several Acts to be Done by the same party, but is void

Massachusetts.—Maynard *v.* Frederick, 7 Cush. (Mass.) 247; Hubbell *v.* Bissell, 2 Allen (Mass.) 196; Gilmore *v.* Hubbard, 12 Cush. (Mass.) 220.

New Hampshire.—Tracy *v.* Herrick, 25 N. H. 381; Chase *v.* Strain, 15 N. H. 535.

New York.—Cox *v.* Jagger, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522; Smith *v.* Sweeny, 35 N. Y. 291; Martin *v.* Williams, 13 Johns. (N. Y.) 264; McBride *v.* Hagan, 1 Wend. (N. Y.) 326; Jackson *v.* Ambler, 14 Johns. (N. Y.) 96.

North Carolina.—Griffin *v.* Hadley, 8 Jones (N. Car.) 82; Cowan *v.* McNeely, 10 Ired. (N. Car.) 5; Knight *v.* Holden, 104 N. Car. 107.

Vermont.—Rixford *v.* Nye, 20 Vt. 132.

Where Partners in a Contract submitted a dispute in regard to the final settlement and division of the amount due them on such contract, and the award directed an apportionment, further ordering that one of them, "being more familiar with the liabilities of the firm, should draw the balance due from the corporation and pay the same to the partners," the court held that the last direction was separable and might be disregarded, and the rest of the award sustained, even if it were in excess of authority, which they did not believe. Tracy *v.* Herrick, 25 N. H. 401.

In Barrows *v.* Capen, 11 Cush. (Mass.) 37, the court, by Bigelow, J., said: "It is now the well settled rule that, if the thing awarded to be done, which is bad as being beyond the submission, forms no part of the consideration for or element in the performance of that part which is good as being within the submission, but is wholly distinct and independent thereof, then the award can be separated, and the bad part rejected, and that which is good held valid and binding upon the parties."

If an arbitrator on a reference of an action only, after making a good award in respect thereof awards that the parties shall execute mutual releases, the award is void only as to the award of releases. Watson Arb. 193; Doe *v.* Richardson, 8 Taunt. 697, 4 E. C. L. 251.

Where Three Partners Entered into a Submission in order to have the claims of each partner against the other determined, and also the claims of each upon the firm, and *vice versa*, and the award in one clause decided that the defendant owed the plaintiff a thousand dollars, and in another provided how the outstanding debts should be paid and the future collections divided, it was held, that if this latter part was without the terms of the submission, it had not for that reason rendered the whole award void. Barrows *v.* Capen, 11 Cush. (Mass.) 37.

Where Arbitrators Appointed by a Probate Court, to determine the validity of a claim against a deceased insolvent's estate, made an award that nothing was due to the claimants from the estate, and that the administrator recover costs, and this was followed by a statement that the estate had a good claim against the claimants, it was held that these two parts were so separable that one might

be accepted and the other rejected. Gilmore *v.* Hubbard, 12 Cush. (Mass.) 220.

Excess as to Costs.—Where the arbitrators have awarded the costs to a party without having any authority to award in regard to them, although the direction as to the costs is void, yet if it is clearly separable from the other part of the award, it will be rejected, and the other part of the award sustained.

England.—Candler *v.* Fuller, Willes 62; Whitehead *v.* Firth, 12 East 165; Strutt *v.* Rogers, 7 Taunt. 213, 2 E. C. L. 212; Aitchison *v.* Cargey, 2 Bing. 199, 9 E. C. L. 380; Boodle *v.* Davies, 3 Ad. & El. 200, 30 E. C. L. 73; Cockburn *v.* Newton, 9 Dowl. 676; Barker *v.* Tibson, 2 W. Bl. 953; Marden *v.* Cox, Cowp. 127; Rees *v.* Waters, 16 M. & W. 263; Firth *v.* Robinson, 1 B. & C. 277, 6 E. C. L. 119.

Maine.—Gordon *v.* Tucker, 6 Me. 247; Tyler *v.* Dyer, 13 Me. 41; Walker *v.* Merrill, 13 Me. 173; Day *v.* Hooper, 51 Me. 178; Hanson *v.* Webber, 40 Me. 194.

Maryland.—Garitee *v.* Carter, 16 Md. 309.

Massachusetts.—Maynard *v.* Frederick, 7 Cush. (Mass.) 247; Hubbell *v.* Bissell, 2 Allen (Mass.) 196; Caldwell *v.* Dickinson, 13 Gray (Mass.) 365; Shirley *v.* Shattuck, 4 Cush. (Mass.) 470.

New York.—Doke *v.* James, 4 N. Y. 568.

North Carolina.—Blossom *v.* Van Amringe, 63 N. Car. 65.

Vermont.—Rixford *v.* Nye, 20 Vt. 132.

Similarly, where the part of the award which directs the costs to be paid to a party is void for uncertainty, if the party in whose favor the uncertain order was made chooses to forego the costs, the remainder of the award will be sustained. Judgment on the award will, in such a case, be without costs, unless the award is referred back for amendment in regard to the costs alone. Leominster *v.* Fitchburg, etc., R. Co., 7 Allen (Mass.) 38.

Where the amount of the costs is specifically stated, and also included in the gross sum awarded, it will be deducted from such sum; if it is clearly specified or directions are given by which it can be ascertained, without being included in the gross sum, it will be rejected. Shirley *v.* Shattuck, 4 Cush. (Mass.) 470.

Where the arbitrator awards costs, although there are specific provisions in the submission in regard to their payment, the award will not be invalid because of the direction in regard to them given by the arbitrator; such direction will be rejected. Cox *v.* Jagger, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522.

When Costs Not Ascertained.—The fact that the arbitrators have neglected to ascertain the costs will not render that part of their award void which directs the payment of money upon the question submitted to them. Rixford *v.* Nye, 20 Vt. 132.

Award of Lawyer's Expenses.—Where, in addition to providing for payment of his own services and costs of court, the arbitrator, without authority, awarded that the defendant should pay "lawyer's expenses," it was

as to some of them, because of excess of authority or otherwise, the award

held that this erroneous part could be stricken out without affecting the rest of the award. *Warner v. Collins*, 135 Mass. 26.

When Amount in Excess.—If the arbitrator's authority does not empower him to award a greater amount than the penalty of the injunction bond, and his award is in excess of that sum, but it is not shown that any matter outside of the submission has been considered by him, the award will not be void *in toto*. The plaintiff may remit the excess and have judgment for the residue. *Ehrman v. Stanfield*, 80 Ala. 118.

Excess in Reserving Authority.—The rule is that if the arbitrator reserves to himself authority to decide anything in the future, the award will be void, as not being final. See *infra*, this title, *The Award must Be Final*. But under certain circumstances, where the award otherwise contains a complete and final settlement of the matter submitted, such reservation may be rejected as surplusage. Where an award directed a certain sum to be paid with a proviso that if he who was to pay could disprove the receipt of the goods for which such sum was to be paid, before a certain day, or give better proof of the payment of some sums of money, he should not be required to pay such sums as he might prove to have been paid or for which he might disprove having received any goods, the reservation was held void, but the remainder of the award good as an award to pay the whole amount, the requirement in regard to proof being surplusage, as the arbitrator's power was at an end when the award was made. *Beckwith v. Warley*, Rolle Abr., Arb., H. 9, p. 250.

In *Warley v. Beckwith*, Hob. 218, another report of the same case, it is said that the court took time to consider whether the whole award should be set aside as not final on account of the reservation, or whether the reservation should be rejected and the remainder of the award held good.

In *Manser v. Heaver*, 3 B. & Ad. 295, 23 E. C. L. 73, a dispute as to a watercourse was submitted, and the arbitrator gave certain definite directions, adding that, as disputes might arise in regard to the proper execution of the directions of the award, the parties might bring the matter before him so that he might make a final award in regard to the whole dispute, but that if no proceedings were taken by the plaintiff within two months after the work was done, the award as originally made should be final, and he extended the time for making his final and further award, if requested, to six months. The court upheld the original directions as being a final settlement of all matters in difference at the time the award was made, but rejected the reservation as void, being mere surplusage which referred to prospective differences only, and did not affect the valid part of the award.

Excess in Conditions Precedent.—In some instances, where the thing to be done is made conditional upon the performance of other things, some of which can be separated from others, the fact that one of these latter is void

will not invalidate the whole award if it can be so separated from the valid portion as to admit of the good part being sustained. As where mutual releases were directed upon the payment of certain sums and certain costs, the direction as to the payment of costs being in excess of authority, this latter part was rejected, and the remainder of the award was held good. *Aitcheson v. Corgey*, 2 Bing. 199, 9 E. C. L. 380. See *Kendrick v. Davies*, 5 Dowl. 693, where this ruling was followed in a similar case by Judge Coleridge.

Where the arbitrators undertake to establish a condition precedent without authority, as by directing a payment to be made only upon a condition which is in excess of their power, the condition will be held void, and the payment ordered to be made will be recoverable without the performance of such condition. *New York v. Butler*, 1 Barb. (N. Y.) 325; on appeal, 1 Hill (N. Y.) 489, 7 Hill (N. Y.) 329, the point not being raised on the appeals.

Excess in Direction as to Future Acts.—Where an arbitrator exceeded his authority in giving directions in regard to future repairs, the award was held void as to the excess only. *Johnston v. Cheape*, 5 Dow 247.

So where a direction was given in regard to the use of a stream of water which flowed through certain ponds, in the event of the ponds becoming filled up at any time, the court thought this direction in excess of authority, but held that it did not invalidate the rest of the award. *Winter v. Lethridge*, 13 Price 533.

Where the question was which of two parties interested in a ship should pay the expenses connected with it after a certain date, and the award directed one party to pay them, and to give the other party a bond of indemnity against the payment of such expenses, the court held the direction in regard to the payment good, though doubting as to the validity of the direction as to the bond. *Brown v. Watson*, 6 Bing. N. Cas. 118, 37 E. C. L. 307.

Excess as to Releases.—Where mutual releases have been directed of all matters in difference, the submission being confined to particular differences only, or where they have been directed of all matters in difference up to the date of the award, when the arbitrator's authority to direct them extended only to the date of the submission, such directions have been held void as to the matters not referred, or as to differences arising between the date of the submission and the award, but they have been held good where within the arbitrator's authority. *Williams v. Richardson*, 8 Taunt. 697, 4 E. C. L. 251; *Squire v. Grevelt*, 2 Ld. Raym. 961; *Abrahat v. Brandon*, 10 Mod. 201; *Anonymous*, 12 Mod. 8; *Hooper v. Pierce*, 12 Mod. 116; *Hill v. Thorn*, 2 Mod. 309; *Lee v. Elkins*, 12 Mod. 585.

It has been thought, however, that a release, as being an entire instrument, could not be in part good and in part void. *Vanlore v. Tribb*, Rolle Abr., Arb., N. 1, p. 258, 1

will as a general rule be sustained as to the parts that are valid.¹

Rolle 437; *Pickering v. Watson*, 2 W. Bl. 1118.

In *Munro v. Alaire*, 2 Cai. (N. Y.) 320, it was held that if the submission is to be considered as relating to a single matter only, an award which directs "a release" in general terms will be construed as requiring a release only in the matter submitted.

Excess in Ordering Payment.—Where the award directed a payment to be made to the defendant as a balance of a general account, and also of another sum stated to be due him on account of unlawful insurance partnership transactions between him and the plaintiff, the award was held void as to the amount said to be due on the illegal matter only. *Aubert v. Maze*, 2 B. & P. 371.

An award found that a stated sum was the value of work done by one of the parties, found another stated sum as the interest thereon, and another sum as the costs, but in regard to the two latter the award was in excess of authority. It was set aside in regard to the two latter directions, and sustained as to the first. *Chase v. Strain*, 15 N. H. 535. See *Banks v. Adams*, 23 Me. 259. But see *Emery v. Wase*, 8 Ves. Jr. 505.

Excess as to Staying Suits.—If the arbitrator, under a submission in which the costs of the action are to abide the event, directs a *stet processus* after finding on all the issues, the direction has been held void as in excess of authority, but, as being plainly separable from the rest of the award, it was rejected, and the valid part sustained. *Ward v. Hall*, 9 Dowl. 610.

So where a submission was made in regard to tithes, and the award directed that all suits between the parties should cease when other suits were actually depending between them in regard to other matters, the award was held good as to the action in regard to tithes, but void as to the others. *Webb v. Ingram*, Cro. Jac. 663.

Excess as to Strangers.—Where the defendant has been ordered to pay one sum to the plaintiff and another to a stranger to the award, or to make a lease for life to the plaintiff with remainder to a stranger, the direction of the award in regard to the plaintiff has been sustained, although the order, so far as the stranger was concerned, was invalid. *Bretton v. Prat*, Cro. Eliz. 758; *Bac. Abr.*, Arb., E. 1; *Com. Dig.*, Arb., E. 14.

See *contra*, *Barney v. Fairchild*, Rolle Abr., Arb., N. 9, p. 259.

Where a banker was directed by the award to pay the other party to the submission a certain sum out of the money of a stranger, which was in his custody, though such direction was in excess, it was held that the rest of the award would be sustained if not affected by the order as to the stranger's money. *Ingram v. Milnes*, 8 East 445.

In *Cox v. Jagger*, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522, where the submission was between two parties only, but the award directed that a certain sum should be paid by one to the other or by either of two strangers, the part as to the strangers was rejected, and

the award held good as to the direction to one party to pay a certain sum to the other. See, to the same effect, *Smith v. Sweeney*, 35 N. Y. 291.

Excess as to Real Estate.—Where the submission authorized the arbitrators to determine in regard to the title to certain lands and to run out the boundary, such lands being included in a certain patent, it was held that if they undertook to carry out the directions of the submission in regard to lands not within this particular patent, the excess would be separable and void, but would not affect the rest of the award. *Jackson v. Ambler*, 14 Johns. (N. Y.) 96.

Where the arbitrators awarded in regard to damages for trespass, and also undertook to settle a boundary line, it was held that the award might be void in the direction as to the boundary line, but valid in regard to the direction for damages, there being no necessary connection between them, although the action for damages for trespass was in regard to the land over which the boundary ran. *Giddings v. Hadaway*, 28 Vt. 342; *Lyle v. Rodgers*, 5 Wheat. (U. S.) 394.

Where the award determined a boundary line and ordered payment of costs and delivery of possession also, it was sustained in regard to the boundary, though in excess in regard to the costs and delivery of possession. *Bacon v. Wilber*, 1 Cow. (N. Y.) 117.

In *Richter v. Chamberlin*, 6 Binn. (Pa.) 34, an action of trespass was submitted before any pleadings were filed. The arbitrators awarded "the lands in dispute in favor of the defendant, and the division as it now stands to be the established line." It was held that the award could have no effect upon the title or boundary of the land, as the submission had given the arbitrators no authority to pass on such matters, but that it might be taken as a finding that the plaintiff had no cause of action.

Excess as to Ordering Verdict.—Where the arbitrator, without authority, directs a verdict to be entered after having correctly decided all the matters submitted to him, the direction of a verdict, being separable, will be disregarded, and the valid part of the award will be sustained. *Howett v. Clements*, 1 C. B. 128, 50 E. C. L. 128; *Hawkyard v. Stocks*, 2 D. & L. 936. See *Jackson v. Clarke*, McClell. & Y. 200, where the whole award was held void, as the direction of the verdict could not be separated from the rest of it.

Excess as to Directing Judgment.—In *Body v. Cox*, 4 D. & L. 75, on a submission of an action of ejectment, the arbitrator, who had no authority to direct the entry of a judgment, awarded as follows: "I award, order, and determine that judgment for the plaintiff be entered in the said action, with one shilling damages, and that the plaintiff do recover under the said judgment a plot or parcel of land," etc. The court set aside the direction of the judgment as surplusage, but sustained the rest of the award as containing in itself a final decision of the matters submitted.

1. Where All the Acts are to be Performed by

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b. WHEN NOT SEPARABLE—AWARD VOID.—Where the part of the award which is bad cannot be separated from the rest, or is not so clearly separable that it can be seen that the good part is not affected by the invalid part, then the award will be void *in toto*.¹

One Party, he can lose nothing by being relieved of the performance of such parts as are bad, nor can he be deprived thereby of any equivalent or recompense. It is only "where the good and the bad relate to different parties, and the void part of the award is the consideration or recompense of the thing awarded on the other side," that the whole award will be held void. *Nichols v. Rensselaer County Mut. Ins. Co.*, 22 Wend. (N. Y.) 126. See *Gordon v. Tucker*, 6 Me. 255.

1. Good and Bad Parts Inseparable—Award Void in Toto—England.—*Tandy v. Tandy*, 9 Dowl. 1044; *Watkins v. Phillpotts, McClel. & Y.* 393; *Nickels v. Hancock*, 7 De G. M. & G. 300; *Waters v. Bridges, Cro. Jac.* 639; *Candler v. Fuller, Willes* 62; *Storke v. De Smeth, Willes* 66; *Bowes v. Fernie*, 4 Myl. & C. 150; *Buccleuch v. Metropolitan Board of Works*, L. R. 5 Exch. 229; *In re Marshall and Dresser*, 3 Q. B. 878, 43 E. C. L. 1018.

United States.—*Myers v. Tork, etc.*, R. Co., 2 Curt. (U. S.) 28.

California.—*White v. Arthur*, 59 Cal. 33.

Connecticut.—*Parmelee v. Allen*, 32 Conn. 115.

Maine.—*Sawyer v. Freeman*, 35 Me. 542; *Philbrick v. Preble*, 18 Me. 255, 36 Am. Dec. 718; *Clement v. Durgin*, 1 Me. 300.

Maryland.—*Bullitt v. Musgrave*, 3 Gill (Md.) 31; *Bullock v. Bergman*, 46 Md. 270.

Massachusetts.—*Com. v. Pejepscut Proprietors*, 7 Mass. 399.

New Hampshire.—*Whitcher v. Whitcher*, 49 N. H. 176, 6 Am. Rep. 486; *Chase v. Strain*, 15 N. H. 535.

New York.—*Nichols v. Rensselaer County Mut. Ins. Co.*, 22 Wend. (N. Y.) 125.

See also *Burr v. Fairholme*, 3 N. J. L. 520; *Turner v. Burt*, 24 New Bruns. 547.

In *Tomlin v. Fordwich*, 5 Ad. & El. 147, 31 E. C. L. 304, the terms of a lease were the subject-matter of the submission, and the arbitrator, among other things, ordered the premises to be put in repair to the satisfaction of a third party named. As this direction was void as being a delegation of authority, and as it was not capable of being separated from the rest, it was held to render the whole award invalid. Lord Denman, C. J., said: "I always find a difficulty in separating the good part of an award from the bad. The arbitrator probably frames one part with a view to the other, and each may be varied by the view which he takes of the whole." From which observation it may be gathered that even when the bad part of an award is clearly separable grammatically from the good, yet they may be inseparably interconnected where one is made the ground on which the arbitrator has based some equivalent provision on the other part affecting the other party. See Russell on Awards (6th ed.) 339. The rule as stated in *Nickels v. Hancock*, 7 De G. M. & G. 300, is that the court, ordi-

narily, will not enforce specific performance of part of an award.

Directions as to Costs.—Where an arbitrator had exceeded his authority in awarding costs as between attorney and client, the court set aside the whole award, as the direction as to costs was so connected with the benefit intended to be given to the defendant that it could not be separated from the rest. *Secombe v. Babb*, 8 Dowl. 167, 6 M. & W. 129.

Where, on a reference respecting the defendant's bill of costs as an attorney, the arbitrator was to determine the balance between the parties, but no question of liability was to be raised; on its being shown that the arbitrator had made certain deductions from the defendant's bill, because he had not been admitted an attorney of one of the superior courts of Westminster, the court held that he ought not to have made such deductions, and set the whole award aside. *Harries v. Thomas*, 2 M. & W. 32.

Unauthorized Disallowance.—Where the arbitrator, having no authority to disallow a certain sum admitted by the defendants, stated that he had disallowed the sum after finding a general balance due by the defendants, the award was held bad, and although the defendants offered to allow the sum so disallowed on account against themselves, the court held that the error could not be cured in that way, and set the whole award aside. *Skipworth v. Skipworth*, 9 Beav. 135.

Where the Submission Limited the Time a Lease was to Run, and stated the day on which it was to begin, viz., the 1st of May, 1801, and referred the terms of the lease to the arbitrator, and he, after fixing the terms, directed a lease for the time limited to begin on the 1st of May, 1804, not 1801, such excess was held to be inseparable, and to render the whole award void. *Bonner v. Liddell*, 1 Brod. & B. 80, 5 E. C. L. 20.

Where the Arbitrator Awarded a Gross Sum on account of some matters which were within the submission, and others which were not within it, so that it was impossible to determine how much properly belonged to each, as where, having no power to award interest beyond the submission, the arbitrator directed the payment of a single sum for principal and interest to a day subsequent to the submission, it was held that the whole award should be set aside, unless the court could separate the amount awarded for interest beyond the submission. *Watkins v. Phillpotts, McClel. & Y.* 393.

Damages—Dams.—In *Clement v. Durgin*, 1 Me. 300, where the submission was as to the damages which had been or should afterwards be sustained by a party by reason of the flowage of his land by the construction of a dam by another party, and the arbitrator fixed the damages, awarding further, in excess of his authority, that the dam be not hereafter raised

An Award of a Gross Sum, part of which is in excess of authority, will generally render the whole award void, as it is always difficult, and many times impossible, to apportion it between the good and the bad parts of the award.¹ Yet in some cases, where the separation could be made with certainty, the award, though for a gross sum, has been sustained.²

c. WHERE ONE PART IS THE CONSIDERATION FOR THE OTHER.—It used to be held in *England*, that when parts of the award were rejected as bad, yet if there remained something awarded on each side, so as to fulfil the technical requirement of mutuality, it would be sustained, although it did not give effect to the intention of the arbitrator.³

"more than three feet above the present height," the last order was held to be void, to be inseparable, and to render the whole award void, the court holding that "what influence the privilege of raising the dam to a height not exceeding three feet, awarded to the respondent, might have had in the estimate of damages, we have no means of ascertaining."

Direction Depending on Void Order.—Where an award directed that if the defendant could show before a certain day that he had delivered certain currants to the plaintiff, then the arbitrators should make a further award, but if he could not show it that he could make no claim on the plaintiff, adding that the defendant should pay the plaintiff a certain sum, unless the arbitrators or the umpire made a further award in regard to the currants within a time stated, the award was held altogether void, although no further award was made on the ground that the order directing the defendant to pay a certain sum to the plaintiff was dependent on the first part which was itself void as reserving an authority to make a further award. *Brown v. Dalton*, Rolfe Abr., Arb., H. 10, p. 250.

When Exercise of Judicial Discretion Required.—In *Mather v. Day* (Mich. 1895), 64 N. W. Rep. 198, it was held that where an award is too uncertain and ambiguous in some parts of it to be enforced, it will be void *in toto*, although it is sufficiently definite in other respects. When it leaves the amount due from one party to the other to be determined by a reference to books of account, which involves something more than a mere mathematical computation, it is so uncertain as to be void.

1. When Award Is of Gross Sum.—*Skipworth v. Skipworth*, 9 Beav. 135; *Harries v. Thomas*, 2 M. & W. 32; *Watkins v. Phillpotts*, (McClel. & Y. 393; *De Groot v. U. S.*, 5 Wall. (U. S.) 419; *Nichols v. Rensselaer County Mut. Ins. Co.*, 22 Wend. (N. Y.) 125; *Thrasher v. Haynes*, 2 N. H. 429; *Chase v. Strain*, 15 N. H. 535; *Gordan v. Tucker*, 6 Me. 247.

Illustrations.—Where the arbitrator, who had no authority to take land into consideration, allowed a gross sum on account of land, personal property, machines, and appliances, the award was held void, as it was impossible to tell what proportion of the whole amount was to be allotted to each item. *De Groot v. U. S.*, 5 Wall. (U. S.) 431.

Where the award directed a gross sum to be paid by one party to the other, and it was shown that a note which the payee under the

award did not receive until after the date of the submission was included in such sum, and was consequently without the scope of the submission, it was held that the note could not be separated, and that the whole award was void. *Thrasher v. Haynes*, 2 N. H. 429. See *Adams v. Adams*, 8 N. H. 92.

Where joint owners of a vessel entered into a submission in regard to her earnings and expenses, an award was made which ordered the payment of certain gross sums without specifying the items. The arbitrators had included in their estimate of the earnings and expenses the cost of insurance. This was held to be in excess of their authority, and as there was no means by which it could be ascertained, it was declared inseparable, and the whole award consequently void. *Sawyer v. Freeman*, 35 Me. 542.

Where the submission directed the arbitrator to determine the damages for past misconduct on the part of the defendant in the use of certain water power, and he awarded an amount in "full satisfaction of all past and future damages," there being no method of separating the two, the whole award was held void. *Boynton v. Frye*, 33 Me. 216.

2. Gross Sums—When Divisible.—Where it appears upon the face of the award that it has been made up of distinct items which can be easily separated, the separation of a gross sum may then be made in order to sustain one part and avoid the other. Where an award for damages was published verbally to the parties, giving a gross sum to one of them, and the arbitrators at the same time stated the several items which they had allowed, and afterwards made a statement in writing, on request, in which they set out only the gross sum, two of the items which they had stated verbally, and which were included in such, being without the scope of their authority, the court nevertheless held that they might be deducted from the gross sum and judgment rendered for the balance. *Dalrymple v. Whittingham*, 26 Vt. 345.

3. Where One Part of Award Consideration for Other Part—Former Rule.—*Russell on Awards* (6th ed.) 339; *Joyce v. Haines*, Hard. 399; *Bargrave v. Atkins*, 3 Lev. 413; *Lee v. Elkins*, 12 Mod. 585; *Moor v. Bedel*, cited in 10 Coke 131b; *Osborn's Case*, 10 Coke 130b; *Lindsey v. Aston*, 2 Bulst. 38; *Harris v. Knipe*, 1 Lev. 58.

Where the award directed the defendant to execute a bond with two sureties for the payment of money to the plaintiff, and that the plaintiff should thereupon execute a release,

But the rule now is that if the good part is based on the bad as a consideration or condition precedent, if the element of reciprocity is altered and the nullity of any part deprives one of the parties of the benefit intended him as compensation or equivalent for what he is required to do for the other, then the whole award will be void.¹

the court held that the direction as to the sureties was void, but that the direction to the defendant was valid, and held further that the plaintiff was bound to execute the release directed as soon as the defendant alone executed the bond, thereby forcing him to accept a security much less than that intended by the arbitrator. *Thirsby v. Helbot*, Carth. 159, 1 Show. 82, 3 Mod. 272. See *Norwich v. Norwich*, 3 Leon 62; *Cooke v. Whorwood*, 2 Saund. 337; *Furlong v. Thornigold*, 12 Mod. 533.

1. Where One Part of Award Consideration for Other Part—Present Rule.—Russell on Awards (6th ed.) 340; Bac. Abr., Arb., E. 3; Rolle Abr., Arb., K. 8, p. 253; Com. Dig., Arb., E. 14.

England.—Winch v. Sanders, Cro. Jac. 584; Pope v. Brett, 2 Saund. 293b, and notes; Lee v. Elkins, 12 Mod. 587; Tandy v. Tandy, 9 Dowl. 1044; Watkins v. Phillpotts, McClel. & Y. 393; Nickels v. Hancock, 7 De G. M. & G. 300; Storke v. De Smeth, Willes 66; Candler v. Fuller, Willes 62; Bowes v. Fernie, 4 Myl. & C. 150; Thinne v. Rigby, Cro. Jac. 314; Barney v. Fairchild, Rolle Abr., Arb., N. 9, p. 259; Hawkyard v. Stocks, 2 D. & L. 936; Auriol v. Smith, 1 T. & R. 121.

Connecticut.—Parmelee v. Allen, 32 Conn. 115.

Kentucky.—Brown v. Warnock, 5 Dana (Ky.) 492.

Maine.—Philbrick v. Preble, 18 Me. 255, 36 Am. Dec. 718; Gordon v. Tucker, 6 Me. 247; Boynton v. Frye, 33 Me. 216; Clement v. Durgin, 1 Me. 300.

Massachusetts.—Com. v. Pejepsut Proprietors, 7 Mass. 420.

New Hampshire.—Chase v. Strain, 15 N. H. 535.

New York.—Nichols v. Rensselaer County Mut. Ins. Co., 22 Wend. (N. Y.) 125; Schuyler v. Van Der Veer, 2 Cai. (N. Y.) 235.

The rule as laid down in *Gordon v. Tucker*, 6 Me. 247, is that if an award is bad in part only, it may be good as to the rest, but "if by the nullity of any part, one of the parties cannot have the advantage intended as a consideration therefor, the award is bad in the whole."

Costs Dependent on Void Part.—Where the costs of the cause were to abide the event, and the arbitrator directed a verdict for the defendant without authority, the whole award was set aside, on the ground that if the direction as to the verdict were struck out, there would be no decision in favor of the defendant so as to entitle him to costs. *Hawkyard v. Stocks*, 2 D. & L. 936.

Void Payment Part of Consideration.—Where an award directed one party to pay the money due for task work, without stating the amount, and that the other party should pay twenty-five pounds, and that both should give general

releases, the award, being uncertain and void as to the money due for task work, was held void as to the whole, although mutual releases had been ordered, because the payment of the amount due for task work was part of the consideration for the payment of the twenty-five pounds. *Pope v. Brett*, 2 Saund. 293b; Com. Dig., Arb., E. 14.

Want of Reciprocity.—Where the award directed that the defendant should have certain trees, and that he should give security to the plaintiff for the payment of a certain sum stated, which latter direction was void as not specifying what security, the whole award was held void, as otherwise the plaintiff would have no reciprocal advantage. Bac. Abr., Arb., E. 3; Thinne v. Rigby, Cro. Jac. 314.

Where Consideration could Not be Enforced.—The award directed that a certain sum should be paid to a party when he, his wife, and son should execute a conveyance, the wife and son not being parties to the submission; as the direction was void as regarded them, the whole award was held void, as the party of the other part could not enforce the execution of the conveyance for which his money was to be paid. *Barney v. Fairchild*, Rolle Abr., Arb., N. 9, p. 259.

Where title to land had been passed to a party as security for a loan, and the award directed the repayment of the loan and a reconveyance of the land, and as it was void for uncertainty as to the reconveyance of the land, it was held that the whole award failed, as it could not have been the intention of the arbitrator that the lender should get back his money and retain his security. *Lyle v. Rodgers*, 5 Wheat. (U. S.) 394. See *Giddings v. Hadaway*, 28 Vt. 342.

Where personal injuries were inflicted as the result of a dispute in regard to a boundary line, and a submission was made of "all disputes and quarrels or differences that now exist, respecting the establishing the line or partition fence," and of all other disputes, and a verbal award was made, this being void as to the part relating to the title to the land, the court held that the part which related to the personal injury could not be sustained, either "because one or the other of the parties might be more or less in the wrong, according to the decision which should be made respecting his title to the real estate." *Philbrick v. Preble*, 18 Me. 255, 36 Am. Dec. 718.

Offer to Perform Invalid Part.—It has been suggested that where the good and the bad parts of the award are so interdependent as to be inseparable, thereby rendering the whole award void, an offer by the party intended to be bound by the bad part to carry out its directions might perhaps remove the objection to it, and enable him to enforce the performance of the good part and so sustain the award. *Nichols v. Rensselaer County Mut. Ins. Co.*,

d. PRESUMPTION THAT AWARD IS SEPARABLE.—The presumption is in favor of the divisibility of the award, and the courts will make every reasonable intendment in order to hold that the good and the bad parts of the award are not so interdependent as to be inseparable, unless the contrary appears upon the face of the award itself.¹

e. ACTION UPON DIVISIBLE AWARD.—In suing on an award which is in part good and in part bad, if the action be brought only to enforce the part which is good, it will be sustained.² So any direction in an award which is in itself wholly good may be selected as the basis of a separate and independent action.³

5. The Award must Be Final—*a. MEANING OF FINALITY.*—The rule that the award must be final, taken in its broadest sense, touches its validity at almost every point,⁴ but for the purposes of classification it may be said that to be

22 Wend. (N. Y.) 125; *Lee v. Elkins*, 12 Mod. 589; *Kyd on Awards* 259, 287. But see *Skipworth v. Skipworth*, 9 Beav. 135.

1. Presumption in Favor of Divisibility of Award.—*Butler v. New York*, 1 Hill (N. Y.) 489.

In *Nichols v. Rensselaer County Mut. Ins. Co.*, 22 Wend. (N. Y.) 125, a submission was entered into between the assured and the company in regard to the amount of the compensation to be paid for loss. The amount was fixed by the arbitrators, who then directed that the assured should assign to the company his claims against another company in regard to the same loss. The court held: "We cannot, on the face of the award, see any necessary connection or dependence between the part which requires the defendants to pay and that which directs the plaintiffs to assign. The assignment is not made a condition to the payment, nor does it appear that the arbitrators intended that one act should be performed as the consideration, either in whole or in part, for the performance of the other. Looking at the award alone, we are not authorized to say that the arbitrators would not have directed the payment of the money unless there was to be an assignment of the claim against the S. Company, nor that a greater sum was allowed to the plaintiffs in consequence of awarding an assignment." So the award was held divisible, and the good part sustained.

In *Richardson v. Huggins*, 23 N. H. 113, where the arbitrators had certain powers under the submission to award in regard to claims arising before a certain date, but awarded also in regard to claims arising subsequent to the same date if there were any such claims which did not appear, the court refused to presume, merely in order to invalidate the award, that if any claims had arisen after the date stipulated, they would necessarily not be easily separable from the rest, so as to prevent the good part of the award from being upheld.

Under an agreement by which "all matters of controversy subsisting between them, whether debt, damages, costs, title to lands, or any other matters whatsoever," were submitted, and the arbitrators determined certain boundary lines, stating in regard to one of them "where said P. has slightly encroached on said A., which we take into account in the

assessment of damages between the parties," stating further that "on examining and assessing the sums respectively due to each other for damages, costs, etc.," and striking a balance, they found a certain sum due from A. to P.; as the submission did not possess the formal requisites for enabling the arbitrators to pass upon the title to lands, it was urged that the finding for damages, etc., included an estimate for the land of A. upon which P. had encroached, and that consequently the award was *ultra vires* and void; but the court held that it could not be inferred necessarily, nor even probably, that the arbitrators estimated any damages, except for the trespass by encroachment, and upheld the indefinite award for damages, etc. *Parmelee v. Allen*, 32 Conn. 115. See *Tomlin v. Fordwich*, 5 Ad. & El. 147, 31 E. C. L. 304, where the difficulty of separating the good from the bad part of the award is pointed out by Lord Denman, C. J.

2. Action to Enforce Valid Part of Award.—*Orcutt v. Butler*, 42 Me. 83.

From this it may be gathered that it is not necessary to take special proceedings in order to separate the different parts to the award, or to establish the fact that they are divisible. The good part of an award may be always availed of, either as a cause of action or as a defense, just as if it were in itself a complete and perfect award. The separation is made by the court where the whole award is objected to by a party as void because of the invalidity of part of it. *Morse Arb. and Award* 484.

Where a gross sum is awarded and some items included are in excess of authority, an action of assumpsit may be brought for the whole amount, and the court may disallow the items which are in excess, and give payment for the balance. Where the action is of debt on the arbitration bond, the better course is to set up the valid part of the award and assign a breach of that, as a breach of the bond for nonperformance can only be assigned in regard to the valid part. *Dalrymple v. Whittingham*, 26 Vt. 345.

3. Lamphire v. Cowan, 39 Vt. 420; *Schuyler v. Van Der Veer*, 2 Cai. (N. Y.) 235; *Doke v. James*, 4 N. Y. 568; *Lincoln v. Whittenton Mills*, 12 Met. (Mass.) 31.

4. In a sense, if an award is not certain, it is not final; if it is not entire, it is not final;

final the award must so determine the precise point submitted that an action between the same parties will not afterwards lie in regard to it. If it does not do so, it is void.¹ But if nothing remains to be done in order to render

if it is not coextensive with the submission, it is not final; neither is it final if it is not consistent, or mutual, or possible, or if it does not give necessary directions for the execution of its judgment; but these matters have to be considered under the separate headings given in this article, and the special heading of Finality will be set out as the cases seem best to fit in.

1. Rule that the Award must Be Final—England.—*Samon's Case*, 5 Coke 77.

United States.—*Karthauss v. Ferrer*, 1 Pet. (U. S.) 222; *Talbott v. Hartley*, 1 Cranch (C. C.) 31.

Alabama.—*Comer v. Thompson*, 54 Ala. 265; *McCrary v. Harrison*, 36 Ala. 577.

Arkansas.—*Manuel v. Campbell*, 3 Ark. 324; *Lee v. Onstott*, 1 Ark. 206.

Georgia.—*King v. Cook*, T. U. P. Charl. (Ga.) 289, 4 Am. Dec. 715.

Maine.—*Colcord v. Fletcher*, 50 Me. 398.

Maryland.—*Archer v. Williamson*, 2 Har. & G. (Md.) 62; *Carter v. Calvert*, 4 Md. Ch. 199.

Massachusetts.—*Paine v. Paine*, 15 Gray (Mass.) 299; *Lincoln v. Whittenton Mills*, 12 Met. (Mass.) 31.

New Hampshire.—*Spofford v. Spofford*, 10 N. H. 254.

New Jersey.—*McKeen v. Oliphant*, 18 N. J. L. 442.

New York.—*Waite v. Barry*, 12 Wend. (N. Y.) 377; *Matter of Williams*, 4 Den. (N. Y.) 194; *Purdy v. Delavan*, 1 Cal. (N. Y.) 304; *Cox v. Jagger*, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522.

North Carolina.—*Patton v. Baird*, 7 Ired. Eq. (N. Car.) 255.

Pennsylvania.—*Grier v. Grier*, 1 Dall. (Pa.) 173; *Gonsales v. Deavens*, 2 Yeates (Pa.) 539; *Young v. Shook*, 4 Rawle (Pa.) 304; *Semple v. Hutchinson*, 4 Phila. (Pa.) 249.

South Carolina.—*Hattier v. Etinaud*, 2 Deasus. (S. Car.) 571.

Texas.—*Hooker v. Williamson*, 60 Tex. 524.

Wisconsin.—*Dundon v. Starin*, 19 Wis. 261.

Illustrations.—Where, on a submission of partnership affairs, the award merely ordered one partner to pay a sum of money to the other, without directing the partnership to be dissolved, or stating an account between each partner and the firm, the award was held void as not final. *Paine v. Paine*, 15 Gray (Mass.) 299.

So where an award directed one party to pay a sum of money to the other as the value of certain shares in a company, without directing a transfer of such shares, it was held not to be final, and therefore void. *Matter of Williams*, 4 Den. (N. Y.) 194.

Where an award was that "we come to the final conclusion that in the amount of damages we do not agree on any sum, but our agreement is that each party pay his own arbitrators" a certain sum each, it was held that it was not such a final award as would bar another action for the same cause by the same plaintiff

against the same defendant, although he had paid one of the arbitrators. *Smith v. Holcomb*, 99 Mass. 552.

In *Peters v. Peirce*, 8 Mass. 398, it was held that if arbitrators state in their award that they made the award after the examination of all the business referred to them, this is a sufficient expression of their intention to make a final decision.

In *Plummer v. Stone*, 65 Me. 410, it was held that where a cause is referred to be decided upon legal principles, and the referee neither reports nor is requested to report the facts on the questions of law arising thereon, his award is nevertheless final.

In *Akely v. Akely*, 16 Vt. 450, it was held that in order to render an award final, it is necessary that it should dispose of all the matters submitted, and that it should appear clearly from the award what the decision was.

Meaning of the Rule as to Finality of Award.—The meaning of the rule that an award shall be final is that the thing awarded to be done shall be a final discharge of all future claims by the party in whose favor it was made against the other on account of the cause submitted. *Borretts v. Patterson*, Tayl. (N. Car.) 37, 1 Am. Dec. 576; *Blackledge v. Simpson*, 2 Hayw. (N. Car.) 30, 2 Am. Dec. 614.

It does not mean that nothing shall remain to be done to complete the execution of the award, but that the thing to be done shall have been determined and defined by the arbitrators with reasonable certainty. *Strong v. Strong*, 9 Cush. (Mass.) 560. See *Jocelyn v. Donnel*, Peck (Tenn.) 274, 14 Am. Dec. 753; *Boodlee v. Davies*, 3 Ad. & El. 200, 30 E. C. L. 73.

In *Doolittle v. Malcom*, 8 Leigh (Va.) 608, it was held that an award, which was written on the back of a submission bond, that one party should pay a stated sum to the other, should be taken to settle all matters therein submitted to the arbitrators, and that it was consequently sufficiently final and certain.

If an award is as final as the nature of the thing will admit, it is sufficient. *Philips v. Knightley*, 2 Stra. 903; *Borretts v. Patterson*, Tayl. (N. Car.) 37, 1 Am. Dec. 576. See *Beale v. Beale*, 3 Vent. 65.

In *Colcord v. Fletcher*, 50 Me. 398, the court, by Kent, J., said: "What is a final disposition? It is such a disposition that nothing further remains to fix the rights and obligations of the parties, and no further controversy or litigation is required, or can arise on the matter. It is such an award that the party against whom it is made can perform or pay it, without any further ascertainment of rights or duties. It is not absolutely necessary that the award should state in figures the exact amount to be paid. It is sufficient if there is such reference in the award to documents, or other matters, that nothing remains but mere arithmetical computation to

it final, but a mere ministerial act or an arithmetical calculation, it will be sustained.¹

b. CONDITIONAL AWARD.—As a rule, an award which makes the execution of its judgment conditional upon the voluntary performance, by one party, of some particular act for the benefit of the other, thereby leaving the matter open to future litigation, is void, as not being final.² However, if the

render the award final and conclusive." *Citing* *Waite v. Barry*, 12 Wend. (N. Y.) 377; *Lincoln v. Whittenton Mills*, 12 Met. (Mass.) 31.

Award Not Final as to Strangers.—The function of the award is to bar future actions between the parties in regard to the matters submitted; it cannot determine the rights of strangers. Where an award on a general submission of partnership affairs determined the liabilities, rights, and duties of the partners towards each other, it was held that it could do no more. The arbitrators had exhausted their powers. "They could not appoint a receiver of the partnership. They reached the limit of their powers when they settled the rights of the parties as between themselves." *Lampshire v. Cowan*, 39 Vt. 420.

Where, under a reference requiring the arbitrators to settle the accounts between the plaintiff and the defendant, an award was made by them declaring that the defendant and another were entitled to certain credits on their account with the plaintiff, it was held bad, because not final. *Jacob v. Ketcham*, 37 Cal. 197.

Where Time of Operation Indefinite—Award Not Final.—Where the decision of the award is binding only for a limited time, it is not final; it must be conclusive, both at the present and in the future. Where a landowner and a mill owner submitted a question as to the damages to be paid by the mill owner to the former for flowing his land, and the arbitrators directed him to pay a certain sum annually, so long as he should keep up the dam, with "the understanding and agreement" that if he should not keep it up, the landowner should "be entitled to such damage as it appears his lands sustain in consequence of former flowing, until they shall arrive at their primitive goodness," it was held that the award was not final, for it left the matter open to future dispute in case the dam should not be kept up. *Lincoln v. Whittenton Mills*, 12 Met. (Mass.) 31.

Award for a Certain Sum and More.—Where the award stated that a party had a just claim for the sum awarded and for "even more, if insisted on," it was held that by implication the claim for more was waived before the arbitrator. Payment of the amount awarded was held to be a discharge of the debtor under the award, and the receipt of such amount to be a waiver by the claimant of any further demand. *M'Kinstry v. Solomons*, 2 Johns. (N. Y.) 57, *affirmed* in 13 Johns. (N. Y.) 27.

Claim Not Proved.—Where an action on an insurance policy was submitted, and the award held that no sufficient proof had been produced to establish a claim against the company, the award was held to be final. *McDermott v. U. S. Ins. Co.*, 3 S. & R. (Pa.) 604.

Where Two Suits Submitted, Decision of One

Not Final.—Where two persons have mutual suits, one against the other, and submit both to arbitration, an award made upon one suit only is not final. *Morse v. Hale*, 27 Vt. 660; *Coupland v. Anderson*, 2 Call (Va.) 106; *Randall v. Randall*, 7 East 81.

Unless Final, the Award cannot be Enforced.—Where arbitration is made under a rule of court, the court cannot enforce the award unless it is final and conclusive. *Patton v. Baird*, 7 Ired. Eq. (N. Car.) 255.

Remedy when Award Not Final.—Where an award is not final because it puts the plaintiff wholly in the defendant's power, appoints no definite time for payment of the debt, and leaves mortgaged property in the mortgagor's hands to enjoy the profits indefinitely, it will be set aside by a court of equity, and the defendant will be referred to a court of law for the damages claimed by him. *Hattier v. Etinaud*, 2 Desaus. (S. Car.) 571.

When Made Final by Consent.—If the award is within the terms of the submission and the subject-matter is brought before the arbitrators, it is final, and, although it is not included in the rule, it will be final if it is decided by consent, but it will not be final if there is no consent. *Alexander v. Westmoreland Bank*, 1 Pa. St. 395. See *McCullough v. Myers*, Hard. (Ky.) 206; *Conger v. James*, 2 Swan (Tenn.) 213.

1. Arbitrators Leaving Ministerial Acts Unperformed.—Anonymous, 3 Atk. 644; *Kyd on Awards* 126, 198-216; *Brown v. Hankerson*, 3 Cow. (N. Y.) 70; *Waite v. Barry*, 12 Wend. (N. Y.) 377; *Coghill v. Hord*, 1 Dana (Ky.) 350, 25 Am. Dec. 148; *Colcord v. Fletcher*, 50 Me. 398.

If an umpire, in making his award, should direct that if any error be found in the calculation, on proof thereof the plaintiff is to refund the amount, this does not open the merits of the dispute; the award remains final and valid. *M'Kinstry v. Solomons*, 2 Johns. (N. Y.) 57, 13 Johns. (N. Y.) 27. See *infra*, this title, *The Award must Be Certain*.

2. Rule as to Conditional Awards.—Russell on Awards (6th ed.) 283; *Crofts v. Harris*, Carth. 187; *Lincoln v. Whittenton Mills*, 12 Met. (Mass.) 31.

Illustrations.—A subscriber to a joint-stock company brought an action against the company for the value of his shares, and the company brought a cross-action for calls. Upon a reference, the arbitrator awarded that the subscriber was entitled to judgment for a specified sum as the price of his shares, after deducting what was awarded for the calls, "upon his surrendering the fifty-two shares of stock held by him, or transferring the same in favor of the said company, or of any person or persons they may direct, for

direction of the award is in itself final and absolute, but made dependent upon the fulfilment of a lawful condition, it will be sustained.¹

their behoof." The award was held void as not final, as it merely said conditionally that if the subscriber chose to give up his shares, the company should pay him a certain sum. To be final, the award should have directed him positively to surrender the shares, and it should have also directed the company to pay him a sum awarded in his favor. *Baillie v. Edinburgh Oil Gas Light Co.*, 3 Cl. & F. 639. See *Carnochan v. Christie*, 11 Wheat. (U. S.) 446.

Where the award directed one party to pay the other a certain sum, and that the second party should execute a release to the former, provided, however, that if the first party should be discharged of any arrears due soldiers under an act of indemnity, then the award should be void, it was held void absolutely, as not being final because the arbitrator had, by adding the proviso, made it incapable of being a final determination of the dispute. *Kinge v. Times*, Sid. 59, Vin. Abr., Arb., H. 18.

So the award was held not final where it directed that if either party were dissatisfied with it, and paid the other a stated sum within a limited time, it would be void and the parties free to take action against each other as before it was made. *Sherry v. Richardson*, Pop. 15.

Where the submission authorized the arbitrator to set aside certain deeds and to direct what should be done, and he directed that certain deeds should be set aside "if and so far as the same respectively are in force, and if and so far as I have power and jurisdiction to set the same aside, * * * and if I have not power and jurisdiction to set the same or any or either of them aside * * * I declare that the rest of my award is yet to stand," the award was held void as not final. *Nickels v. Hancock*, 7 De G. M. & G. 300.

An award to which the arbitrators attach a condition that neither party shall be bound by it, is void. *Sartwell v. Horton*, 28 Vt. 370.

1. Qualification of Rule as to Conditional Awards.—*Com. v. Pejepsct Proprietors*, 7 Mass. 399; *Burns v. Hindman*, 7 Ala. 531.

If the arbitrator directs that an act be done on the premises of a third person, it will be valid, although directing a trespass if made conditional on the consent of such third person. *Turner v. Swainson*, 1 M. & W. 572.

Directing Execution of Lease upon Condition of Payment of Rent.—Where the award directed that a lease of certain premises should be made to a party, provided that if the rent due under the lease should not be paid by him, the award should be void as to his holding the lease, it was sustained, for though conditional it became absolute on the payment of the rent, and, if it was not paid, the enjoyment of the lease was taken away absolutely. *Furser v. Prowd*, Cro. Jac. 423.

Awarding Lands upon Condition of Execution of Deed of Release.—Where the award directed the defendants to have and hold certain disputed land, on condition that within six

months from the date of the award they should execute a deed of release to the plaintiff, the award was sustained, the court holding that the execution of the release was a condition precedent, and that they must perform it before they could make any claim to the land under the award. *Lee v. Elkins*, 12 Mod. 585.

Conditional Award Returnable to Court—Conditional Judgment.—If an award which is returnable into court and upon which judgment is to be entered is made conditional, the court may enter a conditional judgment, according to the direction of the award. Execution will not be allowed to issue on the judgment, but an action may be brought on the judgment when the condition has been fulfilled. Where the judgment creditors wrongfully take out execution, a remedy may be had by *audita querela*. *Skillings v. Coolidge*, 14 Mass. 43; *Com. v. Pejepsct Proprietors*, 7 Mass. 399. See *Day v. Laffin*, 6 Met. (Mass.) 280.

Award Conditional upon Determination by Court of Question of Law.—An award may be made conditional upon the determination of a question of law by the court, the arbitrator declining to pass upon such point. *Brickhouse v. Hunter*, 4 Hen. & M. (Va.) 363, 4 Am. Dec. 528.

So an award may be made conditional upon the courts deciding that the arbitrator was competent in law to give a certain direction, *Waugh v. Mitchell*, 1 Dev. & B. Eq. (N. Car.) 510; or that a witness be held legally competent to testify in the cause, *Fuller v. Wheelock*, 10 Pick. (Mass.) 135; or that certain evidence should have been admitted, *Scott v. Van Sandan*, 6 Q. B. 237, 51 E. C. L. 237.

Where a cause and all matters in difference were referred to arbitration, and the award was in favor of the defendant, giving directions as to costs, and concluding: "But if the court shall be of opinion, upon the facts hereinbefore stated, that the plaintiff is entitled to recover in the action, then I determine the action in favor of the plaintiff, and order and award that the defendant shall pay damages to the plaintiff to the amount of one shilling" and costs, the award was sustained, because, as the arbitrator "had come to a positive finding, and expressly declared his own opinion," the award was final, and the latter part of the award, in which reference was made to the court, might be rejected. *Barton v. Ranson*, 3 M. & W. 322.

Where the direction of the award was that the defendants should have and hold certain land on condition that they should execute a deed of release to the plaintiffs within six months, sufficient to bar them from any future claims to certain lands and to confirm the same lands to the plaintiff according to the opinion of the Supreme Court or of the attorney-general, the award was sustained as based upon a good and operative condition. *Com. v. Pejepsct Proprietors*, 7 Mass. 399.

It has been held that where an award, good in part and bad in part, is upon a condition, if the condition is confined to the bad part the effect of the condition will be so restricted.¹

c. **DEPENDENT AWARD.**—If one award is dependent upon another, and the latter falls, it carries with it the former.²

d. **ALTERNATIVE AWARD.**—An award directing a party to perform a certain act, or in the alternative to do something else, both alternatives being certain, will be sustained as final.³

One of the Alternatives Uncertain or Impossible.—Where the award directs one of two things to be done, and one of them is uncertain or impossible, the party against whom the award is made is bound to perform the other one.⁴

e. **AWARD RESERVING OR DELEGATING JUDICIAL POWER.**—If an arbitrator reserves to himself the power of performing, in the future, any judicial act in regard to the matters submitted, the award will be void for want of finality.⁵ The award will also be void if the arbitrator, instead of deciding

Where an Award Discharges Each of the Parties to the Submission from all demands of the other, and dismisses all the suits, it is not a conditional award; it is conclusive in favor of and against each of the parties. *Burns v. Hindman*, 7 Ala. 531.

1. *Walker v. Walker*, 28 Ga. 140.
2 **Dependent Awards.**—*Cameron v. Castleberry*, 29 Ga. 495. Here the court said: "There is nothing to show that the award, in the last case, would have been what it was if the award in the first had not been what it was. The award in the first falling, the award in the second ought, therefore, to fall with it."

But an award absolute and unconditional in its terms may be accepted independently of another award made by the same arbitrators and rendered at the same time respecting other matters in dispute between the parties, no mutual dependence between the two being shown. *Fay v. Bond*, 1 Allen (Mass.) 211.

3. **Rule as to Alternative Awards.**—*Russell on Awards* (6th ed.) 285; *Thornton v. Carson*, 7 Cranch (U. S.) 596; *Com. v. Pejepsut Proprietors*, 7 Mass. 399; *Williams v. Williams*, 11 Smed. & M. (Miss.) 393; *Curtis v. Gokey*, 68 N. Y. 300; *Hanson v. Webber*, 40 Me. 194; *Clement v. Comstock*, 2 Mich. 359.

Where the award directed a certain sum to be paid by a specified day, and, if the party did not pay it by that day, then to pay a greater sum at another specified date in the future, the award was sustained. *Royston v. Rydall*, Rolle Abr., Arb., H. 8, p. 250, *Com. Dig.*, Arb., E. 15. See *Kockill v. Witherell*, 2 Keb. 838.

On a Submission of a Dispute as to a Right of Way, the award directed that in case the right was taken away, the plaintiff was to pay so much less than a stated sum, and, if not, that he was to pay so much more than such amount, and it was upheld as final. *Collet v. Podwell*, 2 Keb. 670.

So where Alternative Payments were Directed on account of the price of oxen, the award was sustained. *Hanson v. Webber*, 40 Me. 194.

Void as to One Alternative.—Where the award was in the alternative that one of the parties should pay a sum of money or give security, it was held that the award was valid

for the money, though void as to the security, on the ground that it was general and uncertain, and did not state what the security should be, and, as the giving the security was not a consideration for anything to be done by the plaintiff, it might be rejected as surplusage. *Stanley v. Chappell*, 8 Cow. (N. Y.) 235.

One Alternative Requiring Cooperation of Strangers.—Where one of the alternatives requires the party to do an act in conjunction with other persons, not parties to the submission, the award is not void; for if the party cannot induce such other persons to join with him, that is no reason why he should not perform the alternative act. *Thornton v. Carson*, 7 Cranch (U. S.) 596.

4. *Simmonds v. Swaine*, 1 Taunt. 549; *McDonald v. Arnout*, 14 Ill. 58; *Stanley v. Chappell*, 8 Cow. (N. Y.) 235. See *Clement v. Comstock*, 2 Mich. 359.

One Alternative Impossible.—Where the award directed the defendant to cause satisfaction to be entered on the judgment roll in a certain case, or pay a sum of money, and there was no such case, the direction to pay the sum of money was held good. *Wharton v. King*, 2 B. & Ad. 528, 22 E. C. L. 130.

Where the direction is to deliver a certain deed which the party has not in his power or possession, or to pay a sum of money, the party is bound to perform the alternative which is in his power, that is, to pay the money. *Lee v. Elkins*, 12 Mod. 585.

One Alternative Uncertain.—In *Oldfield v. Wilmer*, 1 Leon. 304, where the award directed the defendant to pay a certain sum by a stated day, or to find two sureties to be bound with him to pay the same sum in certain annual instalments until it was all paid, it was held good as to the first direction but void as to the second.

In *Simmonds v. Swaine*, 1 Taunt. 549, *Heath, J.*, said: "If one of two matters is awarded in the disjunctive, and one alternative is impossible or uncertain, that alternative must be taken which can be performed."

5. **Reservation of Judicial Power.**—*Russell on Awards* (6th ed.) 286.

England.—*Winch v. Saunders*, 2 Rolle 214, *Cro. Jac.* 584; *Selby v. Russell*, 12 Mod.

the matter submitted, delegates his judicial function, either in whole or in part, to a third person, whether a party to the submission, or a stranger, or the court.¹

f. AWARD RESERVING OR DELEGATING MINISTERIAL FUNCTIONS.—Although an arbitrator may not reserve or delegate a judicial power, he is at liberty, if he thinks fit, to reserve a ministerial act to be done in the future by himself, or to direct that such act shall be done by a stranger; in either case, even after the time limited for making the award has expired.²

139; *Thorp v. Cole*, 2 C. M. & R. 367, 4 Dowl. 457; *Nott v. Long*, cited in *Cayhill v. Fitzgerald*, 1 Wils. 28.

United States.—*Levezey v. Gorgas*, 4 Dall. (U. S.) 71; *Kingston v. Kincaid*, 1 Wash. (U. S.) 448.

California.—*Porter v. Scott*, 7 Cal. 312.

Kentucky.—*Coghill v. Hord*, 1 Dana (Ky.) 350, 25 Am. Dec. 148.

Maryland.—*Archer v. Williamson*, 2 Har. & G. (Md.) 62; *Calvert v. Carter*, 6 Md. 135.

Pennsylvania.—*Sutton v. Horn*, 7 S. & R. (Pa.) 228.

Virginia.—*Byars v. Thompson*, 12 Leigh (Va.) 550, 37 Am. Dec. 680.

Where the award directed the defendant to leave upon the land for the plaintiff's use as many trees as the arbitrators should afterwards determine, it was set aside as reserving a future authority to themselves. *Thinnie v. Rigby*, Cro. Jac. 314. See *Lindsay v. Lindsay*, 11 Ir. C. L. Rep. 311.

Where an award of arbitrators contained a declaration that they would correct "any errors which may be discovered," it was held to be void. *Hooker v. Williamson*, 60 Tex. 524.

Award Good, though Reservation Void.—Where the arbitrator was empowered to decide as to the use of a stream, and decided the question referred, ordering certain works to be erected by the defendant, and reserving to himself the power of deciding as to whether they were properly executed, at the same time making a final award and stating that his award was final unless the plaintiff objected within a certain time, the reservation of authority was held void, but the rest of the award was held good as containing a final decision. *Manser v. Heaver*, 3 B. & Ad. 295, 23 E. C. L. 73; *Goddard v. Mansfield*, 19 L. J. Q. B. 305. See *Barton v. Ranson*, 3 M. & W. 322; *Tomlin v. Fordwich*, 5 Ad. & El. 147, 31 E. C. L. 304.

Where the arbitrators, in their award, reserved a right to reconsider a claim which they allowed the party against whom they awarded, and then completed the award without reconsidering the claim, it was held that the award was good for the amount awarded, and that the reservation was void. *Byars v. Thompson*, 12 Leigh (Va.) 550, 37 Am. Dec. 680.

Express Reservation of Power.—Where arbitrators make a decision which is expressly stated to be subject to future alterations upon the suggestion of errors by either party, it does not constitute a valid award. *McCrary v. Harrison*, 36 Ala. 577.

Question for the Jury.—Where a dispute was submitted to arbitration in accordance with the terms of an insurance policy, and the

award was in appearance final, but was left open as to some items for further consideration, and one party claimed that it was final and the other that it was not, it was held in an action on the policy, that the court properly left it to the jury to determine whether the paper signed by the arbitrator was complete, and intended by the arbitrators to be final. *Herndon v. Imperial F. Ins. Co.*, 110 N. Car. 279.

1. Arbitrators Delegating Judicial Functions.—*Russell on Awards* (6th ed.) 287; *Lower v. Lower*, Rolle Abr., Arb., E. 20 and H. 11; *Johnson v. Latham*, 19 L. J. Q. B. 329; Rolle Abr., Arb., I. 9; *Sutton v. Horn*, 7 S. & R. (Pa.) 228; *Coghill v. Hord*, 1 Dana (Ky.) 350, 25 Am. Dec. 148.

See *supra*, this title, *Delegation of His Authority by the Arbitrator*.

In *Brickhouse v. Hunter*, 4 Hen. & M. (Va.) 363, 4 Am. Dec. 528, it was held that an award is not wanting in certainty and finality because the arbitrators referred to a report previously made by a commissioner in chancery, and declared their concurrence therein in general terms instead of specifying the particulars or substance thereof in the award itself, and that it was not void because they submitted to the court the propriety of their award in point of law, or because they stated the grounds and reasons of their report as a guide for the court in deciding upon it.

Where an Award Directs One Person to Give Bonds to another, with such sureties as that other shall approve of, it is not final, as it delegates the judicial act of deciding on the sufficiency of the sureties to another. Com. Dig., Arb., E. 15.

So where the award was that one person should pay another a certain sum, and should also beg his pardon in such manner and place as he should appoint, the delegation of the power to appoint the time and place was held to invalidate the award. *Glover v. Barrie*, 1 Salk. 71.

But a Power to Tax Costs may be Delegated, because it is in effect a ministerial act, *Selby v. Russell*, 12 Mod. 139; *Lingood v. Eade*, 2 Atk. 501; *Thorp v. Cole*, 2 C. M. & R. 367, 4 Dowl. 457; *Worrel v. Atworth*, Sid. 358; *Cargay v. Aitcheson*, 2 B. & C. 170, 9 E. C. L. 52; *Pedley v. Goddard*, 7 T. R. 73; unless the delegation be made to some one other than an officer of the court, then it becomes a judicial act, *Knott v. Long*, 2 Stra. 1025. Neither can the delegation be made to an officer of an inferior court. *Addison v. Gray*, 2 Wils. 293.

2. Reservation and Delegation of Ministerial Acts.—*Russell on Awards* (6th ed.) 289; *Winch*

g. PRESUMPTION AS TO FINALITY.—Where an award recites the matters submitted, and purports to be final on its face, it will be deemed final, unless the contrary is proved.¹

6. The Award must Be Certain.—a. GENERAL RULE.—The Award must Be Certain to a Common Intent, so that no reasonable doubt can arise on its face as to the meaning of the arbitrators, or as to the nature and extent of the duties imposed by it upon the parties, or as to how they are to be enforced.²

v. Saunders, 2 Rolle 214, Palm. 145, Cro. Jac. 584; *Thorp v. Cole*, 2 C. M. & R. 367, 4 Dowl. 457; *Owen v. Boerum*, 23 Barb. (N. Y.) 187; *Burrows v. Guthrie*, 61 Ill. 70; *Coghill v. Hord*, 1 Dana (Ky.) 350, 25 Am. Dec. 148; *Carter v. Calvert*, 4 Md. Ch. 199; *Archer v. Williamson*, 2 Har. & G. (Md.) 62; *Backus v. Fobes*, 20 N. Y. 204; *Waite v. Barry*, 12 Wend. (N. Y.) 380.

The Measurement of Land is such a ministerial act. *Hunter v. Bennison*, Hard. 43.

Boundaries.—So where the award provided that a subsequent survey should fix the boundary line of tracts of land in dispute, the award was held to be valid. *Galloway v. Webb*, Hard. (Ky.) 326.

Amount of Compensation for Land.—But where the amount of compensation to be paid for land per acre was made to depend upon the quantity on one side of a brook, but the award did not determine the quantity on that side or on the other, the court held the award not final as there was no means of determining the rate of compensation. *Hopecraft v. Hickman*, 2 Sim. & S. 130.

An Award need Not State in Figures the Exact Amount to be paid if it can afterwards be determined by computation. See *Colcord v. Fletcher*, 50 Me. 398; *Waite v. Barry*, 12 Wend. (N. Y.) 377; *Fletcher v. Webster*, 5 Allen (Mass.) 566; *Kendrick v. Tarbell*, 26 Vt. 416; *Strong v. Strong*, 9 Cush. (Mass.) 560; *M'Kinstry v. Solomons*, 2 Johns. (N. Y.) 57, 13 Johns. (N. Y.) 27.

Directions to Execute Bond, Releases, etc.—Awards which direct the execution of releases or other documents are void if the reservation be of a judicial duty, but if it be construed to be a reservation of a ministerial function they will be sustained. A reservation to the arbitrators themselves is generally construed to be judicial. Where the direction was that the defendant should pay a certain sum to the plaintiff, and as security for the payment should execute such a bond as the arbitrators should advise, it was held judicial and the award invalid, *Rolle Abr., Arb., A. 4*, p. 250; so where the direction was that the defendant should secure the payment of a certain sum to the plaintiff in such a manner as they should advise, 19 Edw. IV. 1, cited in *Hunter v. Bennison*, Hard. 43; or as a stranger should advise, *Rolle Abr., Arb., H. 6*, p. 250; *Emery v. Emery*, Cro. Eliz. 726.

If the arbitrators, on a reference out of chancery, award mutual releases of all matters in difference, leaving it to the court to give directions to the master to settle the form, if they think fit, the award will be upheld. *Lingood v. Eade*, 2 Atk. 501.

So where the direction is that one party

shall execute such a bond as security as his opponent's counsel shall advise, it has been sustained, or if the award directs a general release as fully and beneficially as counsel shall advise, because the delegation to counsel in these cases was not as arbitrator, but for the purpose of making the bond or release as strong in law as he can, a ministerial, not a judicial function. *Cater v. Startut*, *Rolle Abr., Arb., H. 7*, p. 250, Sty. 217, Jenk. 129.

An award provided that by one of the parties a deed should be executed sufficient in the opinion of the Supreme Court or of the attorney-general to bar them from any future claims to the land conveyed. The award was held to be valid. *Com. v. Pejepsct Proprietors*, 7 Mass. 399.

But It Is Only the Formal Preparation of an Instrument that can be delegated; its nature and character must be determined by the award. Where the matter submitted was the right to a certain house and premises, and the award directed certain parties to execute to another all such conveyances, releases, and assurances as might be necessary to pass their respective interests to him, but reserved to the arbitrator a power to appoint a counsel or solicitor therefor, in case of dispute, to decide as to what should be the proper conveyances, etc., and as to the clauses, provisions, and covenants which they were to contain, it was held absolutely void, because it did not state the manner in which the conveyance was to be made. *Coleridge, J.*, said: "It is settled that if an arbitrator does not decide the matter referred to him at the time he makes his award, but reserves to himself a future power to act when his power is gone, it is an excess of authority, as he cannot in that way keep alive his authority, nor can he, I think, delegate it as he attempts to do here." *In re Tandy v. Tandy*, 9 Dowl. 1044.

1. *Dougherty v. McWhorter*, 7 Yerg. (Tenn.) 239.

2. Award must Be Certain to Common Intent.—*England*.—*Hawkins v. Colcough*, 1 Burr. 277.

United States.—*Grier v. Grier*, 1 Dall. (U. S.) 173; *Kingston v. Kincaid*, 1 Wash. (U. S.) 448; *Lyle v. Rodgers*, 5 Wheat. (U. S.) 394; *James v. Thurston*, 1 Cliff. (U. S.) 367; *Talbot v. Hartley*, 1 Cranch (C. C.) 31; *Faw v. Davy*, 1 Cranch (C. C.) 440; *Strong v. Barbour*, 1 Mackey (D. C.) 209.

Alabama.—*Comer v. Thompson*, 54 Ala. 265; *McCrary v. Harrison*, 36 Ala. 577.

Arkansas.—*Manuel v. Campbell*, 3 Ark. 324; *Lee v. Onstott*, 1 Ark. 206.

California.—*Porter v. Scott*, 7 Cal. 314; *Jacob v. Ketcham*, 37 Cal. 197; *Pierson v. Norman*, 2 Cal. 599.

Must Show Questions Decided, and How Decided.—Where the award leaves it doubtful whether the question submitted has been decided, it will be void for

Connecticut.—Carter v. Ross, 2 Root (Conn.) 507; Parkhurst v. Powers, 2 Root (Conn.) 531.

Georgia.—King v. Cook, T. U. P. Charl. (Ga.) 286, 4 Am. Dec. 715. See Sheffield v. Clark, 73 Ga. 92.

Illinois.—Howard v. Babcock, 21 Ill. 259; Ingraham v. Whitmore, 75 Ill. 24; Burrows v. Guthrie, 61 Ill. 70; Henrickson v. Reinback, 33 Ill. 299; Alfred v. Kankakee, etc., R. Co., 92 Ill. 609.

Indiana.—Hollingsworth v. Pickering, 24 Ind. 435; Parker v. Eggleston, 5 Blackf. (Ind.) 128; Hays v. Hays, 2 Ind. 28.

Iowa.—Woodward v. Atwater, 3 Iowa 61.

Kentucky.—Turpin v. Banton, Hard. (Ky.) 320; Brown v. Warnock, 5 Dana (Ky.) 492.

Maine.—Colcord v. Fletcher, 50 Me. 398.

Maryland.—Carter v. Calvert, 4 Md. Ch. 199; Archer v. Williamson, 2 Har. & G. (Md.) 67.

Massachusetts.—Parker v. Parker, 103 Mass. 167; Strong v. Strong, 9 Cush. (Mass.) 560; Smith v. Holcomb, 99 Mass. 552; Peters v. Peirce, 8 Mass. 398.

Mississippi.—Rhodes v. Hardy, 53 Miss. 587; Gibson v. Powell, 5 Smed. & M. (Miss.) 712.

New Hampshire.—Aldrich v. Jessiman, 8 N. H. 516; Hayes v. Bennett, 2 N. H. 422.

New Jersey.—Sheppard v. Stites, 7 N. J. L. 90; McKeen v. Oliphant, 18 N. J. L. 442.

New York.—Schuyler v. Van Der Veer, 2 Cai. (N. Y.) 235; Purdy v. Delavan, 1 Cai. (N. Y.) 315; Perkins v. Giles, 50 N. Y. 228; Waite v. Barry, 12 Wend. (N. Y.) 377; Vosburgh v. Bame, 14 Johns. (N. Y.) 302; Jackson v. Ambler, 14 Johns. (N. Y.) 96; Cox v. Jagger, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522; Wright v. Wright, 5 Cow. (N. Y.) 197; Butler v. New York, 7 Hill (N. Y.) 329; Hiscock v. Harris, 74 N. Y. 108; Perkins v. Giles, 53 Barb. (N. Y.) 342; Brown v. Hankerson, 3 Cow. (N. Y.) 70; Waite v. Barry, 12 Wend. (N. Y.) 377; Case v. Ferris, 2 Hill (N. Y.) 75; Solomons v. M'Kinstry, 13 Johns. (N. Y.) 27; Byers v. Van Deusen, 5 Wend. (N. Y.) 268.

North Carolina.—Carson v. Carter, 64 N. Car. 332; Gibbs v. Berry, 13 Ired. (N. Car.) 388.

Pennsylvania.—McCracken v. Clarke, 31 Pa. St. 498; Gratz v. Gratz, 4 Rawle (Pa.) 411; Wood v. Earl, 5 Rawle (Pa.) 44; Young v. Shook, 4 Rawle (Pa.) 304; Gonsales v. Deavens, 2 Yeates (Pa.) 539; Burkholder v. McFerran, 3 S. & R. (Pa.) 422; Spalding v. Irish, 4 S. & R. (Pa.) 322.

Rhode Island.—Harris v. Social Mfg. Co., 9 R. I. 99, 11 Am. Rep. 224.

South Carolina.—Coxe v. Gent, 1 McMull. (S. Car.) 302.

Tennessee.—Toomey v. Nichols, 6 Heisk. (Tenn.) 159; Duberry v. Clifton, Cooke (Tenn.) 329.

Texas.—Stephenson v. Price, 30 Tex. 715. *Vermont.*—Hazeltime v. Smith, 3 Vt. 535; Akely v. Akely, 16 Vt. 450.

Virginia.—Doolittle v. Malcom, 8 Leigh

(Va.) 608, 31 Am. Dec. 671; Cauthorn v. Courtney, 6 Gratt. (Va.) 381; Brickhouse v. Hunter, 4 Hen. & M. (Va.) 363, 4 Am. Dec. 528.

Wisconsin.—Pettibone v. Perkins, 6 Wis. 616; Dundon v. Starin, 19 Wis. 261; Bancroft v. Grover, 23 Wis. 463, 99 Am. Dec. 195.

Certainty to a Common Intent only is sufficient, for the award will be construed by no technical rules, but in a fair and liberal spirit, with a view to support it as far as a sensible and reasonable interpretation will allow. Russell on Awards (6th ed.) 292; Hawkins v. Colclough, 1 Burr. 275; Burrows v. Guthrie, 61 Ill. 70; Bush v. Davis, 34 Mich. 190; Purdy v. Delavan, 1 Cai. (N. Y.) 304; Wright v. Smith, 19 Vt. 110.

In Butler v. New York, 1 Hill (N. Y.) 489, the court, by Cowen, J., said: "Technical precision and certainty are never necessary in an award. If it be expressed in such language that plain men acquainted with the subject-matter can understand it, that is enough, no matter how short and elliptical." See Rogers v. Corrothers, 26 W. Va. 246.

The rule that an award should be certain and final does not require that no more shall remain to be done to complete its execution, but that the things to be done shall be determined and defined to a reasonable certainty. Strong v. Strong, 9 Cush. (Mass.) 560.

Rule as to Certainty Required Same as in Contracts.—In Akely v. Akely, 16 Vt. 450, the court, by Redfield, J., said: "The degree of uncertainty, to avoid an award of arbitrators, should be such as would avoid any other contract—such as would leave the meaning of the arbitrators wholly in doubt."

If an award is sufficiently definite to be binding as a contract, it is sufficiently definite as an award. Bush v. Davis, 34 Mich. 190; Perkins v. Giles, 53 Barb. (N. Y.) 349, *affirmed* 50 N. Y. 228.

In Chase v. Jeffs, 51 N. H. 494, it was held, in a case of mutual trespass, that an award that one of the parties pay the other twenty-four dollars, and the other pay him sixteen dollars, is not void for uncertainty.

Where the Court Has Power to Recommit the Award, it may be scrutinized more closely than where such a power does not exist. Where the power does not exist, the award will be upheld if the court is "not prepared to say" that it is "so indefinite and uncertain as to be incapable of execution, and, therefore, absolutely void." Strong v. Strong, 9 Cush. (Mass.) 560. See Fletcher v. Webster, 5 Allen (Mass.) 566; Blackledge v. Simpson, 2 Hayw. (N. Car.) 30, 2 Am. Dec. 614; Clement v. Comstock, 2 Mich. 359; Rogers v. Tatum, 25 N. J. L. 281.

Award of Future Damages for the Use of Land for Mining Purposes.—Under a statute which provided for the determination by arbitrators beforehand of the amount of damages which would accrue to the owner of lands by reason of their use for mining purposes (Nova Scotia Rev. Stat., 5th series, c. 7), it was held

uncertainty.¹ And it will be void also if it leaves it uncertain how the matters so submitted were determined.²

that an award which gave to a landowner a fixed sum as estimated damages for all works or occupation necessary to, or required by, the mining lessee, was not bad for uncertainty, although it did not specify how much of the land would be necessary for the mining operations. *Palgrave Gold Min. Co. v. McMillan* (1892), A. C. 460, reversing *Palgrave Min. Co. v. McDonald*, 24 Nova Scotia 70. In delivering judgment in the Privy Council, Lord Hobhouse said that the only uncertainty involved in the case was inherent in the subject-matter. "It is impossible to specify beforehand whither the proper working of a mine may lead, or what works may become necessary, and in the case of dumping grounds it is expressly anticipated that the necessity may arise from time to time. As the damages are to be paid beforehand, all that can be done is to make the best estimate of them that can be made."

Matters Not Admitting of Certainty.—Technical objections ought not to be allowed to defeat an award, where it is made in regard to mercantile transactions which do not admit of certainty. *Borretts v. Patterson*, Tayl. (N. Car.) 37, 1 Am. Dec. 576.

Awards Objected to for Uncertainty, but Sustained.—In the following cases the award of arbitrators was sustained, although objections were made to them upon the ground of uncertainty:

The Ship *Liverpool Packet*, 2 Sprague (U. S.) 37; *Carsley v. Lindsay*, 14 Cal. 390; *Coulter v. Hitchens*, 3 Harr. (Del.) 70; *Madison Ins. Co. v. Griffin*, 3 Ind. 277; *Hays v. Miller*, 12 Ind. 187; *Galloway v. Webb*, Hard. (Ky.) 326; *Brown v. Warnock*, 5 Dana (Ky.) 492; *Hanson v. Webber*, 40 Me. 194; *Skeels v. Chickering*, 7 Met. (Mass.) 316; *Benson v. White*, 101 Mass. 48; *Willard v. Bickford*, 39 N. H. 536; *Warder v. Whitall*, 1 N. J. L. 98; *Coxe v. Lundy*, 1 N. J. L. 295; *Inlay v. Wikoff*, 4 N. J. L. 148; *Purdy v. Delavan*, 1 Cai. (N. Y.) 304; *Carter v. Sams*, 4 Dev. & B. (N. Car.) 182; *White v. Jones*, 8 S. & R. (Pa.) 349; *Santee v. Keister*, 6 Binn. (Pa.) 36; *Harker v. Addis*, 4 Pa. St. 515; *Coxe v. Gent*, 1 McMull. (S. Car.) 302; *Whitcomb v. Preston*, 13 Vt. 53; *Wright v. Smith*, 19 Vt. 110; *Bowman v. Downer*, 28 Vt. 532; *Remelee v. Hall*, 31 Vt. 582, 76 Am. Dec. 140; *Macon v. Crump*, 1 Call (Va.) 575.

1. Award Not Showing whether Question Submitted has been Decided.—*Russell on Awards* (6th ed.) 292; *Young v. Reuben*, 1 Dall. (U. S.) 119; *Burghardt v. Turner*, 12 Pick. (Mass.) 534; *Higby v. Upton*, 3 Met. (Mass.) 409; *In re Fairley and Wilson*, 25 New Bruns. 368.

Upon a reference of a chancery suit which had been brought to rescind an agreement, the main question in the reference being whether the agreement should be rescinded and the suit put an end to, the arbitrator gave direction that certain things should be done, the performance of which was to be taken in satisfaction of all the matters in dis-

pute, and that each party should bear his own costs. But the award was held void, because the directions given did not clearly determine whether the agreement was to be rescinded and the suit put an end to. *In re Tribe and Upperton*, 3 Ad. & El. 295, 30 E. C. L. 91.

Cases wherein Award Held Void for Uncertainty.—In the following cases the awards of the arbitrators were held void for uncertainty: *McDonald v. Bacon*, 4 Ill. 428; *Parker v. Eggleston*, 5 Blackf. (Ind.) 128; *Hollingsworth v. Pickering*, 24 Ind. 435; *Turpin v. Banton*, Hard. (Ky.) 320; *Walsh v. Gilmor*, 3 Har. & J. (Md.) 383, 6 Am. Dec. 502; *Leominster v. Fitchburg, etc.*, R. Co., 7 Allen (Mass.) 38; *Sheppard v. Stites*, 7 N. J. L. 90; *McKeen v. Allen*, 17 N. J. L. 506; *Schuyler v. Van Der Veer*, 2 Cai. (N. Y.) 235; *Brown v. Hankerson*, 3 Cow. (N. Y.) 70; *Thomas v. Molier*, 3 Ohio 266; *Young v. Reuben*, 1 Dall. (Pa.) 119; *Barnet v. Gilsom*, 3 S. & R. (Pa.) 340; *Burkholder v. McFerran*, 3 S. & R. (Pa.) 422; *Zerger v. Sailer*, 6 Binn. (Pa.) 24; *Spalding v. Irish*, 4 S. & R. (Pa.) 322; *Sicard v. Peterson*, 3 S. & R. (Pa.) 468; *Murray v. Bruner*, 6 S. & R. (Pa.) 276; *Kitchen v. Funston*, 14 S. & R. (Pa.) 337; *Gratz v. Gratz*, 4 Rawle (Pa.) 411; *Stephenson v. Price*, 30 Tex. 715.

2. Effect of Payment Ordered Not Determined.—Where a cause and all matters in difference were submitted, a verdict having been taken in the cause subject to the award of an arbitrator who was empowered to direct a verdict for the plaintiff or the defendant as he might think proper, and he directed a verdict to be entered for the plaintiff, without saying for how much, and that the defendant should pay a stated sum to the plaintiff, the award was held void because it left it uncertain whether the arbitrator meant the verdict to stand for the sum originally taken, and the amount ordered to be paid by the defendant to be in respect of the matters out of the cause, or whether he intended the sum ordered to be paid by the defendant to be substituted for the nominal verdict. *Mortin v. Burge*, 4 Ad. & El. 973, 31 E. C. L. 242.

Award that Executor shall Pay out of Assets of Estate.—But an award which directed an executor to pay a balance due from his testator's estate, out of the assets in his hands, was sustained, although it did not ascertain whether the executor actually had any assets. *Love v. Honeybourne*, 4 D. & R. 814, 16 E. C. L. 222.

Right Unlimited in Time to Elect Land or Its Value, and Value Undetermined.—Where the award was that a party should have the land secured to him, or its value in money, at his option, it was held to be uncertain and not conclusive, unless the time in which the election was made was limited and the value of the land determined in money. *Coghill v. Hord*, 1 Dana (Ky.) 350, 25 Am. Dec. 148.

Award of Partition of Lands "as Agreed between the Parties."—An award of arbitrators "that the partition of the High street and

b. MUST BE CERTAIN AS TO SUM AWARDED—(1) *General Rule*.—Where the award directs a sum of money to be paid, it must definitely ascertain what the amount is, so that the parties may know at once what one is to give and the other to receive;¹ otherwise it will be void for uncertainty.²

Where the Rule by Which Amount is to be Determined is Stated.—But an award will not be void for uncertainty, although it does not specify the exact amount to be paid, if it gives the rule or indicates the means by which such sum can be calculated.³

Seventh street property agreed between the parties according to the plan of M. B. shall be carried into effect," was held void for uncertainty, for the reason that the partition was to be made in accordance with an agreement which lay in parol, and the existence of which was disputed, and the terms and conditions of which were not set forth in the award. *Gratz v. Gratz*, 4 Rawle (Pa.) 411. See also *Massy v. Aubry*, Sty. 365.

1. Certainty as to Amount of Payments Awarded.—See *Garitee v. Carter*, 16 Md. 309; *Shirley v. Shattuck*, 4 Cush. (Mass.) 470; *Strong v. Strong*, 9 Cush. (Mass.) 560; *Case v. Ferris*, 2 Hill (N. Y.) 75; *Carson v. Carter*, 64 N. Car. 332.

Award of a Certain Sum to be Paid Annually.—Where, in an action of damages for breach of contract to maintain the plaintiff during life, supplying him with board, fire, lights, etc., an award of a certain sum to be paid annually during the life of such plaintiff was made, it was held that it could not be objected to upon the ground that it was unreasonable or uncertain. *Remelee v. Hall*, 31 Vt. 582, 76 Am. Dec. 140.

Awards as to Partnership Accounts.—Where the question submitted to the arbitrator was to settle partnership disputes between two parties, and the award contained an itemized statement of the partnership accounts, and found a balance due by one partner to the other, it was held to be definite and valid. *Fulmore v. McGeorge*, 91 Cal. 611.

Where partnership accounts were referred to arbitrators to determine the amount due each partner, and to settle whether one of the partners should be charged with any part of the losses of the firm, and the award decided merely that the plaintiff was not to be charged with any part of the losses, but, with that exception, the accounts were to stand as they stood on the books at the time of the award, it was held that the award was sufficiently definite, and that, therefore, it was enforceable. *Cochran v. Bartle*, 91 Mo. 636.

In a partnership matter to be settled by arbitration, the award decided that one of the partners should pay the partnership debts from certain moneys in his hands. The amount of the partnership's debts was not fixed. The court held the award sufficiently certain. "For aught we can see or is averred, the debts due in the case before us might be quite easy of liquidation—perhaps were agreed on by the parties; and if a thing extrinsic, ordered to be done by an award, may be certain, the rule now is to intend that it is certain till the contrary appear by averment." *Case v. Ferris*, 2 Hill (N. Y.) 75.

And see *Byers v. Van Deusen*, 5 Wend. (N. Y.) 268. Compare *Colcord v. Fletcher*, 50 Me. 398.

2. Russell on Awards (6th ed.) 294; *Hewitt v. Hewitt*, 1 Q. B. 110, 41 E. C. L. 460; *In re Marshall and Dresser*, 3 Q. B. 878, 43 E. C. L. 1018; *Shackelford v. Purket*, 2 A. K. Marsh. (Ky.) 435, 12 Am. Dec. 422; *St. Paul F., etc., Ins. Co. v. Gotthelp*, 35 Neb. 351; *Flannery v. Sahagian*, 134 N. Y. 85. See *supra*, this title, *The Arbitrator—Powers of the Arbitrator in Particular Matters—Awards as to Payment of Money*.

Illustrations of Awards for Indefinite Sums.—Where an award directs one party to pay another so much money as is due in conscience, it is void for uncertainty, *Watson v. Watson*, Sty. 28; or if it directs the payment of money due for task work, without ascertaining the amount, *Pope v. Brett*, 2 Saund. 292; or if it directs generally that a party shall pay so much as land is worth, without determining the value of the land, *Titus v. Perkins*, Skin. 247; or if it awards the balance due upon a settled account after deducting the amount of an unsettled account, *Ingraham v. Whitmore*, 75 Ill. 24; *Zerger v. Sailer*, 6 Binn. (Pa.) 24; or to pay the half of a debt for which a certain person is bound, without saying what the debt amounts to, *Gray v. Gray*, Rolle Abr., Arb., Q. 2, p. 263; *Com. Dig., Arb., E. 11*; or to pay the market price for a certain article at a certain time, without saying at what place, as such price varies with the locality, *Hurst v. Bambridge*, Rolle Abr., Arb., Q. 7, p. 263; *Com. Dig., Arb., E. 11*; and see *Waddle v. Downman*, 12 M. & W. 562; or to pay the arrears of rent due after the purchase by a stranger of certain lands, without setting out such arrears and stating from what time they are to be calculated, *Massy v. Aubry*, Sty. 365.

An award is void for uncertainty which declares that A shall pay to B the sum of money which B paid to A for the purchase of one of two horses which were sold together for three hundred dollars. *Howard v. Babcock*, 21 Ill. 259.

An award of a sum certain, less indefinite amounts not determined, is void for uncertainty. *Parker v. Eggleston*, 5 Blackf. (Ind.) 128; *Waite v. Barry*, 12 Wend. (N. Y.) 377; *Spalding v. Irish*, 4 S. & R. (Pa.) 322. See *Fletcher v. Webster*, 5 Allen (Mass.) 566.

So is an award of a definite sum, plus an indefinite amount. *Herbst v. Hageners*, 137 N. Y. 290; *Stanley v. Southwood*, 45 Pa. St. 189.

3. Indicating Rule or Principle of Calculation Sufficient.—*Kyd on Awards* 126, 198, 216;

(2) *Certainty as to Costs*.—An award as to costs is in its nature peculiar, and forms an exception to the rule that the amount awarded must be specified, because when a general direction is given, awarding costs in a pending cause, the amount will be taxed by the officer of the court, whose duty is ministerial, not judicial, and the exact sum can be thereby ascertained definitely.¹

Russell on Arb. 297; Carsley v. Lindsay, 14 Cal. 390; Gudgell v. Pettigrew, 26 Ill. 305; Bannister v. Read, 6 Ill. 92; Colcord v. Fletcher, 50 Me. 398; Towne v. Jaquith, 6 Mass. 46, 4 Am. Dec. 84; Maynard v. Frederick, 7 Cush. (Mass.) 252; Bush v. Davis, 34 Mich. 190; Cochran v. Bartle, 91 Mo. 636; Chase v. Jeffs, 51 N. H. 494; Worder v. Whitall, 1 N. J. L. 98; Waite v. Barry, 12 Wend. (N. Y.) 377; Brown v. Hankerson, 3 Cow. (N. Y.) 72; Butler v. New York, 1 Hill (N. Y.) 489; Wilson v. Brown, 82 Pa. St. 437; Kendrick v. Tarbell, 26 Vt. 416. See Hopcraft v. Hickman, 2 Sim. & S. 130; Higgins v. Willes, 3 M. & R. 382; Rogers v. Tatum, 25 N. J. L. 281.

Where a general submission was entered into of all controversies relating to a certain voyage, and the arbitrator directed that one of the parties should pay his share of the expenses of the voyage and allow on account his proportion of the loss which should happen to the ship during the voyage, the award was held good, as the expenses and losses might be ascertained with certainty. Beale v. Beale, Rolle Abr., Arb., H. 14.

But in Perry v. Mitchell, 2 D. & L. 457, it was questioned whether an action could be maintained on such an award.

Neither Amount nor Means of Calculating Amount Indicated.—The award will be void for uncertainty where neither the amount is named, nor sufficient means are indicated by which it can be found, and the means indicated should be of such a nature that no dispute can arise concerning the amount. Alexander v. McNear, 28 Fed. Rep. 403; Hays v. Hays, 2 Ind. 28; Shackelford v. Purket, 2 A. K. Marsh. (Ky.) 435, 12 Am. Dec. 422; Fletcher v. Webster, 5 Allen (Mass.) 566; Waite v. Barry, 12 Wend. (N. Y.) 377; Spalding v. Irish, 4 S. & R. (Pa.) 322.

Amount to be Paid in Proportion to the Interests of Parties.—Where the award directed two persons to pay a debt in the proportion of the shares held by each of them respectively in a certain ship, without stating what these shares were, the award was held valid, as it did "not appear that it was in dispute between the parties what these shares were." Wohlenberg v. Lageman, 6 Taunt. 250. See Gudgell v. Pettigrew, 26 Ill. 305.

Discharge need Not be Directed.—An award directing the payment of a specific sum is final and sufficient, without directing a release from the party to whom it is paid. A discharge from the defendant will be presumed from the payment of the sum awarded. M'Kinstry v. Solomons, 2 Johns. (N. Y.) 57, affirmed 13 Johns. (N. Y.) 27; Byers v. Van Deusen, 5 Wend. (N. Y.) 268.

Award of Interest.—An award ordering the payment of a certain sum with interest is good. Skeels v. Chickering, 7 Met. (Mass.)

316; Emery v. Hitchcock, 12 Wend. (N. Y.) 156; Solomons v. M'Kinstry, 13 Johns. (N. Y.) 27; White v. Jones, 8 S. & R. (Pa.) 349.

The fact that the award provides for the correction of any mistake in addition or calculation of interest will not invalidate it. M'Kinstry v. Solomons, 2 Johns. (N. Y.) 57.

In Higgins v. Willes, 3 M. & R. 382, the matter submitted was whether one party was liable to pay interest upon a stated sum to the other. The award was that he was liable without setting out the amount so due. Upon objection that the amount should have been ascertained, Bayley, J., said: "If he gives you the rule by which the amount is to be ascertained, the rest is mere matter of addition."

1. Costs.—Pedley v. Goddard, 7 T. R. 73; Hanson v. Liversedge, 2 Vent. 242; Cargey v. Aitcheson, 2 B. & C. 170, 9 E. C. L. 52; Holdsworth v. Barsham, 31 L. J. Q. B. 145, 2 B. & S. 480, 110 E. C. L. 480; in error, 32 L. J. Q. B. 289, 4 B. & S. 1, 116 E. C. L. 1; Reynolds v. Reynolds, 15 Ala. 406; Brown v. Warnock, 5 Dana (Ky.) 492; Benson v. White, 101 Mass. 48; Nichols v. Rensselaer County Mut. Ins. Co., 22 Wend. (N. Y.) 125; Boughton v. Seamans, 9 Hun (N. Y.) 392; Wright v. Smith, 19 Vt. 110; Macon v. Crump, 1 Call (Va.) 575. See Leominster v. Fitchburg, etc., R. Co., 7 Allen (Mass.) 38. See also *supra*, this title, *The Arbitrator—Power of the Arbitrator over the Costs*.

In Thoreau v. Pallies, 5 Allen (Mass.) 354, it was held that where an action is submitted to an arbitrator with an agreement that he may pass upon all questions of costs, an award fixing the amount of costs in gross is *prima facie* valid.

Amount Ascertained from Attorney's Bill.—Where the award directed one party to pay the other all such sums as he had expended in the prosecution of his suit, it was upheld as certain, as the amount could be ascertained from the attorney's bill. Beale v. Beale, Cro. Car. 383. See Linfield v. Ferne, 3 Lev. 18; Thorp v. Cole, 2 C. M. & R. 367, 4 Dowl. 457.

Old Cases Conflict.—Where the award directed the defendant to pay the plaintiff all such costs, charges, and expenses as the plaintiff had been put to in a certain cause then pending between the parties, it was held to mean such costs as would be ascertained by the officer of the court, and the award was upheld. Fox v. Smith, 2 Wils. 267.

But in another old English case, a direction given that the defendant should pay all reasonable expenses which the plaintiff had sustained, was held uncertain and void. Bargrave v. Atkins, 3 Lev. 413. See Pinkny v. Bullock, cited in 3 Lev. 413.

General Award of Costs Good in Causes in Superior Courts Only.—In *England* the

c. CERTAINTY AS TO TIME.—There is a conflict of authority as to whether it is necessary that the award should designate the exact time when its directions are to be carried out. In *England* the rule is that the time need not be specified.¹ A contrary opinion has been held in the *United States*, although the decisions are conflicting.²

d. CERTAINTY AS TO PLACE.—It has been held that where an award directs the payment of money, it need not specify any place where such payment may be made.³

e. CERTAINTY AS TO SUBJECT-MATTER—(1) *Personal Property*.—When an award gives any directions in regard to a chattel, it must describe it

rule that a general award of costs is valid, applies to causes in the superior courts only; if the award directs the costs in an action in the inferior courts to be paid without ascertaining the amount, it will be void. Russell on Awards (6th ed.) 296; Addison v. Gray, 2 Wils. 293; Winter v. Gorlick, 1 Salk. 75.

Where an award of costs is made, however, it will be presumed, until the contrary is shown, that it is a cause in the superior courts. Fox v. Smith, 2 Wils. 267.

When Reference Made Rule of Court.—When the reference is made a rule of court, the costs may be taxed without specifying the amount in the award. Thorp v. Cole, 2 C. M. & R. 367, 4 Dowl. 457. See Holdsworth v. Barsham, 31 L. J. Q. B. 145, 2 B. & S. 480, 110 E. C. L. 480; in error, 32 L. J. Q. B. 289, 4 B. & S. 1, 116 E. C. L. 1.

Party to be Paid Not Named.—Where the award directs a party to pay the costs of an action or reference, it need not state to whom they are to be paid. The inference is that they are to be paid to the opposite party. Baily v. Curling, 20 L. J. Q. B. 235.

1. Certainty as to Time—English Authorities.—Russell on Awards (6th ed.) 292. See Rees v. Waters, 16 M. & W. 263, 4 D. & L. 567.

In Freeman v. Bernard, 1 Salk. 69, it was held that if a request to do the act were necessary it should be done within a convenient time after such request, but if a request was not needed it should be performed within a reasonable time.

Where the award was not dated, and it directed one of the parties to do an act a certain number of days from the date of the award, it was sustained on the ground that such date would be taken to be the time of delivery, and the number of days was then calculated from the day of delivery. Armitt v. Breame, 1 Salk. 76, 2 Ld. Raym. 1076.

An award was, in an old case, held void which directed a sum to be paid "on the said first day of May," because no such day had been previously mentioned. Com. Dig., Arb., E. 11; Markham v. Jennings, Rolle Abr., Arb., 263. See *infra*, this title, *Performance of the Award—Time of Performance*.

2. Certainty as to Time—Decisions in the United States.—In Carnochan v. Christie, 11 Wheat. (U. S.) 446, the arbitrators directed a certain sum to be placed by one party to the credit of another, provided that the second party should grant, or cause to be granted, to the first a clear, unincumbered and satisfactory title to certain lands, but the award did not state

within what time such title should be made. Marshall, C. J., held that the award was void, for, as no time was limited within which the title was to be made, "the question whether this credit was to be allowed or disallowed was left indefinitely open," and the court had no power to supply the omission, as to do so would be to usurp the functions of the arbitrators.

An award in an action against the supervisors of a township, that the defendants pay the plaintiff a certain sum "as soon as the defendants shall be in possession of the township's funds to do so," is bad, because the money is to be paid *in futuro*, and on a contingency. Williams v. Landon, 14 S. & R. (Pa.) 338.

An award requiring a railroad company to pay a certain amount at any time fixed by the company, upon giving the landowner three days' notice of time and place of payment, the landowner then to deliver a deed, was held to be void for uncertainty. Alfred v. Kankakee, etc., R. Co., 92 Ill. 609.

Where the parties agreed to have the ground rent of certain lots determined by an award of arbitrators, and also what amount should be paid up to the date of the award, an award stating the yearly rental, and specifying the amount that a party would owe at a stated day, and that an abatement of a stated sum should be allowed on the yearly rental until the party be put in possession, the time whereof was not determined, was held void for uncertainty. Evans v. Sheldon, 69 Ga. 100.

It has been held, however, that an award ordering a certain sum to be paid, without specifying the time of payment, is not void for uncertainty. The money becomes payable immediately. Ehrman v. Stanfield, 80 Ala. 118; Blood v. Shine, 2 Fla. 127. See Soper v. Frank, 47 Vt. 368.

An award providing for the payment of a stipulated sum annually by one of the parties to the other, for the latter's life, is valid. Remelee v. Hall, 31 Vt. 582, 76 Am. Dec. 140. See *infra*, this title, *Performance of the Award—Time of Performance*.

3. Russell on Awards (6th ed.) 292; Anonymous, 1 Keb. 92; 2 Brownl. 309; Rees v. Waters, 16 M. & W. 263, 4 D. & L. 567.

However, where the direction was to pay for a commodity at the market price, it was held essential to designate the place, as the price varies in different places. Hurst v. Bambridge, Rolle Abr., Arb., Q. 7, p. 263; Com. Dig., Arb., E. 11; Waddle v. Downman, 12 M. & W. 562.

specifically, so that it can be identified, or the award will be void.¹

(2) *Real Property*.—An award in regard to real estate ought to describe it with sufficient accuracy to enable an officer to give possession of the premises, and it ought to designate its limits by metes and bounds, or at least to indicate the means by which such limits can be determined, otherwise it will be void.²

1. Russell on Awards (6th ed.) 300.

Chattels and Things Referred to must be Determined.—Where the award was that the party should finish the "house" and keep "the stone," there being no further description of either, the award was held void, the court doubting whether the parties themselves could tell what house or stone was referred to. *Schuyler v. Van Der Veer*, 2 Cai. (N. Y.) 235.

Where an award directed the delivery of "a certain obligation," without further description, it was held void. *Bedam v. Clerkson*, 1 Ld. Raym. 123.

So an order for the delivery of "three boxes and several books" was held invalid without further description. *Cockson v. Ogle*, 1 Lutw. 550.

Also an award that one party shall "deliver or account for on oath all bonds, notes, bills, or other securities heretofore given to them as collateral security," without specifying what bonds or other securities were either conveyed or pledged as collateral security. *Lyle v. Rodgers*, 5 Wheat. (U. S.) 394.

An award directing one of the parties to surrender a bond bearing a certain date, but without giving the names of the parties to the bond, or any other particulars by which it could be identified, was held to be void. *Sheppard v. Stites*, 7 N. J. L. 90; *McKeen v. Allen*, 17 N. J. L. 506.

Certainty in Describing a Debt.—Where the award stated that A owes B a certain sum for "the T. oxen," it was held sufficiently certain. *Waddle v. Downman*, 12 M. & W. 562.

Dividing a Fence.—Where arbitrators were empowered by the submission to determine to whom a certain fence belonged, and decided that the defendant might take away the rails and stakes put into the fence by a former order, it was held that the effect of this award was to give what remained of the fence to the plaintiff, and that the award was sufficiently certain. *Whittemore v. Mason*, 14 Ill. 392.

2. **Description of Real Property.**—*Aldrich v. Jessiman*, 8 N. H. 516; *Rogers v. Corrothers*, 26 W. Va. 248; *Crawford v. Orr*, 84 N. Car. 246; *Schuyler v. Van Der Veer*, 2 Cai. (N. Y.) 235; *Sicard v. Peterson*, 3 S. & R. (Pa.) 468; *Thomas v. Molier*, 3 Ohio 266.

An award ordering a party to deliver "the said farm," without further describing the farm, is void. *Brown v. Hankerson*, 3 Cow. (N. Y.) 70.

So an award of three-quarters of the whole section of certain land to be "taken of the upper part" of said land. *Duncan v. Duncan*, 1 Ired. (N. Car.) 466.

An award of a sum of money to the plaintiff "at the time the plaintiff will make a correct deed of conveyance to the heirs of A.

for two acres and a half of land," without further description of the land, is uncertain and void. *Murray v. Bruner*, 6 S. & R. (Pa.) 276.

Lands Awarded "According to the Respective Possessions" of the Parties.—Where commissioners appointed to determine the rights of claimants of land under a patent awarded that certain of the parties should hold certain of the lands "according to their respective possessions forever," it was held good and "certain to a common intent," as the commissioners evidently meant the actual possessions of the parties, and "an actual possession *quasi pedis possessio* is susceptible of clear and definite proof, and no lands can be conveyed by any possible mode of expression dispensing with the necessity of parol proof to locate it." The court further said that as such a description would be sufficient in a deed (*Vin. Abr. Grant*, Co. Litt. 4, 6), they could not require more certainty of description in an award than the law requires in describing land conveyed by deed. *Jackson v. Ambler*, 14 Johns. (N. Y.) 108.

Land Identified by Map or Plan.—So if a map or plan be annexed to an award, and referred to in it, this, taken with the written direction of the award itself, will render the award sufficiently certain. *Darge v. Horicon Iron Mfg. Co.*, 22 Wis. 691; *Jackson v. Ambler*, 14 Johns. (N. Y.) 96.

Land Identified by Reference to Deed.—Where the question submitted was the price of certain land, and the award referred to a deed of the land to identify it, following the description in the deed, it was held to be sufficiently certain, although the description in the deed was indefinite. *Day v. Hooper*, 51 Me. 178.

In *Akely v. Akely*, 16 Vt. 450, where the defendant had executed certain deeds to the complainant, one being of a fifty-acre lot, which contained a certain stipulation, and a subsequent controversy was submitted in which it was awarded that the defendant should quitclaim all right, etc., to the lands which he had heretofore deeded or attempted to deed to the complainant, and objection was made that the deed to the fifty-acre lot was void, and that consequently the award was void as leaving it uncertain whether the fifty-acre lot came within it, the court said that it might be that if the award were pleaded in bar, it would be held uncertain on a general demurrer, but that it was "as certain as if it had referred to the deed of the very land—or nearly so upon the testimony—for there is no other land attempted to be conveyed to which it could be referred."

But where the award was that B. and L. should reconvey "all lands heretofore conveyed or pledged to them by the late G. D. as a collateral security," and it appeared from the pleadings, the facts stated, and even the

A description which would be sufficiently certain in a deed will be sufficient also in an award.¹

(3) *Boundary Lines*.—Where the subject-matter of the submission is the determination of a boundary line, it must be described with sufficient certainty in the award to enable its exact location to be ascertained.²

award itself, that G. D. had given deeds absolute upon their face, but which were claimed to have been intended as collateral security, the award was held uncertain as not defining with sufficient clearness what lands had been thus conveyed as security. *Lyle v. Rodgers*, 5 Wheat. (U. S.) 408.

Other Illustrations of Descriptions of Land Held Sufficient.—An award which ordered a conveyance to be made of certain portions of land "up to the original claim lines," was held not to be void for uncertainty, because parol evidence might be admitted to establish such lines. *Williams v. Warren*, 21 Ill. 541.

An award in a dispute about a lot is not void for uncertainty because it does not appear on the face of the award that the lot described in it is the identical lot of the submission. This may be proved on trial. *Rogers v. Tatum*, 25 N. J. L. 281. See *Northern Cent. R. Co. v. Canton Co.*, 24 Md. 492.

Where the award described the subject-matter as a brewery near the village of —, in which the parties had a joint interest, it was held sufficiently certain, in the absence of evidence that there was any other brewery in the neighborhood, or that the parties had any interest in another brewery. *Byers v. Van Deusen*, 5 Wend. (N. Y.) 268.

1. *Payne v. Crawford*, 97 Ala. 604; *Williams v. Warren*, 21 Ill. 541; *Jackson v. Ambler*, 14 Johns. (N. Y.) 108; *Warren v. Syme*, 7 W. Va. 474; *Rogers v. Corrothers*, 26 W. Va. 238.

Whether Boundary Involved in Trespass Q. C. F. must be Decided.—In an action of trespass *quare clausum fregit*, where the title came into dispute by reason of a difference as to the proper location of the boundary line, it was held that the arbitrators need not determine such line; an award finding that the *locus in quo* belonged to one party or the other, and an award of damages accordingly was held enough; such a finding, in its legal effect, was the same as a verdict in favor of the plaintiff on all the issues. *Ballard v. Waldo*, 8 Jones (N. Car.) 153.

And where, in such a case, the award decided that there was no trespass, the award was held to be certain. *Harralson v. Pleasants*, Phil. (N. Car.) 365. See *Richter v. Chamberlin*, 6 Binn. (Pa.) 34.

Directions to Mortgagee.—An award directing a mortgagee to reassign the mortgaged lands without stating for what period the reassignment is to be made is sufficiently certain, for the court will imply that it was intended to include the whole interest mortgaged. *Rosse v. Hodges*, 1 Ld. Raym. 233.

2. **Certainty as to Boundary Lines.**—An award which describes the boundary of certain lands by reference to certain monuments which do not actually exist at the time the

award is made, will be void for uncertainty. *Giddings v. Hadaway*, 28 Vt. 342.

So is a boundary line fixed from one known monument to another by land of one of the parties uncertain. *Clark v. Burt*, 4 Cush. (Mass.) 396.

In *Caldwell v. Dickinson*, 13 Gray (Mass.) 365, where the award was that the boundary line should be "the line established by the survey of O. R., as exhibited by him to the arbitrators, and known at the hearing as the 'R. line,' viz.," etc., it was objected to on the ground that it was uncertain, without referring to a plan which was not annexed to the award, and which was not a public plan or survey, or within the control of the defendant. But it was sustained, as the line could be run without the assistance of the plan, being sufficiently described in the award itself.

An award which fixes with accuracy the terminal points of a disputed line between adjacent landowners, and its course and distance, is not obnoxious to the allegation of uncertainty. A simple response to the inquiry submitted, in analogy to a jury verdict, is sufficient. *Crawford v. Orr*, 84 N. Car. 246.

If an award settling a corner and lines between two tracts of land shows that two points, one in each of two lines, are ascertained, they will be regarded as fixed and certain, unless the record shows that they are uncertain; and if the award gives directions to ascertain where the corner which must settle the dispute is located by the award, and in such a manner that any competent surveyor could, from such award, find the corner and lines, the award is certain. *Rogers v. Corrothers*, 26 W. Va. 248; *Crawford v. Orr*, 84 N. Car. 246.

Where the arbitrators are to establish a boundary line by reference to, or in conformity with, some original line, it will be presumed that they have done so in their award, and such award may be explained by evidence showing what the boundaries actually are which the award indicates. *Robertson v. M'Niel*, 12 Wend. (N. Y.) 578.

Where a question as to the true boundary line between adjoining landowners is submitted to arbitration, the award of the arbitrators is sufficient to establish the line between such parties, their heirs, and successors in title. *Kennedy v. Farley*, 82 Hun (N. Y.) 227. See *Vosburgh v. Teator*, 32 N. Y. 561; *Wood v. Lafayette*, 46 N. Y. 484. See also the following cases involving the descriptions of boundaries to real property in awards: *Redden v. Smith*, 5 Harr. (Del.) 389; *Allen v. Kingsbury*, 16 Pick. (Mass.) 235; *Clark v. Burt*, 4 Cush. (Mass.) 396; *Pike v. Gage*, 29 N. H. 461; *Bacon v. Wilber*, 1 Cow. (N. Y.) 117; *Massey v. Thomas*, 6 Binn. (Pa.) 333; *Farris v. Caperton*, 1 Head (Tenn.) 606; *Woods v. Page*, 37 Vt. 252.

f. **CERTAINTY AS TO PERSONS.**—An award must indicate distinctly the persons who are required to do any act which it orders, and also those towards whom such act is to be done. But it need not designate them by name. Any description by which they can be readily ascertained is sufficient.¹

Payments to be Distinguished as Made to Individual or Fiduciary.—So where claims against a party, both in his own right and in a representative character, are submitted to arbitration, the award should show in what character the amount awarded is to be paid.²

g. **CERTAINTY AS TO GENERAL DIRECTIONS.**—Acts to be Done should be Clearly Described.—It is as essential that the award should be as precise in directing the performance of any act as in designating the persons who are to do such act, or as it must be in regard to the payment of money.³

1. Parties should be Indicated with Clearness.—Russell on Awards (6th ed.) 301; *In re Tidswell*, 3 N. R. 81; *Grier v. Grier*, 1 Dall. (U. S.) 173; *Lyle v. Rodgers*, 5 Wheat. (U. S.) 394; *Rainforth v. Hamer*, 25 L. T. 247.

Where the submission required the arbitrator to direct at what price A or B should purchase a certain piece of land, and he awarded that it should be purchased, at a price designated by him, by A or B, the award was held void as not distinctly stating whether it was A or B who was to pay the amount fixed. *Hullock, B.*, put the question: "Against whom are you to ask for an attachment?" *Lawrence v. Hodgson*, 1 Y. & J. 16. See *Rainforth v. Hamer*, 25 L. T. 247.

In *Miller v. DeBurgh*, 4 Exch. 809, an award which directed the defendant to pay the plaintiff a sum of money on proof that the plaintiff had discharged certain claims was held uncertain and void for not stating to whom the proof was to be made.

An award which does not determine to which of the parties to the submission the title to certain land particularly belongs is not admissible in evidence, especially where one of the parties to the suit was a party to the submission. *Woodward v. Woodward*, 14 Ill. 370.

Awards Sustained as Sufficiently Ascertaining Parties.—An award which directs a party to pay the costs, without saying to whom, sufficiently indicates that they are to be paid to the opposite party. *Baily v. Curling*, 20 L. J. Q. B. 235.

Where the award directed a nuisance to be abated, which was erected on the defendant's land, it was held to imply that the act of removing it should be performed by the defendant himself, though it did not say so specifically. *Arnitt v. Breame*, 1 Salk. 76, 2 Ld. Raym. 1076; *Com. Dig.*, Arb., E. 11.

An award which directed a payment to be made to the plaintiff or to his solicitor in the cause, designating such solicitor by name, was held sufficient. *Hare v. Fleay*, 11 C. B. 472, 73 E. C. L. 472.

If one of two executors refer a matter in his own right and one in right of his testator, and the referees award thereon a sum of money to himself and another to him and his coexecutor, the award is good. *Macon v. Crump*, 1 Call (Va.) 575.

An award which directed the defendant, or his executors or administrators, to execute a

release to the plaintiff, was held not to be void for uncertainty because of the ambiguity as to who was to make the release, the court holding that the "or" was conjunctive, and that the introduction of the executors was merely a cautionary proceeding on the part of the arbitrators, and in fact mere surplusage. *Freeman v. Bernard*, 1 Ld. Raym. 247; *Bac. Abr.*, Arb., E. 4; *Downey v. Vesey*, 2 Vent. 249.

2. Payments to Representatives.—In What Character to be Made.—*Lyle v. Rodgers*, 5 Wheat. (U. S.) 394; *Hoffman v. Hoffman*, 26 N. J. L. 175. See *Callahan v. M'Alexander*, 1 Ala. 366; *Doyle v. Reilly*, 18 Iowa 108, 85 Am. Dec. 582. Compare *Strong v. Beroujon*, 18 Ala. 168.

Where a bill was filed against a husband and wife for an account by certain legatees and devisees, alleging that the wife, while sole executrix, had received certain funds of the estate, etc., and it was agreed that "all matters in controversy in this cause be referred to the arbitrament of S.," and an award was filed directing the husband and wife to pay a sum in gross to each complainant as due from the testator's personal estate, the rents of his real estate, and balances on the guardian's accounts, it was set aside for uncertainty in not stating on account of which of the defendants, and in what character, the indebtedness accrued. *Dorsey v. Dorsey*, 11 Gill & J. (Md.) 299.

3. Designation of Acts to be Performed.—Russell on Awards (6th ed.) 300. See *Thoreau v. Pallies*, 5 Allen (Mass.) 354; *Stearns v. Cope*, 109 Ill. 340.

An award to do a certain act should be so certain that specific performance could be enforced. *Banks v. Adams*, 23 Me. 259; *Etner v. Shope*, 43 Pa. St. 110; *Cauthorn v. Courtney*, 6 Gratt. (Va.) 381; *In re Tidswell*, 3 N. R. 281; *Farr v. Johnson*, 25 Ill. 522; *Howard v. Babcock*, 21 Ill. 259; *Henrickson v. Reinback*, 33 Ill. 299; *Kintner v. State*, 3 Ind. 86; *Perkins v. Giles*, 53 Barb. (N. Y.) 342, affirmed 50 N. Y. 228.

In *Schuyler v. Van DerVeer*, 2 Cai. (N. Y.) 235, the court, by Kent, C. J., said: "It ought to appear from the context of the award, or from the nature of the thing awarded, or by a manifest reference to something connected with it, what things the parties are ordered to do."

Certainty as to Securities Directed to be Given.—An award ordering one party to give

When General Award as to Whole Matter Good.—But unless the submission expressly requires it, it is not necessary that the award should give specific directions in regard to each one of several matters referred. They may all be included in one general award.¹

Results without Reasons Therefor Good.—Nor is it necessary that the arbitrators should give reasons for their award; stating the reasons will not necessarily

security to the other, if required, without further specifying the security, is void. *Hewitt v. Hewitt*, 1 Q. B. 110, 41 E. C. L. 460; *Tipping v. Smith*, 2 Stra. 1024; *Thinne v. Rigby*, Cro. Jac. 314; *Duport v. Wildgoose*, 2 Bulst. 260; *Jackson v. De Long*, 9 Johns. (N. Y.) 43; *Barnet v. Gilson*, 3 S. & R. (Pa.) 340. See *Stanley v. Chappell*, 8 Cow. (N. Y.) 235; *Peck v. Wakely*, 2 McCord (S. Car.) 279.

But in *Cutter v. Cutter*, 48 N. Y. Super. Ct. 470, affirmed 98 N. Y. 628, it was held that an award that notes should be "satisfactorily secured," was not void for uncertainty.

Where the award directed the defendant to enter into a bond, conditioned that the plaintiff and his wife should enjoy certain lands, without stating the amount of the bond, the award was held void for uncertainty. *Samon's Case*, 5 Coke 77b.

Where the direction of the award was that a certain sum should be paid, or should be secured to be paid, within a week from the date of the award, the court sustained the award, holding that the party should, within the time limited, either pay the amount stated or give such security as would be satisfactory to the person to whom the payment was to be made. *Simmonds v. Swaine*, 1 Taunt. 549.

Illustrations of Acts Not Sufficiently Described.—Where an award, instead of settling definitely what was due from one party to another, merely required them to perform certain duties towards each other simultaneously, with the understanding that one "was to do what was right," it was held that it should be set aside for uncertainty. *Comer v. Thompson*, 54 Ala. 265.

So where, upon a submission to arbitration, the statement of the award was that the defendants were entitled to keep up and maintain their dam at a certain height, and to keep boards thereon of a designated width at all times, except in times of freshet, the award was held void for uncertainty, as the word "freshet" is so varying in its meaning as to necessitate constant litigation. *Harris v. Social Mfg. Co.*, 9 R. I. 99, 11 Am. Rep. 224.

1. General Award without Specific Directions as to Each Matter Submitted—England.—*Waddle v. Downman*, 12 M. & W. 562.

United States.—*Heckers v. Fowler*, 2 Wall. (U. S.) 123; *Karthus v. Ferrer*, 1 Pet. (U. S.) 222.

Alabama.—*Brewer v. Bain*, 60 Ala. 153.

Illinois.—*Stearns v. Cope*, 109 Ill. 340.

Maine.—*Vannah v. Carney*, 69 Me. 221.

Massachusetts.—*Strong v. Strong*, 9 Cush. (Mass.) 560; *Shirley v. Shattuck*, 4 Cush. (Mass.) 470; *Blackwell v. Goss*, 116 Mass. 394; *Bigelow v. Maynard*, 4 Cush. (Mass.) 317; *Houston v. Pollard*, 9 Met. (Mass.) 164; *Mickles v. Thayer*, 14 Allen (Mass.) 114.

New York.—*Emery v. Hitchcock*, 12 Wend. (N. Y.) 156; *Morewood v. Jewett*, 2 Robt. (N. Y.) 496; *Wood v. Auburn, etc., R. Co.*, 8 N. Y. 160.

Vermont.—*Bowman v. Downer*, 28 Vt. 532; *Soper v. Frank*, 47 Vt. 368.

Compare *Murry v. Mills*, 1 Neb. 456.

Where Submission Requires Specific Directions on All Matters.—Where the submission specifically requires an award upon each one of several distinct matters, it must be complied with. *Houston v. Pollard*, 9 Met. (Mass.) 164; *Rider v. Fisher*, 5 Scott 86.

Finding Balance Includes Deductions from Claim.—Where the submission in a dispute arising in a building contract left it to the arbitrator "to say what deduction shall be made in favor of M. and what balance shall be due," an award of a balance only was held good, as the amount to be deducted was presumed to have been taken into consideration in arriving at the balance ordered to be paid. *Bigelow v. Maynard*, 4 Cush. (Mass.) 317.

In *Strong v. Strong*, 9 Cush. (Mass.) 560, it was said: "The arbitrators, in finding the balance due to a party, do also necessarily find what deduction, if any, should be made for his claim as certainly as if they had in express terms stated the sum which they deducted."

An Award for a Sum of Money in Gross, where several matters have been submitted, will be good; it will be supposed that all matters have been considered. *Dickerson v. Tyner*, 4 Blackf. (Ind.) 253; *Strong v. Strong*, 9 Cush. (Mass.) 560; *Shirley v. Shattuck*, 4 Cush. (Mass.) 470; *Bigelow v. Maynard*, 4 Cush. (Mass.) 317; *Harden v. Harden*, 11 Gray (Mass.) 435; *Emery v. Hitchcock*, 12 Wend. (N. Y.) 156; *Darge v. Horicon Iron Mfg. Co.*, 22 Wis. 691. See *Waddle v. Downman*, 12 M. & W. 562; *Hawkins v. Benton*, 8 Q. B. 479, 55 E. C. L. 479.

Illustrations of Matters Necessarily Decided by General Award.—An award under a submission concerning the ownership of certain oxen sold by A to B, and claimed by C, simply stated that A should pay certain sums respectively to B and C. It was held that this was sufficiently certain to infer that the ownership was adjudged to A. *Hanson v. Webber*, 40 Me. 194.

The question of overflowing lands by a milldam having been submitted to arbitration, an award that the owner of the dam pay to the owner of the land a specified sum annually, "for each year he keeps his milldam up to a certain point indicated by the arbitrators on a certain stump," included the right of the dam owner to raise the water to the height indicated by the arbitrators. *Sitton v. Cureton*, 72 Ga. 207.

invalidate the award, but a simple statement of the result is enough.¹

Compliance with Conditions Not Necessarily Stated.—Neither are the arbitrators required to state in the award, in order to make it certain, that all the necessary conditions have been complied with, as that notice has been given of the time and place of the meetings, or the like.²

Uncertainty Cured by Context.—An award will not be void for uncertainty if the matter objected to can be ascertained from the context.³

h. AWARD MADE CERTAIN BY EXTRINSIC AID.—Where an award refers to other documents, and is incomplete and uncertain without them, or without proof of what they contain, it is necessary that those instruments should be annexed to the award, or that they should be so fully described in it as to enable them to be identified with certainty; and generally, if an award can be rendered certain by reference to any outside matter, it will be upheld.⁴

1. Statement of Result Is Sufficient.—*Vaughan v. Smith*, 69 Ala. 92; *McKnight v. McCullough*, 21 Iowa 111; *Sides v. Brendlinger*, 14 Neb. 491; *Patton v. Baird*, 7 Ired. Eq. (N. Car.) 255; *Osborne v. Calvert*, 83 N. Car. 365; *Keener v. Goodson*, 89 N. Car. 273; *Clanton v. Price*, 90 N. Car. 96; *Blossom v. Van Amringe*, 63 N. Car. 65; *Lamphire v. Cowan*, 39 Vt. 420; *Stewart v. Cass*, 16 Vt. 663, 42 Am. Dec. 534.

The arbitrators need not make the evidence part of their award, although requested to do so. *Allen v. Miles*, 4 Harr. (Del.) 234; *State v. Petticrew*, 19 Mo. 373.

2. Award need Not Set Forth Compliance with Conditions.—*Rigden v. Martin*, 6 Har. & J. (Md.) 403; *Upshaw v. Hargrove*, 6 Smed. & M. (Miss.) 286; *New York v. Butler*, 1 Barb. (N. Y.) 325.

The award need not state that the arbitrators were sworn, or that the parties appeared before them. *Houghton v. Burroughs*, 18 N. H. 499; *Negley v. Stewart*, 10 S. & R. (Pa.) 207.

Or that they heard all the parties. *Warner v. Collins*, 135 Mass. 26; *Maynard v. Frederick*, 7 Cush. (Mass.) 247; *Yates v. Russell*, 17 Johns. (N. Y.) 461; *Schultz v. Halsey*, 3 Sandf. (N. Y.) 405; *Ackley v. Finch*, 7 Cow. (N. Y.) 290. *Compare* *Short v. Pratt*, 6 Mass. 496; *Blin v. Hay*, 2 Tyler (Vt.) 304, 4 Am. Dec. 738; *Rixford v. Nye*, 20 Vt. 132.

Or that all the legally offered evidence was received. *Leominster v. Fitchburg*, etc., R. Co., 7 Allen (Mass.) 38.

Or that they acted within the scope of their authority. *Hoffman v. Hoffman*, 26 N. J. L. 175.

3. Uncertainty Removed by Context.—Where an award is objected to on the ground of uncertainty, and its meaning can be arrived at from the context, the objection will be set aside. *Borretts v. Patterson*, Tayl. (N. Car.) 37, 1 Am. Dec. 576. See *Hawkins v. Colclough*, 1 Burr. 277; *Lingood v. Eade*, 2 Atk. 501.

Award Held Good by Implication.—Where, by manifest implication from the whole face of the award, a direction which would render it good, if positively expressed, appears evident, the award is valid. *Lamphire v. Cowan*, 39 Vt. 420. See *Wood v. Shepherd*, 2 Patt. & H. (Va.) 442.

4. England.—*O'Rourke v. Railway Com'rs.*, 15 App. Cas. 371; *Cargey v. Aitcheson*, 3 D.

& R. 433, 2 B. & C. 170, 9 E. C. L. 52, 2 Bing. 199, 9 E. C. L. 380; *M'Lel.* 367; *Bucclench v. Metropolitan Board of Works*, L. R. 5 H. L. 448; *Massy v. Aubry*, Sty. 365.

United States.—*Kingston v. Kincaid*, 1 Wash. (U. S.) 448.

Alabama.—*Odum v. Rutledge*, etc., R. Co., 94 Ala. 488.

Illinois.—*Farr v. Johnson*, 25 Ill. 522; *Henrickson v. Reinback*, 33 Ill. 299.

Indiana.—*Hays v. Miller*, 12 Ind. 187; *Hollingsworth v. Pickering*, 24 Ind. 435.

Massachusetts.—*Benson v. White*, 101 Mass. 48.

Michigan.—*Clement v. Comstock*, 2 Mich. 359.

New York.—*Butler v. New York*, 1 Hill (N. Y.) 489.

Pennsylvania.—*Santee v. Keister*, 6 Binn. (Pa.) 36.

South Carolina.—*Coxe v. Gent*, 1 McMull. (S. Car.) 302.

Vermont.—*Bowman v. Downer*, 28 Vt. 532.

See *Farris v. Caperton*, 1 Head (Tenn.) 606; *Burrows v. Guthrie*, 61 Ill. 70.

Id Certum Est Quod Certum Reddi Potest.—In *Burrows v. Guthrie*, 61 Ill. 70, the court, by Breese, J., said: "Arbitrations are regarded, in modern times, more favorably than formerly, and if they settle the rights of the parties, and can be rendered certain by reference to accounts or other documentary evidence, they will be sustained. Force is given to the favored maxim of the law, *id certum est quod certum reddi potest*." See also *Odum v. Rutledge*, etc., R. Co., 94 Ala. 488; *Henrickson v. Reinback*, 33 Ill. 299.

Illustrations.—Where a note was described in an award as the note of "A B," and the note could be identified by extrinsic evidence, such a description was held to be not so uncertain as to invalidate the award. *Bancroft v. Grover*, 23 Wis. 463, 99 Am. Dec. 195.

An award was upheld which ordered that A should make and execute a deed "of all the lands he holds by" a certain conveyance of B. *Whitcomb v. Preston*, 13 Vt. 53.

But in *Colcord v. Fletcher*, 50 Me. 398, where the submission was between part owners of a vessel, an award that "there is due to C. the amount collected on policy of insurance held by F. for his (C.'s) sixteenth part of barque S.," was held void as uncertain, as it did not show whether any money

For What Purposes Extrinsic Evidence Admitted.—But the courts admit extrinsic evidence reluctantly, when adduced for the purpose of making awards certain, and will not admit it for the purpose of altering or correcting them.¹

i. **WHEN AWARD WILL BE PRESUMED CERTAIN.**—It may be said generally that an award will always be presumed to be certain and valid until the contrary is proved. No intendment will be indulged to overturn an award, but every reasonable intendment will be allowed to uphold it.²

had been collected, or how much. "A verdict could not be found for the plaintiff on the submission and award alone, as the award makes no reference to any fact or document from which a judgment could be made up."

Awards under a Statute.—Where arbitrators, under the submission prescribed by the *Massachusetts Rev. Stat., c. 114*, instead of setting out in their award their doings and the results thereof, refer therein to statements of their proceedings delivered by them to the parties, the award cannot be sustained. So if, instead of awarding that one party shall recover a definite sum from the other, they indorse a stated sum upon a note held by one of the parties against the other, and direct that the note thus reduced by the indorsement thereon shall be held by the payee as their award, such award cannot be accepted and made the ground of a judgment. It is too uncertain. *Day v. Laffin*, 6 Met. (Mass.) 280.

Necessity of Averment.—In *Kingston v. Kincaid*, 1 Wash. (U. S.) 448, it was held that awards must be so plainly expressed that the parties may know what they are directed to do by a fair construction of the whole instrument, or by reference to something connected with it. But if certainty be obtained by something outside of the award, the party may, by an averment, cure an objection which might otherwise be fatal to it. See further, *Grier v. Grier*, 1 Dall. (U. S.) 173; *Jackson v. Ambler*, 14 Johns. (N. Y.) 96; *Akely v. Akely*, 16 Vt. 450.

But where the decision was that the defendant should give an indorser "as per agreement submitted to the arbitrators and acknowledged by the parties," it was held that although such decision might be made certain and good by reference to the agreement to which it related, yet both declaration and award were bad, as there was no sufficient averment in the declaration by which the defect might be cured. *Walsh v. Gilmor*, 3 Har. & J. (Md.) 383, 6 Am. Dec. 502.

1. When and for What Purposes Extrinsic Evidence Admitted.—Extrinsic evidence has been admitted sometimes, but rather reluctantly, to render certain matters not clearly specified by the award. *Plummer v. Lee*, 2 M. & W. 495; *In re Marshall and Dresser*, 3 Q. B. 878, 43 E. C. L. 1018.

It has been held that the testimony of arbitrators or referees is not admissible for the purpose of explaining anything vague or uncertain in the award or report. *Kingston v. Kincaid*, 1 Wash. (U. S.) 448; *Aldrich v. Jessiman*, 8 N. H. 516; *Ward v. Gould*, 5 Pick. (Mass.) 291.

It is not very clearly settled how far extrinsic statements of arbitrators will be ad-

mitted in evidence to impeach their award. *Bell v. Price*, 22 N. J. L. 578; *Ward v. American Bank*, 7 Met. (Mass.) 486; *Jones v. Boston Mill Corp.*, 6 Pick. (Mass.) 154.

Where an award is within the scope of the submission, where it is free from ambiguity and the arbitrators were not deceived or misled, but decided correctly upon the evidence submitted to them, and as they intended, extrinsic evidence is not admissible to vary or contradict the award. *May v. Miller*, 59 Vt. 577.

2. When Award Presumed Certain.—Russell on Awards (6th ed.) 298.

England.—*Cargey v. Aitcheson*, 2 B. & C. 170, 9 E. C. L. 521; *Wohlenberg v. Lageman*, 6 Taunt. 250.

United States.—*Karthus v. Ferrer*, 1 Pet. (U. S.) 228.

Georgia.—*King v. Cook*, T. U. P. Charl. (Ga.) 286, 4 Am. Dec. 715.

Illinois.—*Merritt v. Merritt*, 11 Ill. 565; *McMillan v. James*, 105 Ill. 194; *Haywood v. Harmon*, 17 Ill. 477; *McDonald v. Arnout*, 14 Ill. 62; *Hubbard v. Firman*, 29 Ill. 90; *Darst v. Collier*, 86 Ill. 96.

Iowa.—*Tomlinson v. Hammond*, 8 Iowa 40.

Maine.—*Fryeburg Canal v. Frye*, 5 Me. 38.

Maryland.—*Archer v. Williamson*, 2 Har. & G. (Md.) 67; *Roloson v. Carson*, 8 Md. 208.

Massachusetts.—*Strong v. Strong*, 9 Cush. (Mass.) 560.

Michigan.—*Neib v. Hinderer*, 42 Mich. 451.

New Hampshire.—*Truesdale v. Straw*, 58 N. H. 207.

New Jersey.—*Smith v. Minor*, 1 N. J. L. 19.

New York.—*Ott v. Schroepel*, 5 N. Y. 482; *Morewood v. Jewett*, 2 Robt. (N. Y.) 496.

North Carolina.—*Borretts v. Patterson*, Tayl. (N. Car.) 37, 1 Am. Dec. 576.

Pennsylvania.—*Wheeler v. Woodward*, 66 Pa. St. 158; *Berkheimer v. Geise*, 82 Pa. St. 64.

Tennessee.—*Dougherty v. McWhorter*, 7 Yerg. (Tenn.) 239.

Texas.—*Green v. Franklin*, 1 Tex. 497.

Vermont.—*Kendrick v. Tarbell*, 26 Vt. 416.

Virginia.—*Richards v. Brockenbrough*, 1 Rand. (Va.) 449; *Forrer v. Coffman*, 23 Gratt. (Va.) 871; *Coupland v. Anderson*, 2 Call (Va.) 106; *Armstrong v. Armstrongs*, 1 Leigh (Va.) 491.

Wisconsin.—*Bancroft v. Grover*, 23 Wis. 463, 99 Am. Dec. 195; *McCourt v. McCabe*, 46 Wis. 597; *Call v. Ballard*, 65 Wis. 187; *Dolph v. Clemens*, 4 Wis. 181; *Monitor Iron Works Co. v. Ketchum*, 44 Wis. 126.

Presumption in Favor of Award.—Where the award directed the plaintiff and defendant to pay the costs of certain actions in certain proportions, and that such sums as had been expended by either party in those actions

Where Party does Not Object to Award.—Where the findings of fact by a report are uncertain, it is the duty of the person dissatisfied with them to apply for more specific directions; not to seek to get the report set aside as invalid. If he does not do so, the court will presume that the facts necessary to sustain the judgment were properly found.¹

j. HOW AWARD AVOIDED FOR UNCERTAINTY.—Equity will Not Interfere to set aside an award on the ground of uncertainty; if the award cannot be enforced at law, it is void.²

Demurrer and Motion.—On a suit brought on the award, if it is uncertain and void on its face, the defendant may demur;³ or if it is made returnable into court, a motion may be made to set it aside if it is uncertain.⁴

7. The Award must Be Entire.—The rule that an award must be entire appears to mean, in *England*, that it must be one instrument only, and complete in itself, made, as it were, *uno actu*, at the same place and at the same time.⁵

should be allowed as part of the proportion of the costs to be borne by each, the award not stating the amount of those sums, the court held that the award was uncertain if there were any disputes as to the amount so expended, but, as it had not been shown that any such disputes had existed, the court would not presume that there had been any. *Cargey v. Aitcheson*, 2 B. & C. 170, 9 E. C. L. 52. See *Plummer v. Lee*, 2 M. & W. 495; *Wohlenberg v. Lageman*, 6 Taunt. 250.

Award "Of and Concerning the Premises."—Where the award purports to be "of and concerning the premises," it will have the effect of applying the general words of the award to the particular matters submitted. *Rose v. Sparke*, cited in 1 Saund. 324; *Thorp v. Cole*, 2 C. M. & R. 367, 4 Dowl. 457. See *Perry v. Mitchell*, 2 D. & L. 452.

Award of Sum to Firm—Partners Presumed Equally Interested.—Where a submission was made of the affairs of two partnerships; and one person who was a member of both firms was ordered to pay a stated sum to each firm, but the award did not state how the amount ordered to be paid one firm should be divided between the members of the firm, it was held that it would be presumed that they were entitled to equal shares unless the contrary were shown, and the award was held sufficiently certain. *Henrickson v. Reinback*, 33 Ill. 299.

1. *Brainerd v. Dunning*, 30 N. Y. 211.
2. **When Equity will Interfere.**—*Perkins v. Giles*, 53 Barb. (N. Y.) 342.

"An award cannot be impeached but for corruption, partiality, or gross misbehavior in the arbitrators, or for some palpable mistake of the law or the fact." The court, by Kent, Ch., in *Herrick v. Blair*, 1 Johns. Ch. (N. Y.) 101.

"Nothing short of this will answer as a ground of interference to set aside the determination of these tribunals of the parties' own selection." *Johnson, J.*, in *Perkins v. Giles*, 53 Barb. (N. Y.) 342.

3. **Demurrer.**—*Hewitt v. Furman*, 16 S. & R. (Pa.) 135.

But on demurrer the court ought probably to presume that facts existed which would sustain the award, if such a state of facts can be supposed. *Hewitt v. Furman*, 16 S. & R. (Pa.) 135.

4. **Motion to Set Aside.**—*Russell on Awards* (6th ed.) 663.

The report of a referee is final, unless excepted to; the party cannot afterwards object to the report or have it reviewed on appeal. Such exceptions, when taken and filed, must be incorporated in the case, otherwise it will be assumed by the court that no exceptions were taken. *Sutherland v. Rose*, 47 Barb. (N. Y.) 149.

When an Award is Set Aside for Uncertainty, the court cannot, as arbitration is a matter of consent, force a party to agree to a settlement of the matter in controversy. Neither can the court recommit the case to the arbitrators on motion of one of the parties and over the objections of the other party. It can do so only by renewal of the original consent. *Evans v. Sheldon*, 69 Ga. 100.

5. **Award must Be Entire.**—The *English* rule is stated as follows by *Russell*: "It is implied in all cases, unless something to the contrary is expressed, or may be inferred from the submission, that the arbitrator can make but one award. This must be one entire and complete instrument in itself; therefore, if it be made part one day and part another, though each and every part be made within the time limited for the award, it will be void." See also *Com. Dig., Arb., E. 16*; *Rolle Abr., Arb., H. 1, 2, p. 250*; *Gould v. Staffordshire Potteries Waterworks Co.*, 5 Exch. 223.

Where there are several arbitrators they may assemble and consult and form their final determination on specific matters at several days, but their award, which expresses their final determination upon all the matters submitted taken together, must be one and entire. *Com. Dig., Arb., E. 16*; *Rolle Abr., Arb., H. 3, p. 250*.

Matters between two parties, A and B, were submitted, and subsequently, after the reference had begun, C was also made a party to the arbitration. The arbitrator made two awards, in one of which he awarded that A was indebted to C, without mentioning B; in the other he awarded that A was indebted to B, without mentioning C. Both awards were held to be bad, because there was no one award determining all the matters in dispute.

But in the *United States* the rule that an award must be one, or contained in a single instrument, has not been enforced.¹

8. The Award must Be Mutual—*a. OLD ENGLISH RULE.*—The early English rule in regard to the necessity for mutuality in awards was that they are void, unless something be arbitrated for the defendant's benefit, as well as for the plaintiff's; that, all controversies being between two parties, that which is awarded to be done by one must be an advantage to both, so as to end the controversy, and discharge one as well as give satisfaction to the other.²

Winter v. Munton, 2 Moo. 723, 4 E. C. L. 421. See *Davis v. Dyer*, 54 N. H. 146.

However, in *Smith v. Reece*, 6 D. & L. 520, where the duty of the arbitrator was to certify in cross-actions between the parties, and he made a separate certificate in each action, on a separate piece of paper, it was held that if the directions in the two pieces of paper were drawn up at the same time, they formed but one award.

May be Empowered to Make Several Awards.—The parties, in their discretion, may empower the arbitrators to make more than one award if they think proper, and then the arbitrators may include the several matters submitted to them distributively in separate awards, each of which may be binding from the time of its execution. *Dowes v. Cox*, 3 Bing. 20, 11 E. C. L. 12; *Wrightson v. Bywater*, 3 M. & W. 199.

Where power had been expressly given to the arbitrator to make two awards, and it was stipulated that in the first award he might state a case for the opinion of the court and assess damages contingently, but that neither party was to enforce payment of any sum found due by the first award until the second award had been made by the arbitrator, the court held that under such a submission the first award was not in law or effect a final award. *Wood v. Copper Miners' Co.*, 24 L. J. C. P. 34.

By Stat. 22 and 23 Vict., c. 59, § 21, the arbitrator in regard to such matters as the statute applies to, may make several awards, each on part of the matters referred.

1. Award must Be Entire—Rule in United States.—*Morse on Arb.* 370; *Steere v. Brownell*, 113 Ill. 415; *Conrad v. Johnson*, 20 Ind. 421. See *Blodgett v. Prince*, 109 Mass. 46; *Maynard v. Frederick*, 7 Cush. (Mass.) 252; *Sperry v. Ricker*, 4 Allen (Mass.) 18.

Illustrations.—Several distinct matters in difference between two parties were submitted to arbitration, the parties agreeing to abide by "the award." The arbitrators found separately upon each matter, but embodied their separate findings in one apparently single instrument, so that the one document contained what in terms purported to be seven different awards. The court held that these awards were "but the detail of 'the award' which the submission seems to have contemplated, and we do not perceive how the award is in any sense invalidated because the decision upon each claim is stated in detail." *Kendrick v. Tarbell*, 26 Vt. 416.

Two parties submitted to arbitration two questions: 1st, the amount which had been actually paid upon a certain contract, and to indorse the amount so found on said con-

tract; 2d, of and concerning all actions, debts, demands, etc. The arbitrators indorsed upon the contract the payment of a certain sum, and delivered their award in regard to the other matters. The court held, *per Paige, J.*, that the indorsement on the contract might be regarded as a part of the principal award, the indorsement and the award being simultaneous acts of the arbitrators; and *per Foot, J.*, "It appears to me that there is no room to doubt that the parties not only submitted two distinct matters, but provided for separate awards upon them. The language of their bonds is clear and explicit on this point. * * * It is unreasonable that the parties may not provide for separate awards." The award was upheld. *Ott v. Schroepel*, 5 N. Y. 484.

Arbitrators, after completing their award, added an addendum relating to the legality of the contract, and providing that if the arbitrators should become satisfied "that no recovery can be had under such a contract, this award is to be changed, and an award given that neither party is entitled to recover from the other." It was held that the addendum did not avoid the award, but had to be taken as a part of it, although the award with the addendum was void for uncertainty. *Rhodes v. Hardy*, 53 Miss. 587.

Where an award was accompanied by a paper entitled "General Result," which contained a summary of the calculations by which the arbitrators had determined the amount due by one party to the other, and proceedings were taken to set it aside on the ground of mistake, the court held that "this paper might be considered for the purposes of the present inquiry as part of the award." *Bell v. Price*, 22 N. J. L. 578.

Marginal Notes in Award.—Where the following note was made on the margin of the award: "G. P. is to give up the note which he holds against N. S. & Co. The store remains joint property. The outstanding debts to be equally divided;" it was held that these words were "to be considered as part of the award, and to receive the same construction as if they had been inserted in the body of the instrument. The words form a distinct sentence, and the meaning is the same, whether they be read in one place or another after any distinct sentence. Besides, these words are merely explanatory of what would have been the operation and effect of the award if they had not been inserted." *Platt v. Smith*, 14 Johns. (N. Y.) 368.

2. Mutuality in Awards—Early English Rule.—*Russell on Awards* (6th ed.) 302; *Bac. Abr., Arb.*, E. 3; *Stain v. Wild*, Cro. Jac. 352.

b. MODERN ENGLISH RULE.—At the present time, however, it is not necessary that an award should state that a sum awarded to be paid, or an act to be done in favor of one of the parties, shall be in satisfaction, or that it should contain any equivalent terms; it will necessarily be presumed that the payment of the sum so awarded, or the performance of the act, will operate as a discharge to the other party.¹

c. UNITED STATES RULE—RELEASES.—In the United States the rule is that an award is not void for want of mutuality, merely because it does not order a release to be made, or does not itself contain words of satisfaction which supersede the necessity of such release. "Mutuality is nothing more than that the thing awarded to be done should be a final discharge of all future claims by the party in whose favor the award is made, against the others, for the causes submitted, or, in other words, that it shall be final."²

What Necessary to Render the Award Mutual.

—It is not necessary that anything more should be done to render the award mutual than that the thing directed to be done should be a final discharge of all future claims by the party in whose favor the award is made, against the other on account of the matters submitted; and where the directions of the award are given to one party only, and nothing else appears to the court, it will be presumed that he only is the wrongdoer, and the award will be upheld if it releases him from all future liability in regard to the wrong. *Bac. Abr., Arb., E. 3.*

Where, on a Submission of an Action of Trespass, the arbitrator awarded that one party should pay the other a stated sum, such an award under the early English rule was held void as being on one side only. The trespass in such a case was held not to be discharged, and the party ordered to pay was held to have received no benefit by the award; but on the other hand, it was said that if the award had been made of and concerning the premises it would have been valid, or if it had directed him to pay the money for the trespass, for although he was directed only to perform an act, yet the trespass would have been discharged by that award, and consequently both parties would have benefited, and the award would have been mutual. *Nichols v. Grunton, Hob. 49; Horton v. Benson, Freem. 204; Ayland v. Nicholls, Freem. 265; Ormelade v. Coke, Cro. Jac. 354; Veale v. Warner, 1 Saund. 327, note (2).*

Direction to Pay a Certain Sum "for Arrears of Rent."—In *Hopper v. Hackett, 1 Lev. 132*, it was held that an award which directed one of the parties to pay a certain sum "for arrears of rent" was mutual, as the word "for" implied that it was to be in satisfaction of such arrears, and so an advantage was conferred on both parties.

So an Award of a Certain Sum "for having Made the First Breach in the Law," was upheld, as it was evidently a discharge of the breach. *Hawkins v. Colclough, 1 Burr. 275.*

An Award that a Debtor shall Pay a Debt is mutual. *Baspoole v. Freeman, Cro. Jac. 285, 8 Coke 97b; Elliott v. Cheval, 1 Lutw. 541.*

So is an Award that All Suits shall Cease, as it has the effect of a release, and both the submission and award may be pleaded in discharge as well as the release. *Strangford*

v. Green, 2 Mod. 228; Harris v. Knipe, 1 Lev. 58.

Where All Matters in Controversy were Submitted by Rule of Court, and the award was that a certain sum should be paid by one party to the other without giving further directions, *Holt, C. J.*, refused to grant an attachment before the payee should tender a release, but he did not rule that the award should be set aside. — *v. Palmer, 12 Mod. 234.*

Award Unequal on its Face.—Where the matter submitted was an action of trespass for taking and detaining the plaintiff's beasts, and the award merely ordered that the owner should have his cattle back, it was held to be void, on the ground that it was against natural justice to return a man his own without giving him satisfaction for the unjust taking and detention. *Bac. Abr., Arb., E. 3; Rolle Abr., Arb., I. 3, p. 251.*

The same rule has also been said to apply where the award directs that the owner shall have parcel of his own goods. But where the award directed that "whereas the parties are indebted to each other in the like sum; or whereas they have done each other a trespass," they should release each other, it was held mutual and valid. *Bac. Abr., Arb., E. 3; Rolle Abr., Arb., I. 3, p. 251.*

1. Mutuality in Awards—Present English Rule.—*Russell on Awards* (6th ed.) 304; *Kyd on Awards* 153; *Thomlinson v. Arriskin, Comyns* 328; *Cooper v. Hirst, 1 Lutw. 539; Veale v. Warner, 1 Saund. 327, note (2).* See *Doolittle v. Malcom, 8 Leigh (Va.) 608, 31 Am. Dec. 671; Horrel v. M'Alexander, 3 Rand. (Va.) 94.*

In *Hobson v. Stewart, 4 D. & L. 589*, where the arbitrator directed the defendant to pay the plaintiff a certain sum, without stating for what it was to be paid, the reference being of a cause only, the award was upheld as mutual, the court saying: "To hold that the arbitrator awarded this sum of money, not in respect of the matters in difference in the cause, but in respect of some matters in regard to which he had no right to award, would be to make an intentment for the express purpose of defeating the award."

2. Mutuality in Awards—Rule in United States.—*Morse on Arb. and Award* 378, 379.

United States.—*Karthauss v. Ferrer, 1 Pet. (U. S.) 222.*

Massachusetts.—*Jones v. Boston Mill Corp., 6 Pick. (Mass.) 148.*

What Constitutes Mutuality.—To be mutual, an award need not require from both parties the same thing, or things which may be enforced by the same legal process. One may be required to pay a sum of money which can be enforced

Mississippi.—Gibson v. Powell, 5 Smed. & M. (Miss.) 712.

New Hampshire.—Spofford v. Spofford, 10 N. H. 254.

New Jersey.—McKeen v. Oliphant, 18 N. J. L. 442.

New York.—Purdy v. Delavan, 1 Cai. (N. Y.) 304; Weed v. Ellis, 3 Cai. (N. Y.) 254; M'Kinstry v. Solomons, 2 Johns. (N. Y.) 57, 13 Johns. (N. Y.) 27; Cox v. Jagger, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522.

North Carolina.—Borretts v. Patterson, Tayl. (N. Car.) 37, 1 Am. Dec. 576.

Pennsylvania.—Power v. Power, 7 Watts (Pa.) 205.

Virginia.—Doolittle v. Malcom, 8 Leigh (Va.) 608, 31 Am. Dec. 671.

An Award may Be Mutual by Implication.—So where one was ordered to pay for certain oxen, it was held to imply that the oxen were the property of the other party. *Hanson v. Webber*, 40 Me. 194. And see *Reynolds v. Reynolds*, 15 Ala. 398; *Gordon v. Tucker*, 6 Me. 247; *Weed v. Ellis*, 3 Cai. (N. Y.) 254; *Gaylord v. Gaylord*, 4 Day (Conn.) 422.

Illustrations as to Mutuality.—But an order to an heir to take real estate and to pay out a certain sum of money to the other heirs is not mutual, unless a conveyance of the real estate be ordered to the other party. *Miller v. Moore*, 7 S. & R. (Pa.) 164. But if the title is already vested in the party in whose favor the award was made, a conveyance is not essential. *Jones v. Boston Mill Corp.*, 6 Pick. (Mass.) 148.

Where one was ordered to pay a certain sum for stock held by the other party, without an order for the transfer of the stock, the award was held to be not mutual, and consequently void. *Matter of Williams*, 4 Den. (N. Y.) 194.

Where an award ordered that in settlement of some disputed accounts, B. should pay to S. the balance found due on these accounts, the award was objected to as not "mutual." The court said: "The rule is that an award must be mutual. But the meaning of that is that the award must be so constructed as not to leave him, who is to pay, liable to be sued for the same cause for which he is awarded to pay. But here it sufficiently appears by looking into the bill, pleadings, reference, and award, for what cause they order this sum to be paid; and then it follows that if he should be again sued for the same cause, he may produce these proceedings, and show he has already discharged himself of these demands. It is not necessary that they should have awarded anything to be paid or done by S." *Blackledge v. Simpson*, 2 Hayw. (N. Car.) 30, 2 Am. Dec. 614.

Where an award directs the payment of a sum of money by one of the parties to a submission, without directing any act to be done by the other party, it cannot be objected to for want of mutuality for that reason only. *Reynolds v. Reynolds*, 15 Ala. 398.

An award which orders the payment of a sum of money embraces in itself mutuality, as it must be presumed that such payment is in satisfaction of the matter submitted. *Gordon v. Tucker*, 6 Me. 247.

Where the terms of the submission were that all claims and demands of every kind in law and equity between the parties should be referred to arbitration, and with power to the arbitrators to allow each party what could be adjudged just and reasonable, and the award was that one was indebted to the other in a stated amount, and that said amount should be recovered, etc., it was held that this award was mutual, final, and certain. *Gaylord v. Gaylord*, 4 Day (Conn.) 422.

Awards of Releases.—Where an award ordered that one party should execute a general release at a certain date, and that the other party should execute a like release after the first one had been executed, the award was upheld as mutual. *Munro v. Alaire*, 2 Cai. (N. Y.) 327.

Where the submission gave the arbitrator power to order mutual releases, an award ordering several releases where one of the parties to the arbitration consisted of several individuals, was upheld. *Smith v. Demarest*, 8 N. J. L. 195.

Where a dispute in regard to a boundary line was submitted by an agreement which bound the parties to execute such releases as the arbitrators should think proper to order, it was held that it was not essential that the award should direct both parties to execute such releases in order to render it mutual. If the award determines that the title is in one party with such clearness as not to admit of doubt, it will be sustained; as where one party was in possession of the land over which the line was run, and was directed to release to the other all the land upon that line, it was held that the award could not be objected to on the ground that it did not direct the second party to execute a release to the part of the land on the other side of the line, as the first party was already in possession of the land and claimed title to it. *Jones v. Boston Mill Corp.*, 6 Pick. (Mass.) 148.

Where an award directs the parties to make mutual releases, it will be presumed, unless the contrary appears or is shown, that the execution of such releases must be concurrent. *McNeil v. Magee*, 5 Mason (U. S.) 244; *Jesse v. Cater*, 28 Ala. 475.

A direction that two parties named should "forthwith" execute conveyances to a third, and that the third should "forthwith" execute releases to them, was held to mean that the releases should be made as soon as the conveyances should be executed. *Boyes v. Bluck*, 13 C. B. 652, 76 E. C. L. 652.

So where one party agreed to release to the other certain land, and the buyer agreed to pay any sum "therefor" that should be found by arbitrators to be its value, it was held that the execution of the release need not be made

by execution, and the other to execute a certain conveyance which can be enforced by attachment; but if the court cannot enforce both things, it will enforce neither.¹

d. WHEN PERSONS UNDER DISABILITY PARTIES.—It was formerly the rule that if an infant or a married woman was party to a submission, an award made thereunder was void for want of mutuality, as it could not be enforced as against them.² But where the opposite party enters into such a submission knowingly, the courts at the present time are disposed to uphold the award.³

until the sum so determined was tendered. *Portland v. Brown*, 43 Me. 223.

Where the agreement between parties to a pending suit was that the submission should be made of "everything now in dispute between the parties," and an award was made thereupon requiring the defendant to pay one hundred dollars to the plaintiff, who was then to execute a release of all demands "existing at the time of the submission, and that the defendant should pay the costs of the suit," it was held that the question of the costs was included within the terms of the submission, and that the award thereof was valid, but that the release did not include the award for costs. *Bird v. Routh*, 88 Ind. 47.

Awarding Debt to Stranger.—Where the award directs one of the parties to pay a debt to a stranger to the submission, both of the parties being bound to pay such debt, as in the case of debts due by a partnership firm, the award is valid as between the parties, though, of course, it cannot operate to prevent the stranger from suing either party on account of it. *Lamphire v. Cowan*, 39 Vt. 420.

But an award against a stranger to the arbitration is, of course, not binding on him; and when one party cannot enforce an award so given in his favor, the part of the award which operates against him will also be void as not mutual. *Brazill v. Isham*, 1 E. D. Smith (N. Y.) 437.

Where a submission was entered into between A and B, and the award was that A's children were entitled to a certain sum, and the award was objected to on the ground that it was not made between the parties to the submission, it was nevertheless held to be binding. *King v. Cook*, T. U. P. Charl't. (Ga.) 286, 4 Am. Dec. 715.

Mutuality must Not Rest on Outside Circumstances.—The mutuality must be in the award itself, and not rest upon circumstances outside of the award. An award which directed the payment by R. of a sum of money to one of his joint creditors, was held not to be mutual. The court held that though payment of the award "would operate to discharge R., yet his discharge would not rest upon the award, but upon the prior and continuing right of O. as one of the joint creditors to receive payment of the debt for himself and [his co-creditor]. Thus it would seem that no protection or benefit whatever could result to R. from the submission or award." *Onion v. Robinson*, 15 Vt. 510.

Where Directions to One Party Void.—If an award directs the performance of acts by both parties, and the award is void as to the acts to

be done by one party, and the void act is the consideration or recompense of the thing to be done by the other party, the whole award will be void for lack of mutuality. *Nichols v. Rensselaer County Mut. Ins. Co.*, 22 Wend. (N. Y.) 125.

A dispute as to the measurement of certain timber was referred to arbitration by the consignees of the ship which carried it and the consignees of the timber, and was decided in favor of the consignees of the timber. It was held that this award, though in their favor, was not binding upon them, as, had it been against them they might have repudiated it if they saw fit, and that consequently it was not binding on the owner of the vessel. *Belmont v. Tyson*, 3 Blatchf. (U. S.) 530.

1. *Kunkle v. Kunkle*, 1 Dall. (Pa.) 364; *Munro v. Alaire*, 2 Cai. (N. Y.) 320; *Stuart v. Ralston*, cited in 1 Dall. (Pa.) 365.

2. **Where One of the Parties under Disability—Mutuality.**—*Cavendish v. —*, 1 Cas. in Ch. 279; *Biddell v. Dowse*, 6 B. & C. 255, 13 E. C. L. 164.

An award under a submission by two parties, one of whom is incompetent to submit, may be void for want of mutuality. *Furbish v. Hall*, 8 Me. 315.

The objection in such cases is said to be properly an objection to the submission, and not to the award. *Russell on Awards* (6th ed.) 305, also pp. 16, 18.

The heirs of an intestate person agreed with one having a claim against the estate to submit the matter to arbitration, before an administrator had been appointed for the intestate's estate, and before the time within which one might have been appointed had yet expired. It was held that an award made under the agreement to arbitrate was not binding upon the estate or upon the administrator afterwards appointed; and the fact that the estate was sufficient to pay all claims against it, so that no interests were affected by the agreement, except those of the heirs, did not make that agreement effective. *Stahl v. Brown*, 72 Iowa 720.

3. **When the Opposite Party Knows of the Disability.**—*Russell on Awards* (6th ed.) 305; *In re Warner*, 2 D. & L. 148; *Wrightson v. Bywater*, 3 M. & W. 199; *Jones v. Powell*, 6 Dowl. 483; *Palmer v. Davis*, 28 N. Y. 242; *Smith v. Van Nostrand*, 5 Hill (N. Y.) 419; *Horrel v. M'Alexander*, 3 Rand. (Va.) 94.

In *Palmer v. Davis*, 28 N. Y. 242, the court, by Marvin, J., said: "The ancient strict rule of the common law has been modified. * * * The rule more recently established and acted upon by courts of law in England is

e. **SUBMISSION BY UNAUTHORIZED AGENT.**—Where a person submits to arbitration on behalf of another and without authority, the award following will not be mutual. And it will be too late, after the award is made, for the party in whose favor it is made to rectify the submission, if he was not bound by it at the time of the hearing and the making of the award.¹

9. The Award must Be Possible.—If the award directs anything to be done which, *ex rei natura*, cannot be done, as to pay money or surrender an estate on a day past, it will be void. But although the doing of the act be a practical impossibility, as if it orders the payment of twenty pounds by a party who has not twenty pence, inasmuch as such an award is not in its nature repugnant and contradictory it may be sustained.²

10. How Far the Award must Be Consistent and Reasonable—*a.* **RULE AS TO CONSISTENCY.**—The rule is that an award must be a consistent and intelligible instrument.³ Where it is manifestly inconsistent and repugnant, it will be set aside.⁴ However, notwithstanding any apparent inconsistency or

that where a party has knowingly and voluntarily entered into a submission with a married woman or infant, and an award has been made against him, the court will not set it aside on the ground that the married woman or infant is not bound by it, as the party knew beforehand that they could not be bound by it, and therefore has all the consideration for his agreeing to his submission for which he stipulated; and if he did not mean to be satisfied with such effect as the award would have upon them, he ought not to have consented to the reference.⁵

1. Submission by Unauthorized Agent—Mutuality.—Where overseers of the poor submitted the claims of a pauper without legal authority, the award made thereunder was held void for want of mutuality on suit brought on it by the pauper. *Furbish v. Hall*, 8 Me. 315. The want of mutuality in such a case is that between the supposed principal and the other party to the submission, the award not being mutual as between them, but the award may be mutual as between the person who professes to be agent and the other party so as to make the agent personally liable. *Buchanan v. Curry*, 19 Johns. (N. Y.) 137, 10 Am. Dec. 200. See *Belmont v. Tyson*, 3 Blatchf. (U. S.) 530; *Bacon v. Dubarry*, 1 Ld. Raym. 246; *Cayhill v. Fitzgerald*, 1 Wils. 28, 58.

2. Award must Be Possible.—Russell on Awards (6th ed.); Com. Dig., Arb., E. 12; Rolle Abr., Arb., E., p. 248, F.; Bac. Abr., Arb., E. 4; Colwel v. Child, Cas. in Ch. 86; *Young v. Reuben*, 1 Dall. (U. S.) 119.

If the Act Ordered Is Possible at the Time of the Award, but afterwards becomes impossible because of the act of a party or a stranger, it will still remain binding on the party ordered to carry out its directions. Com. Dig., Arb., E. 12.

Direction to do Something Simply Beyond the Party's Power.—Where the award contains a direction which, though not physically impossible, is beyond the power of the party to effect, as to turn the course of the river Thames, it will be void. Bac. Abr., Arb., E. 4; Coke Litt. 206.

Direction to Strangers to the Submission.—An award ordering a stranger to the submission to do an act is void for impossibility, as the

arbitrator has no power over him. *Martin v. Williams*, 13 Johns. (N. Y.) 264; *Kratzer v. Lyon*, 5 Pa. St. 274; *Brazill v. Isham*, 1 E. D. Smith (N. Y.) 437.

Ordering Something Illegal to be Done.—So is an award ordering a thing to be done which is illegal in itself, void. *Maybin v. Coulon*, 4 Dall. (U. S.) 298; *Yeamans v. Yeamans*, 99 Mass. 585.

3. General Rule as to Consistency and Reasonableness of Award.—*Storke v. De Smeth*, Willes 66; *Sherry v. Richardson*, Pop. 15. See *Doe v. Cropper*, 10 Ad. & El. 197, 37 E. C. L. 90.

The Old Rules in Regard to Awards Were Very Rigid and Exacting.—Where the award directed the payment of the sum "on the said first day of May," when no such day had previously been mentioned, the award was held void. Com. Dig., Arb., E. 11; *Markham v. Jennings*, Rolle Abr., Arb., 263.

In *Berry v. Perry*, 3 Bulst. 62, it was said that if there is any contradiction in the words of an award, so that one part cannot stand without the other, the first part shall be upheld and the second rejected; but if the second part is but an explanation of that which went before, both will be sustained. See *Sherry v. Richardson*, Pop. 15.

Where Inconsistent Parts Separable.—In *Cox v. Jagger*, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522, it was held that where two parts of the award are inconsistent, but the award is capable of being sustained, the first part will be upheld, and the latter rejected as surplusage. See *Viele v. Troy*, etc., R. Co., 20 N. Y. 191; *Nichols v. Rensselaer County Mut. Ins. Co.*, 22 Wend. (N. Y.) 129; *Robertson v. M'Neil*, 12 Wend. (N. Y.) 578.

4. Awards Manifestly Repugnant and Inconsistent.—Russell on Awards (6th ed.) 306; *Shaver v. Scott*, 5 U. C. Q. B. (O. S.) 575.

Where an action was brought against a person for fraudulently misrepresenting another's circumstances, and on a submission the arbitrator found that the defendant, in answer to inquiries respecting the conduct of the party whose circumstances were misrepresented, had omitted to state material facts, and for that reason had not made a fair representation,

repugnancy, the courts will make every reasonable intendment in its favor, and will strive, so far as they reasonably can, to uphold it.¹

b. REASONABLENESS CANNOT BE INQUIRED INTO.—It has been said that an award ought to be reasonable, or that it will be void.² But the courts at the present time, for the most part, decline to inquire into the reasonableness of the decision of the arbitrator,³ and a court of equity will enforce specific performance of an award, although upon its face it appears to be unreasonable in some things.⁴

the arbitrator, however, distinctly acquitted the defendant of all fraud in making the representations, but, believing himself bound by adjudged cases to award that knowledge of the falsehood of the statement was fraud and deceit, he awarded in favor of the plaintiffs. Upon these facts the court set the award aside, Parke, J., saying: "The conclusion to which the arbitrator has come in this case is quite absurd. He says, 'I think he is innocent,' and then awards against him." *Ames v. Milward*, 8 Taunt. 637, 4 E. C. L. 234.

In *Curd v. Wallace*, 7 Dana (Ky.) 190, 32 Am. Dec. 85, where a religious society separated, and a dispute arose as to which of the parties into which it had divided was entitled to the use of the church, and the question was submitted to arbitration, and the arbitrators decided that neither of the parties had a right to the house, but that both of them should use it alternately, it was held that the award was void for repugnancy and illegality.

1. Every Reasonable Intendment to be Made in Favor of the Award.—*In re Templeman and Reed*, 9 Dowl. 962; *Stonehewer v. Farrar*, 9 Jur. 203.

Where, on a Submission of Several Actions, the award directed proceedings in such actions to cease, and at the same time ordered judgment to be entered up on one of them (an ejectment), it was nevertheless held to be consistent because, by reading the two directions together, the court held that the meaning of the award was that the action of ejectment was to cease, unless the defendant failed to surrender the premises on a certain day, in which case judgment was to be entered up for the plaintiff and execution taken out. *Jones v. Powell*, 6 Dowl. 483.

Awarding on Inconsistent Issues.—In an action brought on an agreement, the defendant denied the agreement, then pleaded breach of the agreement, and again admitted the agreement, but alleged that it was rescinded before breach, and in another plea asserted that it was varied by consent. The arbitrator awarded a general verdict to be entered for the defendant, and it was sustained by the court, which held that a general finding of inconsistent pleas in favor of the defendant did not render the award inconsistent, as this might have been the result of a trial *ad nisi prius*. *Cooper v. Langdon*, 9 M. & W. 60, 1 Dowl. N. S. 392. See *Hellaby v. Brown*, 1 H. & N. 729, 26 L. J. Exch. 217.

In *Maloney v. Stockley*, 4 M. & G. 647, 43 E. C. L. 335, it was held that pleas of *nunquam inhabitatus* and payment might both be consistently awarded in the defendant's favor in a

submission of an action of debt, on the ground that if the plaintiff had failed to prove his case at the trial and the defendant proved a judgment, a verdict would be entered for the defendant in both issues.

The plaintiff in a cause alleged that he was entitled to the reversion in a close; that a certain person had wrongfully and injuriously erected incumbrances thereon, and that the defendant had wrongfully, etc., kept and continued such incumbrances on the premises. The defendant in answer pleaded, first, not guilty, and secondly, that the person so alluded to had not erected the incumbrances on the close. The arbitrator directed a verdict for the plaintiff on the first plea, and for the defendant on the second, and the award was upheld, because as the first plea put in issue only the continuance of the incumbrance by the defendant, and not its erection by the original alleged wrongdoer, the award was not inconsistent. *Grenfell v. Edgcome*, 7 Q. B. 661, 53 E. C. L. 661.

Where, in an action of assumpsit on a retainer to project certain works and to examine certain bills with care, the defendant pleaded: nonassumpsit; no retainer; that he did use care in projecting the works; that he did use care in examining the bills; and on a submission of the cause the award found for the defendant on the first, second, and fourth of the above pleas, but for the plaintiff on the third, the award was upheld on the ground that on the third and fourth issues it was hypothetical and made only in order to determine the costs of them. *Beaufort v. Welch*, 10 Ad. & El. 527, 37 E. C. L. 172.

2. An award that one party should serve another for two years has been held unreasonable. So has an award which directed that one party should release his land to another in satisfaction of a trespass. Com. Dig., Arb., E. 13; Rolle Abr., Arb., B. 12, 13, p. 243.

3. Rule as to Inquiry by Courts into Question of Reasonableness.—*Waller v. King*, 9 Mod. 63; *Underhill v. Van Cortlandt*, 2 Johns. Ch. (N. Y.) 367, 17 Johns. (N. Y.) 405.

See further, *Jones v. —*, 1 Rolle 380; *Brown v. Brown*, 3 Ch. Cas. 140, cited in 1 Vern. 157.

In *Parker v. Avery*, Kirby (Conn.) 353, it was said by the court that it would be unprecedented to go into the merits of an award, and that so long as there was no misbehavior or corruption in the arbitrators, its reasonableness or unreasonableness did not affect its validity. See *Mulder v. Cravat*, 2 Bay (S. Car.) 370.

4. Specific Performance.—Russell on Awards (6th ed.) 308.

In *Wood v. Griffith*, 1 Swanst. 43, the Court

Excessive Award.—It may be said that an award will not be set aside because it is excessive, unless it is so grossly extravagant as to be in itself evidence of fraud or partiality.¹

11. Construction of Awards Generally—*a. GENERAL RULE*—Formerly, Courts were Prejudiced against the System.—In early days, the courts looked with jealousy upon submissions to arbitration as being in a way an usurpation by laymen of the functions of the regular tribunals, and upon awards as being the unlearned decisions of rustic judges.²

Modern Rule—Awards Construed Liberally.—But the modern rule is to construe awards liberally on the ground that the parties acting freely in transacting their own business have a right to select such judges as they see fit.³ Consequently, every reasonable intendment and presumption will be made in favor of the validity of the award, and the onus of proving that it is invalid rests on the party who seeks to impeach it.⁴

of Chancery compelled one of the purchasers of an estate to join the other in a sale of their equitable interest in such estate in pursuance of the directions of an award, although the question whether the vendor could make a good title was then at issue in the Court of Exchequer, and although the court was of opinion that forcing the sale in accordance with the award, while the title was still in dispute, was unreasonable, as it would necessarily depreciate the value of the property.

1. Excessive Awards.—Hartford F. Ins. Co. v. Bonner Mercantile Co., 56 Fed. Rep. 378; Fowler v. Jackson, 86 Ga. 337; Rudd v. Jones, 4 Dana (Ky.) 229; Nutter v. Taylor, 78 Me. 424; Baltimore, etc., R. Co. v. Canton Co., 70 Md. 405; Van Cortlandt v. Underhill, 17 Johns. (N.Y.) 405. See also Rand v. Redington, 13 N. H. 72, 38 Am. Dec. 475; Tracy v. Herrick, 25 N. H. 381; Baker v. Crockett, Hard. (Ky.) 396; Bumpass v. Webb, 4 Port. (Ala.) 65, 29 Am. Dec. 274.

2. See Morse Arb. and Award 436.

Prejudice of Courts against Awards.—In Simmonds v. Swaine, 1 Taunt. 549, Mansfield, Ch. J., said: "The courts have sometimes been very strongly inclined against awards, as carrying away causes from their own jurisdiction to the decision of private persons, but they now give these instruments a more liberal construction."

3. Modern Rule — Liberal Construction of Awards.—Russell on Awards (6th ed.) 531, 703; Bac. Abr., Arb., F.

England.—Freeman v. Bernard, 1 Salk. 69; Hawkins v. Colclough, 1 Burr. 274; Morgan v. Mather, 2 Ves. Jr. 15; *In re* Templeman and Reed, 9 Dowl. 962; Stonehewer v. Farrar, 9 Jur. 203.

United States.—James v. Thurston, 1 Cliff. (U. S.) 367; Burchell v. Marsh, 17 How. (U. S.) 344; Davy v. Faw, 7 Cranch (U. S.) 171.

Colorado.—Dorr v. Hammond, 7 Colo. 79.

Connecticut.—Hamlin v. Norwich, 40 Conn. 13.

Georgia.—Mulligan v. Perry, 64 Ga. 567.

Maine.—Walker v. Merrill, 13 Me. 173;

Hanson v. Webber, 40 Me. 194.

Maryland.—Archer v. Williamson, 2 Har. & G. (Md.) 62; Sisson v. Baltimore, 51 Md. 83; Garitee v. Carter, 16 Md. 309.

Massachusetts.—Spear v. Hooper, 22 Pick.

(Mass.) 144; Parker v. Parker, 103 Mass. 167; Skillings v. Coolidge, 14 Mass. 43.

Missouri.—Tucker v. Allen, 47 Mo. 491.

New Hampshire.—Shepardson v. Perkins, 60 N. H. 76.

New Jersey.—Rogers v. Tatum, 25 N. J. L. 281.

New York.—Purdy v. Delavan, 1 Cai. (N. Y.) 304; Jackson v. Ambler, 14 Johns. (N. Y.) 96; Herrick v. Blair, 1 Johns. Ch. (N. Y.) 101; Van Cortlandt v. Underhill, 17 Johns. (N. Y.) 411; Nason v. Ludington, 13 Abb. N. Cas. (N. Y. C. Pl.) 401; Chatfield v. Hewlett, 2 Dem. (N. Y.) 191; Schuyler v. Van Der Veer, 2 Cai. (N. Y.) 235; Butler v. New York, 1 Hill (N. Y.) 489.

Pennsylvania.—Gonsales v. Deavens, 2 Yeates (Pa.) 539.

Vermont.—Remeele v. Hall, 31 Vt. 582, 76 Am. Dec. 140; Rixford v. Nye, 20 Vt. 132.

Virginia.—Smith v. Smith, 4 Rand. (Va.) 95.

Wisconsin.—Bancroft v. Grover, 23 Wis. 463, 99 Am. Dec. 195; Dolph v. Clemens, 4 Wis. 181.

4. Every Reasonable Presumption and Intendment Made in Favor of Awards—*United States.*—Karthauss v. Ferrer, 1 Pet. (U. S.) 222; Taber v. Jenny, 1 Sprague (U. S.) 315; Silver v. Connecticut River Lumber Co., 40 Fed. Rep. 192.

Arkansas.—Green v. Ford, 17 Ark. 586.

Florida.—Blood v. Shine, 2 Fla. 127.

Georgia.—King v. Cook, T. U. P. Charlt. (Ga.) 286, 4 Am. Dec. 715.

Illinois.—Merritt v. Merritt, 11 Ill. 565; Haywood v. Harmon, 17 Ill. 477; Henrickson v. Reinback, 33 Ill. 299; McMillan v. James, 105 Ill. 194.

Iowa.—Thompson v. Blanchard, 2 Iowa 44.

Maine.—Fryeburg Canal v. Frye, 5 Me. 38; Hayes v. Forskoll, 31 Me. 112.

Maryland.—Roloson v. Carson, 8 Md. 208; Caton v. McTavish, 10 Gill & J. (Md.) 192.

Massachusetts.—Fiske v. South Wilbraham Mfg. Co., 7 Allen (Mass.) 476; Tallman v. Tallman, 5 Cush. (Mass.) 325; Strong v. Strong, 9 Cush. (Mass.) 560.

New Hampshire.—Parsons v. Aldrich, 6 N. H. 264.

New Jersey.—Smith v. Minor, 1 N. J. L. 19.

To be Construed in Light of the Submission.—In construing the award, the court is entitled to read it in the light of the submission, and by reference to outside circumstances that may aid in its interpretation.¹

b. AWARD SUSTAINED BY IMPLICATION.—Where that can be made to appear by manifest implication which, if positively expressed, would render the award valid, such implication may be made in order to uphold the award.²

New York.—Brown v. Hankerson, 3 Cow. (N. Y.) 70; Case v. Ferris, 2 Hill (N. Y.) 75; Jackson v. Ambler, 14 Johns. (N. Y.) 96; Robertson v. M'Niel, 12 Wend. (N. Y.) 578; Ott v. Schroepel, 5 N. Y. 482; New York Lumber, etc., Working Co. v. Schnieder, 119 N. Y. 475.

North Carolina.—Carter v. Sams, 4 Dev. & B. (N. Car.) 182.

Pennsylvania.—Gonsales v. Deavens, 2 Yeates (Pa.) 539; Liverpool, etc., Ins. Co. v. Goehring, 99 Pa. St. 13.

Texas.—Green v. Franklin, 1 Tex. 497.

Vermont.—Rixford v. Nye, 20 Vt. 132; Kendrick v. Tarbell, 26 Vt. 416; Lamphire v. Cowan, 39 Vt. 420.

Virginia.—Coupland v. Anderson, 2 Call (Va.) 106; Armstrong v. Armstrongs, 1 Leigh (Va.) 491; Richards v. Brockenbrough, 1 Rand. (Va.) 449.

Wisconsin.—Dolph v. Clemens, 4 Wis. 181; Call v. Ballard, 65 Wis. 187; Wood v. Treleven, 74 Wis. 577.

Illustrations.—Where an award directed J. D. to assign certain bonds given by M. G. and J. V. to certain parties designated, the assignment to be to the use of said parties and at their "own proper risk and costs," and objection was taken to the award because it did not appear by it that J. D. had any title to the bonds which he was ordered to assign, and to which he was nominally no party, the court refused to entertain any presumption against the award, and upheld it as valid, as they could not actually and affirmatively collect from the award itself that J. D. had no title to the bonds which he was ordered to assign. Gonsales v. Deavens, 2 Yeates (Pa.) 539.

Where "all demands" between the parties were submitted under a statute which declared that such demands only could be submitted "as might be the subject of a personal action at law, or of a suit in equity," and the award directed that the plaintiff should recover a stated sum, and that "the same should be in full of all matters referred to us," although it did not appear that all the matters included in the decision were "the subject of personal actions at law or suits in equity," the award was sustained on the ground that the presumption was in its favor until something subversive of it was positively proved. Fiske v. South Wilbraham Mfg. Co., 7 Allen (Mass.) 476.

Where it was set out in a judgment rendered upon an award, that the arbitrators were sworn according to law, but it did not appear from the record that the oath was administered before the award was made, the Supreme Court held that it should be presumed that proof was made that such was the fact. Price v. Kirby, 1 Ala. 184.

Fraud.—Every intendment will be made in favor of an award, and it will not be set aside because the arbitrators have rejected evidence in relation to an issue before them, nor will it be inferred that they have acted fraudulently in doing so, but rather that other evidence had so far settled the matter in their judgment as to render further proof unnecessary. Fraud will not be presumed because the arbitrators have awarded either too little or too much. Root v. Renwick, 15 Ill. 461.

An award will be sustained against technical objections where there is no fraud, Tracy v. Herrick, 25 N. H. 381; Allen v. Hiller, 8 Ind. 310; Snyder v. Rouse, 1 Metc. (Ky.) 625; and an award will not be set aside because of a guess in the amount awarded where there is no fraud, Port Huron, etc., R. Co. v. Callanan, 61 Mich. 22.

1. Kanouse v. Kanouse, 36 Ill. 439; Prescott v. Fellows, 41 N. H. 9, 77 Am. Dec. 752; Greenough v. Rolfe, 4 N. H. 357. See Johnson v. Noble, 13 N. H. 286, 38 Am. Dec. 485; White Mountains R. Co. v. Beane, 39 N. H. 107. See *supra*, this title, *Award Made Certain by Extrinsic Aid*.

2. **Award Valid by Implication.**—Morse Arb. and Award 439.

In Rixford v. Nye, 20 Vt. 132, a submission was entered into under a contract which stipulated for payment by instalments. The award took in the whole contract and directed payments to be made by instalments corresponding with the contract. The award was objected to on the ground that the arbitrators were authorized by the submission to award only as to the first instalment, and as such first payment might, for anything that appeared on the award, have been directed in regard to a later instalment, the award was not divisible and was void; but the court overruled the objection, saying that it was not a reasonable construction or intendment of the award. See Lamphire v. Cowan, 39 Vt. 420; Spear v. Hooper, 22 Pick. (Mass.) 144.

Where the award of an arbitrator, after stating his decision, contained the following clause: "In arriving at this result, I have excluded every claim (including those for intoxicating liquors) submitted by said parties, except the following which I have allowed," it was held that the meaning of the award was that the arbitrator disallowed the claims which the award stated he "excluded" in arriving at the result, not that he had not passed judgment on all the claims submitted. Hammond v. Deehan, 78 Me. 399.

On a plea of tender, followed by the payment into court of the amount tendered, an award of arbitrators in favor of the plaintiff, although for a less amount, imports a finding against the tender. Berkheimer v. Geise, 82 Pa. St. 64.

c. WHEN QUESTION RESERVED FOR COURT.—The rule is that when a question is reserved in the award to be determined by the court, the extent of such reservation will be narrowly and precisely construed.¹

12. **Mistake in the Award**—a. GENERAL RULE—(1) *In England*.—The law in regard to the effect of a mistake in the award is in a somewhat unsettled state.² So far as any general rule can be laid down, it appears that in England, inasmuch as the arbitrators are judges of the parties' own choosing, their award cannot be objected to on the ground that it is an unreasonable judgment, or against the law;³ nor can it be impeached for mistake of fact.⁴ But if it is a clear and gross mistake, which is admitted by

1. Morse Arb. and Award 448.

In *Gould v. Ward*, 4 Pick. (Mass.) 104, the referees awarded that if the court should hold that a certain act was a fraud which would render a sale void, they found in favor of one party, but if they held that it was not, then they found in favor of the other party. The court, in passing judgment, held that the exact question referred to them was whether or not the act alluded to was fraudulent *per se*; in other words, whether such act was a fraud in law; that if it was only evidence of fraud, no matter how strong, they could not hold it to be fraudulent.

2. **Mistake in Awards**.—In *Chace v. Westmore*, 13 East 357, where the award was questioned on the ground of mistake, Lord Ellenborough, C. J., said that no general and certain rule could be laid down to indicate in what cases the courts would refuse to allow an award to be opened.

The Common-law Courts Formerly Made a Distinction between a lay and a legal arbitrator. If questions of law and fact were submitted to a barrister, the courts would not open the award, unless perverse misconstruction of the law were shown on his part, but if the submission were to a layman the courts had not the same confidence in his capacity or honesty. Russell on Awards (6th ed.) 309; *Chace v. Westmore*, 13 East 357; *Perriman v. Staggall*, 9 Bing. 679, 23 E. C. L. 478; *Williams v. Jones*, 5 M. & R. 3; *Sharman v. Bell*, 5 M. & S. 504; *Cramp v. Symons*, 1 Bing. 104, 8 E. C. L. 423.

The Courts of Equity, however, never recognized such a distinction. *Ching v. Ching*, 6 Ves. Jr. 282; *Steff v. Andrews*, 2 Madd. 6.

And numerous more recent decisions have placed the awards of lawyers and laymen on the same footing. *In re Marsh*, 16 L. J. Q. B. 330; *Fuller v. Fenwick*, 3 C. B. 705, 54 E. C. L. 705, 16 L. J. C. P. 79; *In re Brown and Croydon Canal Co.*, 9 Ad. & El. 522, 36 E. C. L. 188; *Ashton v. Pointer*, 3 Dowl. 201; *Wilson v. King*, 2 Crompt. & M. 689, 2 Dowl. 538, note a; *Wade v. Malpas*, 2 Dowl. 638; *Huntig v. Ralling*, 8 Dowl. 879; *Jupp v. Grayson*, 3 Dowl. 199.

See *Fairchild v. Adams*, 11 Cush. (Mass.) 549, where Shaw, C. J., says, speaking of the distinction made in the old cases between lawyers and laymen: "But what does this mean? Simply that it is supposed to be intended by the parties that the case shall be decided according to law. And do they not intend this in all cases? The rule refers contested questions of right to the decision of the

arbitrators; and what are any questions of right but questions of fact first, and then of the rules of law applicable to the facts?"

3. **Awards Unreasonable or against Law**.—Russell on Awards (6th ed.) 310; *Fuller v. Fenwick*, 3 C. B. 705, 54 E. C. L. 705, 16 L. J. C. P. 79; *Steff v. Andrews*, 2 Madd. 6; *Evans v. Pratt*, 3 M. & G. 759, 42 E. C. L. 396; *Hodgkinson v. Fernie*, 3 C. B. N. S. 189, 91 E. C. L. 189, 27 L. J. C. P. 66; *Baggalay v. Borthwick*, 10 C. B. N. S. 61, 100 E. C. L. 61, 30 L. J. C. P. 342; *In re Marsh*, 16 L. J. Q. B. 330; *Medcalfe v. Ives*, 1 Atk. 63; *Hodge v. Burgess*, 3 H. & N. 293, 27 L. J. Exch. 318; *Faviell v. Eastern Counties R. Co.*, 2 Exch. 344; *Boutillier v. Thick*, 1 D. & R. 366, 16 E. C. L. 43.

Appeal from Award.—Neither courts of law nor of equity have any jurisdiction by way of appeal from the arbitrator's award. *Goodman v. Sayers*, 2 Jac. & W. 249.

Where an arbitrator awarded that some pleas demurred to were good, and the declaration bad in substance, the award was objected to on the ground that the arbitrator had manifestly come to an erroneous decision as to the validity of the pleas in law, but the court refused to entertain the objection, as the demurrers were among the things referred, and there was nothing in the reference which empowered the parties to appeal to the court as a court of error upon the judgment given on the demurrers. *Wilde, C. J.*, said: "The court has no more authority to review the arbitrator's decision upon a point of law referred to him than on a point of fact. Whatever may have been formerly the understanding, it is enough to say that in modern times the decisions are distinct and uniform that if parties choose to refer a matter of law to the arbitrator, his decision upon the matter is final." *Emmerson v. Simpson*, Law Times June 5, 1847.

4. **Mistake of Fact**.—*Morgan v. Mather*, 2 Ves. Jr. 17; *Baggalay v. Borthwick*, 10 C. B. N. S. 61, 100 E. C. L. 61, 30 L. J. C. P. 342. See *Ravee v. Farmer*, 4 T. R. 146; *Doe v. Rosser*, 3 East 15; *Smith v. Johnson*, 15 East 213; *Price v. Williams*, 1 Ves. Jr. 365; *Dick v. Milligan*, 2 Ves. Jr. 23.

An award will not be set aside on the ground that the decision of the arbitrator is contrary to the evidence. *In re Bradshaw's Arbitration*, 12 Q. B. 562, 64 E. C. L. 562.

Nor can objections be made to it which involve questions arising altogether on the merits. *Winter v. Lethbridge*, 13 Price 533; *Brown v. Brown*, 1 Vern. 157; *Boutillier v.*

the arbitrators, the courts will set the award aside.¹

Thick, 1 D. & R. 366, 16 E. C. L. 43; Hill v. Ball, 1 Dow. N. S. 164; Lancaster v. Hemington, 4 Ad. & El. 345, 31 E. C. L. 85.

The rule applies whether the decision of the arbitrators be made in an award or in a certificate. Price v. Price, 9 Dowl. 344.

1. Clear and Gross Mistake Admitted by the Arbitrators.—Knox v. Symmonds, 1 Ves. Jr. 369; Delver v. Barnes, 1 Taunt. 48; Anonymous, 2 Chit. Rep. 44, 18 E. C. L. 244; Ward v. Dean, 3 B. & Ad. 234, 23 E. C. L. 59; Rogers v. Dallimore, 6 Taunt. 111; Hardy v. Ringrose, 1 H. & W. 185; Wade v. Huntley, 2 Tidd Pr. (9th ed.) 841; Potter v. Newman, 4 Dowl. 504; Payne v. Bailey, 7 Moore 167; Anderson v. Darcey, 18 Ves. Jr. 447; Chuck v. Cremer, 17 L. J. Ch. 287; Dinn v. Blake, L. R. 10 C. P. 388; Flynn v. Robertson, L. R. 4 C. P. 324; Mills v. Bowyer's Soc., 3 Kay & J. 66.

There are, however, many cases in which the courts have inquired into the correctness of the principles on which the arbitrator based his decision. Hardy v. Innes, 6 Moo. 574, 17 E. C. L. 59; Johnson v. Durant, 2 B. & Ad. 925, 22 E. C. L. 211.

Where an action brought by an attorney on a bill of costs not taxable was referred to the clerk of assize, the Court of Exchequer held that it was within their power to inquire whether the arbitrator had adopted the right rule of taxation. Broadhurst v. Darlington, 2 Dowl. 38.

It was held in Corneforth v. Geer, 2 Vern. 705, by Harcourt, L. C., that if the arbitrator acted upon a plain mistake, either as to the law or the facts, the award would be set aside in the same way as it would for an error appearing in the body of the award itself. See Anonymous, 3 Atk. 644; Richardson v. Nourse, 3 B. & Ald. 237.

But where the point of law was doubtful, the court refused to interfere, Ridout v. Pain, 3 Atk. 486, 1 Ves. 11; and the court refused to interfere also where the mistake could be discovered only by examining matters of account, Brown v. Brown, 1 Vern. 157.

In Morgan v. Mather, 2 Ves. Jr. 15, Loughborough, L. C., said that where it was shown that by a mistake in calculation the arbitrator had awarded a wrong sum, he could not set aside the award on motion; but he doubted whether the court in such a case would enforce the award by attachment.

Gross Mistake.—It has been held in some cases that where a gross mistake has been made by the arbitrator, as where one sum has been put for another, although the award has been written by the arbitrator himself, yet it will not be considered as his award, as it is not the intentional decision of his mind. Helaby v. Brown, 1 H. & N. 729, 26 L. J. Exch. 217. See Whitmore v. Smith, 7 H. & N. 509, 31 L. J. Exch. 107.

Pure Question of Law.—It has been held that the decision of an arbitrator is final, whether right or wrong, when a question of pure law is referred to him, it being presumed that where a reference of that nature is made it

amounts in effect to an agreement between the parties to be bound by his decision. Ching v. Ching, 6 Ves. 282; Young v. Walter, 9 Ves. Jr. 364; Steff v. Andrews, 2 Madd. 6; Price v. Hollis, 1 M. & S. 105.

Question of Law and Fact.—But it has been held, on the contrary, that where a mixed question of law and fact was submitted, which the arbitrator was bound to decide according to the law, and he, intending to decide according to the law, made a mistake as to what the law was, the award would be set aside, as it was not a decision according to the law as it was intended to be. Kent v. Elstob, 3 East 18; Young v. Walter, 9 Ves. Jr. 364; Broadhurst v. Darlington, 2 Dowl. 38.

Mistake Construed Misconduct.—A claimed that two sums of money were due to him by B, and the question submitted to the arbitrators was whether he was entitled to both or to one only. The arbitrators, in their finding, intended to award him both sums, but instead of adding them together, they by mistake deducted the smaller from the greater and awarded the resulting sum to B, a palpable and gross mistake, which was acknowledged by the affidavit of the arbitrators themselves. The court held that the mistake was of such a character as to amount, although not morally, yet, in the judicial sense of the word, to misconduct on the part of the arbitrators. "We think we do not extend the jurisdiction of the court beyond its proper limits when we give relief in a case under these very peculiar circumstances by holding this case to fall within the acknowledged power of the court to relieve against the misconduct of the arbitrators." *In re Hall and Hinds*, 2 M. & G. 847, 40 E. C. L. 656.

In Ashton v. Pointer, 2 Dowl. 651, the Court of Exchequer, previous to the decision of the above case by the Common Pleas, had said that an award could be set aside for an error in fact only when the mistake was "so glaringly wrong as to amount to misconduct in the arbitrators."

The above method of construing a plain and unintentional mistake as technical misconduct seems to be rather carrying the principles of construction beyond the limit of good sense, dodging difficulties instead of applying the old rule and setting the award aside on the ground of plain and gross mistake, or on the ground that the arbitrators had not done what they intended to do. But the Exchequer were not satisfied, either with the latter plan or with throwing the award out on a technicality; they held that an award ought not to be set aside on the ground of mistake at all; that it was better that injustice should be done in some cases than that the door should be opened for inquiries on the merits, as, in nine cases out of ten, mistake of some kind or other would be alleged in the award. Where the arbitrator made a mistake in giving credit to the plaintiff for a large sum, admitted by the defendant to be due to the plaintiff, and acknowledged the error when the mistake was pointed out to him, and wanted to have the award referred

(2) *In United States*—(a) **Award Generally Binding.**—The weight of authority in the United States leans towards making absolute the certain and simple rule that the award of the arbitrators, when made in good faith, is final, and that it cannot be questioned or set aside for a mistake, either of law or of fact.¹

back to him, so that he could set it right, to which the defendant objected, the court refused to set aside the award, as it did not show any mistake on its face, and as the arbitrator had not made any affidavit admitting the mistake. *Phillips v. Evans*, 12 M. & W. 309, 13 L. J. Exch. 80. See *Hagger v. Baker*, 14 M. & W. 9.

The absence of an affidavit in *Phillips v. Evans*, 12 M. & W. 309, distinguished it from *In re Hall and Hinds*, 2 M. & G. 847, 40 E. C. L. 656.

But more recently the Court of Queen's Bench intimated that *Phillips v. Evans* had carried the rule too far, and approved the finding in *In re Hall and Hinds*, 2 M. & G. 847, 40 E. C. L. 656; and consequently where it appeared by the oath of the arbitrator that he had omitted to include in his award a large sum admitted to be due to the plaintiff, they set aside the award for the mistake. Lord Denman, C. J., said: "The rule of conclusiveness is at most one for guiding our discretion, which cannot be so absolutely fettered and rendered powerless." *Hutchinson v. Shepperton*, 13 Q. B. 955, 66 E. C. L. 955.

1. Mistake in Award—General Tendency of Authorities in United States—United States.—*Kleine v. Catara*, 2 Gall. (U. S.) 61; *York*, etc., *R. Co. v. Myers*, 18 How. (U. S.) 246; *Burchell v. Marsh*, 17 How. (U. S.) 344; *Davy v. Faw*, 7 Cranch (U. S.) 175; *Hartford F. Ins. Co. v. Bonner Mercantile Co.*, 56 Fed. Rep. 378, 15 U. S. App. 134.

Alabama.—*Bumpass v. Webb*, 4 Port. (Ala.) 65, 29 Am. Dec. 274.

Arkansas.—*Kirtan v. Spears*, 44 Ark. 166.

California.—*Tyson v. Wells*, 2 Cal. 130; *Carsley v. Lindsay*, 14 Cal. 394; *Peachy v. Ritchie*, 4 Cal. 207; *Headley v. Reed*, 2 Cal. 325.

Colorado.—*Wilson v. Wilson*, 18 Colo. 615.

Connecticut.—*Hall v. Norfolk F. Ins. Co.*, 57 Conn. 105.

Delaware.—*Stewart v. Grier*, 7 Houst. (Del.) 378.

Georgia.—*Forbes v. Turner*, 54 Ga. 252; *Lester v. Callaway*, 73 Ga. 730; *Anderson v. Taylor*, 41 Ga. 10.

Illinois.—*Merritt v. Merritt*, 11 Ill. 565; *Smith v. Douglass*, 16 Ill. 34; *Pottle v. McWorter*, 13 Ill. 454; *Ross v. Watt*, 16 Ill. 99; *Wiley v. Platter*, 17 Ill. 538.

Indiana.—*Indiana Cent. R. Co. v. Bradley*, 7 Ind. 49; *Moore v. Barnett*, 17 Ind. 349.

Iowa.—*Thornton v. McCormick*, 75 Iowa 285; *Struthers v. Clark*, 40 Iowa 508.

Kansas.—*Russell v. Seery*, 52 Kan. 736.

Kentucky.—*Ewing v. Beauchamp*, 3 Bibb (Ky.) 41; *Baker v. Crockett*, Hard (Ky.) 396; *Jackson v. Rose* (Ky. 1895), 30 S. W. Rep. 16.

Maine.—*Brown v. Clay*, 31 Me. 518; *Tyler v. Dyer*, 13 Me. 41; *Whitmore v. Le Ballis-*

tier, 35 Me. 488; *Sweetsir v. Kenney*, 32 Me. 464; *Walker v. Sanborn*, 8 Me. 288.

Maryland.—*Baltimore, etc., R. Co. v. Canton Co.*, 70 Md. 405.

Massachusetts.—*Boston Water Power Co. v. Gray*, 6 Met. (Mass.) 131; *Rundell v. La Fleur*, 6 Allen (Mass.) 480; *Smith v. Boston etc., R. Co.*, 16 Gray (Mass.) 521; *Bigelow v. Newell*, 10 Pick. (Mass.) 348; *Jones v. Boston Mill Corp.*, 6 Pick. (Mass.) 148; *Davis v. Henry*, 121 Mass. 150; *Carter v. Carter*, 109 Mass. 306; *Ellicott v. Coffin*, 106 Mass. 365; *Gardner v. Boston*, 120 Mass. 266; *Nickles v. Thayer*, 14 Allen (Mass.) 114.

Michigan.—*Brush v. Fisher*, 70 Mich. 469, 14 Am. St. Rep. 510.

Minnesota.—*Goddard v. King*, 40 Minn. 164; *Daniels v. Willis*, 7 Minn. 374.

Missouri.—*Cochran v. Bartle*, 91 Mo. 636.

New Hampshire.—*White Mountains R. Co. v. Beane*, 39 N. H. 107; *Johnson v. Noble*, 13 N. H. 286, 38 Am. Dec. 485; *Greenough v. Rolfe*, 4 N. H. 357; *Bean v. Wendell*, 22 N. H. 582.

New Jersey.—*Hartshorne v. Cuttrel*, 2 N. J. Eq. 297.

New York.—*Jackson v. Ambler*, 14 Johns. (N. Y.) 96; *Cranston v. Kenny*, 9 Johns. (N. Y.) 212; *Campbell v. Western*, 3 Paige (N. Y.) 124; *Mitchell v. Bush*, 7 Cow. (N. Y.) 185; *De Long v. Stanton*, 9 Johns. (N. Y.) 38; *Underhill v. Van Cortlandt*, 2 Johns. Ch. (N. Y.) 339; *Fudickar v. Guardian Mut. L. Ins. Co.*, 62 N. Y. 405; *Turnbull v. Martin*, 37 How. Pr. (N. Y. C. Pl.) 21; *Smith v. Cutler*, 10 Wend. (N. Y.) 589, 25 Am. Dec. 580; *Ketcham v. Woodruff*, 24 Barb. (N. Y.) 147; *Winship v. Jewett*, 1 Barb. Ch. (N. Y.) 173; *Perkins v. Giles*, 53 Barb. (N. Y.) 342, 50 N. Y. 228; *Sweet v. Morrison*, 116 N. Y. 19, 15 Am. St. Rep. 376; *Gernsheim v. Central Trust Co. (Supreme Ct.)*, 40 N. Y. St. Rep. 967; *McGregor v. Sprott (Supreme Ct.)*, 13 N. Y. Supp. 191.

North Carolina.—*Gardner v. Masters*, 3 Jones Eq. (N. Car.) 462; *Patton v. Garrett*, 116 N. Car. 847; *Reizenstein v. Hahn*, 107 N. Car. 156; *Eaton v. Eaton*, 8 Ired. Eq. (N. Car.) 102.

Pennsylvania.—*Tilghman v. Fisher*, 9 Watts (Pa.) 441; *Riddle's Estate*, 19 Pa. St. 431; *M'Calmont v. Whitaker*, 3 Rawle (Pa.) 84, 23 Am. Dec. 102; *Speer v. Bidwell*, 44 Pa. St. 23.

Rhode Island.—*Harris v. Social Mfg. Co.*, 8 R. I. 133, 5 Am. Rep. 549.

South Carolina.—*Alken v. Bolan*, 1 Brev. (S. Car.) 239, 2 Am. Dec. 660.

Texas.—*Moore v. Jones (Tex. Civ. App. 1894)*, 25 S. W. Rep. 987.

Vermont.—*Ennos v. Pratt*, 26 Vt. 630; *May v. Miller*, 59 Vt. 577; *Howard v. Puffer*, 23 Vt. 365.

Virginia.—*Ross v. Overton*, 3 Call (Va.)

An Error in Applying the Rules of Evidence, on the part of the arbitrators has been

309, 2 Am. Dec. 552; *Morris v. Ross*, 2 Hen. & M. (Va.) 408; *Mathews v. Miller*, 25 W. Va. 817; *Tennant v. Divine*, 24 W. Va. 387; *Byars v. Thompson*, 12 Leigh (Va.) 550, 37 Am. Dec. 680; *Portsmouth v. Norfolk County*, 31 Gratt. (Va.) 727.

Wisconsin.—*Bancroft v. Grover*, 23 Wis. 463, 99 Am. Dec. 195.

Rule as to Conclusiveness—Its Extent and Reasons Stated.—In *The Boston Water Power Co. v. Gray*, 6 Met. (Mass.) 131, a leading case, the court, by Shaw, C. J., said: "In general, arbitrators have full power to decide upon questions of law and fact, which directly or incidentally arise in considering and deciding the questions embraced in the submission. * * * When not limited by the terms of the submission, they have authority to decide questions of law necessary to the decision of the matters submitted; because they are judges of the parties' own choosing. Their decision upon matters of fact and law, thus acting within the scope of their authority, is conclusive upon the same principle that a final judgment of a court of last resort is conclusive, which is that the party against whom it is rendered can no longer be heard to question it. It is within the principle of *res judicata*; it is the final judgment for that case and between these parties. It is amongst the rudiments of the law, that a party cannot, when a judgment is relied on to support or to bar an action, avoid the effect of it by proving, even if he could prove to perfect demonstration, that there was a mistake of the facts or of the law. * * * When the parties have expressly or by reasonable implication submitted the questions of law, as well as the questions of fact, arising out of the matter of controversy, the decision of the arbitrators on both subjects is final. It is upon the principle of *res judicata*, on the ground that the matter has been adjudged by a tribunal which the parties have agreed to make final, and a tribunal of last resort for that controversy; and, therefore, it would be as contrary to principle for a court of law or equity to rejudge the same question as for an inferior court to rejudge the decision of a superior, or for one court to overrule the judgment of another, where the law has not given an appellate jurisdiction or a revising power acting directly upon the judgment alleged to be erroneous." See *Bigelow v. Newell*, 10 Pick. (Mass.) 355.

Unlimited Submission.—In *New Hampshire*, where the plaintiff in an action referred moved to set aside the report of the referees on the ground of a mistake in law, and introduced evidence to show that the referees intended to decide "according to their views of the law of the case," the court refused to grant the motion, and said that if the parties agree that the award shall be made agreeably to legal principles, it will be set aside for a mistake in law, but that if the submission embody no such restriction, "the arbitrators are constituted judges of the law as well as of the facts; and their decisions upon any question

of law that may arise in the course of the trial, * * * which has been discussed by the parties before them, and has been deliberately considered and decided by them, is final and conclusive in the cause and between the parties to it. No court will revise their decision where they have fairly exercised their judgment upon the question submitted to them, and their award will not be set aside, however different the decision upon the law may be from the opinions entertained by the court. * * * This narrows the exception on account of mistake of law to the case of a reference limited to legal principles, or of some error in relation to a point not discussed or decided by the arbitrators, but assumed by them, by which they have in fact been prevented from exercising their judgment upon the real question submitted to them." *White Mountains R. Co. v. Beane*, 39 N. H. 107. See *Johnson v. Noble*, 13 N. H. 286, 38 Am. Dec. 485; *Cushman v. Wooster*, 45 N. H. 410; *Bean v. Wendell*, 22 N. H. 582; *Greenough v. Rolfe*, 4 N. H. 357.

Decision of Engineers and Architects.—Where an engineer or architect in charge is made the arbitrator between the owner or company and the contractor by the terms of the contract, his decision will not be set aside because of a mere mistake of judgment, where there is no proof of fraud, dishonesty, or gross mistake. *Kennedy v. U. S.*, 24 Ct. of Cl. 122; *Sweet v. Morris*, 116 N. Y. 19, 15 Am. St. Rep. 376; *Crumlish v. Wilmington, etc., R. Co.*, 5 Del. Ch. 270; *Sanders v. Hutchinson*, 26 Ill. App. 633; *Langdon v. Northfield*, 42 Minn. 464; *St. Paul, etc., R. Co. v. Bradbury*, 42 Minn. 222.

One of the stipulations in a building contract was that all matters in dispute arising under it should be submitted to an architect whose decision should be final, and where such a dispute did arise and the architect made his award, but the appellant, through mistake, omitted to prove the payment of two thousand two hundred and twenty-five dollars to the appellee, and there was no charge of fraud, it was held that the award was binding and conclusive upon the parties, and could not be set aside on account of the mistake. *English v. Wilmerding Borough School Dist.*, 165 Pa. St. 21. The court admitted that this was a case of great hardship to the defendant, but could not see their way to granting any relief, feeling bound by the rule as laid down in *Hostetter v. Pittsburgh*, 107 Pa. St. 419.

Mistake as to Evidence.—An award will not be set aside because of an error of judgment as to the weight or effect of evidence. *Russell v. Seery*, 52 Kan. 736. See *Leslie v. Leslie*, 50 N. J. Eq. 103; *Bowden v. Crow*, 2 Tex. Civ. App. 591.

Effect of Stipulation on Submission.—Where parties to several pending actions submit the matters in dispute between them to the determination of an amicable compounder, with the stipulation that the actions shall be withdrawn and considered as not filed, the issues in such actions are not open to judicial determination, though there be a provision in

held not to be a sufficient reason for setting aside an award.¹

In Some Cases, Awards Set Aside.—In some cases, it has been held that an award may be set aside for plain and gross mistake, either of law or fact, provided the circumstances are such that the court, in its discretion, thinks it best or proper to do so:² as where the mistake appears on the face of the award

the submission for an appeal. The finding of such an arbitrator can be reviewed only when he is charged with irregularity in the proceedings, or with exceeding his authority; it cannot be reviewed for errors of fact or law. *Amet v. Boyer*, 36 La. Ann. 266. See *supra*, this title, *Arbitrator Is Judge of Law and Fact*.

Award Set Aside.—Where the arbitrators allowed certain items of account by mistake, and omitted to state in their award that the plaintiff "was to use the milldam and water as it was at the time" of the making of the award, it was held that the award would be set aside, although the mistake did not appear upon its face. *King v. Armstrong*, 25 Ga. 264. The court in this case distinctly refused to adopt the modern decisions to the effect that if an award is good on its face, it is not to be impeached on the ground of mere mistakes. *Citing In re Hall and Hinds*, 2 M. & G. 847, 40 E. C. L. 656, against them. The court, by Benning, J., said: "I prefer to follow the earlier cases," *citing* *Corneforth v. Geer*, 2 Vern. 705; *Anonymous*, 3 Atk. 644; *Ridout v. Pain*, 3 Atk. 486; *Richardson v. Nourse*, 3 B. & Ald. 237, 5 E. C. L. 269; *Rex v. Wheeler*, 3 Burr. 1258; *Anderson v. Darcy*, 18 Ves. Jr. 447. "This opinion has the support, as it appears to me, of the cases that had been decided in England, at the time when the law of England was adopted by Georgia."

1. *Johnson v. Noble*, 13 N. H. 286, 38 Am. Dec. 485. See *supra*, this title, *Power to Admit or Reject Evidence*.

2. **In Some Cases, Awards Set Aside—Gross Mistakes of Law or Fact—Alabama.**—*Bumpass v. Webb*, 4 Port. (Ala.) 65, 29 Am. Dec. 274. *California.*—*Muldrow v. Norris*, 2 Cal. 74, 56 Am. Dec. 313.

Georgia.—*South Carolina R. Co. v. Moore*, 28 Ga. 398, 73 Am. Dec. 778; *Akridge v. Patillo*, 44 Ga. 585; *Thrasher v. Overby*, 51 Ga. 91.

Maryland.—*Heuitt v. State*, 6 Har. & J. (Md.) 95, 14 Am. Dec. 259.

Massachusetts.—*Knight v. Wilder*, 2 Cush. (Mass.) 199, 48 Am. Dec. 660.

New Hampshire.—*Rand v. Redington*, 13 N. H. 72, 38 Am. Dec. 475; *Johnson v. Noble*, 13 N. H. 286, 38 Am. Dec. 485; *Davis v. Cillely*, 44 N. H. 448, 84 Am. Dec. 85; *Sanborn v. Murphy*, 50 N. H. 65.

New York.—*Fudickar v. Guardian Mut. L. Ins. Co.*, 45 How. Pr. (N. Y. Super. Ct.) 462; *Van Cortlandt v. Underhill*, 17 Johns. (N. Y.) 420; *Smith v. Cutler*, 10 Wend. (N. Y.) 589, 25 Am. Dec. 580.

North Carolina.—*Smith v. Kron*, 109 N. Car. 103.

Pennsylvania.—*Newton v. Grambo*, 1 Browne (Pa.) 235; *McCalmont v. Whitaker*, 3 Rawle (Pa.) 84, 23 Am. Dec. 102; *Thompson v. White*, 4 S. & R. (Pa.) 135.

South Carolina.—*Alken v. Bolan*, 1 Brev. (S. Car.) 239, 2 Am. Dec. 660.

Tennessee.—*Jocelyn v. Donnel*, Peck (Tenn.) 274, 14 Am. Dec. 753.

Texas.—*Payne v. Metz*, 14 Tex. 56.

Virginia.—*Pollard v. Lumpkin*, 6 Gratt. (Va.) 398, 52 Am. Dec. 128; *Lavell v. Gold*, 25 Gratt. (Va.) 473; *Chapline v. Overseers of Poor*, 7 Leigh (Va.) 231, 30 Am. Dec. 504; *Grigsby v. Weaver*, 5 Leigh (Va.) 205; *Byars v. Thompson*, 12 Leigh (Va.) 550, 37 Am. Dec. 680; *Pleasants v. Ross*, 1 Wash. (Va.) 156, 1 Am. Dec. 449.

See *infra*, this title, *Qualifications of the Rule*.

In *Williams v. Paschall*, 4 Dall. (Pa.) 284, it was said that equity would interfere to set aside an award if "a plain error in law or fact" was set forth specifically and proved.

So an award will be set aside for a mistake palpable on its face, *Morris v. Ross*, 2 Hen. & M. (Va.) 408; or for a plain mistake in law, or for a mistake of fact, such as the arbitrator himself would admit, *Hartshorne v. Cuttrell*, 2 N. J. Eq. 297; or for a gross mistake, *Sumpster v. Murrell*, 2 Bay (S. Car.) 450; *Askew v. Kennedy*, 1 Bailey (S. Car.) 46; *Bumpass v. Webb*, 4 Port. (Ala.) 65, 29 Am. Dec. 274.

In *Pulliam v. Pensoneau*, 33 Ill. 375, it was held that an award would not be set aside for mistake, unless it was made by all the arbitrators.

The reports of referees have been set aside for evident mistakes, either of fact or law, apparent on their face. *Williams v. Craig*, 1 Dall. (Pa.) 313; *Lyle v. Clason*, 1 Cai. (N. Y.) 323. See *Pleasants v. Ross*, 1 Wash. (Va.) 156, 1 Am. Dec. 449; *Brickhouse v. Hunter*, 4 Hen. & M. (Va.) 363, 4 Am. Dec. 528; *Hartshorne v. Cuttrell*, 2 N. J. Eq. 297; *Goldsmith v. Tilly*, 1 Har. & J. (Md.) 361; *Head v. Muir*, 3 Rand. (Va.) 122.

Part of Award Set Aside for Mistake.—In *Davis v. Cillely*, 44 N. H. 448, 84 Am. Dec. 85, it was held that equity would interfere to relieve against a mistake of law made by the arbitrators whereby they allowed a greater sum than should have been awarded. It was also held that a mistake in a single item awarded would be corrected without setting the whole award aside, where the amount of the error, although not apparent on the face of the award, is clearly established by the same evidence that shows the error itself, and the court can distinctly see that no injustice can be done by the correction.

The court *cited* *Young v. Walter*, 9 Ves. Jr. 364; *Kent v. Elstob*, 3 East 18; *Chace v. Westmore*, 13 East 357; *Richardson v. Nourse*, 3 B. & Ald. 237, 5 E. C. L. 269; *Medcalfe v. Ives*, 1 Atk. 63; *Ridout v. Pain*, 3 H. & K. 486; *Greenough v. Rolfe*, 4 N. H. 358; *Bean v. Wendell*, 20 N. H. 219; *Severance v. Hilton*, 32 N. H. 292; *Piersons v. Hobbes*,

itself, or in some writing made at the same time, and connected with it, or where the mistake is admitted by the arbitrators;¹ or where the arbitrator has been led into the mistake by undue means or by fraudulent concealment on the part of one of the parties or his agent.²

A party who seeks to set aside an award on the ground of mistake must show that the award would have been different had the mistake not occurred.³

(b) **Mistakes of Fact.**—In regard to questions of fact only, the rule is that they are peculiarly within the scope of the arbitrator's authority; their judgment upon them is conclusive, and the award final.⁴

33 N. H. 31; Prescott v. Fellows, 41 N. H. 9, 77 Am. Dec. 752; White Mountains R. Co. v. Beane, 39 N. H. 108; Corneforth v. Geer, 2 Vern. 705; Herrick v. Blair, 1 Johns. Ch. (N. Y.) 101; Underhill v. Van Cortlandt, 2 Johns. Ch. (N. Y.) 363, in support of the first point; and Pope v. Brett, 2 Saund. 293, a, b; Candler v. Fuller, Willes 64; Simon v. Gavil, 1 Salk. 74; Addison v. Gray, 2 Wils. 293; Martin v. Williams, 13 Johns. (N. Y.) 264; Gordon v. Tucker, 6 Me. 254, to sustain the second position.

1. **Where Mistake on Face of Award or Admitted by Arbitrator.**—*Alabama.*—Bumpass v. Webb, 4 Port. (Ala.) 65, 29 Am. Dec. 274.

Connecticut.—Brown v. Green, 7 Conn. 536; Allen v. Ranney, 1 Conn. 569.

Delaware.—Allen v. Miles, 4 Harr. (Del.) 234.

Georgia.—South Carolina R. Co. v. Moore, 28 Ga. 398, 73 Am. Dec. 778.

Kentucky.—Cleveland v. Dixon, 4 J. J. Marsh. (Ky.) 228.

Maryland.—State v. Williams, 9 Gill (Md.) 172.

Massachusetts.—Fairchild v. Adams, 11 Cush. (Mass.) 549; Barrows v. Sweet, 143 Mass. 316.

Missouri.—Valle v. North Missouri R. Co., 37 Mo. 450.

New Jersey.—Hartshorne v. Cuttrell, 2 N. J. Eq. 297.

New York.—Halstead v. Seaman, 52 How. Pr. (N. Y. Supreme Ct.) 415; Underhill v. Van Cortlandt, 2 Johns. Ch. (N. Y.) 339, 17 Johns. (N. Y.) 405; Winship v. Jewett, 1 Barb. Ch. (N. Y.) 173; Bouck v. Wilber, 4 Johns. Ch. (N. Y.) 405; Toppan v. Heath, 1 Paige (N. Y.) 293; Herrick v. Blair, 1 Johns. Ch. (N. Y.) 101; Woodworth v. Van Buskerk, 1 Johns. Ch. (N. Y.) 432; Todd v. Barlow, 2 Johns. Ch. (N. Y.) 551; Garvey v. Carey, 4 Abb. Pr. N. S. (N. Y. Supreme Ct.) 159, 35 How. Pr. (N. Y.) 282, 7 Robt. (N. Y.) 286.

North Carolina.—Ryan v. Blount, 1 Dev. Eq. (N. Car.) 386.

South Carolina.—Alken v. Bolan, 1 Brev. (S. Car.) 239, 2 Am. Dec. 660; Murrell v. Howard, 2 Brev. (S. Car.) 62; Cohen v. Habenicht, 14 Rich. Eq. (S. Car.) 31.

Tennessee.—Nance v. Thompson, 1 Sneed (Tenn.) 321; Conger v. James, 2 Swan (Tenn.) 213.

Virginia.—Pollard v. Lumpkin, 6 Gratt. (Va.) 398, 52 Am. Dec. 128; Pleasants v. Ross, 1 Wash. (Va.) 156, 1 Am. Dec. 449.

2. **Mistake Induced by Fraud of the Parties.**—Eaton v. Eaton, 8 Ired. Eq. (N. Car.) 102; Roloson v. Carson, 8 Md. 208. See further,

M'Calmont v. Whitaker, 3 Rawle (Pa.) 84, 23 Am. Dec. 102; Horton v. Stanley, 1 Miles (Pa.) 418; Learned v. Bellows, 8 Vt. 79; Morris v. Ross, 2 Hen. & M. (Va.) 408; South Carolina R. Co. v. Moore, 28 Ga. 398, 73 Am. Dec. 778.

3. **What must be Shown by Party Alleging Mistake.**—Gorham v. Millard, 50 Iowa 554; De Castro v. Brett, 56 How. Pr. (N. Y. Supreme Ct.) 484; Halstead v. Seaman, 52 How. Pr. (N. Y. Supreme Ct.) 415; Sweet v. Morrison, 116 N. Y. 19, 15 Am. St. Rep. 376; Todd v. Barlow, 2 Johns. Ch. (N. Y.) 551; Morris Run Coal Co. v. Onondaga Salt Co., 58 N. Y. 667; Woods v. Morrell, 1 Johns. Ch. (N. Y.) 103; Fudickar v. Guardian Mut. L. Ins. Co., 62 N. Y. 392; Perkins v. Giles, 50 N. Y. 229. See also Thompson v. Blanchard, 2 Iowa 44; Pomroy v. Kibbee, 2 Root (Conn.) 92; Tomlinson v. Hammond, 8 Iowa 40; Daniels v. Willis, 7 Minn. 374; Davy v. Faw, 7 Cranch (U. S.) 171.

4. **Mistakes of Fact—General Rule.**—*United States.*—Kleine v. Catara, 2 Gall. (U. S.) 61; Jolly v. Blanchard, 1 Wash. (U. S.) 252.

Colorado.—Wilson v. Wilson, 18 Colo. 615.

Connecticut.—Bunell v. Pinto, 2 Conn. 431; Curley v. Dean, 4 Conn. 259, 10 Am. Dec. 140.

Maine.—Weston v. Stuart, 11 Me. 326; Brown v. Clay, 31 Me. 518.

Maryland.—Goldsmith v. Tilly, 1 Har. & J. (Md.) 361; Cromwell v. Owings, 6 Har. & J. (Md.) 10.

Massachusetts.—Brown v. Bellows, 4 Pick. (Mass.) 179; Boston Water Power Co. v. Gray, 6 Met. (Mass.) 131; Fairchild v. Adams, 11 Cush. (Mass.) 549.

New Hampshire.—White Mountains R. Co. v. Beane, 39 N. H. 107.

New Jersey.—Bell v. Price, 22 N. J. L. 578.

New York.—Todd v. Barlow, 2 Johns. Ch. (N. Y.) 551; DeLong v. Stanton, 9 Johns. (N. Y.) 38.

North Carolina.—Pierce v. Perkins, 2 Dev. Eq. (N. Car.) 250.

Tennessee.—Conger v. James, 2 Swan (Tenn.) 213.

Virginia.—Morris v. Ross, 2 Hen. & M. (Va.) 408.

In Roloson v. Carson, 8 Md. 208, it was held that mistakes committed by arbitrators in drawing incorrect inferences or forming erroneous judgments or conclusions from facts, will not vitiate the award; a mistake, to have this effect, must be gross and manifest, and of some fact by which the arbitrators were deceived and misled.

Want of Diligence in Parties.—In Valle v. North Missouri R. Co., 37 Mo. 445, it was

But this Rule Is Not Without Its Exceptions, thus an eminent authority has said: "Another ground for setting aside an award is a mistake of fact, apparent upon the award itself; and this is held to invalidate the award, upon the principle that the award does not conform to the judgment of the arbitrators, and the mistake apparent in some material and important particular shows that the result is not the true judgment of the arbitrators. The mistake, therefore, must be of such a nature, so affecting the principles upon which the award is based, that if it had been seasonably known and disclosed to the arbitrators, if the truth had been known and understood by them, they would probably have come to a different result. A familiar instance of this class of mistakes is an obvious error in computation, by which the apparent result in sums, or times, or other things of like kind, is manifestly erroneous. In such case, it is clear that the result stated is not that intended; it does not express the real judgment of the arbitrators."¹

Mistake must Be Apparent and Prejudicial.—The mistake for which an award will be set aside must be apparent upon its face, in some material point, and extremely prejudicial to the losing party.²

held that an award would not be set aside on the ground of a mistake by the arbitrators of a material fact, where such mistake resulted from the mere ignorance of the party against whom the award was rendered, and where it was one which he could have discovered by the use of due diligence. See *Davis v. Henry*, 121 Mass. 150; *Harper v. Pike County*, 52 Ga. 659.

1. Shaw, Ch. J., in *Boston Water Power Co. v. Gray*, 6 Met. (Mass.) 131. And see *Spoor v. Tyzzer*, 115 Mass. 40; *Eisenmeyer v. Sauter*, 77 Ill. 515; *Kleine v. Catara*, 2 Gall. (U. S.) 61; *Garvey v. Carey*, 4 Abb. Pr. N. S. (N. Y. Super. Ct.) 159; *Rogers v. Cruger*, 7 Johns. (N. Y.) 557; *Underhill v. Van Cortlandt*, 2 Johns. Ch. (N. Y.) 339; *Roloson v. Carson*, 8 Md. 208; *American Screw Co. v. Sheldon*, 12 R. I. 324; *Davis v. Henry*, 121 Mass. 150; *Rundell v. La Fleur*, 6 Allen (Mass.) 480.

The arbitrator must have been mistaken about some actual fact. Where one arbitrator signed the award drafted by the other arbitrator without reading it, and afterwards found that it did not contain what he supposed, this was held not to be such a mistake as would avoid the award. *Withington v. Warren*, 10 Met. (Mass.) 431.

In *American Screw Co. v. Sheldon*, 12 R. I. 324, it was held that a mistake of fact, which is a ground for setting aside an award, must be a wrong assumption made by the arbitrators, and not a wrong conclusion drawn by them.

Extrinsic Evidence.—In *Barrows v. Sweet*, 143 Mass. 316, it was held that an award might be impeached for mistakes of fact made by the arbitrators which were not apparent upon the face of the award, but were proved by extrinsic evidence. See *Bean v. Farnam*, 6 Pick. (Mass.) 269; *Mickles v. Thayer*, 14 Allen (Mass.) 114; *Boston Water Power Co. v. Gray*, 6 Met. (Mass.) 131.

A Bona Fide Error in Judgment by arbitrators, holding that certain claims were not barred by the statute of limitations, is not an error for which the award will be set aside. *Tenant v. Divine*, 24 W. Va. 387. And see

Portsmouth v. Norfolk County, 31 Gratt. (Va.) 727.

2. **Mistake must Be Apparent and Prejudicial.**—*Alabama.*—*Bumpass v. Webb*, 4 Port. (Ala.) 65, 29 Am. Dec. 274.

Delaware.—*Allen v. Miles*, 4 Harr. (Del.) 234.

Illinois.—*Pulliam v. Pensoneau*, 33 Ill. 375.

New Jersey.—*Green v. Lundy*, 1 N. J. L. 497; *Hartshorne v. Cuttrell*, 2 N. J. Eq. 297.

New York.—*Bissell v. Morgan*, 56 Barb. (N. Y.) 369; *Halstead v. Seaman*, 52 How. Pr. (N. Y. Supreme Ct.) 415; *Platt v. Smith*, 14 Johns. (N. Y.) 368; *Underhill v. Van Cortlandt*, 2 Johns. Ch. (N. Y.) 339.

Pennsylvania.—*Horton v. Stanley*, 1 Miles (Pa.) 418; *M'Calmont v. Whitaker*, 3 Rawle (Pa.) 84, 23 Am. Dec. 102; *Speer v. Bidwell*, 44 Pa. St. 23; *Williams v. Paschall*, 4 Dall. (U. S.) 285.

South Carolina.—*Askew v. Kennedy*, 1 Bailey (S. Car.) 46; *Sumpter v. Murrell*, 2 Bay (S. Car.) 450.

Tennessee.—*Conger v. James*, 2 Swan (Tenn.) 213.

Vermont.—*Learned v. Bellows*, 8 Vt. 79.

Virginia.—*Morris v. Ross*, 2 Hen. & M. (Va.) 408; *Ross v. Overton*, 3 Call (Va.) 309, 2 Am. Dec. 552; *Pollard v. Lumpkin*, 6 Gratt. (Va.) 398, 52 Am. Dec. 128.

Evidence Conflicting.—The award will not be reviewed upon a question of fact where evidence is conflicting, and it is not contrary to the weight of evidence. *Kalbfleisch v. Long Island R. Co.*, 102 N. Y. 520.

Usury.—An award may, however, be objected to on the ground of usury in the computation. *Woods v. Matchett*, 47 Md. 390.

Promise to Correct Error.—Where one of the parties to a submission promises to correct any mistakes which the arbitrators may have made, such promise is without consideration and void. *Efner v. Shaw*, 2 Wend. (N. Y.) 567.

Clerical Errors and the Like.—In *Kleine v. Catara*, 2 Gall. (U. S.) 61, Story, J., said: "If, however, there be an error of fact, as a mistake in calculation, apparent upon the face of an award, or if referees are satisfied that such a mistake has intervened, and wish to correct

(a) **Mistakes of Law.**—Where questions of pure law are submitted directly, the award is final, whether the decision of the arbitrators is in accordance with the opinion of the court or not.¹

(b) **QUALIFICATIONS OF THE RULE**—(1) *When Submission Requires Award According to Law.*—Where the parties, by the express terms of the submission, stipulate and require that the hearing shall be conducted and the award made in conformity with the rules and principles of law, and the arbitrators are mistaken in their finding on the law, the award will be set aside for such mistake.²

the error, although the court will not set aside the award, yet it will recommit it to rectify the mistake."

In other cases, the courts have set aside the award for a misstatement of the amount awarded, on the ground that it was not in fact the arbitrator's award, not being the intentional decision of his mind. *Hellaby v. Brown*, 1 H. & N. 729, 26 L. J. Exch. 217. See *Whitmore v. Smith*, 7 H. & N. 509, 31 L. J. Exch. 107.

Again, in the case of clerical errors, they have disregarded the exact words, and given effect to the evident intention of the arbitrators. *Brown v. Hankerson*, 3 Cow. (N. Y.) 70. See *Higgins v. Kinneady*, 20 Iowa 474; *Moulson v. Rees*, 6 Binn. (Pa.) 32. Or they have assumed that they were utterly immaterial and of no consequence. And it has been held that a correction of an immaterial error made by a stranger left the award in the same state as before such alteration was made. *Trew v. Burton*, 1 Crompt. & M. 533.

In *Bell v. Price*, 22 N. J. L. 578, the award was accompanied by a paper entitled "general result," containing certain calculations which showed how the arbitrators had arrived at their decision. It was alleged that the document showed that an item had been admitted which ought to have been rejected. But the court held that although the paper might be taken as part of the award, yet the error was not one of calculation, nor was it a mistake apparent on the face of the award; it was an independent fact which could be proved only by outside evidence, and could not, for that reason, be reached by proceedings in a court of law, though the court did not feel "called upon to make any inquiry as to the power of courts of equity, upon bill filed, to set aside an award."

Mistakes in charging interest and the like do not furnish a ground for a court of equity to interfere and set aside an award. *Gardner v. Masters*, 3 Jones Eq. (N. Car.) 462.

An error in computation which may be made certain by mathematical calculation will not avoid an award. *Clement v. Foster*, 69 Me. 318.

Variance in Duplicate Awards.—Where documents purporting to be duplicate awards were delivered to the parties, but one showed a material variance from the other in the description of the boundary lines of the premises which were the subject of the submission, both awards were held void, as it was impossible to say which was the real one. *Green v. Lundy*, 1 N. J. L. 497.

But an error in such a case must be an error of substance. Where the omission or mistake

can be supplied or corrected from the context, the award will be sustained, as where the word "dollars" was left out in a counterpart copy of the award delivered to one of the parties. *Platt v. Smith*, 14 Johns. (N. Y.) 368. See *Spofford v. Spofford*, 10 N. H. 254.

1. Mistakes of Law.—*Kleine v. Catara*, 2 Gall. (U. S.) 61; *Jackson v. Ambler*, 14 Johns. (N. Y.) 96; *Cranston v. Kenny*, 9 Johns. (N. Y.) 212; *Campbell v. Western*, 3 Paige (N. Y.) 124; *Greenough v. Rolfe*, 4 N. H. 357; *Smith v. Smith*, 4 Rand. (Va.) 95; *Sherly v. Graham*, 72 Ill. 158.

But it has been held that where the error in law is in a point "universally known and clear," then the decision is "plainly and grossly against law," and is bad. But that if the point "might be doubtful," the award would be sustained. *Cleary v. Coor*, 1 Hayw. (N. Car.) 225. See *Morris v. Ross*, 2 Hen. & M. (Va.) 408; *Ross v. Overton*, 3 Call (Va.) 309, 2 Am. Dec. 552; *Pollock v. Sutherland*, 25 Gratt. (Va.) 95.

In *Bell v. Price*, 22 N. J. L. 578, it was held that the court would interfere in case of a mistake in law, only where it was apparent upon the submission or award that the arbitrators were bound or intended to decide according to law.

In *Walker v. Walker*, 1 Winst. (N. Car.) 259, it was held that if an arbitrator makes a mistake in law as to what is submitted to him, his award will be void; that is, if by such error he was induced to embrace within his award a matter not submitted to him or to reject one which was submitted; but otherwise not. A mistake in law in a matter within the scope of his authority would not of itself affect the award.

Presumptions.—It will be presumed that the arbitrators have decided according to the law, if there is no proof, in relation to the proceedings before them, showing that they have not done so. *Smith v. Stewart*, 5 Ind. 220. See *Mitchell v. Bush*, 7 Cow. (N. Y.) 185; *Merritt v. Merritt*, 11 Ill. 565.

Question for the Court.—Whether an award is or is not illegal upon its face, is a question of law for the court. It is not a question of fact to be submitted to the jury. *Cobb v. Morris*, 40 Ga. 671.

2. Express Stipulation for Award According to Law.—See, for the general principles, *Kleine v. Catara*, 2 Gall. (U. S.) 61; *Johnson v. Noble*, 13 N. H. 286, 38 Am. Dec. 485; *Bean v. Wendell*, 20 N. H. 213; *White Mountains R. Co. v. Beane*, 39 N. H. 107; *Walker v. Sanborn*, 8 Me. 288; *Brown v. Clay*, 31 Me. 518; *Com. v. Roxbury*, 9 Gray (Mass.) 451.

Arbitrator to State Case for Opinion of Court.—So where the submission specifically requires that the arbitrator, at the request of the parties, shall state the case for the opinion of the court, the award must set out all such facts as will raise all the questions of law, or it will be void.¹

Award to be Made "upon Just and Legal Grounds."—In *Greenough v. Rolfe*, 4 N. H. 357, the case was submitted with the stipulation that the arbitrators should decide it "upon just and legal grounds." The court held that they were bound to decide it according to the law, and that it would necessarily presume that they intended to make the law their guide, and, if they had mistaken the law, the award would have to be set aside.

Award to be Made "In Accordance with the Law."—Where the submission provided that the award should be "in accordance with the law," and the arbitrators began by assuming the existence of a fact on which they ought to have decided, and, instead of applying the law properly to the fact, assuming that the fact was proved, they did directly the opposite, it was held that "this was manifestly a gross mistake of law, which led the arbitrators to decide the case on a false issue. On well settled principles, the award is void." *Estes v. Mansfield*, 6 Allen (Mass.) 69.

Award to Be "upon Equitable as Well as upon Legal Principles."—Where, by the terms of the submission, the arbitrators were to decide upon equitable as well as upon legal grounds, their award will be void if it shows that equitable considerations which would have led them to a different decision were, through mistake, altogether disregarded by them. *Prescott v. Fellows*, 41 N. H. 9, 77 Am. Dec. 752. See *Johnson v. Noble*, 13 N. H. 286, 38 Am. Dec. 485; *Greenough v. Rolfe*, 4 N. H. 357, *distinguished*.

Question whether Such Stipulations Directory or Mandatory.—The point has been raised in some cases whether a stipulation in a submission that the arbitrators shall decide according to rules of law is directory or mandatory. Where the stipulation was that "the said referees are to determine all questions according to the rules of law and equity, the same as though the matter was to be tried in a court of equity," the court, in construing the clause, said: "One of the principal questions made in the case is, whether this clause is to be interpreted as a limitation of the power of the arbitrators, or whether it is merely directory. If it is directory, it leaves them to be the ultimate judges as to how the matter would be tried in a court of law or equity, and thus makes their decision final and conclusive, as the parties agree it shall be. But if it is a limitation of their power, then the award is not final or conclusive; but this court is the ultimate tribunal to decide how the principal questions ought to be settled. It is an objection to this view, that the only power thus left to this court is of a destructive character in case of our disagreement with the arbitrators. We may destroy the award, but have no power to correct it." The court held the stipulation to be directory. *Mickles v. Thayer*, 14 Allen (Mass.) 114. See also the observations

of Chief Justice Shaw in *Bigelow v. Newell*, 10 Pick. (Mass.) 348.

The Broad Rule That may be Deduced from the Cases is stated in *Boston Water Power Co. v. Gray*, 6 Met. (Mass.) 131, by Shaw, C. J., where he says: "If the submission be of a certain controversy, expressing that it is to be decided conformably to the principles of law, then both parties proceed upon the assumption that their case is to be decided by the true rules of law, which are presumed to be known to the arbitrators, who are then only to inquire into the facts, and apply the rules of law to them and decide accordingly. Then if it appears by the award, to a court of competent jurisdiction, that the arbitrators have decided contrary to law—of which the judgment of such a court, when the parties have not submitted to another tribunal, is the standard—the necessary conclusion is that the arbitrators have mistaken the law, which they were presumed to understand; the decision is not within the scope of their authority, as determined by the submission, and is for that reason void. But when the parties have expressly, or by reasonable implication, submitted the questions of law as well as the questions of fact arising out of the matter of controversy, the decision of the arbitrators on both subjects is final."

Where Submission and Statute Contradictory.—Where a case pending was referred to arbitration by rule of court, the award to be final without appeal to any court, "except for fraud, accident, or mistake," and the arbitration to be carried out in accordance with the provisions of *Georgia Statute of 1856*, and subsequently other matters between the parties as well as the suit were referred to arbitration by an agreement out of court, which recited the former reference, and provided that the arbitrators should be subject to the statute mentioned and to the rule of court, it was held that although the statute allowed the award to be impeached only for fraud, it might be impeached also for accident or mistake, "according to the rule of reference." *South Carolina R. Co. v. Moore*, 28 Ga. 398, 73 Am. Dec. 778.

1. Stating Case for Court.—*Russell on Awards* (6th ed.) 325; *Bradbee v. Christ's Hospital*, 4 M. & G. 714, 43 E. C. L. 368; *Sheridan v. Nagle*, 6 Ir. Rep. C. L. 110.

However, where the arbitrator stated some abstract legal propositions contended for by the defendant, certifying that he had overruled them, the court upheld his ruling, and refused to refer back the award in order that he might set out the facts on which the questions of law arose. *Jay v. Byles*, 3 M. & Sc. 86.

Where the arbitrator clearly intended to leave a question of law to be decided by the court, although he actually determined it in one part of his award, the court will consider and pass upon it. *Sherry v. Oke*, 3 Dowl. 349.

Award to be Subject to Review by Court.—If the arbitrators are authorized to pass upon both the law and the facts, but at the same time the award shall be subject to the review and final adjudication of all matters of law in the cause by the court, and the arbitrators make a mistake in the law, the award will be set aside.¹

It is not necessary that the arbitrator should himself decide the legal questions he reserves for the opinion of the court. *Richards v. Easto*, 15 M. & W. 244; *Grocers Co. v. Doune*, 3 Bing. N. Cas. 34, 32 E. C. L. 27.

But he should decide positively the question of fact upon which the legal opinion is to be based. *Ferguson v. Norman*, 4 Bing. N. Cas. 52, 33 E. C. L. 276.

Hypothetical Award.—The arbitrator may award hypothetically, as when, after setting forth the facts, he states the questions on which he requires the opinion of the court, and concludes by awarding that if the court shall decide a question in one way then he awards that certain acts shall be done, but if the court holds a different opinion then he awards in another way. *Waller v. Lacy*, 1 M. & G. 54, 39 E. C. L. 349; *Arnold v. Poole*, 4 M. & G. 860, 43 E. C. L. 444.

In *In re Wright and Cromford Canal Co.*, 1 Q. B. 98, 41 E. C. L. 454, Lord Denman, C. J., expressed a doubt as to whether, if the court disagreed with the arbitrator, a hypothetical award could stand, or whether it should not be set aside altogether. However, such awards have been held final, and compared to the finding of a jury on a special verdict. *Scott v. Van Sandau*, 6 Q. B. 237, 51 E. C. L. 237.

The arbitrator ought to provide for the event of the court differing from him in opinion, because if he finds for the plaintiff, and finds facts which show that the plaintiff ought to have been nonsuited, the court can only set aside the award, and cannot direct a nonsuit, and so the whole litigation becomes fruitless. *Peters v. Anderson*, 1 Marsh. 238.

But if, after finding for the plaintiff, he directs that if the court differs from him the verdict shall be entered for the defendant, the decision of the court in the defendant's favor will entitle him, in many cases, to have the verdict entered for him. *France v. White*, 8 Dowl. 53; *Waller v. Lacy*, 1 M. & G. 54, 39 E. C. L. 349; *Arnold v. Poole*, 4 M. & G. 860, 43 E. C. L. 444; *In re Webb*, 8 Taunt. 443, 4 E. C. L. 159; *Bradbee v. Christ's Hospital*, 4 M. & G. 714, 43 E. C. L. 368. See *supra*, this title, *Alternative Award*.

When in Arbitrator's Discretion.—Sometimes the submission provides that the arbitrator shall "be at liberty to raise any point for the opinion of the court at the request of either of the parties;" in such a case, it is a matter in his discretion to do so if he sees fit. *Wood v. Hotham*, 5 M. & W. 674. See *Miller v. Shuttleworth*, 7 C. B. 105, 62 E. C. L. 105.

In *Jay v. Byles*, 3 M. & Sc. 86, where the submission stipulated that the arbitrator "shall state points of law," it was treated as directory, not compulsory. As to the arbitra-

tor's discretion in deciding as to the admissibility of evidence and reserving points of law for the opinion of the court, see *Scott v. Van Sandau*, 1 Q. B. 102, 41 E. C. L. 456.

In *Jephson v. Howkins*, 2 M. & G. 366, 40 E. C. L. 414, it was held that where the arbitrator may report to the court in his discretion, he should not state the evidence, merely leaving it to the court to find the facts; it is his duty to draw the necessary inferences of fact.

Stating Special Case under Statute.—In *England* there are special statutory provisions enabling the arbitrator to state a special case for the opinion of the court. See *Russell on Awards* (6th ed.) 323, 325; 17 and 18 Vict., c. 125, § 5; 36 and 37 Vict., c. 66; 38 and 39 Vict., c. 77, Order xxxvi., § 34; *Collins v. Paddington Vestry*, 5 Q. B. Div. 368; *Shubrook v. Tufnell*, 46 L. T. N. S. 749; *London Dock Co. v. St. Paul's Shadwell*, 32 L. J. Q. B. 30; *Rhodes v. Airedale Drainage Com'rs*, 1 C. P. Div. 402; *In re Dare Valley R. Co.*, L. R. 4 Ch. 554; *In re Newbold and Metropolitan R. Co.*, 14 C. B. N. S. 405, 108 E. C. L. 405; *Gumm v. Fowler*, 29 L. J. Q. B. 189; *Jones v. Victoria Graving Dock Co.*, 2 Q. B. Div. 374; *Mirabita v. Imperial Ottoman Bank*, 22 Sol. Journal 237; *Bidder v. North Staffordshire R. Co.*, 4 Q. B. Div. 412; *In re Great Britain Mut. L. Assur. Soc.*, 19 Ch. Div. 39; *Dunkirk Colliery Co. v. Lever*, 9 Ch. Div. 20.

It is not compulsory on the arbitrator to state a case on the demand of the party under the provisions of 17 and 18 Vict., c. 125, § 5. *Gibbon v. Parker*, 5 L. T. N. S. 584; *Baggallay v. Borthwick*, 30 L. J. C. P. 342, 10 C. B. N. S. 61, 100 E. C. L. 61; *Holloway v. Francis*, 9 C. B. N. S. 559, 99 E. C. L. 559.

1. Award to Be Subject to Review by Court.—*Morse Arb. and Award* 303; *Com. v. Roxbury*, 9 Gray (Mass.) 451. In this case, the submission was entered into by rule of court and agreement of the parties, the finding to be "subject to the review and final adjudication of all matters of law in the cause by the court," and the referee reported the facts, finding in favor of one of the parties; the court accepted his finding of the facts, but gave judgment for the other party without recommitting the award, on the ground that he had been mistaken in the law.

In *Knight v. Wilder*, 2 Cush. (Mass.) 199, 48 Am. Dec. 660, it was held that arbitrators appointed under a rule of court may submit a question of law to the court, if they think proper, and it is evident that when they do submit such a question to the court, it is their intention to be bound by the law; and if it appears that they have decided contrary to the law under those circumstances, then the award does not express their real decision, and may be set aside.

(2) *Where the Award Sets Out the Reasons of the Decision.*—Formerly, where the arbitrator set out the reasons of his decision in the award, the courts assumed that he thereby intended to intimate that he had decided according to the law; and if, upon consideration of such reasons, they found that he had proceeded on principles contrary to the law, they set the award aside.¹

Present Rule in England.—But it appears that at the present time in England, the courts will not examine the reasons of the arbitrator's decision, unless he is expressly authorized by the submission to state a point of law for their review.²

1. Award Containing Reasons of Arbitrators—

Early Rule.—*Pratt v. Hilman*, 4 B. & C. 269, 10 E. C. L. 331; *Sharman v. Bell*, 5 M. & S. 504; *Williams v. Jones*, 5 M. & R. 3; *Ames v. Milward*, 8 Taunt. 637, 4 E. C. L. 234; *Kent v. Elstob*, 3 East 18; *Gaby v. Wilts*, etc., Canal Co., 3 M. & S. 580; *Wood v. Hotham*, 5 M. & W. 674. See also *Fuller v. Fenwick*, 3 C. B. 705, 54 E. C. L. 705; *Toby v. Lovibond*, 17 L. J. C. P. 201; *Young v. Walter*, 9 Ves. Jr. 364; *Broadhurst v. Darlington*, 2 Dowl. 38; *Muldrow v. Norris*, 2 Cal. 74, 56 Am. Dec. 313; *Heuitt v. State*, 6 Har. & J. (Md.) 95, 14 Am. Dec. 259; *Kelly v. Johnson*, 3 Wash. (U. S.) 45; *Bumpass v. Webb*, 4 Port. (Ala.) 65, 29 Am. Dec. 274; *Nance v. Thompson*, 1 Sneed (Tenn.) 321; *Leavitt v. Palmer*, 3 N. Y. 19, 51 Am. Dec. 333; *Smith v. Kron*, 109 N. Car. 103.

Presumption.—In *Kleine v. Catara*, 2 Gall. (U. S.) 61, Story, J., said that where the referees state the principles or reasons on which they have based their decision, it will be presumed that they intended to decide according to law, and that in setting out their reasons they submitted them to the court for review, and consequently the courts were bound to inquire whether a mistake of law had been made, and that if such mistake should appear, the award would be set aside. See also *Pleasants v. Ross*, 1 Wash. (Va.) 156, 1 Am. Dec. 449; *Lavell v. Gold*, 25 Gratt. (Va.) 473; *Grigsby v. Weaver*, 5 Leigh (Va.) 205.

As Arbitrators are Not Bound to Decide According to Strict Law, it is only when they refer some point to judicial inquiry by spreading it on the face of the award, and mistake the law in a palpable and material point, that an award will be set aside. *Ruckman v. Ransom*, 23 N. J. Eq. 118.

In Pennsylvania it has been Held that where arbitrators, appointed under a rule of court by which their award was to be final, have appended a statement of facts to their award which shows the grounds on which they proceeded, such statement is not the subject of review by the Supreme Court; but the court below, on a rule to set aside such award, may interfere where injustice has been done, without inquiring particularly into the admission or rejection of evidence by the arbitrators; and if the court below refuses to interfere, the party is without further remedy. But if the mistake had appeared on the face of the award itself, the Supreme Court might have interfered. *Murray v. Henrie*, 11 Pa. St. 412.

Arbitrator Mistaken on His Own Theory.—In *Spoor v. Tyzzer*, 115 Mass. 40, it was held that, in an arbitration to determine the

boundary between two estates, the award might be impeached by showing that the arbitrator made a mistake upon his own theory, but not by showing that he erred in judgment, or made a mistake as to the true beginning corner. See *Carter v. Carter*, 109 Mass. 306; *Davis v. Henry*, 121 Mass. 150.

2. Award Stating Principles of the Decision.—**Present Rule in England.**—*Russell on Awards* (6th ed.) 322; *In re Wright and Cromford Canal Co.*, 1 Q. B. 98, 41 E. C. L. 454.

Where the arbitrator, without being expressly empowered to state facts for the purpose of raising a point of law for the court, made such a statement, professing to ground his decision upon it, but the facts did not warrant the conclusion at which he arrived, or the reasons given by him were unsatisfactory, the court declined to draw any conclusions so as to impeach the award, and sustained it where it contained a positive determination of the matters in difference. *Archer v. Owen*, 9 Dowl. 341.

The court also upheld the award where there was a finding upon evidence which a judge would have been satisfied to leave to a jury. *Barrett v. Wilson*, 1 C. M. & R. 586, 3 Dowl. 220; *Archer v. Owen*, 9 Dowl. 341.

It has been held in some cases that the courts will not presume that there were no facts to warrant the conclusion at which the arbitrator arrived, except those set out in the award; he may have had reasons of his own for stating certain facts only, as in order to clear the character of a party from imputation. *Lancaster v. Hemington*, 4 Ad. & El. 345, 31 E. C. L. 85; *Teale v. Younge*, McClell. & Y. 497.

Where Statements of Fact have been Made without Authority, the courts have sometimes refused to interfere, even when their opinion was invited. *Barton v. Ranson*, 3 M. & W. 322; *Bradbee v. Christ's Hospital*, 4 M. & G. 757, 43 E. C. L. 390; *In re Wright and Cromford Canal Co.*, 1 Q. B. 98, 41 E. C. L. 454; *Scott v. Van Sandau*, 6 Q. B. 237, 51 E. C. L. 237.

Where the Arbitrator Makes an Unnecessary Statement of fact, although such fact be the basis of the award, the statement will not render the award void, and will be rejected as surplusage. *Harrison v. Lay*, 13 C. B. N. S. 528, 106 E. C. L. 528.

Where, however, the arbitrator stated the facts without making any finding expressly adjudicating on the points in difference, stating merely: "If on these facts the court be of opinion the plaintiff is entitled, then I award in favor of the plaintiff; but if the

Present Rule in United States.—And in the United States the courts are inclined to hold, even where the award sets out the reasons of the arbitrator's decision, that they have no right to review the award, unless it distinctly appears from the statement of the reasons of the decision that the arbitrator thereby intended to submit his conclusion as matter of law to the court.¹

(3) *Where the Arbitrator Expresses an Intention to be Governed by Law.*—If the arbitrator states expressly in his award that it was his intention to decide according to the rules and principles of the law, the court will review the principles upon which he based his decision, and will set the award aside if he was mistaken in the law.²

court think the defendant entitled, then I award in favor of the defendant," the award was held not final, and bad. *In re Wright and Cromford Canal Co.*, 1 Q. B. 98, 41 E. C. L. 454.

1. Award Setting Forth Arbitrator's Reasons.—Present Doctrine in United States.—In *Fairchild v. Adams*, 11 Cush. (Mass.) 555, the court, by Shaw, C. J., said: "But it is argued * * * that if the arbitrators state the grounds of their award simply, and without expressing the contrary, it is to be presumed that they do mean to submit those grounds to the court. This is to be taken with some qualification. If they state the grounds of their decision avowedly for the satisfaction of the parties, or one of them, and it distinctly appears that they do not intend to submit their conclusions as matter of law to the court, then the award is conclusive. The question is as to the intent of the arbitrators. Perhaps, where they say nothing in regard to their intent, the presumption is that they intend to say: 'These are the grounds of our award; if they are right in point of law, we think the award is right, but we submit the question to the court.' In such a case, the court might revise and set aside the award, if it were found not to be well grounded in point of law, because it would not then be the award which the arbitrators intended to make." See *Ward v. American Bank*, 7 Met. (Mass.) 486; *Bigelow v. Newell*, 10 Pick. (Mass.) 348.

In *Smith v. Boston, etc., R. Co.*, 16 Gray (Mass.) 521, where a general submission was entered into by bond, the award "to be final and binding on the parties," and the award was not returned into court, and did not submit questions of law to the decision of the court directly, although the arbitrators "at the request of" one of the parties annexed "a statement of the facts and principles upon which the foregoing award was made," "to be taken as a part of said award," it was held that the finding of the arbitrators was conclusive, and that the court would not examine the questions of law arising upon the annexed statement, especially when the facts were complicated and the questions of law doubtful. The court, by Dewey, J., remarked: "The arbitrators undoubtedly intended to give publicity to their reasons for the award they had made, holding themselves responsible as men of intelligence and learning in the matter submitted to them. But there must be something beyond this to establish the position that they made this supplement to their award in order that it might appear whether

they had decided according to law. It must appear that they made the statement for the purpose that their award might be inoperative if it appeared that they had not decided according to law as held by judicial tribunals. For aught that appears, this board of arbitrators intended to make an award based upon their own views of the law and facts of the case, irrespectively of the law of the books. * * * We fail to perceive any indications of a purpose on the part of the arbitrators to state a case for revision or correction in matters of law if they had erred respecting the same."

In *Cutting v. Stone*, 23 Vt. 571, the referee in his report stated the reasons of his decision, without adding that he intended to decide the case according to the strict rules of law, and the court held that no question could be raised in regard to any question of law decided by the referee.

Intention of Arbitrator.—However, the judicial mind is not always so clear upon this point, and the matter seems to resolve itself into the question: What was the real intention of the arbitrator?

In *Boston Water Power Co. v. Gray*, 6 Met. (Mass.) 168, the court, by Shaw, C. J., said: "Where it is manifest upon the award itself that the arbitrator intended to decide according to law, but has mistaken the law, then the award is set aside, because it is manifest that the result does not conform to the real judgment of the arbitrator. For then, whatever his authority was to decide the questions of law, if controverted, according to his own judgment, the case supposes that he intended to decide as a court of law would decide, and, therefore, if such decision would be otherwise, it follows that he intended to decide the other way." See also *Johnson v. Noble*, 13 N. H. 286, 38 Am. Dec. 485; *U. S. v. Ames*, 1 Woodb. & M. (U. S.) 76.

2. Award Declaring Arbitrator's Intention to Decide According to Rules of Law.—*Morse Arb. and Award* 305; *Aubert v. Maze*, 2 B. & P. 371; *Delver v. Barnes*, 1 Taunt. 48; *Kent v. Elstob*, 3 East 18; *Young v. Walter*, 9 Ves. Jr. 365; *Johns v. Stevens*, 3 Vt. 308; *King v. Neuse Mfg. Co.*, 79 N. Car. 360; *Ryan v. Blount*, 1 Dev. Eq. (N. Car.) 386; *Leach v. Harris*, 69 N. Car. 532; *Patton v. Baird*, 7 Ired. Eq. (N. Car.) 255; *Johnson v. Noble*, 13 N. H. 286, 38 Am. Dec. 485; *Crissman v. Crissman*, 5 Ired. (N. Car.) 502; *Moore v. Luckess*, 23 Gratt. (Va.) 160.

In *Cushman v. Wooster*, 45 N. H. 410, a referee, in an affidavit annexed to his report,

c. WHEN EVIDENCE OF MISTAKE MAY BE ADMITTED.—The rule as to how far extrinsic evidence, or statements made by the arbitrators subsequent to the award, may be admitted to show mistake of law or fact, is not very clear. In the older cases, such evidence was sometimes admitted,¹ and the affidavits of the arbitrators even required.²

Mistakes Not Apparent on Face of Award.—But although such evidence is sometimes admitted,³ the courts at the present time are not disposed to allow

stated that he presented the facts in his report and his ruling thereon, expecting "that the court would review the questions there decided, and sustain or set aside the report, as they might consider the questions of law decided by me right or wrong." The court said that "a plainer case could not well be stated;" that the correctness of his ruling on the law had been expressly left to the court, and that if he was in error as to the law the report could not be sustained.

But in *Learned v. Bellows*, 8 Vt. 79, where the referees' report concluded with the statement that "in all things they intended to decide according to law," Redfield, J., said that it was becoming the common practice for referees to conclude their reports with the same or similar words, and that it would be intolerable if such a clause had the effect of bringing their award before the court every time to determine whether they were right or wrong in the law. The cases of *Johns v. Stevens*, 3 Vt. 308, and *Hazeltine v. Smith*, 3 Vt. 535, had only established the principle that if referees adopt any rule, whether of law, equity, or arithmetic, and fail in applying it so as to come to a different conclusion from that at which they would arrive by applying their rule correctly, and this was fully proved, the court would not accept their report.

If referees make mistakes in applying their own principles, the award will be set aside. *Allen v. Ranney*, 1 Conn. 569.

Expression Not Amounting to Declaration of Such Intention.—In *Smith v. Thorndike*, 8 Me. 119, where the arbitrators reported upon a written statement of facts that one party was "legally entitled" to a certain sum, their decision was held to be final and not liable to be reviewed for a mistake in law, the court probably assuming that it did not amount to an express assertion that the arbitrators intended to decide according to the principles of law. See also *Wyatt v. Lynchburg, etc.*, R. Co., 110 N. Car. 245.

Award Containing Conflicting Propositions of Law.—Presumption.—Where an arbitrator, who intended to decide the questions submitted to him according to law, stated in his award two propositions of law, one of which was erroneous, and the other correct upon the facts as he thought them to be, the court, in reviewing his award, will presume that it was based on the view which was correct, and it cannot inquire whether he took a correct view of the facts. *Willoughby v. Thomas*, 24 Gratt. (Va.) 521.

Extrinsic Evidence.—In *Fain v. Headerick*, 4 Coldw. (Tenn.) 338, it was held that if the arbitrators undertake to decide strictly upon legal principles and mistake the law, the award

will be set aside, although such mistake is shown by extrinsic evidence. See further, *State v. Ward*, 9 Heisk. (Tenn.) 100; *Moore v. Luckess*, 23 Gratt. (Va.) 160; *Nance v. Thompson*, 1 Sneed (Tenn.) 321.

1. Extrinsic Evidence to Show Mistake.—Rule of the Early Cases.—Russell on Awards (6th ed.) 316; *Kent v. Elstob*, 3 East 18; *Sharman v. Bell*, 5 M. & S. 504; *Holmes v. Higgins*, 1 B. & C. 74, 8 E. C. L. 33; *Pratt v. Hilman*, 4 B. & C. 269, 10 E. C. L. 331; *Toby v. Lovibond*, 17 L. J. C. P. 201; *The Ayre and Calder Nav. Case*, cited in *Williams v. Jones*, 5 M. & R. 3; *Jones v. Corry*, 5 Bing. N. Cas. 187, 35 E. C. L. 79. Compare *London Dock Co. v. St. Paul's Shadwell*, 32 L. J. Q. B. 30.

Illustrations.—Where the question referred was the injury done to a ship at sea, the arbitrator delivered with his award a paper in which he set out the reasons of his decision, and which the court treated as embodied in the award, and, as he had acted on some marine law and not on the law of England, they set the award aside for the mistake. *Kent v. Elstob*, 3 East 18; *Sharman v. Bell*, 5 M. & S. 504.

Even a letter in which the arbitrator showed that the award extended to matters not within the submission was admitted, and the award set aside in consequence. *The Ayre and Calder Nav. Case*, cited in *Williams v. Jones*, 5 M. & R. 3.

Extrinsic evidence, adduced with a view of setting the award aside, is admissible to prove mistakes in matters of law made by the arbitrators. *Claypool v. Miller*, 4 Blackf. (Ind.) 163.

But in Other Older Cases Such Statements have been Rejected.—As, a letter of the arbitrator, *Williams v. Jones*, 5 M. & R. 3; *Brown v. Nelson*, 13 M. & W. 397; a letter from a barrister who was arbitrator, *In re Keene and Atkinson*, Exch. April 16, 1847; the letter of an umpire, *Leggo v. Young*, 16 C. B. 626, 81 E. C. L. 626, 24 L. J. C. P. 200; a statement to explain the award, *Gordon v. Mitchell*, 3 Moore 41; and a paper delivered with the award to limit the verdict, *Doe v. Cropper*, 10 Ad. & El. 197, 37 E. C. L. 90.

2. In Some Cases Affidavits of Arbitrators Required.—*Knox v. Symmonds*, 1 Ves. Jr. 369; *Delver v. Barnes*, 1 Taunt. 48; *Payne v. Bailey*, 7 Moore 147; *Potter v. Newman*, 4 Dowl. 504; *Wade v. Huntley*, 2 Tidd. Pr. 841 (9th ed.); *Hardy v. Ringrose*, 1 H. & W. 185; *Rogers v. Dallimore*, 6 Taunt. 111; *Ward v. Dean*, 3 B. & Ad. 234, 23 E. C. L. 59; *Anonymous*, 2 Chit. Rep. 44, 18 E. C. L. 244; *Anderson v. Darcy*, 18 Ves. Jr. 447.

3. Although a mistake of fact does not appear upon the face of the award, yet such

such evidence or statements to be admitted with a view to having awards set aside for mistakes of law or fact not apparent upon the face of the awards themselves.¹

Inquiry of Arbitrators as to Grounds of Decision—England.—Sometimes in England, under peculiar circumstances, the court will inquire of the arbitrator upon what grounds he made his award, if the parties do not object, or if they directly consent to the inquiry.²

d. EFFECT OF ACQUIESCENCE.—Where a party, with full knowledge of the facts on which he relies for the impeachment of the award, has nevertheless accepted and executed the award, it will not be set aside because of the objections made by him.³

mistake may be proved by extrinsic evidence, and the proof of a mistake of fact which is enough to set aside an award in a court of equity is competent to impeach it in an action at law. *Barrows v. Sweet*, 143 Mass. 316; *Bean v. Farnam*, 6 Pick. (Mass.) 269; *Boston Water Power Co. v. Gray*, 6 Met. (Mass.) 131; *Mickles v. Thayer*, 14 Allen (Mass.) 114; *Brown v. Bellows*, 4 Pick. (Mass.) 179. See also *Fam v. Headerick*, 4 Coldw. (Tenn.) 327; *Bean v. Wendell*, 20 N. H. 213; *Bouck v. Wilber*, 4 Johns. Ch. (N. Y.) 405; *Boston Water Power Co. v. Gray*, 6 Met. (Mass.) 131; *Jones v. Boston Mill Corp.*, 6 Pick. (Mass.) 155; *Hurst v. Hurst*, 1 Wash. (U. S.) 56; *North Yarmouth v. Cumberland*, 6 Me. 26; *In re Hall and Hinds*, 2 M. & G. 847, 40 E. C. L. 656; *Hale v. Handy*, 26 N. H. 215.

1. When Mistake Not Apparent on Face of Award.—*Leggo v. Young*, 16 C. B. 626, 81 E. C. L. 626, 24 L. J. C. P. 200; *Hodge v. Burgess*, 3 H. & N. 293, 27 L. J. Exch. 318, explained in *Holgate v. Killick*, 7 H. & N. 418, 31 L. J. Exch. 7; *Dinn v. Blake*, L. R. 10 C. P. 388; *Pleasants v. Ross*, 1 Wash. (Va.) 156, 1 Am. Dec. 449; *Hartshorne v. Cuttrell*, 2 N. J. Eq. 297; *Brickhouse v. Hunter*, 4 Hen. & M. (Va.) 363, 4 Am. Dec. 528; *Goldsmith v. Tilly*, 1 Har. & J. (Md.) 361; *Wyatt v. Lynchburg, etc., R. Co.*, 110 N. Car. 245.

In *Bennett v. Murray*, 5 Nova Scotia 614, it was held that parol evidence would not be admitted to explain an award.

Generally, the testimony of arbitrators to impeach their own award is inadmissible. *Bigelow v. Maynard*, 4 Cush. (Mass.) 317.

In *Kleine v. Catara*, 2 Gall. (U. S.) 61, Story, J., made it a *quære* whether extrinsic evidence is admissible to show an error in law not apparent on the face of the award.

In *Boston Water Power Co. v. Gray*, 6 Met. (Mass.) 131, it was ruled in the court below that gross mistakes, such as would avoid the award, might be proved by outside evidence; and that it might be shown that the arbitrators, "through inadvertence or mistake, assumed a fact as true which was not true, or overlooked some material fact which was true, in either case affecting their decision." But this ruling of the lower court was not excepted to, and, upon appeal, was not affirmed by the decision in the case.

Where the Arbitrator was Summoned as a Witness to prove a mistake in his own understanding of the decision of the other arbitrators, and he thought that he had agreed to

charge a certain sum for rent for five years, whereas the award charged a greater sum for ten years, his evidence was rejected. The court, by Shaw, C. J., said: "It appears to us that this would be inadmissible, on many grounds. * * * The most the witness could say was, that, according to his present recollection, he understood the agreement of the arbitrators at their conference [to be] to charge a certain rent for five years; when, by his formal and solemn act done at the time, in concurrence with the other arbitrators, in a form binding on the rights of the parties, he has declared that they agreed to allow rent for ten years. He could not be received thus by his parol testimony to contradict his formal award in writing." *Withington v. Warren*, 10 Met. (Mass.) 431. See *Campbell v. Western*, 3 Paige (N. Y.) 124.

Where the question was raised as to whether a referee might be summoned to testify as to the evidence on which he had made his report, so that the court might judge of the correctness of his inferences of fact and conclusions of law, the court, by Shaw, C. J., said that such a proceeding could not be allowed. "Formerly, it is believed, it was not unfrequent to call upon referees thus to testify, with a view to prevent the acceptance of their report; but we think it contrary to the principle on which such references proceed, and opposed by the most recent and satisfactory decisions." *Ward v. American Bank*, 7 Met. (Mass.) 486.

2. See Russell on Awards (6th ed.) 319; *In re Brown and Croydon Canal Co.*, 9 Ad. & El. 522, 36 E. C. L. 188; *R. v. Brewer*, Q. B. June 11, 1845; *Holden v. Newman*, 13 East 161; *Squibb v. Bolton*, Cas. in Ch. 186; *Alder v. Savill*, 5 Taunt. 453; *In re Dare Valley R. Co.*, L. R. 6 Eq. 429. Compare *Morgan v. Mather*, 2 Ves. Jr. 15.

See *supra*, this title, *The Arbitrator as a Witness*.

3. Acquiescence.—*DeCastro v. Brett*, 56 How. Pr. (N. Y. Supreme Ct.) 484.

Where an error made by the arbitrators has once been acquiesced in by the parties, the only remedy to correct it is a direct action of nullity. *Peniston v. Somers*, 15 La. Ann. 679. See *Norris v. Fristoe*, 3 La. Ann. 646.

Where an Amended Award has been Made with the consent of the parties it is not void on the ground that the arbitrators had no power, after having made and filed their

13. Recommitment of the Award.—*a.* **POWER OF COURTS TO RECOMMIT.**—When an award is made under a rule of court in a suit pending, the court has power to recommit the award to the arbitrators.¹ By some statutes, a power to recommit an award is expressly conferred upon the court;² under other statutes, it has been held not to exist.³ In some early cases, the authority of the court to recommit an award was denied,⁴ and this led to the insertion

award, to meet again and review the case, where the amendment is of mere formal matters, miscalculations, or mistakes. The rule is that the power of the arbitrators is at an end when the award is made, but this is not without exceptions, as to amending formal defects, etc., and in this case the parties confirmed it by acquiescence. *Fortune v. Killebrew* (Tex. Civ. App. 1893), 21 S. W. Rep. 986.

1. *Kleine v. Catara*, 2 Gall. (U. S.) 61; *Adams v. Adams*, 8 N. H. 92; *Yeaton v. Brown*, 52 N. H. 14; *Thompson v. Warder*, 4 Yeates (Pa.) 336; *Snyder v. Hoffman*, 1 Binn. (Pa.) 43; *Etter v. Edwards*, 4 Watts (Pa.) 63.

In *Kleine v. Catara*, 2 Gall. (U. S.) 61, Story, J., said: "The clear result of the authorities is that the judgment of the referees is conclusive in all matters of fact, and upon principle it seems difficult to hold another doctrine without destroying the whole object, as well as the authority, of the arbitration. If, however, there be an error of fact, as a mistake in calculation, apparent upon the face of an award, or if referees are satisfied that such a mistake has intervened, and wish to correct the error, although the court will not set aside the award, yet it will recommit it to rectify the mistake."

In Maine recommitments of reports made under a rule of court or under a submission before a justice in accordance with the Maine R. S., c. 108, are proper whenever, in the opinion of the court, the purposes of justice require such a course. *Cumberland v. North Yarmouth*, 4 Me. 459. See *Brann v. Vassalboro*, 50 Me. 64.

In Massachusetts the same rules prevail where the reference is pursuant to a rule of court or before a justice under the statute of 1786 (see Mass. R. S., c. 114). *Boardman v. England*, 6 Mass. 70; *May v. Haven*, 9 Mass. 325; *Blood v. Robinson*, 1 Cush. (Mass.) 389.

2. See *Iowa Rev. Code* 1888, § 3427; *Brown v. Harper*, 54 Iowa 549; *Maine R. S.* 1883, c. 108, § 5; *Massachusetts R. S.*, c. 114, § 9; *Blood v. Robinson*, 1 Cush. (Mass.) 389; *Minnesota Gen. Stat.*, c. 89, § 11; *Johnston v. Paul*, 22 Minn. 17; *Pennsylvania Arbitration Act* 1836, § 7 (1 Pepper & Lewis Dig., tit. Arbitration, § 7, p. 162); *Coleman v. Lukens*, 3 W. & S. (Pa.) 37; *Brooke v. Bannon*, 3 W. & S. (Pa.) 384; *Rogers v. Playford*, 12 Pa. St. 181; *Kidd v. Emmett*, 72 Pa. St. 150; *Heslop v. Bush*, 80 Pa. St. 72; *Graham v. Graham*, 9 Pa. St. 254; *Gunn v. Bowers*, 126 Pa. St. 552; *Rank v. Rank*, 21 W. N. C. (Pa.) 399; *Ontario R. S.* 1887, c. 53, § 37; *Green v. Citizens Ins. Co.*, 18 Can. Sup. Ct. 338.

In England authority to recommit was granted by statute of 17 and 18 Victoria, c. 125 (Com. Law Procedure Act of 1854), § 8, as follows: "In any case, where reference

shall be made to arbitration as aforesaid, the court or a judge shall have power at any time and from time to time to remit the matters referred, or any or either of them, to the reconsideration and redetermination of the said arbitrator, upon such terms as to costs and otherwise as to the said court or judge may seem proper."

For the construction of this statute, see *Mills v. Bowyer's Soc.*, 3 Kay & J. 66; *Morris v. Morris*, 6 El. & Bl. 383, 88 E. C. L. 383, 2 Jur. N. S. 542; *Dinn v. Blake*, L. R. 10 C. P. 388; *In re Aitken's Arbitration*, 3 Jur. N. S. 1296; *Hodgkinson v. Fernie*, 3 C. B. N. S. 189, 91 E. C. L. 189; *Hodge v. Burgess*, 3 H. & N. 293. See also *English Arbitration Act* of 1889, § 10; *In re Keighley and Durant* (1893), 1 Q. B. 405.

In *In re Keighley and Durant* (1893), 1 Q. B. 405, the Court of Appeal held that § 10 of the English Arbitration Act of 1889 (52 and 53 Vict., c. 49) was in effect a reenactment of § 8 of the Common Law Procedure Act of 1854, and Lord Esher, M. R., said that the effect of each of these acts was to treat all submissions to arbitration, whether made by consent or compulsory, as though they contained a clause giving the court power to refer back the award to the arbitrator or umpire.

How Award may be Recommitted—In England.

—The power to recommit the award may be exercised on motion to set it aside, made by the party who objects to it. *Anning v. Hartley*, 27 L. J. Exch. 145; *Peterson v. Ayre*, 23 L. J. C. P. 129; *Howett v. Clements*, 1 C. B. 128, 50 E. C. L. 128.

Or upon the direct application of a party who seeks to support its substantial validity. *Caswell v. Grocutt*, 31 L. J. Exch. 361; *Cross v. Cross*, 13 C. B. N. S. 253, 106 E. C. L. 253.

Sometimes the award is referred back on the application of the party against whom it is made. *Bradley v. Phelps*, 6 Exch. 897; *Bury v. Dunn*, 1 D. & L. 141; *Nalder v. Batts*, 1 D. & L. 700.

Or when manifest error is shown in opposing an order for an attachment to enforce the award. *Morris v. Morris*, 6 El. & Bl. 383, 88 E. C. L. 383, 25 L. J. Q. B. 261; *Johnson v. Latham*, 19 L. J. Q. B. 329; *Davies v. Pratt*, 16 C. B. 586, 81 E. C. L. 586, 25 L. J. C. P. 71.

3. See *Black v. Harper*, 63 Ga. 752, where it was held that such an authority did not exist under section 4243 of the *Georgia Code*, but that the power of the court was limited to confirming or setting aside the award. See also *Evans v. Sheldon*, 69 Ga. 100.

4. *Kynaston v. Liddell*, 8 Moo. 223, 1 E. C. L. 104; *Ex p. Cuerton*, 7 D. & R. 774, 16 E. C. L. 321; *Smith v. Smith*, 28 Ill. 56.

Consent of Parties.—Where the arbitrators themselves petition for a resubmission to

in the submission of a stipulation giving the court authority to refer back the award to the arbitrator.¹

b. WHEN AWARD WILL BE RECOMMITTED.—It has been said that courts have no power to refer back an award except where they can set it aside for being invalid;² yet they have frequently referred back awards when they were not invalid, and generally an award may be recommitment to the arbitrators on the ground of newly discovered evidence or for any other reason that would be ground for a new trial.³

them, on the ground of a change of opinion since the award was returned, the award will not be recommitment to them, except by the consent of the parties. *Cleaveland v. Dixon*, 4 J. J. Marsh. (Ky.) 226.

With the consent of the parties, it would seem that a recommitment may be made in any case. See *Smith v. Smith*, 28 Ill. 56; *Brown v. Harper*, 54 Iowa 546; *Fitzgerald v. Fitzgerald*, Hard. (Ky.) 235.

In Pennsylvania, where there is a mere informality in the report, the court may send it back without consent; but where the award is set aside in consequence of a material error on the part of the referees, consent of both parties is essential to induce the court to recommit the award. *Shaw v. Pearce*, 4 Binn. (Pa.) 485.

1. Russell on Awards (6th ed.) 480; *Smith v. Smith*, 28 Ill. 59. See *In re Keighley and Durant* (1893), 1 Q. B. 405.

See, as to the construction of such clauses, *Nickalls v. Warren*, 6 Q. B. 615, 51 E. C. L. 615, 9 Jur. 10; *Howett v. Clements*, 7 M. & G. 1044, 49 E. C. L. 1044; *Davies v. Pratt*, 16 C. B. 586, 81 E. C. L. 586; *Webber v. Lee*, 1 D. & L. 584; *Porch v. Hopkins*, 1 D. & L. 881; *Lord v. Hawkins*, 2 H. & N. 55. And as to the effect of such a clause in a court of equity, *Londonderry, etc., R. Co. v. Leithman*, 12 Beav. 423.

2. Russell on Awards (6th ed.) 482; *Webber v. Lee*, 1 D. & L. 584; *Hodge v. Burgess*, 3 H. & N. 293, 27 L. J. Exch. 318; *Mills v. Bowyer's Soc.*, 3 Kay & J. 66; *Fuller v. Fenwick*, 3 C. B. 705, 54 E. C. L. 705.

Georgia.—Under the Georgia statute the court ought not to order a new trial to be had before the arbitrators, where an exception to an award which involved matters of fact has been sustained. It should cause an issue to be made, to be tried by a special jury. *Black v. Harper*, 63 Ga. 752.

Canada.—An award will be recommitment only for such reason as would formerly have justified setting it aside. *Latta v. Wallbridge*, 7 L. J. (U. C.) 207.

So an express power to recommit will only be exercised when the award is egregiously wrong, and not sanctioned by the evidence. *In re Brown and Overholt*, 2 Ont. Pr. Rep. 9. See *McClain v. Maitland*, 2 Ont. Pr. Rep. 279; *Kesteven v. Gooderham*, 20 U. C. Q. B. 500.

3. Russell on Awards (6th ed.) 483; *Depew v. Davis*, 2 Greene (Iowa) 260; *Boardman v. England*, 6 Mass. 70; *Cumberland v. North Yarmouth*, 4 Me. 459; *May v. Haven*, 9 Mass. 325; *Walker v. Sanborn*, 8 Me. 290; *Zachary v. Shepherd*, 2 T. R. 781. See *Baby v. Davenport*, 2 U. C. Q. B. 65; *Bleecker*

v. Loyall, 2 Ont. Pr. Rep. 14; *In re Smith and Ranney*, 2 Ont. Pr. Rep. 82; *In re Ingersoll and Elwood*, 3 Ont. Pr. Rep. 162; *Clancy v. Clancy*, 5 Ont. Pr. Rep. 108.

Discovery of New Evidence.—The award may be recommitment on the ground of discovery of new evidence. *In re Huntley*, 1 El. & Bl. 787, 72 E. C. L. 787; *Burnard v. Wainwright*, 1 L. M. & P. 455, 19 L. J. Q. B. 423; *Davenport v. Vickery*, 9 W. R. 701; *Depew v. Davis*, 2 Greene (Iowa) 260; *In re Keighley and Durant*, 10 Coke 139 (1893), 1 Q. B. 405.

For Substantial Alterations.—Or for the purpose of making substantial alterations as the result of a rehearing, when errors of substance cannot otherwise be corrected. *M'Rae v. M'Lean*, 2 El. & Bl. 946, 75 E. C. L. 946; *Algona Dist. Tp. v. Lotts' Creek Dist. Tp.*, 54 Iowa 286; *Cumberland v. North Yarmouth*, 4 Me. 459.

Other Instances.—The award has been recommitment to the arbitrator, although he asked some questions of the witness in the absence of one of the parties, or where the award has been executed separately by several arbitrators. *Anning v. Hartley*, 27 L. J. Exch. 145.

But in a case where the arbitrators irregularly received a claim in the absence of one of the arbitrators, the objection being useless, the court refused to refer back the award. *In re Tidswell*, 33 Beav. 213. See *Mordue v. Palmer*, L. R. 6 Ch. 22.

An award may be recommitment for correction where it is for a gross sum and embraces matters not within the submission, or is for a wrong sum by reason of a mistake in computation, if it can be ascertained how much was allowed on what was, and how much was allowed on what was not, within the submission, or if the mistake in computation can be ascertained; when so corrected, judgment will be rendered upon the award. *Yeaton v. Brown*, 52 N. H. 14.

So where an arbitrator made an award which was larger than it should have been, owing to error in the calculation, it was held that the error did not render the award void, but that the award might be amended upon a recommitment. *Clement v. Foster*, 69 Me. 318.

An award has also been recommitment to the arbitrators for acting *ultra vires* in attempting to force the parties to enter into a new contract in regard to the subject-matter of the submission. *Hooper v. Balfour*, 62 L. T. 646; *In re Green and Balfour*, 63 L. T. 725.

Where an award is amended by the consent of the parties, and forms the basis of a judgment entered thereon, the judgment is binding upon them, because the court has a right

When the Award Is Good on Its Face the courts will not, as a rule, refer it back for an alleged mistake in law.¹

c. POWER AND DUTY OF THE ARBITRATOR ON RECOMMITMENT.—Where an award is referred back to the arbitrator all his original powers revive unless they are restricted by the order of reference.²

to recommit an award to the arbitrators for alteration even in matters of substance. *Fortune v. Killebrew* (Tex. Civ. App. 1893), 21 S. W. Rep. 986.

Where the referees return a report which does not embrace all the subjects of the submission, it will in *Massachusetts* be recommitted to them for further consideration. *Boardman v. England*, 6 Mass. 70; *Kleine v. Catara*, 2 Gall. (U. S.) 61.

For Mistake.—The court, upon evidence partly supplied by the arbitrators themselves, recommitted an award for correction of a mistake. *McKellar v. White*, 1 New Zealand C. of App. 282. See *Ex p. Winter*, Rev. Judg'ts Victoria 1853, p. 72; *Brooks v. McPherson*, 8 Vict. L. Rep. 154; *In re Armstrong and Culley*, 4 Vict. L. Rep. 178 (Australia).

The common-law reasons of mistake, fraud, or want of jurisdiction, are grounds for the recommitment of the award. *Depew v. Davis*, 2 Greene (Iowa) 263.

For Uncertainty.—An award was made in a boundary case, setting out the line, and was held to be uncertain in its description of the line, but the court, instead of setting it aside, recommitted it for reconsideration. *Ex p. Rusdin*, 7 New South Wales 247.

Want of Finality.—The award may be re-committed for being bad on its face, or for not being final, *In re Fearon and Flinn*, L. R. 5 C. P. 34; *Morris v. Morris*, 6 El. & Bl. 383, 88 E. C. L. 383, 25 L. J. Q. B. 261; *Bird v. Penrice*, 6 M. & W. 754; *Brann v. Vassalboro*, 50 Me. 64; or in order to have the costs ascertained and stated in it, *In re Huntley*, 1 El. & Bl. 787, 72 E. C. L. 787.

For Informality.—In *Pennsylvania* the award may also be recommitted for informality. *Bowers v. Worrell*, 1 Browne (Pa.) 170; *Snyder v. Hoffman*, 1 Binn. (Pa.) 43; *Shaw v. Pearce*, 4 Binn. (Pa.) 485; *Thompson v. Warder*, 4 Yeates (Pa.) 336; *Heslop v. Bush*, 80 Pa. St. 70.

Where Recommitment Refused.—But in *Sanborn v. Davis*, 5 N. H. 389, it was held that the court would not recommit an award on the ground that new evidence had been discovered since the hearing, where the parties had agreed to have the report made known at the time of the hearing, and to abide the decision. Nor will an award be recommitted on the ground that one of the parties was taken by surprise on a point included within the terms of the submission, where he had ample opportunity to be heard; he should have applied for further time.

And where arbitrators, through negligence, overlooked a large quantity of lumber which they should have included in their estimate and award, and an action was brought to determine the amount so overlooked, after the purchaser had taken it away and sold it, the court refused to recommit the award to

the arbitrators for another estimate, and gave judgment for the amount proved to be due. *Stubbings v. McGregor*, 86 Wis. 248.

So where an award is rendered invalid by being based upon demands which were not submitted to the arbitrators, but which one of the parties had improperly laid before them, the court, on motion of such party, will not recommit the case to the arbitrators in order that they may amend their award. The court, by *Richardson, C. J.*, said: "The question whether a case shall be sent back is always to be settled in the exercise of a sound discretion. It is by no means a matter of course. And this is not a case which, in our opinion, ought to be sent back to the referees." *Adams v. Adams*, 8 N. H. 82.

1. Where Award Is Good on Its Face.—Russell on Awards (6th ed.) 484; *Baggalay v. Borthwick*, 30 L. J. C. P. 342, 10 C. B. N. S. 61, 100 E. C. L. 61; *Fuller v. Fenwick*, 3 C. B. 705, 54 E. C. L. 705; *Gibbon v. Parker*, 5 L. T. N. S. 584; *Hodgkinson v. Ferme*, 27 L. J. C. P. 66, 3 C. B. N. S. 189, 91 E. C. L. 189; *London Dock Co. v. St. Paul's Shadwell*, 32 L. J. Q. B. 30; *Hodge v. Burgess*, 3 H. & N. 293, 27 L. J. Exch. 318; *Nalder v. Batts*, 1 D. & L. 700; *Bury v. Dunn*, 1 D. & L. 141; *Phillips v. Evans*, 12 M. & W. 309; *Hopkins v. Sanford*, 41 Mich. 243.

When the award is good on its face the court will not recommit it so that the arbitrators may state the grounds of their decision, and thus leave it open to objection on points of law. *Wells v. Gzowski*, 16 U. C. Q. B. 42.

Mistake as to Jurisdiction.—But where the arbitrator mistook his jurisdiction and refused to investigate a charge of fraud, the court re-committed the award to him to reconsider the charge. *Insull v. Moojen*, 27 L. J. C. P. 75, 3 C. B. N. S. 359, 91 E. C. L. 359.

Failure of Intention.—So the courts have re-committed the award where it did not carry out the arbitrator's intention by his own admission, though on its face it was good in law. *Shaw v. Pitt*, W. R. 616, June 14, 1856; *Walton v. Swanage Pier Co.*, 10 W. R. 629; *In re Warner and Powell's Arbitration*, L. R. 3 Eq. 261; *Lockwood v. Smith*, 10 W. R. 628; *Mills v. Bowyer's Soc.*, 3 Kay & J. 66. In *Mordue v. Palmer*, L. R. 6 Ch. 22, the award was referred back for the omission of words giving the plaintiff the costs of the reference.

The award has been recommitted where there has been no failure of intention, the court thinking it a proper case for a recommitment. *Harland v. Newcastle*, 39 L. J. Q. B. 69, L. R. 5 Q. B. 47.

In *Gore v. Baker*, 4 El. & Bl. 470, 82 E. C. L. 470, 24 L. J. Q. B. 94, the award was re-committed in order to enable the arbitrator to find on separate items of one general account.

2. M'Rae v. M'Lean, 2 El. & Bl. 946, 75 E. C. L. 946; *French v. Richardson*, 5 Cush.

When Rehearing Necessary.—It is his duty to hear any additional evidence offered on the points referred back to him.¹ Where the award is recommitment for the correction of a mere clerical error or technical defect in form, in regard to which the arbitrator does not need the assistance of either party, he may amend the award or make a new one without hearing the parties or giving them notice to attend before him.²

May Return Same Award.—An arbitrator, however, is not bound to alter an award merely because it is referred back to him; he may return the same award.³

d. RECOMMITMENT IS IN THE DISCRETION OF THE COURT.—(1) *General Rule.*—Whether or not an award which has been returned into court shall be recommitment to the arbitrator, is not a question of law; it is a matter which rests in the discretion of the court; and, if the court to which it is returnable refuses to refer it back, its decision cannot be reviewed upon exception.⁴

(Mass.) 450; Smith v. Warner, 14 Mich. 152; Maner v. Wilson, 16 S. Car. 469.

Power over Costs.—He has the same power over the costs of the second reference as over the first, on the ground that whatever power he had "under the original submission, he had impliedly under the reference back to him." M'Rae v. M'Lean, 2 El. & Bl. 946, 75 E. C. L. 946. See Pearson v. Overell, 12 W. R. 709; Morris v. Morris, 6 El. & Bl. 383, 88 E. C. L. 383, 25 L. J. Q. B. 261; Johnson v. Latham, 20 L. J. Q. B. 236; *In re Huntley*, 1 El. & Bl. 787, 72 E. C. L. 787.

Failure of One of the Arbitrators to Attend after Recommitment.—In Doherty v. Doherty, 148 Mass. 367, it was held that where an award is recommitment to the arbitrators in order to make a specified amendment, and is signed by only two out of three of them after such recommitment, while the third is not present, and has been given no notice of the meeting, or opportunity to reconsider the award, the award will be void. See Short v. Pratt, 6 Mass. 496.

But in Petersen v. Loring, 1 Me. 64, where a report made by three arbitrators was recommitment, and one of them failed to attend the subsequent meeting, it was held that the other two were competent to make a new award if similar to the first, with the additional costs of references. But they cannot in the absence of the third revise the essential merits of the case. Cumberland v. North Yarmouth, 4 Me. 459. See Walker v. Melcher, 14 Mass. 148.

1. Hearing Additional Evidence.—Nickalls v. Warren, 6 Q. B. 615, 51 E. C. L. 615.

But it has been held that he may amend the award upon a recommitment without giving the parties notice, and without hearing any evidence when none has been directly offered. Baker v. Hunter, 16 M. & W. 672, 16 L. J. Exch. 203.

Both parties have a right to be heard before arbitrators when their award is returned to them to be corrected. Bowers v. Worrell, 1 Browne (Pa.) 212.

2. Correction of Errors without a Hearing.—Baker v. Hunter, 16 M. & W. 672, 10 L. J. Exch. 203; *In re Huntley*, 1 El. & Bl. 787, 72 E. C. L. 787; Blood v. Robinson, 1 Cush. (Mass.) 389; May v. Haven, 9 Mass. 325.

Where the arbitrator in the original award

had found on one issue only, the court held that he might correct the error without rehearing the parties. Bird v. Penrice, 6 M. & W. 754.

Where an award was referred back to the arbitrator to reconsider his direction in regard to the height of a weir, it was held that he was not bound to hear the parties upon the matter referred, or in regard to the costs. Johnson v. Latham, 20 L. J. Q. B. 236.

And where a direction as to the costs was defective, it was held that the arbitrator might correct it on a recommitment without giving notice to the parties. Morris v. Morris, 6 El. & Bl. 383, 88 E. C. L. 383, 25 L. J. Q. B. 261.

In case of a misnomer, a certificate that the right name should be read for the wrong has been held sufficient. Howett v. Clements, 1 C. B. 128, 50 E. C. L. 128; Davies v. Pratt, 16 C. B. 586, 81 E. C. L. 586, 25 L. J. C. P. 71.

Recommitment in the case of acknowledged error has been taken, when made with the consent of the parties, to be tantamount to an agreement that the error should be corrected. McGheehan v. Duffield, 5 Pa. St. 497.

3. May v. Haven, 9 Mass. 325.

4. Discretion to Recommit.—Walker v. Sanborn, 8 Me. 288; Cumberland v. North Yarmouth, 4 Me. 459; Boardman v. England, 6 Mass. 70; Whitney v. Cook, 5 Mass. 139; Johnston v. Paul, 22 Minn. 17; Adams v. Adams, 8 N. H. 82; Eastman v. Burleigh, 2 N. H. 484; Champaign County v. Norton, 1 Ohio 270. See Cutler v. Grover, 15 Me. 159; Clapp v. Hanson, 15 Me. 345.

It appears that where an award is objected to and impeached on the strength of outside facts which do not involve a charge of fraud, partiality, or corruption, its acceptance or nonacceptance is in the discretion of the court. Walker v. Sanborn, 8 Me. 288. See Morse Arb. and Award 335.

An award will not be recommitment for mere error of judgment in the arbitrators. Harris v. Seal, 23 Me. 435.

Although the question of recommitment is not one of law, but is addressed to the discretion of the court, yet the question whether an award is illegal and void on its face is a question of law for the court, and cannot be submitted to the jury. Cobb v. Morris, 40 Ga. 671; Tucker v. Allen, 47 Mo. 488.

(2) *Discretion as to Time*.—The time within which a motion to refer the award back may be made is also in the discretion of the court.¹ And a rule to recommit an award may be enlarged by consent.²

(3) *May Recommit More than Once*.—After an award has been referred back and amended, application may be again made to set it aside, and if it be defective a second time it will be again avoided.³

e. RECOMMITMENT IS OF THE WHOLE CASE.—Unless the award is referred back for the correction of a clerical error, or one which may be corrected from an inspection of the award itself, it is said that the recommitment must be of the whole case, and not of a single issue only.⁴

14. Effect of the Award—*a. AWARD A FINAL JUDGMENT*.—The rule is that an award is a final judgment, both at law and in equity, in regard to all the matters within the scope of the submission disposed of by it as between the parties thereto, binding on them for all time.⁵

1. *Leicester v. Grazebrook*, 40 L. T. N. S. 883; *Caswell v. Grocutt*, 31 L. J. Exch. 361; *Cross v. Cross*, 13 C. B. N. S. 253, 106 E. C. L. 253.

Award may be Referred Back at Any Time.—Where a motion to refer back the award to have a mistake, admitted by the arbitrator, corrected, was made eighteen months after the making of the award, the court recommit the award for such correction. *Mordue v. Palmer*, L. R. 6 Ch. 22.

It has been held, where an order of *nisi prius* referring a cause and all matters in difference contained a provision that in the event of any application being made to the court in regard to the award, the court should have authority to recommit the award; that the usual limitation of time must be understood in the submission, and that the application to recommit must be made within the same time as a motion to set the award aside. *Doe v. Holmes*, 12 Q. B. 951, 64 E. C. L. 951; *Mays v. Cannell*, 22 L. J. Q. B. 321.

The above ruling, however, has been held not to decide that if a valid objection be taken to the award, the court must feel bound to yield to the objection, and so annul the award instead of recommitting it merely because the time limited for moving to set the award aside has expired. *Brooks v. Parsons*, 1 D. & L. 691, 13 L. J. Q. B. 50.

The *English* statute gives the court power to refer the award back to the arbitrator "at any time." 17 and 18 Vict., c. 125, § 8.

2. *Stafford v. Stafford*, 25 L. T. 572. See *Sanborn v. Davis*, 5 N. H. 389; *Eastman v. Burleigh*, 2 N. H. 484.

3. **Second Recommitment**.—*Nickalls v. Warren*, 6 Q. B. 615, 51 E. C. L. 615; *Howett v. Clements*, 1 C. B. 128, 50 E. C. L. 128; *In re Manley and Anderson*, 2 Ont. Pr. Rep. 354.

It has been doubted whether a clause of reference in a submission gave the court the power to refer back the award more than once. *Nickalls v. Warren*, 6 Q. B. 615, 51 E. C. L. 615.

But now the court by statute in *England* has the power to refer the award back "from time to time." 17 and 18 Vict., c. 125, § 8.

4. *Morse Arb. and Award* 336; *Smith v. Warner*, 14 Mich. 152.

But see *M'Rae v. M'Lean*, 2 El. & Bl. 946, 75 E. C. L. 946; *Doherty v. Doherty*, 148 Mass. 367.

This matter of course depends largely on the wording and construction of the statute allowing a recommitment.

5. **Award Binds Parties**.—*England*.—*Day v. Bonnin*, 3 Bing. N. Cas. 219, 32 E. C. L. 91; *Bird v. Cooper*, 4 Dowl. 148; *Stonehewer v. Farrar*, 9 Jur. 203; *Dudgeon v. Martin*, 1 McQueen H. L. 714; *Sybray v. White*, 1 M. & W. 435; *Bailey v. Lechmere*, 1 Esp. 377; *Whitehead v. Tattersall*, 1 Ad. & El. 491, 28 E. C. L. 127; *Shelling v. Farmer*, 1 Stra. 646.

Alabama.—*Wright v. Bolton*, 8 Ala. 548; *Chambers v. Crook*, 42 Ala. 171, 94 Am. Dec. 637.

Arkansas.—*Keeler v. Harding*, 23 Ark. 697.

California.—*Fulmore v. McGeorge*, 91 Cal. 611.

Colorado.—*Wilson v. Wilson*, 18 Colo. 615.

Connecticut.—*Bunnel v. Pinto*, 2 Conn. 431;

Curley v. Dean, 4 Conn. 259, 10 Am. Dec. 140;

Chapman v. Champion, 2 Day (Conn.) 101.

Georgia.—*Wilkinson v. Sitton*, 54 Ga. 71.

Illinois.—*Rogers v. Holden*, 13 Ill. 293;

Chicago Wharfing, etc., Co. v. Street, 54 Ill. App. 569.

Indiana.—*Spencer v. Curtis*, 57 Ind. 221;

Martin v. Bevan, 58 Ind. 282.

Iowa.—*Thornton v. McCormick*, 75 Iowa 285;

Donican v. Mulry, 69 Iowa 583.

Louisiana.—*In re Wallace*, 31 La. Ann. 335.

Maine.—*Frison v. De Peiffer*, 83 Me. 71;

Johnson v. Knowlton, 35 Me. 467.

Maryland.—*Strite v. Reiff*, 55 Md. 92.

Massachusetts.—*Carter v. Carter*, 109 Mass. 309;

Leonard v. Wading River Reservoir Co., 113 Mass. 235; *Homes v. Aery*, 12 Mass. 134.

Michigan.—*McArthur v. Oliver*, 53 Mich. 299;

Beam v. Macomber, 35 Mich. 455.

Minnesota.—*Johnston v. Paul*, 23 Minn. 46.

Mississippi.—*Jones v. Harris*, 58 Miss. 293;

Handy v. Cobb, 44 Miss. 699.

Missouri.—*Taylor v. Scott*, 26 Mo. App. 249;

Hinkle v. Harris, 34 Mo. App. 223.

New Hampshire.—*Girdler v. Carter*, 47 N. H. 305;

Varney v. Brewster, 14 N. H. 49;

Johnson v. Noble, 13 N. H. 286, 38 Am. Dec. 485;

Truesdale v. Straw, 58 N. H. 207; *Ford v. Burleigh*, 60 N. H. 278, 62 N. H. 388.

New Jersey.—*Veghte v. Hoagland*, 10 N. J. Eq. 45;

Barr v. Chandler, 47 N. J. Eq. 532;

Richardson v. Lanning, 26 N. J. L. 130.

unless it is expressly provided that it shall have binding force and

New York.—*Coleman v. Wade*, 6 N. Y. 44; *Wheeler v. Van Houten*, 12 Johns. (N. Y.) 311; *Fidler v. Cooper*, 19 Wend. (N. Y.) 285; *Wyatt v. Benson*, 23 Barb. (N. Y.) 327; *Emmet v. Hoyt*, 17 Wend. (N. Y.) 410; *Freeman v. Kendall*, 41 N. Y. 518.

North Carolina.—*Barrett v. Henry*, 85 N. Car. 321; *Moore v. Austin*, 85 N. Car. 179.

Pennsylvania.—*Jones v. Pennsylvania R. Co.*, 143 Pa. St. 374; *Hewitt v. Furman*, 16 S. & R. (Pa.) 135; *Evars v. Kamphaus*, 59 Pa. St. 379; *Speer v. M'Chesney*, 2 W. & S. (Pa.) 233; *Montgomery's Appeal* (a 1886), 5 Cent. Rep. 469.

Vermont.—*May v. Miller*, 59 Vt. 577; *Rixford v. Nye*, 20 Vt. 132; *Buck v. Buck*, 2 Vt. 417; *Preston v. Whitcomb*, 11 Vt. 47.

Virginia.—*Pleasants v. Ross*, 1 Wash. (Va.) 156, 1 Am. Dec. 449; *Canada v. Barksdale*, 84 Va. 742.

See *Masel v. Angel*, 6 D. & R. 15, 16 E. C. L. 251; *Doe v. Long*, 4 U. C. Q. B. 146; *Bell v. Miller*, 9 Grant's Ch. (U. C.) 385; *Ehrman v. Stanfield*, 80 Ala. 118; *Bulkley v. Stewart*, 1 Day (Conn.) 130, 2 Am. Dec. 57; *Veal v. Willingham*, 80 Ga. 243; *Shockey v. Glasford*, 6 Dana (Ky.) 13; *Bedell v. Kennedy*, 109 N. Y. 153; *Fleming v. Phoenix Assur. Co.*, 75 Hun (N. Y.) 530; *Merrick's Estate*, 5 W. & S. (Pa.) 9; *Harris v. Social Mfg Co.*, 8 R. I. 133, 5 Am. Rep. 549; *Gray v. Reed*, 65 Vt. 178.

The decision is equally conclusive whether the arbitrator is appointed to make a certificate or an award. *Price v. Price*, 9 Dowl. 334; *Williams v. Mouldsdales*, 7 M. & W. 134.

An award made after the time limited may sometimes be enforced where the arbitrators have been unable to perform their duty on account of the misconduct of a party. *Morse v. Merest*, 6 Madd. 26. See *Dimsdale v. Robertson*, 2 Jones & La T. 58.

When Erroneous or Made under Misapprehension.—Even when erroneous, the award, if fairly made, is binding. *Morse v. Bishop*, 55 Vt. 231.

So an award is binding, although the parties to the submission were under a misapprehension as to the law and the legal consequences of the award. *Ennos v. Pratt*, 26 Vt. 630.

When Not Made Judgment of Court.—An award under a common-law arbitration is not required to be made a judgment of any court. It is binding between the parties until set aside. *Sheffield v. Clark*, 73 Ga. 92.

Award Entered as Judgment without Order.—Where a dispute is submitted to arbitrators, although without an order of court, and the award is allowed to be entered without objection as the judgment in the action, this amounts to a confession of judgment of the sum found by the award. *Thompson v. Greene*, 85 Ala. 240.

Judgment on an award is not granted as of course, and the party aggrieved may defend himself against the motion for judgment, even though he neglected to apply in time to have the award vacated. *Shores v. Bowen*, 44 Mo. 396.

Relief in Equity against Award.—Under the *Alabama* statute, an award is conclusive and final in a court of law "unless the arbitrators are guilty of fraud, partiality, or corruption in making it." But the parties have a right to go into equity for any relief that a court of equity can grant, as the award has no more force under the statute than a judgment at common law. *Chambers v. Crook*, 42 Ala. 171, 94 Am. Dec. 637.

Finding as to Law.—Where the parties agreed to submit certain legal questions to the decision of an arbitrator, and one of the parties subsequently sued the other, and the subject-matter of such suit was the same as that upon which the arbitrator's decision was rendered, it was held that the award was the law which governed the case. *Lunsford v. Smith*, 12 Gratt. (Va.) 554.

Construction of Contract.—Where the construction of the terms of a contract has been referred by the parties to an arbitrator, his award is conclusive evidence as to the construction of such contract in any subsequent action brought for breach of the same. *Gueret v. Audouy*, 62 L. J. Q. B. 633. See *Collier v. White*, 97 Ala. 615; *Porter v. Buckfield Branch R. Co.*, 32 Me. 539; *Gray v. Reed*, 65 Vt. 178.

Pleading Award in Bar.—An award is no bar to a suit until properly set up in the answer. *Martin v. Rexroad*, 15 W. Va. 512.

Where the submission is entered into under bonds, the award may be pleaded in bar to an action on the same matter before the award is performed. *Pickering v. Pickering*, 19 N. H. 389; *Armstrong v. Masten*, 11 Johns. (N. Y.) 189. See *Jessiman v. Haverhill*, etc., *Iron Manufactory*, 1 N. H. 68.

A plea of an award in bar need not aver a promise to abide by it, or to perform it. Such intention is implied from the submission. *Evans v. M'Kinsey*, Litt. Sel. Cas. (Ky.) 265.

Submission by Guardian of the Affairs of Ward.—Where a guardian submitted the affairs of his wards to arbitration, and the award was made in favor of the infants, and judgment was entered upon such award, and the guardian brought a bill to have the matter settled as if no award had been made, it was held that the judgment was of binding force, and could not be invalidated by the guardian. *Irvine v. Crockett*, 4 Bibb (Ky.) 437.

Other Illustrations of Effect of Award.—Where an agreement for reorganization was entered into between the stockholders of a railroad and a trust company, which required the latter to ascertain the floating debt of the railroad and the expenses of reorganization, and to assess the amount to be paid by the stockholders of the old company to entitle them to new stock, the trust company's determination, made in good faith upon doubtful or disputed facts, was held conclusive upon the railroad. *Gernsheim v. Central Trust Co.* (Supreme Ct.), 40 N. Y. St. Rep. 967, 16 N. Y. Supp. 127. See *Sweet v. Morrison*, 116 N. Y. 19, 15 Am. St. Rep. 376.

effect for a limited time only.¹

Award Concludes Only Questions Directly in Issue.—An award is conclusive only upon questions directly in issue. It does not amount to an estoppel as to matters in issue only collaterally or by inference.²

Award Changes Character of Demand.—An award may change the character of a claim from a claim for goods to one for money, or *vice versa*.³

In Equity, where the submission is by order of court, an award is considered to be of as high dignity as a decree, and rather more conclusive.⁴

An arbitration had and an award rendered between two members of a church, made voluntarily, in compliance with the rule of the church requiring members to settle their disputes in this manner, is as binding as an award rendered without reference to such regulations. *Payne v. Crawford*, 97 Ala. 604, 102 Ala. 387.

Where a submission is made under the terms of a building contract, by the owner and the head contractor, a subcontractor is bound by the award only as to those matters which the building contract authorized to be submitted to arbitration. *Cooke v. Odd Fellows' Fraternal Union*, 49 Hun (N. Y.) 23.

Land was conveyed to a trustee in trust to allow him to occupy the land during the life of the grantor, A to support the grantor, and, in case A should not fulfil his obligation, the trustee to appoint arbitrators to pass upon the matters submitted to them, with power to determine the trust, if requested by either party, in which case the trustee should hold the land for the benefit of the grantor. It was held, on a writ of entry by the trustee against A, after an award of arbitrators determining the trust, that parol evidence was inadmissible to show that A had fulfilled the obligations imposed upon him by the deed. *Cook v. Gardner*, 130 Mass. 313.

Where arbitrators liquidated the amounts due under a bond, and fixed the depreciations, and the obligor afterwards paid the money, but subsequently a depreciation table was established by the legislature, which reduced debts to a greater extent than the arbitrators had done in fixing the depreciation under the bond, it was held, in an action to reclaim the surplus paid under the award, that the award was binding upon the obligor, and was a bar to an action. *Colcock v. Wainwright*, 1 Bay (S. Car.) 114.

1. Russell on Awards (6th ed.) 514; Morse Arb. and Award 487; 22 and 23 Vict., c. 59, § 21.

2. **Award Not an Estoppel as to Matters in Issue Only by Inference.**—In *Newall v. Elliot*, 1 H. & C. 797, proceedings were taken in equity for the infringement of a patent, the validity of which was in dispute, and the matter was referred. The arbitrator awarded that the patent was not illegal and void, and subsequently, in an action between the same parties for another infringement, it was held, upon the principle stated in the text, that the defendant was not estopped by the award from disputing the validity of the patent.

In *Collier v. White*, 97 Ala. 615, it was held that an award which merely fixes the amount due cannot be held to destroy the mortgage security for the debt. See *Howett*

v. Monical, 25 Ill. 122; *Emery v. Owings*, 7 Gill (Md.) 488, 48 Am. Dec. 580; *Flanders v. Chamberlain*, 24 Mich. 305.

The fact that the owner of land has caused the amount of damages done to the land by cattle, taken damage feasant thereon by him, to be assessed by arbitrators in accordance with the provisions of the *Nebraska Herd Law* (Neb. Consol. Stat. 1893, § 99, *et seq.*) does not bar a subsequent recovery by the owner of the cattle for injuries to the cattle by reason of the neglect of the landowner in keeping them while in his possession. *Richardson v. Halstead*, 44 Neb. 606.

Declarations Made by an Arbitrator in the presence of the parties as to the legal effect of the award do not call for any reply from them, and do not estop them from claiming under the award. *Collier v. White*, 97 Ala. 615.

3. **When Award Changes Character of Claim.**—Where an award is made on a money claim determining the amount due, the nature of the original claim is not changed by it; but where the claim is for goods, and the award directed the payment of money in satisfaction, it thereby takes away the right to have the goods; or if the claim be for a debt, and the award directs payment to be made in goods or work, no action can be maintained for the debt. *Allen v. Milner*, 2 C. & J. 47; *Parkes v. Smith*, 15 Q. B. 297, 69 E. C. L. 297; *Comings v. Heard*, L. R. 4 Q. B. 669. See *Freeman v. Bernard*, 1 Salk. 69; *Howett v. Monical*, 25 Ill. 122; *Armstrong v. Masten*, 11 Johns. (N. Y.) 189; *Brazill v. Isham*, 1 E. D. Smith (N. Y.) 437, *affirmed* 12 N. Y. 9.

Effect on a Judgment.—A judgment is not extinguished by an award when it is one of the subjects of the arbitration, so as to make a seizure under the judgment a trespass; but an action may be brought for malicious seizing, or for breach of the agreement to abide by the award. *Barry v. Grogan*, 16 W. R. 727. See *Brandon v. Smith*, 22 L. J. Q. B. 321.

4. **Award Equal to a Decree in Equity.**—*Travers v. Stafford*, 2 Ves. 19; *Pitcher v. Rigby*, 9 Price 79.

So an award for the plaintiff in an action of nuisance, where proceedings were taken to abate the nuisance by injunction, were looked upon by the Court of Chancery as equivalent to the verdict of a jury establishing the existence of the nuisance. *Broadbent v. Imperial Gas Co.*, 7 De G. M. & G. 436, 26 L. J. Ch. 276, 29 L. J. Ch. 377.

But the Court of Chancery will not allow an award to be made binding its officers in certain cases. Where a direction was given that certain accounts should be taken by the master, and by consent the parties were allowed

Award Has Effect of Verdict.—An award has been held to have the same effect as the verdict of a jury.¹

b. EFFECT WHEN AWARD VOID OR NOT FINAL.—The judgments of the courts are conflicting as to the conclusiveness of the award upon the parties.²

Award Not Final does Not Bar Original Cause of Action.—But it may be said generally that where, for any reason, the award is void or not final and decisive, it will not operate as a bar to an action on the original claim.³ Nor will it protect

to submit any question of account to arbitration, the court permitted the master to adopt the finding of the arbitrators, but would not make it compulsory on him to do so even by consent. *Scale v. Fothergill*, 8 Beav. 361.

1. *Leonard v. Wading River Reservoir Co.*, 113 Mass. 235. See *Winkley v. Salisbury Mfg. Co.*, 14 Gray (Mass.) 443; *Lloyd v. Barr*, 11 Pa. St. 41; *Gunn v. Bowers*, 126 Pa. St. 552; *Stephens's Appeal*, 38 Pa. St. 9; *Tacoma R., etc., Co. v. Cummings*, 5 Wash. 206.

The finding of a referee has the same effect as a verdict of a jury in actions at law. The court cannot disregard it and retry the case on the evidence accompanying the report and make a finding of its own. *Kennard, etc., Carpet Co. v. Peck*, 19 Mo. App. 342. See *Prendergast v. Eyermann*, 16 Mo. App. 389.

2. *Gardener v. Oden*, 24 Miss. 382.

See the following cases for the effect of an award as a defense to a subsequent suit brought for the same subject-matter with reference to the facts of each individual case: *Gilman v. Brown*, 1 Mason (U. S.) 191; *Brown v. Wheeler*, 17 Conn. 345, 44 Am. Dec. 550; *Norton v. Savage*, 10 Me. 455; *Tyler v. Carleton*, 16 Me. 380; *Pease v. Whitten*, 31 Me. 117; *Randall v. Glenn*, 2 Gill (Md.) 430; *Shafer v. Shafer*, 6 Md. 518; *Boyd v. Davis*, 7 Mass. 359; *Hodges v. Hodges*, 9 Mass. 320; *King v. Savory*, 8 Cush. (Mass.) 309; *Searle v. Abbe*, 13 Gray (Mass.) 409; *Todd v. Old Colony, etc., R. Co.*, 3 Allen (Mass.) 18, 80 Am. Dec. 49; *Munn v. Reed*, 4 Allen (Mass.) 431; *Brigham v. Holmes*, 14 Allen (Mass.) 184; *Elliott v. Quimby*, 13 N. H. 181; *Veghte v. Hoagland*, 29 N. J. L. 125; *New York Ins. Co. v. Roulet*, 24 Wend. (N. Y.) 505; *Morton v. Cameron*, 3 Robt. (N. Y.) 189; *Coan v. Osgood*, 15 Barb. (N. Y.) 583; *Prentiss v. Farnham*, 22 Barb. (N. Y.) 519; *Bayne v. Gaylord*, 3 Watts (Pa.) 305; *Muirhead v. Kirkpatrick*, 2 Pa. St. 425; *Kratzer v. Lyon*, 5 Pa. St. 274; *Armstrong v. Hall*, 15 Pa. St. 23; *Hildebran v. Rowan*, 11 Humph. (Tenn.) 92.

3. **Where Award Illegal, Void, or Not Final.**—*Lingood v. Croucher*, 2 Atk. 395; *Smith v. Holcomb*, 99 Mass. 552; *New York v. Butler*, 1 Barb. (N. Y.) 325; *Haggart v. Morgan*, 5 N. Y. 422, 55 Am. Dec. 350; *Hart v. Lauman*, 29 Barb. (N. Y.) 410; *Morton v. Cameron*, 3 Robt. (N. Y.) 189; *Canfield v. Watertown F. Ins. Co.*, 55 Wis. 419. See *Soars v. Home Ins. Co.*, 140 Mass. 343; *Hanson v. Pollard*, 9 Met. (Mass.) 164; *Fletcher v. Webster*, 5 Allen (Mass.) 566; *Estes v. Mansfield*, 6 Allen (Mass.) 69; *Reformed Protestant Dutch Church v. Parkhurst*, 4 Bosw. (N. Y.) 496; *Casler v. Ranson*, 5 U. C. Q. B. D. 513; *Adams v. Ham*, 5 U. C. Q. B. 292.

Where the Award Made is Void.—Where an

award made by arbitrators was that a note should be satisfied by the payment of greenbacks, the consideration of which was Confederate treasury notes, it was held that this award was void, as an effort on the part of the arbitrators to do what was illegal, and formed no obstacle to the relief sought by the complainants. *Hale v. Sharp*, 4 Coldw. (Tenn.) 275. See *Fain v. Headerick*, 4 Coldw. (Tenn.) 327.

It was held in *Hyatt v. Wolfe*, 22 Mo. App. 200, that as the arbitration failed, and the award was void, it was but "just and honest that the parties, so far as the rules of law and equity will permit, should be placed *in statu quo*."

Where the matter in dispute is not a subject of arbitration, or is a covenant, and the submission is by oral agreement, the original demand is not affected by the award. *Logsdon v. Roberts*, 3 T. B. Mon. (Ky.) 255.

Cause of Action Subsequent to Award.—In *Garrow v. Nicolai*, 24 Oregon 76, an award was held not to be a bar to an action to set aside a sale on the ground of fraud, such collateral action having arisen subsequent to the date of the submission, and the matters in dispute not having been contemplated in the submission or included in the award.

Submission without Award.—Where matters in a suit pending have been submitted to arbitration, but no action has been taken by the arbitrators under the submission, the order of reference is not a bar to the prosecution of the action. *Gore v. Chadwick*, 6 Dana (Ky.) 477. Nor to a subsequent action. *Smith v. Thomason*, 1 Strobb. (S. Car.) 344. See *Perceval v. Herbemont*, 1 McMull. (S. Car.) 59.

Where matters have been referred to arbitration under a rule of court, but no judgment has been entered upon the award in accordance with the requirements of the statute, the submission and award constitute no bar to a suit. *Crooker v. Buck*, 41 Me. 355. See *Banister v. Higginson*, 15 Me. 73, 32 Am. Dec. 134; *Granger v. Clark*, 22 Me. 128; *Todd v. Old Colony, etc., R. Co.*, 3 Allen (Mass.) 18, 80 Am. Dec. 49.

Where Award Advisory Merely.—Where an award was published by the arbitrators announcing the conclusion at which they had arrived, but with the express condition that neither party was to be bound by it, it was held not to be binding as an award, being merely advisory. *Sartwell v. Horton*, 28 Vt. 370.

Express Reservation in Submission.—An action upon an insurance policy is not barred by the fact that an award by arbitrators was made upon the same policy, where the policy provides that the submission shall not be construed

a party in rights acquired by fraud or mistake.¹

Claim without Scope of Submission.—So an action is not barred upon a claim which is without the scope of the submission, although it has been included in, and passed upon by, the award.²

Matter within Submission Not Decided.—Nor is an action barred in regard to a matter which is within the scope of the submission, but which the arbitrators have refused to decide.³

c. AN AWARD EFFECTS A MERGER.—Like a judgment, an award, when on a matter properly submitted, operates as a merger of the original cause of action, whether the submission be at common law or under a statute. The original claim is extinguished by it, and suit afterwards must be brought upon the award, or upon the covenants of the submission, or the bond, unless the award contains a condition by which the performance of certain acts must be proved before a party can proceed upon the award, in which case such performance must first be shown,⁴ or unless the directions of the award are a

into a waiver of any of the rights or defenses of either of the parties, as this is an express reservation of the right to sue. *New York Mut. F. Ins. Co. v. Alvord*, 61 Fed. Rep. 752.

1. Rights Acquired by Fraud.—*Thornton v. McNeill*, 23 Miss. 369.

Where arbitrators appointed under a provision of an insurance policy for the submission of disputes to arbitration, signed their award when incomplete, relying upon false statements made by the adjuster for one of the companies in the presence of those acting for the others, such award is not conclusive so as to prevent recovery for matters omitted even as against the companies whose adjusters assented to the falsehood only by silence. *Herdon v. Imperial F. Ins. Co.*, 110 N. Car. 279.

2. Claim Not Included in Submission.—*Bixby v. Whitney*, 5 Me. 192; *Webster v. Lee*, 5 Mass. 334; *Hodges v. Hodges*, 9 Mass. 320; *Squires v. Anderson*, 54 Mo. 193; *Blakely v. Frazier*, 11 S. Car. 122. See also *Bagot v. Williams*, 3 B. & C. 235, 10 E. C. L. 62; *Ravee v. Farmer*, 4 T. R. 146; *Thorpe v. Cooper*, 5 Bing. 116, 15 E. C. L. 387; *Seddon v. Tutop*, 6 T. R. 607, 1 Esp. 401; *Barnum v. Reynolds*, 38 Cal. 643; *Thatcher v. Gammon*, 12 Mass. 268; *Rowe v. Smith*, 16 Mass. 306; *Minor v. Walter*, 17 Mass. 237; *Loring v. Mansfield*, 17 Mass. 394; *White v. Ward*, 9 Johns. (N. Y.) 232; *Wheeler v. Van Houten*, 12 Johns. (N. Y.) 311; *Canfield v. Monger*, 12 Johns. (N. Y.) 347; *Bathey v. Button*, 13 Johns. (N. Y.) 187; *Grant v. Button*, 14 Johns. (N. Y.) 377.

See *supra*, this title, *The Award—The Award must Be Coextensive with Terms of Submission*.

3. Claim Not Decided, although within Terms of Submission.—*Bixby v. Whitney*, 5 Me. 192.

In *Pritchard v. Daly*, 73 Ill. 523, it was held that where two neighbors submitted their respective claims for damages to arbitration, and arbitrators considered the claims of one and awarded him damages but refused to consider or hear evidence as to the claims of the other, the latter might pay the amount of the award and then maintain a suit upon his original claim. See *Whetstone v. Thomas*, 25 Ill. 361; *McDonald v. Bacon*, 4 Ill. 428; *Balance v. Underhill*, 4 Ill. 458.

4. England.—*Freeman v. Bernard*, 12 Mod. 130, 1 Ld. Raym. 247.

United States.—*Greene v. Darling*, 5 Mason (U. S.) 201.

Alabama.—*Burns v. Hindman*, 7 Ala. 531.
Connecticut.—*Curley v. Dean*, 4 Conn. 259, 10 Am. Dec. 140; *Bulkeley v. Stewart*, 1 Day (Conn.) 130, 2 Am. Dec. 57.

Colorado.—*Wilson v. Wilson*, 18 Colo. 615.
Illinois.—*Rogers v. Holden*, 13 Ill. 293; *Pritchard v. Daly*, 73 Ill. 523.

Iowa.—*Conger v. Dean*, 3 Iowa 463, 66 Am. Dec. 93.

Kansas.—*Groat v. Pracht*, 31 Kan. 656; *Medberry v. Soper*, 17 Kan. 369; *Miller v. Brumbaugh*, 7 Kan. 352.

Kentucky.—*Tevis v. Tevis*, 4 T. B. Mon. (Ky.) 47; *Evans v. M'Kinsey*, Litt. Sel. Cas. (Ky.) 263; *Logsdon v. Roberts*, 3 T. B. Mon. (Ky.) 255.

Maine.—*Duren v. Getchell*, 55 Me. 241.
Massachusetts.—*Homes v. Aery*, 12 Mass. 134; *Edwards v. Stevens*, 1 Allen (Mass.) 315; *Warfield v. Holbrook*, 20 Pick. (Mass.) 531; *Newburyport Marine Ins. Co. v. Oliver*, 8 Mass. 402; *Richardson v. Suffolk Ins. Co.*, 3 Met. (Mass.) 573.

Nebraska.—*Bentley v. Davis*, 21 Neb. 685.

New Hampshire.—*Varney v. Brewster*, 14 N. H. 49; *Girdler v. Carter*, 47 N. H. 305; *Jessiman v. Haverhill, etc., Iron Manufactory*, 1 N. H. 68; *Pickering v. Pickering*, 19 N. H. 389.

New Jersey.—*Richardson v. Lanning*, 26 N. J. L. 130.

New York.—*Armstrong v. Masten*, 11 Johns. (N. Y.) 189; *Coleman v. Wade*, 6 N. Y. 44; *Fidler v. Cooper*, 19 Wend. (N. Y.) 285; *Cox v. Jagger*, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522.

Pennsylvania.—*Speer v. M'Chesney*, 2 W. & S. (Pa.) 233.

Vermont.—*Preston v. Whitcomb*, 11 Vt. 47; *Babcock v. School Dist. No. 9*, 35 Vt. 250; *Ennos v. Pratt*, 26 Vt. 630; *Robinson v. Morse*, 26 Vt. 392.

The award, in order to effect a merger, must be a valid one, and must have been made in pursuance of a legal submission by the proper parties. *Tevis v. Tevis*, 4 T. B. Mon. (Ky.) 47.

mere repetition of the provisions of an existing document.¹

d. EFFECT UPON MATTERS IN DIFFERENCE NOT PRESENTED—(1) *Rule in England*—Award Bars Suit as to All Matters within Submission, although Not Presented.—The rule in England in regard to the extent of the effect of the award is that it is an absolute bar to any action upon all the matters in difference within the scope of the submission, whether such matters were brought before the arbitrators or not.²

Award Not Bar as to Collateral Questions.—But it is in regard to those questions only which are actually referred, that the award operates as a bar; proceedings in regard to collateral or independent questions upon the same subject are not barred by it.³

Merger of Contract.—Where the subject-matter of the submission is a contract existing between the parties, the legal effect of the award will be to extinguish the contract, and an action must be upon the award. *Varney v. Brewster*, 14 N. H. 49; *Curley v. Dean*, 4 Conn. 259, 10 Am. Dec. 140.

Condition Precedent must be Performed.—Where an award gave certain lands to the defendants upon condition that they would execute certain releases to the commonwealth within six months, which they failed to execute within the time, on action brought by the state for intrusion on the lands the defendants pleaded the award in bar, but the court held the plea bad; that the execution of the releases was a condition precedent in the nature of a consideration, and that the defendants, having failed to perform it, could not be given an advantage which they were only entitled to by carrying out the directions of the award. *Com. v. Pejepscut Proprietors*, 7 Mass. 399.

Where a New Duty is Created by the Arbitrator's Award, instead of that which was in dispute between the parties, the party has his remedy upon the award, and cannot resort to the original cause of action, because the award is a good bar to such action. *Armstrong v. Masten*, 11 Johns. (N. Y.) 189; *Merritt v. Merritt*, 11 Ill. 565.

Setting Aside Award Held Not to Set Aside Sale by Arbitrators under Submission.—Where, upon a dissolution of partnership, an agreement to submit the differences existing between the partners provided that the arbitrators, before proceeding to a hearing, should offer the stock for sale and sell it to one who should offer the largest sum, a sale made in pursuance of such an agreement is not set aside by the setting aside of the award made by the arbitrators. *Brownell v. Steere*, 128 Ill. 209. See *Steere v. Brownell*, 113 Ill. 475; *Alfred v. Kankakee, etc.*, R. Co., 92 Ill. 609.

1. No Merger where Award Merely Affirms Written Contract Arbitrated.—In *Keeler v. Harding*, 23 Ark. 697, where a dispute in regard to a lease was submitted, and the award directed that the lessee should pay the amount of rent stipulated in the lease and in the manner directed by it, it was held that an action would still lie on the original covenants of the lease, as an award merely confirming the provisions of an existing document could not be held to merge such document and extinguish the right of action thereon. See *Howett v. Monical*, 25 Ill. 122.

2. Dunn v. Murray, 9 B. & C. 780, 17 E. C. L. 498; *Dicas v. Jay*, 6 Bing. 519, 19 E. C. L. 155; *Smith v. Johnson*, 15 East 213; *Collins v. Powell*, 2 T. R. 756; *Clegg v. Dear-den*, 12 Q. B. 576, 64 E. C. L. 576.

Subsequent Submission Confined to Matters Not within Former Submission.—In *Trimingham v. Trimingham*, 4 N. & M. 786, 30 E. C. L. 405, it was held that as an award which directs mutual releases closes all accounts between the parties up to the time of the submission, so a second arbitrator upon a subsequent submission of all matters in difference is precluded from passing upon any matter in controversy between the parties at the time of the first submission, which might have been determined by the former arbitrator, although as a matter of fact it was not brought before him or awarded on by him.

Matter Not Presented.—Where all matters in difference were submitted, and the arbitrator directed the amount of compensation that should be paid for the purchase of certain lands which were originally wrongfully taken and held by a railway company, the award was held to bar any claim by the landlord for mesne profits, although no claim for such mesne profits had been specifically presented to the arbitrator. *Smalley v. Blackburn R. Co.*, 2 H. & N. 158, 27 L. J. Exch. 65.

Matter Knowingly Omitted by Arbitrators.—Where the arbitrators knowingly did not award upon a demand which was clearly within the submission, but upon which they wrongly held that they had no right to decide, being, as they thought, not a matter in difference, because it was admitted by the opposite party, the court were inclined to believe, assuming that the award was allowed to stand, that the claim so passed over could not be enforced by any subsequent proceeding. *In re Robson and Railston*, 1 B. & Ad. 723, 20 E. C. L. 483.

But see *Ravee v. Farmer*, 4 T. R. 146; *Golightly v. Jellicoe*, 4 T. R. 147, note a, where it was held that an award upon a submission of all matters in difference does not operate as a bar to the recovery of a demand which was not in dispute at the time of the submission although it existed at a claim at that time. See also *Upton v. Upton*, 1 Dowl. 400.

3. Where the Amount of a Demand Only is Referred, the award does not operate as a bar to an objection to the legality of the demand on an action brought for the sum awarded due. *Steers v. Lashley*, 1 Esp. 166.

Relief in Equity.—Where the omission to present matters within the scope of the submission is accidental, or where the arbitrators refuse to consider them when presented, it appears that equity will give relief.¹

(2) *Rule in the United States.*—There is a conflict of authority upon this point in the decisions in the United States.

View that Award under General Submission Conclusive as to All Matters.—The courts of some of the states of the Union hold that an award under a general submission of all matters in difference bars all further proceedings in regard to all matters that come within the scope of such submission, although some of them were not presented to the arbitrators, nor included in the award.²

The View that Such Award is Conclusive Only as to Matters Determined.—In other states the rule is, that an award constitutes no bar to a suit upon a claim which, although within the terms of the submission, has not been submitted to, nor passed upon by, the arbitrators.³

So in *Oxenham v. Lemon*, 2 D. & R. 461, 16 E. C. L. 103, where a verdict was entered for the plaintiff, subject to the opinion of the court upon a question of law, and leave was given to the defendant to move to enter a non-suit, it was held that an agreement to refer the amount of damages to arbitration, and an award made, did not bar the plaintiff from raising the question of legal liability unless he expressly consented to abandon it.

1. Russell on Awards (6th ed.) 518; Brophy v. Holmes, 2 Molloy 1.

In *Spencer v. Spencer*, 2 Y. & J. 249, on a submission of all matters in difference for the purpose of winding up a partnership and dividing the capital, an item in the account of good debts due the firm was omitted by accident, and the award was made on the basis of the account so taken, and directed one of the partners to receive the good debts. However, the court of equity, in order to prevent the accidental omission of the item from working injustice to those entitled to the partnership fund, required the partner who had been awarded the good debts to account for what he had received of them over and above the amount estimated in the award upon the basis of the account as taken with one item left out.

2. **General Submission—Award Conclusive as to All Matters.**—*McJimsey v. Traverse*, 1 Stew. (Ala.) 244, 18 Am. Dec. 43; *Park v. Halsey*, 2 Root (Conn.) 100; *Bunnel v. Pinto*, 2 Conn. 431; *Stipp v. Washington Hall Co.*, 5 Blackf. (Ind.) 473; *Engleman v. Engleman*, 1 Dana (Ky.) 437; *New York Lumber, etc., Working Co. v. Schnieder*, 119 N. Y. 475; *Ott v. Schroepfel*, 5 N. Y. 482, 7 Barb. (N. Y.) 443; *Fidler v. Cooper*, 19 Wend. (N. Y.) 285; *Wheeler v. Van Houten*, 12 Johns. (N. Y.) 311; *Owen v. Boerum*, 23 Barb. (N. Y.) 187; *Gowen v. Pierson*, 166 Pa. St. 258. See *Kendall v. Stokes*, 3 How. (U. S.) 97; *Curley v. Dean*, 4 Conn. 259, 10 Am. Dec. 140; *McCullough v. McCullough*, 12 Ind. 487; *Gardener v. Oden*, 24 Miss. 382. And compare *Birkbeck v. Burrows*, 2 Hall (N. Y.) 51.

In *Fidler v. Cooper*, 19 Wend. (N. Y.) 285, the court, by Bronson, J., said: "I agree fully in what was said by the court in *Wheeler v. Van Houten*, 12 Johns. (N. Y.) 311, that it would be a dangerous precedent to allow a party on a submission so general, intended to

settle everything and avoid litigation, to lie by and submit only part of his demands, and then institute a suit for the part not brought before the arbitrators. This, like other general rules, may sometimes operate harshly, but it is nevertheless a salutary principle from which we cannot depart without the danger of defeating the beneficial ends intended to be answered by allowing parties to submit their controversies to judges of their own selection."

Where the terms of the submission render it doubtful whether a particular matter was submitted and included in the award, the question should be passed upon by the jury as a question of fact. *Keaton v. Mulligan*, 43 Ga. 308.

3. **General Submission—Award Conclusive Only on Matters Submitted.**—*Mount Desert v. Tremont*, 75 Me. 252; *Bixby v. Whitney*, 5 Me. 192; *Webster v. Lee*, 5 Mass. 334; *Hodges v. Hodges*, 9 Mass. 320; *Smith v. Whiting*, 11 Mass. 447; *King v. Savory*, 8 Cush. (Mass.) 309; *Edwards v. Stevens*, 1 Allen (Mass.) 315; *Bentley v. Davis*, 21 Neb. 685; *Lee v. Dolan*, 39 N. J. Eq. 193; *Whitemore v. Whitemore*, 2 N. H. 26; *Newnan v. Wood*, 1 Mart. & Y. (Tenn.) 190. See *Rollins v. Townsend*, 118 Mass. 224; *Girdler v. Carter*, 47 N. H. 305; *Sling v. National Assur. Co.*, 7 Utah 441.

In *Warfield v. Holbrook*, 20 Pick. (Mass.) 531, a doctrine is laid down which goes further than that announced in the other Massachusetts cases cited above in this note, and which seems to be more nearly in accord with the result of the English cases and those in New York and other American jurisdictions. After stating that an award and the judgment upon it would be a bar to any suit upon a claim embraced in the submission, although not presented to or decided upon by the arbitrators, Shaw, C. J., said: "The cases where an award has been held to be bad as not being final and not embracing all the matters submitted are those where, through mistake of their authority, or oversight, or other accident, the referees have neglected or refused to take into consideration and pass upon demands within their authority, and brought before them by one or the other of the parties." In support of its views, the court cited English cases only, and did not refer to the previous

c. EFFECT OF AWARD TO VEST TITLE TO PROPERTY—(1) Real Estate—Operates on Title by Estoppel Only.—Whether the submission be by deed or not, an award is inoperative to transfer the title to real estate. It acts by way of estoppel merely, and prevents the losing party from denying the superiority of the title of the other party, being good as between the parties to the submission only.¹

adjudications in Massachusetts. In refusing to grant a recommitment of the award, which was asked for, the chief justice further said: "It could extend to nothing more than affording the referees another opportunity of considering this demand, if the defendant should see fit to bring it forward with notice to him that, if he did not bring it forward, he must take the consequences of being barred of any suit, if by law an award on such submission and judgment on it would be such a bar."

In *Pritchard v. Daly*, 73 Ill. 523, it was held that where two neighbors submit their respective claims for damages growing out of deprivations upon each other's crops by their cattle respectively, to arbitration, and the arbitrators only consider the claims of one and award him damages, and refuse to consider or hear evidence as to the claims of the other, the latter may pay the award and then maintain a suit upon his original claim.

Vermont.—In *Buck v. Buck*, 2 Vt. 417, it was held that an award made in pursuance of a parol submission to all demands between the parties does not estop one of the parties from afterwards showing that certain matters in dispute between them at the date of the submission were not laid before the arbitrators nor adjudicated by them. In this case, Hutchinson, J., after noticing the conflict of the authorities upon this point, said: "The New York cases assume the same ground, that upon a general submission to arbitrators all demands must be exhibited or lost. The necessity for this doctrine is not readily perceived; nor is it carried through the cases in which there is some analogy in principle. * * * Awards upon parol submissions of all demands are in some degree parallel with general receipts in full of all demands. Both are very frequently effected without the aid of counsel, and without sufficient knowledge of consequences to excite a prudent caution before all is closed. We are not at present inclined to open the door to go back of written submissions and references that are general, and the awards general, but we admit the inquiry, whether adjudicated or not, in cases of submissions not in writing."

In *Robinson v. Morse*, 26 Vt. 392, it was held that where the submission was under seal, an award in pursuance thereof would bar an action by one of the parties on notes within the scope of the submission and internationally withheld from the examination and decision of the arbitrators. In this case, the court expressly reserved the point whether the same principle would apply in cases of a parol submission, and expressed a doubt, *citing* *Wheeler v. Van Houten*, 12 Johns. (N. Y.) 311, as to the authority of the case of *Buck v. Buck*, 2 Vt. 417.

In *Briggs v. Brewster*, 23 Vt. 100, Redfield, J., intimated that an award would be conclusive of matters not submitted, only where the questions not presented were portions of one entire transaction submitted and adjudicated, or when the submission was general of all demands and under seal.

Failure to Agree.—Where the award declared that the arbitrators "do not agree," and that each party pay a stated sum to his own arbitrator as fees, it was held not to be a bar to a subsequent action upon the claim submitted. *Smith v. Holcomb*, 99 Mass. 552.

Inadequate Award.—But where arbitrators gave an inadequate award by ordering security to be given which in fact was no security, the award was held good. The court said: "It was submitted to them to point out the security in their judgment deemed sufficient. This has been done, and the demandant cannot now object to it." *Cox v. Jagger*, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522.

See *Houston v. Pollard*, 9 Met. (Mass.) 164; *Fletcher v. Webster*, 5 Allen (Mass.) 566; *Estes v. Mansfield*, 6 Allen (Mass.) 69, where it was held that an award which does not decide the principal matter submitted is not binding.

1. Russell on Awards (6th ed.) 520; Rolle Abr., Arb., A.

England.—Marks *v. Marriott*, 1 Ld. Raym. 114; *Smalley v. Blackburn R. Co.*, 2 H. & N. 158, 27 L. J. Exch. 65; *Henry v. Kirwan*, 9 Ir. C. L. Rep. 459; *Doe v. Rosser*, 3 East 15; *Coxall v. Sharpe*, 1 Keb. 937.

United States.—*Calhoun v. Dunning*, 4 Dall. (U. S.) 120.

Connecticut.—*Shelton v. Alcox*, 11 Conn. 240.

Kentucky.—*Shackelford v. Purket*, 2 A. K. Marsh. (Ky.) 435, 12 Am. Dec. 422.

Massachusetts.—*Goodridge v. Dustin*, 5 Met. (Mass.) 363; *Loring v. Whittemore*, 13 Gray (Mass.) 228; *Jones v. Boston Mill Corp.*, 6 Pick. (Mass.) 148.

New Hampshire.—*Girdler v. Carter*, 47 N. H. 305; *Gray v. Berry*, 9 N. H. 473; *Page v. Foster*, 7 N. H. 392; *Carey v. Wilcox*, 6 N. H. 177.

New York.—*Cox v. Jagger*, 2 Cow. (N. Y.) 650, 14 Am. Dec. 522; *Sellick v. Addams*, 15 Johns. (N. Y.) 197; *Jackson v. Gager*, 5 Cow. (N. Y.) 383; *Shepard v. Ryers*, 15 Johns. (N. Y.) 497; *Robertson v. M'Niel*, 12 Wend. (N. Y.) 583.

North Carolina.—*Murray v. Blackledge*, 71 N. Car. 492; *Thompson v. Deans*, 6 Jones Eq. (N. Car.) 22.

Pennsylvania.—*Dixon v. Morehead*, Add. (Pa.) 222.

Compare *Moore v. Helms*, 74 Ala. 368; *Drane v. Hodges*, 1 Har & M. (Md.) 262; *Whitney v. Holmes*, 15 Mass. 152.

Award as to Partition should Direct Conveyances.—Where the arbitrator makes partition of land between tenants in common, the title to the land will not pass

Reference in Action of Ejectment.—Where, in an action of ejectment, the matter was referred to arbitration, and the arbitrators awarded that the premises be delivered up to plaintiff's lessor, it was held, in a subsequent action of ejectment between the same parties, that the defendant was estopped by his previous agreement and the award thereunder from disputing the title of the lessor. *Doe v. Rosser*, 3 East 15. In this case, the court said: "The award cannot have the operation of conveying the land; but there is no reason why the defendant may not conclude himself by his own agreement from disputing the title of the lessor in ejectment. The parties consented that the award of the arbitrator chosen by themselves should be conclusive as to the right to the land in controversy between them, and this is sufficient to bind them in an action of ejectment."

But see *Hardin v. Beaty*, 4 Dev. & B. (N. Car.) 381, where the case just cited was *distinguished*, and in an action of ejectment it was held that a reference and award in a former action of ejectment between the defendant's grantor and the lessor of the plaintiff, by which award the plaintiff's lessor (the defendant in that action) was found guilty of the trespass and ejectment, and nominal damages assessed in favor of the defendant's grantor, would not operate as an estoppel or bar, it not appearing that in the submission in the former action the parties had agreed that the award should be conclusive as to the right to the land.

Award as to Right of Way.—It was held that by an award made under an agreement to submit to arbitration a dispute "concerning a right of way," no greater interest could be acquired in the land by a railroad company than it would have acquired by compulsory proceedings, under the *Alabama* statutes, for securing the right of way over the land. *Odum v. Rutledge, etc.*, R. Co., 94 Ala. 488.

Possession Follows Title.—Where nothing appears to the contrary, possession follows title and is drawn to it, consequently an award which determines the question of possession determines the title. *Knight v. Holden*, 104 N. Car. 107. But see *Pullen v. Rianhard*, 1 Whart. (Pa.) 514.

Where the title to a lease of land for years was submitted, it was held that an award that one party shall have the land, or shall have the term, might pass the interest in the term, but an award that one shall permit the other to enjoy the term, does not transfer the interest in it. *Trusloe v. Yewre*, Cro. Eliz. 223, 2 Leon 104.

Where a dispute as to land held by one party and owned by another, was referred, the award directed that the holding was a tenancy, and that such tenancy should cease on the delivery of the award, and that possession of the land should be given the owner one month after. An execution creditor of the tenant seized the crops growing on the land after the delivery of the award, but before the expiration of the month and before the

landlord had taken possession, and, on issue taken as to whether the growing crops belonged to the tenant or not, it was held that the award had not transferred to the landlord the title to the land or to the growing crop. *Thorpe v. Eyre*, 1 Ad. & El. 926, 28 E. C. L. 243.

Bars Action for Mesne Profits.—An award of a sum of money as compensation for lands which were wrongfully taken in the first instance by a railway company, it being in full satisfaction of all matters in dispute, was held a bar to a subsequent action for mesne profits of the land. *Smalley v. Blackburn R. Co.*, 2 H. & N. 158, 27 L. J. Exch. 65.

Annulling Sale does Not Create New Title.—Where an agreement has been entered into to compromise disputes and to return land to the heirs of the vendor, and this agreement is carried into effect by an award that the land be returned and the sale annulled, such retrocession does not confer a new title, but simply recognizes and confirms the original title without further proceedings. *Amet v. Boyer*, 43 La. Ann. 562.

Agreement to Arbitrate Boundary—Transfer of Land pending Award.—Where a person sold a field to a third party without notifying him that he and the adjoining landowner had agreed to refer a dispute in regard to a boundary line to arbitration, it was held that the vendee was not bound by a subsequent award of the arbitrator. *Emery v. Fowler*, 38 Me. 99.

Effect of Awards Fixing Boundary Lines.—An award fixing a boundary line, though in effect determining the title to the land on either side of it, is based on the principle that it is a finding of where the line originally was, not a transfer of the title to the land itself; it estops the parties from denying that the line determined therein is in fact the true dividing line between them. *Searle v. Abbe*, 13 Gray (Mass.) 409; *Goodridge v. Dustin*, 5 Met. (Mass.) 363; *Rogers v. Kenwick*, Quincy (Mass.) 64; *Robertson v. M'Niel*, 12 Wend. (N. Y.) 578; *Jackson v. Gager*, 5 Cow. (N. Y.) 383; *Stewart v. Cass*, 16 Vt. 663, 42 Am. Dec. 534.

An award determining a boundary line is a bar to an action of trespass, and will sustain an action of ejectment. *Sellick v. Addams*, 15 Johns. (N. Y.) 197; *Jackson v. De Long*, 9 Johns. (N. Y.) 43; *Calhoun v. Dunning*, 4 Dall. (U. S.) 120. See *Shelton v. Alcox*, 11 Conn. 240.

See further, as to the binding effect of the determination of boundary lines by the award of arbitrators, *Payne v. Crawford*, 97 Ala. 604; *Tyler v. Dyer*, 13 Me. 46; *Buck v. Spofford*, 35 Me. 526; *Sweeny v. Miller*, 34 Me. 388; *Goodridge v. Dustin*, 5 Met. (Mass.) 363; *Thayer v. Bacon*, 3 Allen (Mass.) 163, 80 Am. Dec. 59; *Shaw v. Hatch*, 6 N. H. 162; *Marshall v. Reed*, 48 N. H. 36; *Russell v. Allard*, 18 N. H. 222; *Orr v. Hadley*, 36 N. H. 575; *Dorr v. Hill*, 62 N. H. 506; *Jackson v. Dysling*, 2 Cai. (N. Y.) 198; *Shepard v. Ryers*, 15 Johns. (N. Y.) 497; *Davis v. Townsend*, 10 Barb. (N. Y.) 333; *Vosburgh v.*

by his award; he must direct the parties to make conveyances to each other of the portions allotted.¹

(2) *Personal Property*.—It has been held that an award that one of the parties to the submission shall at a day named have a certain chattel, passes the title to the chattel,² and that an award that the right of ownership and possession in a certain chattel is in one of the parties is conclusive;³ but there is authority for the proposition that an award that the title of personal property shall pass from one party and become vested in another upon the happening of some contingency, or the performance of some condition, does not pass the title to the property.⁴

Teator, 32 N. Y. 561; Terry v. Chandler, 16 N. Y. 354, 69 Am. Dec. 707; Gaylord v. Gaylord, 3 Jones (N. Car.) 367; Pearson v. Barringer, 109 N. Car. 398; Evars v. Kamp-haus, 59 Pa. St. 379; Davis v. Havard, 15 S. & R. (Pa.) 165, 16 Am. Dec. 539; Jones v. Orum, 5 Rawle (Pa.) 249; Millar v. Criswell, 3 Pa. St. 449; Okison v. Flickinger, 1 W. & S. (Pa.) 257; Hewitt v. Furman, 16 S. & R. (Pa.) 135; Hollingsworth v. Lupton, 4 Munf. (Va.) 114.

Effect of Oral Award Fixing Boundary.—Generally, in determining questions affecting the title to real estate, the submission and award must be in writing, but an oral award determining a boundary line will be sustained. Jones v. Dewey, 17 N. H. 596; Sawyer v. Fellows, 6 N. H. 107, 25 Am. Dec. 452; Orr v. Hadley, 36 N. H. 576; Furber v. Chamberlain, 29 N. H. 405; Eaton v. Rice, 8 N. H. 378; Gray v. Berry, 9 N. H. 473; Jackson v. Dysling, 2 Cai. (N. Y.) 198; Jackson v. Gager, 5 Cow. (N. Y.) 383.

In *Maine* it has been held that an oral award determining a boundary line is of itself inoperative, Philbrick v. Preble, 18 Me. 255, 36 Am. Dec. 718; but that it may be made effective by long acquiescence, Gove v. Richardson, 4 Me. 327.

An oral award under an oral submission is competent evidence of the true location of the lines or monuments in an action of trespass. Byam v. Robbins, 6 Allen (Mass.) 63.

Effect of Oral Award as to Title.—The question as to the title to real estate cannot be determined by an oral award. Buker v. Bowden, 83 Me. 67.

Necessity of Seal.—Even if the award is in writing, it will not act as an estoppel, if not under seal. Shelton v. Alcox, 11 Conn. 240; Darby v. Russel, 5 Hayw. (Tenn.) 139; Darby v. McCarroll, 5 Hayw. (Tenn.) 286.

1. Necessity for Directing Conveyances on Partition.—Johnson v. Wilson, Willes 248. See Miller v. Moore, 7 S. & R. (Pa.) 164.

See also *supra*, this title, *The Arbitrator—Authority of the Arbitrator—Powers of the Arbitrator in Particular Matters—Power to Award Conveyances*.

But the finding in an award that one of the parties to the submission is entitled to certain lands, does not necessarily require that the other party to the submission shall make a conveyance of such lands to him. Loring v. Whittemore, 13 Gray (Mass.) 228.

In awarding an exchange of lots the arbitrators directed that the parties "can and do make" to each other respectively a "fee sim-

ple title;" it was held that each party could require under this award not merely a conveyance, but the conveyance of a good title. Jesse v. Cater, 28 Ala. 475.

Awards under Statutes Transferring Title.—In *England* awards under certain acts of Parliament differ from awards under private submissions [in that they have the effect of transferring the title to land without any subsequent conveyance by the parties. Russell on Awards (6th ed.) 522. See 41 Geo. III., c. 109; 38 and 39 Vict., c. 66; 1 and 2 Geo. IV., c. 23; Farrer v. Billing, 2 B. & Ald. 171; Greathead v. Morley, 3 M. & G. 139, 42 E. C. L. 80; Ellis v. Arnison, 5 B. & Ald. 47, 7 E. C. L. 18; Barnett v. Metropolitan Board of Works, 29 July, 1882, cited Russell on Awards (6th ed.), p. 523; Cator v. Croydon Canal Co., 4 Y. & C. 405; Doe v. Saunder, 5 Ad. & El. 664, 31 E. C. L. 404; Kingsley v. Young, 17 Ves. Jr. 468, 18 Ves. Jr. 207; Doe v. Neeld, 3 M. & G. 271, 42 E. C. L. 148; Johnson v. Hodgson, 8 East 38.

2. Award Passes Title to Personal Property.—Where, in a submission between a landlord and tenant, it was awarded that the landlord should, at a day named, have a certain cow and calf, it was held that the title to them passed by force of the award, without any further act by the tenant. Girdler v. Carter, 47 N. H. 305. See also Ford v. Burleigh, 60 N. H. 278, 62 N. H. 388.

3. McArthur v. Oliver, 53 Mich. 299.

4. Award Held Not to Pass Title to Personality.—Where, in a reference between landlord and tenant, the arbitrator awarded that a stack of hay should be delivered up to the landlord upon his paying a sum of money, it was held that the property in the hay did not pass on the mere tender of the money, although if the tenant had accepted the tender it would have been a ratification of the award and an assent to the transfer. Hunter v. Rice, 15 East 100.

In the case of Girdler v. Carter, 47 N. H. 305, cited above in the notes to this section, the court held that the facts of the case distinguished it from Hunter v. Rice, 15 East 100, because in the case before them the transfer of title was not made dependent upon any condition subsequent. But the principle of Hunter v. Rice, 15 East 100, would seem to be totally *disapproved*. In commenting upon that case, the court, by Bellows, J., said: "It would seem to be well established that the effect of an award does not depend upon a subsequent assent, but upon the contract of submission, and that after the award is made, it is too late to revoke the submission, or to

f. EFFECT OF THE AWARD UPON STRANGERS—Award does Not in General Affect Strangers.—The rule is that an award cannot be enforced, either by or against a stranger to the submission;¹ nor can he avail himself of it as a defense.²

How Stranger may Become Bound.—But he may make himself a party by accepting its conditions or receiving benefits under it,³ or by assenting to it, or by being present with knowledge that it is to be made and not dissenting when it is made;⁴ or he may become a party by assignment of the subject-matter.⁵

g. AWARD—HOW AFFECTED BY BANKRUPTCY OF PARTY.—The fact that one of the parties becomes bankrupt after entering into the submission and before the making of the award does not necessarily affect the validity of the award.⁶ It may in many cases, notwithstanding the bankruptcy of one of the parties, be enforced by action,⁷ attachment,⁸ or by entering judgment

repudiate the award. Since the decision in *Hunter v. Rice*, 15 East 100, the law upon this subject has undergone considerable change, and it is not certain that the views there adopted would not be modified.⁹

1. Award does Not Bind Strangers.—*Thompson v. Noel*, 1 Atk. 60; *Chapman v. Champion*, 2 Day (Conn.) 101; *Woody v. Pickard*, 8 Blackf. (Ind.) 55; *Sears v. Vincent*, 8 Allen (Mass.) 507; *Wyatt v. Benson*, 23 Barb. (N. Y.) 327. See *supra*, this title, *The Arbitrator—Authority over Strangers to the Submission*.

Award between Debtor and Creditor Held Discharge of Surety.—In *Coleman v. Wade*, 6 N. Y. 44, it was held that when an award extends the time of payment between the principal debtor and his creditor, it effects a discharge from liability of the debtor's sureties who were not parties to the submission. The court distinguished the effect of an award on a judgment, because "if the surety pays the debt after a judgment is recovered his right of subrogation gives him the judgment, and thereby the means of enforcing payment at once from the property of the original debtor. But if he pays after the award his right of subrogation gives him only the legal remedies for the enforcement of it." Where the submission is made by the creditor without the assent of the surety the surety is discharged.

2. *Davis v. Rea*, Cas. temp. Finch 441.

3. Accepting Benefits under Award.—Where an heir who was not a party to the submission received the amount awarded to him, he was held bound by the award. *George v. Johnson*, 45 N. H. 456; *Tracy v. Herrick*, 25 N. H. 381.

4. Assent—Failure to Dissent.—*McGehee v. McGehee*, 12 Ala. 83; *Humphreys v. Gardner*, 11 Johns. (N. Y.) 61; *Kingston v. Phelps*, Peake N. P. 227.

5. Assignment of Subject-matter.—*Smith v. Jones*, 1 Dowl. N. S. 526; *Shelton v. Alcox*, 11 Conn. 240; *Hodges v. Saunders*, 17 Pick. (Mass.) 470. See *Crandall v. Gallup*, 12 Conn. 368; *Hopson v. Doolittle*, 13 Conn. 241, and *in pari materia*, *Ensign v. Kellogg*, 4 Pick. (Mass.) 1; *Champion v. Brown*, 6 Johns. Ch. (N. Y.) 398, 10 Am. Dec. 343; *Buckhurst's Case*, 1 Coke 1.

6. *Russell on Awards* (6th ed.) 525. See *supra*, this title, *The Submission—Revoking the Submission—By Bankruptcy*.

Awards against Bankrupts.—A bankrupt in England cannot be precluded from obtaining

the benefit of the insolvent debtors' act, by an award made against him. *Rex v. Bingham*, 2 Tyrw. 46. So a bankrupt who has been taken on an attachment before he has obtained his certificate will be discharged on obtaining it. *Rex v. Davis*, 9 East 318; *Baker's Case*, 2 Stra. 1152.

If an award directs the payment of a debt against which the bankrupt is protected by his certificate, and also directs the bankrupt to pay costs from which he is not protected, although ineffective as to the debt, it will be enforced as to the costs. *Rex v. Davis*, 9 East 318.

Debt Created by Breach of Award Supports Commission.—Where a party does not perform the award, and thereby becomes liable on the bond, the penalty becomes a debt sufficient to support a commission of bankruptcy until the award is set aside. *Ex p. Lingood*, 1 Atk. 240.

Award Provable against Bankrupt's Estate.—An award of a sum certain is a debt which is provable against the estate of the party against whom it is made under a commission of bankruptcy as a good petitionary creditor's debt. *Antram v. Chace*, 15 East 209.

Where the defendant, after award given for the plaintiff but before judgment was entered on the verdict taken for the plaintiff subject to the reference, became bankrupt, the court permitted the plaintiff to prove as a creditor for the amount of the award and for interest and costs. *Ex p. Harding*, 5 De G. M. & G. 367.

7. Enforceable by Action.—*Taylor v. Marling*, 2 M. & G. 55, 40 E. C. L. 258. In this case the court, by Tindal, C. J., said: "The arbitrator in the present case stood in such a peculiar situation that the bankruptcy of one of the parties could not operate as a revocation of his authority. He was not simply an arbitrator; he was a depository and stakeholder. * * * He had not merely authority to decide the dispute between the parties to the submission, but he had an authority coupled with an interest."

See *Andrews v. Palmer*, 4 B. & Ald. 250, 6 E. C. L. 471; *Haswell v. Thorogood*, 7 B. & C. 705, 14 E. C. L. 111; *Bromley v. Holland*, 7 Ves. Jr. 28.

8. Enforceable by Attachment.—*Hemsworth v. Brian*, 1 C. B. 131, 50 E. C. L. 131. See *Taylor v. Shuttleworth*, 6 Bing. N. Cas. 277, 37 E. C. L. 378.

and issuing execution thereon in the cause referred.¹

b. EFFECT OF AWARD ON ATTORNEY'S LIEN FOR COSTS.—On a reference of a *lis pendens* the plaintiff's attorney has a lien for his costs on any sum awarded to the plaintiff, as in the case of a verdict and judgment; and if, after notice of the lien, the defendant pays the sum awarded to the plaintiff himself instead of to his attorney, the attorney may, by summary application to the court, compel repayment to himself; but his right to apply personally appears limited to cases of attempts to defraud him.²

i. AWARD AS EVIDENCE.—As to Matters within Submission.—An award is conclusive evidence as to all matters which are included within the scope of the submission.³

As to Matters Not within Submission.—An award is not evidence as to matters which are not embraced within the terms of the agreement to submit.⁴

1. Enforceable by Judgment and Execution.—*Andrews v. Palmer*, 4 B. & Ald. 250, 6 E. C. L. 471.

2. Solicitor's Lien for Costs.—*Russell on Awards* (6th ed.) 527. And see the following English cases generally: *Ormerod v. Tate*, 1 East 464; *Symonds v. Mills*, 8 Taunt. 526, 4 E. C. L. 198; *Holcroft v. Manby*, 2 D. & L. 319; *Dunn v. West*, 10 C. B. 420, 70 E. C. L. 420; *Jones v. Turnbull*, 2 M. & W. 601; *Rule 93*, Hil. Term, 2 Wm. IV., 3 B. & Ad. 388; *Cowell v. Betteley*, 10 Bing. 432, 25 E. C. L. 186; *Figes v. Adams*, 4 Taunt. 632; *Caddell v. Smart*, 4 Dowl. 760; *Domett v. Hell- yer*, 2 Dowl. 540; *Pringle v. Gloag*, 10 Ch. Div. 676; *Brearey v. Kemp*, 24 L. J. Q. B. 310.

Where, under the *Pennsylvania* compulsory arbitration law, a judgment has been entered by the prothonotary upon an award of no cause of action, it creates a lien for costs upon the plaintiff's real estate, because such an award is in effect a nonsuit. *Turner v. Whitson*, 15 Pa. Co. Ct. Rep. 484.

The amount of an award appealed from by the defendant is, in *Pennsylvania*, a lien upon his land, but the costs which subsequently accrue upon the trial of the case are not. *Christy v. Crawford*, 8 W. & S. (Pa.) 99. See *Evans v. Duncan*, 4 Watts (Pa.) 24; *Dietrich's Appeal*, 4 Watts (Pa.) 208.

3. Effect of Award as Evidence.—Where an award is admissible in evidence, it is conclusive between the parties. *Sybray v. White*, 1 M. & W. 435; *Whitehead v. Tattersall*, 1 Ad. & El. 491, 28 E. C. L. 127; *Bailey v. Lechmere*, 1 Esp. 377; *Allen v. Milner*, 2 C. & J. 47; *Kingston v. Phelps*, *Peake N. P.* 227; *Bates v. Townley*, 2 Exch. 152; *Keen v. Batshore*, 1 Esp. 194; *Salmon v. Watson*, 4 Moo. 73, 16 E. C. L. 363; *Doe v. Horner*, 8 Ad. & El. 235, 35 E. C. L. 382; *Doe v. Rosser*, 3 East 15; *Ingram v. Milnes*, 8 East 445; *Worthington v. Barlow*, 7 T. R. 433; *Swinford v. Burn*, *Gow* 5, 5 E. C. L. 438; *Johnson v. Durant*, 2 B. & Ad. 925, 22 E. C. L. 211; *Curley v. Dean*, 4 Conn. 259, 10 Am. Dec. 140; *Shackelford v. Purket*, 2 A. K. Marsh. (Ky.) 435, 12 Am. Dec. 422. See *Smith v. Johnson*, 15 East 213; *Bulkley v. Stewart*, 1 Day (Conn.) 130, 2 Am. Dec. 57; *Bunnel v. Pinto*, 2 Conn. 431; *Richards v. Drinker*, 6 N. J. L. 307; *Hume v. Hume*, 3 Pa. St. 144.

Of What Facts Award Is Evidence.—An award is evidence of every fact the decision of which

is clearly implied in such award, even when not expressly stated to be decided. *Shackelford v. Purket*, 2 A. K. Marsh. (Ky.) 435, 12 Am. Dec. 422.

Award under Clause in Insurance Policy.—Where a policy of insurance contained an agreement to submit to arbitrators any dispute as to the amount of loss, the award made upon such submission was held competent evidence to support a plea of arbitration and award. *Herndon v. Imperial F. Ins. Co.*, 107 N. Car. 183. See *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 106 N. Car. 28; *Hamilton v. Liverpool, etc., Ins. Co.*, 136 U. S. 242.

Function of Court when Award is Offered in Evidence.—When an award is offered in evidence, it is the function of the court to determine what facts are requisite to constitute a valid award and to declare the legal effect of the award. *Tucker v. Allen*, 47 Mo. 488.

Impeaching Award Offered as Evidence.—Where an award is adduced as evidence, it cannot be impeached by evidence of the misconduct of the arbitrator, because such testimony is extrinsic to the award itself. *Wills v. Maccarmick*, 2 Wils. 148.

So where an award is pleaded in bar of an action on the original demand, the fact that the referees denied one of the parties a proper hearing is no ground for ruling it out as evidence, this being a question for the jury. *Riley v. Hicks*, 81 Ga. 265.

4. Cox v. Jagger, 2 Cow. (N. Y.) 638, 14 Am. Dec. 522.

Award as Evidence of Account Stated.—An award is not evidence of an account stated between the parties to the submission, unless, perhaps, in the single event of there being no regular agreement to refer, and, consequently, no award capable of being enforced. *Bates v. Townley*, 2 Exch. 152, *disapproving Keen v. Batshore*, 1 Esp. 194; *Moore v. Austin*, 85 N. Car. 179.

Evidence of a Previous Award on Contract Sued upon.—Where an action is brought upon a written contract, the plaintiff cannot give evidence of a previous arbitration which was not statutory, and which resulted in an award against the defendant, and of the defendant's refusal to abide by it and his reason therefor. *Miller v. Dunlap*, 22 Mo. App. 97.

Proof of Contents of Award Not Produced.—Where a settlement was based on an arbitration in writing, it was held that evidence

In Criminal Proceeding.—An award is not evidence in a criminal proceeding.¹

The Recitals in an Award are not necessarily evidence of the performance of the acts done in the course of the proceedings.²

As Regards Strangers to Submission.—An award is inadmissible in evidence against a person who is not a party to the submission, and who is without the jurisdiction of the arbitrators.³ But an award has sometimes been admitted as evidence in favor of a stranger to the submission.⁴

15. Ratification and Repudiation of the Award.—*a. RATIFICATION.*—A valid award creates a complete obligation, and need not be ratified by the parties in order to give it operative force.⁵

Voidable Award.—But where an award is voidable, either because the arbitrators have exceeded their authority, or because all matters submitted have not been considered by them, or for any other reason, the parties may ratify it expressly, or by implication arising from their acts, and after such ratification they will be estopped from objecting to it.⁶

could not be given of the terms of the settlement without producing the award itself. *Smith v. McGehee*, 14 Ala. 404. See *Burke v. Voyles*, 5 Blackf. (Ind.) 190, where it was held that parol evidence of the contents of a written award cannot be given until the absence of the award is accounted for.

1. Not Evidence in Criminal Action.—An award under a submission between private parties is not admissible in evidence in a criminal prosecution against either of them. *Reg. v. Moreau*, 11 Q. B. 1028, 63 E. C. L. 1028.

2. Recitals in Award Not Evidence.—The award as a rule can only be adduced as evidence of those matters in regard to which the parties in the court have made it evidence. *Still v. Halford*, 4 Campb. 17; *Baker v. Hunter*, 16 M. & W. 672; *George v. Lousley*, 8 East 13; *Houghton v. Burroughs*, 18 N. H. 499.

3. As Evidence against Third Parties.—*Evans v. Rees*, 10 Ad. & El. 151, 37 E. C. L. 80; *Wenman v. Mackenzie*, 5 El. & Bl. 447, 85 E. C. L. 447; *Doe v. Webber*, 1 Ad. & El. 119, 28 E. C. L. 54; *Emery v. Fowler*, 38 Me. 99; *Rex v. Cotton*, 3 Campb. 444; *Brett v. Beales*, 1 M. & M. 416.

4. As Evidence for Third Parties.—*Shelling v. Farmer*, 1 Stra. 646; *Guntton v. Nurse*, 5 Moore 259; *Doe v. Boulter*, 6 Ad. & El. 675, 33 E. C. L. 172; *Downs v. Cooper*, 2 Q. B. 256, 42 E. C. L. 663; *Thorpe v. Eyre*, 1 Ad. & El. 926, 28 E. C. L. 243.

5. Sears v. Vincent, 8 Allen (Mass.) 507; *Culver v. Ashley*, 19 Pick. (Mass.) 300.

6. Voidable Award—Ratification—Effect—England.—*Ward v. Evans*, 6 Mod. 37; *Thorold v. Smith*, 11 Mod. 88; *Wilson v. Poulter*, 2 Stra. 859.

Alabama.—*Reynolds v. Roebuck*, 37 Ala. 408.

Georgia.—*Perry v. Mulligan*, 58 Ga. 479; *Tyler v. Stephens*, 7 Ga. 278.

Indiana.—*Stipp v. Washington Hall Co.*, 5 Blackf. (Ind.) 473.

Kansas.—*State v. Gurnee*, 14 Kan. 111.

Kentucky.—*McCullough v. Myers*, Hard. (Ky.) 206.

Louisiana.—*Peniston v. Somers*, 15 La. Ann. 679.

Maryland.—*Bullitt v. Musgrave*, 3 Gill (Md.) 32.

Massachusetts.—*Cogswell v. Cameron*, 136 Mass. 518; *Culver v. Ashley*, 19 Pick. (Mass.) 300; *Clement v. Jones*, 12 Mass. 60; *Herring v. Polley*, 8 Mass. 120; *Erick v. Johnson*, 6 Mass. 193; *Barnaby v. Barnaby*, 1 Pick. (Mass.) 221; *Copeland v. Mercantile Ins. Co.*, 6 Pick. (Mass.) 198; *Lent v. Padelford*, 10 Mass. 236, 6 Am. Dec. 119.

Mississippi.—*Williams v. Williams*, 11 Smed. & M. (Miss.) 393.

Missouri.—*Ellison v. Weathers*, 78 Mo. 115; *Ferris v. Thaw*, 72 Mo. 446; *Trenton First Nat. Bank v. Gay*, 63 Mo. 39; *Squires v. Anderson*, 54 Mo. 193.

New Hampshire.—*George v. Johnson*, 45 N. H. 456.

New Jersey.—*Leslie v. Leslie*, 52 N. J. Eq. 332; *Cross v. Cross*, 17 N. J. Eq. 288.

New York.—*De Castro v. Brett*, 56 How. Pr. (N. Y. Supreme Ct.) 484; *Fudickar v. Guardian Mut. L. Ins. Co.*, 62 N. Y. 392; *Hays v. Hays*, 23 Wend. (N. Y.) 363; *Jones v. Phoenix Bank*, 8 N. Y. 228; *Perkins v. Wing*, 10 Johns. (N. Y.) 143; *Gidley v. Gidley*, 65 N. Y. 170.

North Carolina.—*Sharpe v. King*, 3 Ired. Eq. (N. Car.) 402.

Oregon.—*Belt v. Poppleton*, 11 Oregon 201.

Compare Munson v. Munson, 3 Day (Conn.) 260; *Shelton v. Alcox*, 11 Conn. 240.

In *Ellison v. Weathers*, 78 Mo. 115, the court, by Ray, J., said: "Arbitrators are but the chosen agents of the parties, and, like any other agents, if they exceed their authority in any particular, to that extent their action is wanting in validity; yet, as in other matters of agency, the defect may be waived, and is cured by subsequent ratification, and in such cases no new consideration is necessary to uphold the ratification."

Unless the award was obtained by corruption or fraud, a ratification will bind the parties, whether they acted in ignorance of the law or not. *Tyler v. Stephens*, 7 Ga. 278. See *Callaway v. Bridges*, 79 Ga. 753.

Award under Informal Submission Followed by Acts.—No matter how informal an oral submission to arbitration may be, an award made thereunder is good if it is followed up by the acts of the parties, and if they recognize the

Void Award.—However, an award which is not merely voidable, but which is absolutely void under a statute, cannot be rendered valid by any ratification by the parties.¹

Acquiescence in an award has the effect of a ratification.²

authority of the arbitrators. *Hays v. Hays*, 23 Wend. (N. Y.) 363.

Accepting Benefits under Award.—The acceptance of the benefits of an award, as accepting the performance from the other party to the submission of the obligations imposed by the award, is a ratification, and estops the party so accepting from afterwards denying its validity. *Neel v. Field*, 72 Ga. 201; *Grimmett v. Smith*, 42 Ill. App. 577; *Godfrey v. Knodle*, 44 Ill. App. 638; *Thornton v. McCormick*, 75 Iowa 285; *Buena Vista County v. Iowa Falls, etc., R. Co.*, 55 Iowa 160; *Cobb v. Parham*, 4 La. Ann. 148; *Culver v. Ashley*, 19 Pick. (Mass.) 300; *Fox v. Hazelton*, 10 Pick. (Mass.) 275; *Eveleth v. Chase*, 17 Mass. 458; *Hamilton v. Phoenix Ins. Co.*, 106 Mass. 395; *Taylor v. Smith*, 93 Mich. 160; *Taylor v. St. Johnsbury, etc., R. Co.*, 57 Vt. 106. See *Phillips v. Couch*, 66 Mo. 219; *Furber v. Chamberlain*, 29 N. H. 405.

After accepting performance, a party is estopped from asserting that the award was not authorized by the terms of the submission. *Reynolds v. Roebuck*, 37 Ala. 408.

Compliance a Ratification and Waiver of Irregularity.—Giving a note for the amount of an award is a ratification and a waiver of all irregularities in the proceedings. *Miller v. Brumbaugh*, 7 Kan. 343; *Terry v. Moore*, 3 Misc. Rep. (N. Y. C. Pl.) 285.

Where a dispute exists between parties in regard to mutual money claims, and they agree to submit the matter to arbitration, such submission implies a promise to pay the award, and the effect of such payment as a ratification of the award cannot be invalidated on the ground that it was made in pursuance of a contemporaneous verbal agreement and not of the submission. *Wilson v. Wilson*, 18 Colo. 615.

Performance a Ratification.—Generally, an award will be ratified by a performance. See *Jones v. Dewey*, 17 N. H. 596; *Orr v. Hadley*, 36 N. H. 575; *Eaton v. Rice*, 8 N. H. 378; *Sawyer v. Fellows*, 6 N. H. 107, 25 Am. Dec. 452; *Jackson v. Gager*, 5 Cow. (N. Y.) 383; *Jackson v. Dysling*, 2 Cal. (N. Y.) 198; *Gove v. Richardson*, 4 Me. 327; *Philbrick v. Preble*, 18 Me. 255, 36 Am. Dec. 718; *Burrows v. Guthrie*, 61 Ill. 70; *McKinstry v. Solomons*, 2 Johns. (N. Y.) 57.

Although an award was not recorded or made the judgment of the Superior Court, the question at issue relating to an easement, yet, as it was agreed to and acted upon by the parties, it was held binding upon them. *Rich v. Turnbull*, 95 Ga. 752.

Reducing to Writing and Signing a Verbal Award.—Where the parties to the dispute submitted the difference between them to the decision of arbitrators, who made a verbal award, which the parties ratified by entering into a written agreement signed by them, and witnessed by the arbitrators, it was held that

they had thereby accepted the award, and that no action could be brought upon the original items of account submitted to the judgment of the arbitrators. *Bentley v. Davis*, 21 Neb. 685.

Requesting Partial Temporary Suspension of Award.—A person is not estopped from contesting the validity of an award by asking permission that one of its provisions be suspended temporarily to enable him to finish some work. *Hart v. Kennedy*, 47 N. J. Eq. 51.

Lapse of Time—Sleeping on Rights.—An award will not be set aside for corruption or misconduct on the part of the arbitrator after a long lapse of time and after one of the arbitrators is dead, unless the proof is clear and conclusive. *Dougherty v. McWhorter*, 7 Yerg. (Tenn.) 239. See *Callant v. Downey*, 2 J. J. Marsh. (Ky.) 346; *Hardeman v. Burge*, 10 Yerg. (Tenn.) 202.

Nothing will call a court of equity into activity but conscience, good faith, and reasonable diligence, and where these principles are wanting, the court is passive and will do nothing. *Per Lord Camden*, in *Smith v. Clay*, Amb. 645. See *Barber v. Barber*, 18 Ves. Jr. 286; *Tracy v. Herrick*, 25 N. H. 381.

Where facts alleged to render an award void are known, and no objection is made, equity will not afterwards interfere to set aside the award or a judgment thereon. *Clark v. Thurmond*, 46 Ga. 97; *Fox v. Hazelton*, 10 Pick. (Mass.) 275. See also *Dulin v. Caldwell*, 28 Ga. 117; *Jones v. Frosh*, 6 Tex. 202.

1. Void Award cannot be Ratified.—*Wiles v. Peck*, 26 N. Y. 42, in which case it was held that as a submission to arbitration of the claim of any person to any estate in fee or for life to real estate is void, 2 N. Y. Rev. Stat. 541, § 2, N. Y. Code Civ. Pro., § 2365, it cannot be ratified in the state of *New York*.

Where a person, under the threat of dispossession and loss of business on the part of the opposite party, acquiesces in and carries out the determination of persons professing to act as arbitrators, but who were not sworn and did not consult together, such acquiescence will not deprive him of any rights which may have been disallowed by the so-called arbitration. *Barr v. Chandler*, 47 N. J. Eq. 532. See *Hart v. Kennedy*, 47 N. J. Eq. 51.

2. Acquiescence.—*Jarvis v. Fountain Water Co.*, 5 Cal. 179; *Gove v. Richardson*, 4 Me. 327; *McDaniel v. Bell*, 3 Hayw. (Tenn.) 258. Compare *Wheaton v. Crane*, 27 N. J. Eq. 368.

In *Cross v. Cross*, 17 N. J. Eq. 288, where an award had been accepted by the parties, and acts had been done by them under it, although it omitted to decide upon a matter expressly included within the terms of the submission, it was held that it was valid, and that it should be carried out in all things that it decided.

Ratification by Agent.—Ratification may be made by a duly authorized agent.¹

b. REPUDIATION.—An award may be repudiated by consent of both parties, who will thereupon be restored to their original rights, and when the award is once repudiated it cannot be restored.²

16. Impeaching the Award.—The circumstances under which an award may be attacked, such as for fraud, corruption, partiality, wilful misconduct, and the like, and by whom, have been fully presented in other parts of this article, to which reference is here made.³

17. Performance of the Award—*a. TIME OF PERFORMANCE*—**Failure to Specify Time in Award.**—Where no time is named in the award, within which its directions are to be carried out, the *English* rule is that a reasonable time will be allowed for executing them.⁴ But an award which named no time for the performance of its orders has been held by the Supreme Court of the *United States* to be void for uncertainty.⁵

Being Present and Taking Part in Proceedings before Arbitrators.—A person is estopped from denying the facts found by an award, where his name appears as signed to a submission to arbitration, although as a fact he did not sign such submission, nor authorize his name to be subscribed to it, if he was present at the time the arbitration was had and the award made, gave evidence before the arbitrators, knew that his rights were involved, and made no objection to the arbitration. *Johnson v. Cochran*, 81 Ga. 39, 12 Am. St. Rep. 294.

Effect of Ignorance on Ratification.—But acquiescence effects a ratification only when made with a full knowledge of the facts. Where it is made without such knowledge, the ratifying party may rescind such ratification as soon as he comes to a full knowledge of the facts, where the rescission works no injury to the other party. *Culver v. Ashley*, 19 Pick. (Mass.) 300; *Payne v. Moore*, 2 Bibb (Ky.) 163, 4 Am. Dec. 689; *Hart v. Kennedy*, 47 N. J. Eq. 51. Compare *Tyler v. Stephens*, 7 Ga. 278.

Agreement to Sign Note Made by Arbitrators in Ignorance of Amount.—A parol promise to carry out an award binds the parties, whether made before or after the award; and if the parties agree that the arbitrators shall write a promissory note for the amount of the award, without disclosing the amount, and if, after an award is made and such a note is written, the party liable signs the note, still in ignorance of the amount, the note notwithstanding is valid. *Page v. Pendergast*, 2 N. H. 233. See *Drake v. Collins*, 1 Tyler (Vt.) 79.

1. Authority to Ratify.—An authority to submit, however, does not imply authority to ratify a voidable award. *Bullitt v. Musgrave*, 3 Gill (Md.) 31.

So an award which is void because made upon an unauthorized or unratified submission by one partner cannot be ratified by the co-partner after the award is made, so as to become binding on the other party to the submission, as in such a case there is no mutuality between the parties. *Tillinghast v. Gilmore*, 17 R. I. 431. See *Eastman v. Burleigh*, 2 N. H. 484.

2. Repudiation by Consent.—*Eastman v. Armstrong*, 26 Ill. 216; *Burnside v. Potts*, 23 Ill. 415; *Marshall v. Piles*, 3 Bush (Ky.) 249. See *Payne v. Crawford*, 102 Ala. 387; *Hart v.*

Firzlaiff, 67 Mich. 514; *McKenna v. Lyle*, 155 Pa. St. 599.

Repudiation by One Only.—The mere act of one of the parties cannot have the effect of repudiating a valid award. *Hopson v. Doolittle*, 13 Conn. 236.

Repudiated Award cannot be Revived.—Where an award is repudiated by both parties, it can not be revived. *Marshall v. Piles*, 3 Bush (Ky.) 249.

Where an award has been made, an agreement entered into to refer the matter passed upon to other arbitrators is a waiver of the first award, and no action will lie upon the first award subsequently, although no valid award is made under the second submission. *Rollins v. Townsend*, 118 Mass. 224.

3. See the specific subdivisions of this title, such as *Setting Aside the Submission*; *Who may Be an Arbitrator*; *Duties of the Arbitrator*; *Powers of the Arbitrator in the Proceedings*; *The Award must Be Final*; *The Award must Be Certain*; *Mistake in the Award*, etc. For matters of procedure, see the titles APPEALS, vol. 2 ENCYC. OF PLEADING AND PRACTICE, p. 142; AWARDS, vol. 3 ENCYC. OF PLEADING AND PRACTICE, p. 136.

4. Russell on Awards (6th ed.) 531; Bac. Abr., Arb., F.; *Freeman v. Bernard*, 1 Salk. 69.

May be Performed at Any Time.—An award may be performed part at one time and part at another, although it cannot be made part at one time and part at another. Bac. Abr., Arb., F.

Notice Not Necessary.—A party is bound to perform the award without receiving notice that it has been made, as it is as much within the knowledge of one as of the other. *Child v. Horden*, 2 Bulst. 143; *Gable v. Moss*, 1 Bulst. 44; *Bell v. Twentyman*, 1 Q. B. 766, 41 E. C. L. 767.

Stakeholder.—Where money or other personalty is deposited with a stakeholder, he is not bound to surrender the property until he receives notice of the award. *Wilkinson v. Godefroy*, 9 Ad. & El. 536, 36 E. C. L. 195.

5. No Time of Performance Named—Award Held Uncertain.—Where the award directed that the plaintiff should be entitled to credit for a certain sum on account of sales of land to the defendant, provided "they shall grant or cause to be granted to the said W. C. [the defendant] a clear, unincumbered, and satis-

Direction of Unconditional Payment of Money.—When the award is for the payment of money unconditionally, it has been held that the party becomes liable to pay upon publication of the award, without any demand.¹

b. WHAT IS A SUFFICIENT PERFORMANCE—Substantial Performance Requisite.—The party who is ordered to do an act must comply substantially with the directions of the award; a mere colorable execution of them is not sufficient.² His duty is to comply with the award without question, so far as is lawful and possible for him.³

factory title" to the land, but it did not specify any time within which the title was to be made, the award was set aside as not certain and final. *Carnochan v. Christie*, 11 Wheat. (U. S.) 446.

1. Unconditional Award as to Payment of Money.—*Thompson v. Mitchell*, 35 Me. 281; *Plummer v. Morrill*, 48 Me. 184; *Parsons v. Aldrich*, 6 N. H. 264; *Nichols v. Rensselaer County Mut. Ins. Co.*, 22 Wend. (N. Y.) 125. See *Crosby v. Watkins*, 12 Cal. 85; *Com. v. Pejepsut Proprietors*, 7 Mass. 399.

Money awarded when no time is specified for its payment is payable *instantly*. *Ehrman v. Stanfield*, 80 Ala. 118.

In *Dudley v. Thomas*, 23 Cal. 365, it was held that an award of money is absolute and unconditional, but an award of releases is different, for they are concurrent acts, and neither party can compel the other to execute a release without a tender of a release by himself.

Delay in Making Payment where No Demand Made.—In *Bodett v. Lees*, 12 La. Ann. 761, it was held that a mere delay in making payment of the amount due under the award, where no formal demand had been made for it, did not subject the debtor to the stipulated penalty in addition to the amount of the award.

2. Russell on Awards (6th ed.) 532.

Performance of Award—Illustrations.—Where in an action by a husband and wife, the husband being an unwilling party, in regard to the wife's right to an annuity, the award directed that the arrears of the annuity should be paid to the wife, and the party ordered to pay alleged that the husband had previously demanded such arrears, and stated that they had been paid to him, this was held to be no answer to an attachment for nonpayment to the wife, the payment to the husband being merely collusive, as the party in default knew that the award was intended to be in the wife's favor. *Wynne v. Wynne*, 4 M. & G. 253, 43 E. C. L. 137, 1 Dowl. N. S. 723.

Where an award directed that the owners of certain lands through which a drain passed should keep it of sufficient width and depth to carry off the water "intended to run down the same," and subsequently to the award one of the owners opened an underdrain into the drain awarded, which materially increased the flow of water in a way not contemplated by the arbitrators, it was held that the owner of the land lower down was not bound to alter the drain awarded so as to adapt it to the increased flow of water. *Sharpe v. Hancock*, 7 M. & G. 354, 49 E. C. L. 354.

Reasonable Compliance with Directions.—

Where lessees of a coal mine covenanted to sink for coal as far as could and ought to be accomplished by persons acquainted with the nature of collieries, and to erect thereon such fire engines as would be necessary, and they failed to carry out the exact provisions of the lease, an award upon a reference fixed the damages for such failure, and further ordered that they should sink to and through the coal mines demised, and erect fire engines, etc., according to the terms of the lease, before a certain day; it was held that the award had been sufficiently performed by them on their proving that, in the judgment of men of skill in coal mining, they had sunk for coal as far as they could and ought, and as far as was customary in such cases, and that they had found no coal that would pay to work. *Hanson v. Boothman*, 13 East 22.

Security for Performance—When Forfeited.—Where a note made by a third party was placed in the hands of the arbitrator as security for the performance of the award, the court held that the note could be delivered only after a valid award had been made with which the party depositing the note had failed to comply; and the delivery of the note, because the secured party had neglected to carry out the requirements of a certain memorandum or proposition, made to the parties and appended to the award by the arbitrator, which although agreed to by them was not properly part of the award itself, was declared to be invalid. *Moore v. Cockcroft*, 4 Duer (N. Y.) 133.

Tender of Performance.—Where the award is by parol, a tender of performance and a refusal of such tender will be held equivalent to a performance. *Smith v. Stewart*, 5 Ind. 220.

Where the award requires one of the parties to deliver to the other a deed of lands before a specified day, and also to deliver possession of the lands, and the grantee refuses to accept the deed upon tender, this refusal is equal to a performance by the other party, and debars the grantee from taking proceedings on account of all rights incident to and growing out of the deed. The grantee need make no attempt to deliver possession of the land. *Preston v. Whitcomb*, 11 Vt. 47. See *Lincoln v. Cook*, 3 Ill. 61.

3. Jesse v. Cater, 28 Ala. 482; *Griggs v. Woodruff*, 14 Ala. 20; *Allen v. Greene*, 19 Ala. 34; *Girdler v. Carter*, 47 N. H. 305.

Award Directing Several Acts—Some Bad or Impossible.—Where several different directions are given by the award, all of which are within the arbitrator's authority, the party ordered to perform them, where he has done nothing

Duty of Party Directed to Pay Money.—Where he is ordered to pay money he must seek out the person who is entitled to receive it, and tender it to him.¹

to show his willingness to perform the award, cannot object that one of the things directed is beyond his power, or that compliance with the award would expose him to an action. Russell on Awards (6th ed.) 532. See *Dodgington v. Bailwood*, 7 Dowl. 640; *Bouck v. Bouck*, 57 Minn. 490; *Gray v. Reed*, 65 Vt. 178.

Award Directing Building—Compliance with Building Act.—Where an award directed a person to rebuild premises wrongfully pulled down and to restore them exactly as before, and the doing so would break the provisions of a building act passed since the original erection of the premises, it was held that he was bound under the award to rebuild the premises, but in conformity with the requirements of the building act, and that the increased expense was imposed on him by his own wrongdoing. *Dodgington v. Hudson*, 1 Bing. 410, 8 E. C. L. 571.

Acts Held Breaches of Award or Otherwise.—If the award directs all suits between A and B to cease, and A prosecutes a suit against B and others, he does not thereby break the award. *Barnardiston v. Fowler*, 10 Mod. 204.

Where the award directed the plaintiff not to prosecute nor proceed on the action in the same term, it was held not to be broken by the entry of a continuance from term to term, for without such entry the plaintiff could not afterwards have gone on with his action. But if the award directs that the plaintiff shall not continue the action, it is a breach of the award if he continue it by attorney, but if the attorney enters the continuance without his knowledge it is not broken. *Gray v. Gray*, Cro. Jac. 525.

Where the decision of an award was that a certain road be the joint property of the parties to the submission, and their heirs and assigns, to use, possess, and enjoy as a road free and clear from any molestation each from the other, it was held that such award was not broken by a refusal of one of the parties to let the public travel over the road. *Webb v. Fish*, 4 N. J. L. 425.

Performance of Alternative Award.—If an award be in the alternative, a performance of either alternative is sufficient. *Hanson v. Webber*, 40 Me. 194.

But where one is impossible the other must be performed. *Simmonds v. Swaine*, 1 Taunt. 549; *Lee v. Elkins*, 12 Mod. 585; *Wharton v. King*, 2 B. & Ad. 528, 22 E. C. L. 130.

The same rule applies where one alternative is uncertain. *Oldfield v. Wilmer*, 1 Leon. 140, 304; *Simmonds v. Swaine*, 1 Taunt. 549.

Award of Release in Excess of Authority.—If an arbitrator exceeds his authority by awarding a release of all claims up to the time of the award instead of up to the time of the submission, an execution of a release up to the time of the submission is a good performance of the award. *Stevens v. Matthews*, 1 Ld. Raym. 116; *Marks v. Marriott*, 1 Ld. Raym. 114.

Award of Release on Payment.—If the award direct one party to pay a sum of money and

the other to execute a release on receipt of the sum so awarded, a refusal to accept the money when tendered does not release the party from his liability to execute the release. *Squire v. Grevett*, 2 Ld. Raym. 961; *Linnen v. Williamson*, Rolfe Abr., Arb., K. 16, p. 254; *Simon v. Gavil*, 1 Salk. 74; *Lumley v. Hutton*, Cro. Jac. 447.

Where One Party Dies before Executing Release.—Where the award directs payment by one party and the execution of a release by the other, and the latter dies, payment must be made to his personal representatives, and they must execute the release called for by the award. *Dawney v. Vesey*, 2 Vent. 249.

Release Made to Stranger, to Plaintiff's Use.—It has been held that where the defendant is ordered to execute a release to the plaintiff, and he delivers a properly executed release to a stranger, to the use of the plaintiff, which the plaintiff refuses to accept, the tender and refusal may be pleaded as a good performance of the award if no special place has been mentioned for the delivery. *Alford v. Lee*, Cro. Eliz. 54, 2 Leon 110; *Freeman v. Drew*, 2 Leon 181.

Award to Acquit of a Debt or Suit.—Where an award directs that one "shall acquit the other of such a debt or suit," it is not sufficient unless the party directed to acquit procures an actual discharge. *Freeman v. Sheen*, Cro. Jac. 339, 2 Bulst. 93.

So where a rent charge is submitted, and the award direct *quod staret quietus* of the rent for the party out of whose lands it is to be paid, he who has the charge ought to release the same to the other, for to be quit of the rent supposes the demand not in being. *Freeman v. Sheen*, 2 Bulst. 93, Bac. Abr., Arb., F.

Where an award directed "that a suit in chancery shall cease, and that the plaintiff shall stand acquitted of it," in an action on the bond for the nonperformance of the award, a plea that the defendant did not prosecute the suit and that the plaintiff *stetit inde quietus* was held sufficient, as the award ordered no act to be done by the party, but said that he should stand acquitted. The filing of another bill in chancery for the same matter was not a breach of the award, because the party was not damnified until a subpoena issued on the bill. But if one, being bound to save another harmless, obtains a process against him, this is a plain breach of the award. *Freeman v. Sheen*, Cro. Jac. 339, 2 Bulst. 93, 1 Rolle Rep. 7.

Effect of Award to Indemnify.—Where the award directs a party to execute a bond or covenant indemnifying the other against the costs of an action, and the party so directed executes the bond or covenant, the remedy on the arbitration bond is gone, and in case the party should not be indemnified he must proceed on the bond or covenant. *Phillips v. Knightly*, 1 Barnard 463.

1. *Doyley v. Benton*, 1 Ld. Raym. 533; *Furser v. Prowd*, Cro. Jac. 423.

Duty to Tax Costs Awarded.—Where the

Acts Directed on Both Sides, but Independent of Each Other.—A neglect or refusal of one of the parties to the submission, to perform his part of the award, does not vacate the award or prevent him from enforcing the directions given by it in his own favor, unless the performance of his part is made to take effect at the same time with performance by the other party, or unless it is made a condition precedent to such performance, either expressly or by implication.¹

Acts Directed on Each Side Mutually Dependent.—Where, however, an award requires both parties to do certain things and the performance is to be concurrent, or the things to be done are dependent on each other, or one a condition precedent to the other, the party who wishes to enforce the award must show that he has performed his part, has tendered performance, or has a legal excuse for nonperformance.²

award directs the defendant to pay the plaintiff his costs of the suit on a specified day, to be taxed by the proper officer, it is the duty of the defendant to have them taxed ready for payment on the day specified. *Candler v. Fuller*, Willes 62.

Whether Nonpayment of Rent a Breach of Award.—Where the award was that the defendant shall "enjoy a house, paying rent to the plaintiff," it was held that if the defendant failed to make the payment the arbitration bond was forfeited. The payment of the rent was not a mere condition on failure to do which the estate of the defendant was to cease. *Parsons v. Parsons*, Cro. Eliz. 211.

But where the award was that one party should make a lease for years to another, the other paying certain rent to the lessor, and the lessor made the lease but the rent was not paid, it was held that the nonpayment of the rent was not a breach of the arbitration bond; that the proper remedy was distress or an action of debt for the rent. But if the award directed the lessee to pay the rent, the bond would be forfeited by the nonpayment. *Anonymous*, F. Moore 3, pl. 8.

1. *Loring v. Whittemore*, 13 Gray (Mass.) 228; *Pickering v. Pickering*, 19 N. H. 389; *Nichols v. Rensselaer County Mut. Ins. Co.*, 22 Wend. (N. Y.) 125. See *Gordon v. Tucker*, 6 Me. 247.

Award Directing Independent Acts on Each Side.—Where, by an award, acts are to be performed by both parties, and those acts are distinct and independent, the one not a condition precedent to the other, and one party fails to perform the acts required on his part, the award is not thereby rendered void, but an action lies for breach of the award, and this although the party bringing the action has not performed his part of the award. *Loring v. Whittemore*, 13 Gray (Mass.) 228; *Girdler v. Carter*, 47 N. H. 305; *Schoff v. Bloomfield*, 8 Vt. 472. See *Gascoyne v. Edwards*, 1 Y. & J. 19; *Jessiman v. Haverhill*, etc., *Iron Manufacturing*, 1 N. H. 68.

Where money is awarded and mutual releases ordered, a tender of the release is not necessary before action for the money can be brought. *Dudley v. Thomas*, 23 Cal. 365.

Failure to Execute Bond Immediate Cause of Action.—Where arbitrators award a sum of money payable at some future day, the payment to be secured by a bond, an action for the money will accrue at once upon refusal to

execute the bond. *Bayne v. Morris*, 1 Wall. (U. S.) 97.

Independent Provisions of Award Enforceable Separately.—A suit upon an award need not cover the whole of it. The performance of any part of it may be enforced which is independent in itself, and can be enforced without doing injustice. *Schuyler v. Van Der Veer*, 2 Cal. (N. Y.) 235; *Lamphire v. Cowan*, 39 Vt. 420.

Unauthorized Judgment does Not Avoid Award.—Although a judgment rendered upon an award may be unauthorized and void, such judgment does not avoid the award. *Hume v. Hume*, 3 Pa. St. 144.

Collateral Agreement Not Avoiding Award.—In *Wynn v. Ballas*, 34 Pa. St. 160, it was held that an award for a sum certain is not rendered void by a collateral agreement, between the parties, that the party in whose favor the award was made should surrender the possession of certain premises to the other at a future time; and the court may control the execution so as to carry out such an agreement between the parties.

Award Enforceable by Stranger.—An award under a general submission ordering that one of the parties should pay a certain sum to the creditor of the other party can be enforced by the creditor, although a stranger to the arbitration. *Scearce v. Scearce*, 7 Ind. 286.

2. **Acts Concurrent or Interdependent.**—*Jesse v. Cater*, 28 Ala. 475; *Leitch v. Beaty*, 23 Ill. 642; *Shearer v. Handy*, 22 Pick. (Mass.) 417; *Pomroy v. Gold*, 2 Met. (Mass.) 500; *Hugg v. Collins*, 18 N. J. L. 294; *Huy v. Brown*, 12 Wend. (N. Y.) 591. See *Lamphire v. Cowan*, 39 Vt. 420.

Mutual Releases.—Where an award directed mutual releases upon the payment and receipt of certain money, on suit brought by the party entitled to recover the money for its payment the court, by *Curtis, J.*, said: "I am of opinion that a readiness by the plaintiff to release, and notice to the defendant of such readiness, were necessary to be averred. * * * The acts of the parties were to be concurrent, and an action cannot be sustained by either without averring and proving a readiness on his part to perform and notice thereof, or something sufficient to dispense therewith." *Matthews v. Matthews*, 2 Curt. (U. S.) 105. But see, where the acts were not made dependent on each other, *Nichols v. Rensselaer County Mut. Ins. Co.*, 22 Wend. (N. Y.) 125.

c. AWARD ORDERING DEED—What Is a Sufficient Deed.—Where an award orders the execution of a deed, the making of any deed which is in law effective to pass all the title of the grantor to the premises at the date of the award will sufficiently comply with such direction.¹

Whether Request to Execute Deed Necessary.—There does not appear to be any clear rule as to whether a request to execute the deed in such a case is necessary; in some cases it has been held essential, in others not.²

d. PERFORMANCE BY THE ARBITRATORS.—The arbitrators are not bound to perform the award themselves, nor to see to or superintend its execution, even when the submission contains a provision to that effect.³

e. POWER OF COURT TO DIRECT AWARD TO BE DELIVERED FOR CANCELLATION.—The court has no power over the award to order that it shall be delivered up for cancellation after its directions have been performed.⁴

18. Refusal to Execute Award—Refusal to Carry Out Justifies Refusal by Other Party or Gives Cause of Action.—Where either of the parties refuses to perform the award the other party is either exonerated from carrying out the orders that have been given to himself,⁵ or he may maintain an action for breach of the agreement to submit or upon the bond to abide by the award.⁶

Acts Concurrent, although One Not Condition Precedent of Other.—Whether or not the performance by one party has been made a condition precedent by the arbitrators to performance by the other party, is a question to be determined from their intention as gathered from the whole award. Where A was directed by the award to execute a deed of certain land on or before a specified day and to deliver possession of it to B, and the award directed B to pay a certain sum to A on or before the same day, it was held that it was not necessary to say whether performance by A was or was not a condition precedent to the payment by B. The court said: "Perhaps it is not, but the acts of the parties are clearly concurrent, as they are to be performed upon the same day, and applying the rule applicable to concurrent covenants, which are analogous, the party suing must show performance, or an offer to perform, on his part, to entitle himself to a recovery." *Huy v. Brown*, 12 Wend. (N. Y.) 591.

1. Award of Deed.—*Preston v. Whitcomb*, 11 Vt. 47. See *Tinney v. Ashley*, 15 Pick. (Mass.) 546, 26 Am. Dec. 620.

In the case of *Preston v. Whitcomb*, 11 Vt. 47, the direction to make a good and authentic deed was held to refer to the validity and sufficiency of the deed in point of law merely, and not to the title to be thereby conveyed.

2. When Request to Execute Deed Essential.—In *Rosse v. Hodges*, 1 Ld. Raym. 233, where the award directed that on the payment of a mortgage debt the mortgagee should reassign the mortgaged land, it was held that no request was necessary, as the reassignment might have been made without the presence of both parties; but if it had been a reassignment, a request would have been necessary, because the feeoffee would have to be present to receive the livery.

In *Pomroy v. Gold*, 2 Met. (Mass.) 500, where a party agreed to accept a price for land to be fixed by arbitration, and to convey the land to the other party, it was held that a request for a deed was necessary before the

second party could sue for a breach of the agreement.

A request for the execution of a deed may be made by an agent, though a demand for a money payment stands on a different footing. *Kenyon v. Grayson*, 2 Smith 61.

Whether Vendor should Tender Deed.—The case of *Doe v. Stillwell*, 8 Al. & El. 645, 35 E. C. L. 480, and *Standley v. Hemmington*, 6 Taunt. 561, were decided on the principle, which was supposed to be law, that the vendor was to prepare and tender the conveyance for the execution of the vendee, though such was never the practice of the English conveyancers. *Russell on Awards* (6th ed.) 536. See the title **VENDOR AND PURCHASERS**.

In *Candler v. Fuller*, Willes 62, an old case, it was said that if an award directed a person to convey an estate to another by such a time, he was to procure the conveyances to be made; or if it directed him to convey an estate to another by such conveyances as a certain counsel should approve of, then he was bound to prepare them and have them approved by that counsel.

3. Arbitrators need Not Execute Award.—Where the matter submitted to the arbitrators was to determine the proper height of a dam, and the submission contained a provision that "whatever they decide shall be done under their direction," on the award directing that the dam should be cut down it was objected that the work should be done under the supervision of the arbitrators; but the court held that if they had given general directions, which could be executed by any person skilled in such matters, then they had conformed to the terms of the submission. *Berkshire Woolen Co. v. Day*, 12 Cush. (Mass.) 128.

4. *Russell on Awards* (6th ed.) 534; *Symonds v. Mills*, 8 Taunt. 526, 4 E. C. L. 198.

5. *Preston v. Whitcomb*, 11 Vt. 47.

See *supra*, this title, *Performance of the Award—What Is a Sufficient Performance*.

6. *Purslow v. Bailey*, 2 Ld. Raym. 1039; *Gerry v. Eppes*, 62 Me. 52.

See *Banks v. Adams*, 23 Me. 259; and *supra*,

Refusal to Perform does Not Avoid Award.—The refusal of one or both the parties to abide by the award does not in any way affect its legal validity.¹

19. Effect of the Failure of the Reference—**Failure of Reference in Action Pending—Effect on the Action.**—When an action at law is referred, and the attempt to settle the matter in dispute by arbitration proves abortive, either because the award is set aside, or because no award is made, the action as it originally stood in court may be proceeded with, unless the parties have entered into an agreement that the case should come to an end.² The rule in equity when a reference proves abortive is the same.³

Failure of Reference as to Contract—**Whether Contract Enforceable in Equity.**—Where the reference has proved abortive, as where the terms of a contract are referred, and the arbitrators have failed to decide that matter which is the essence of the contract, and there is no part performance of such contract, neither the submission nor the contract can be enforced in equity.⁴ But when the submission is not of the essence of the contract, and there is part performance, the contract will be enforced;⁵ and sometimes upon part performance, although the

this title, *Performance of the Award—What Is a Sufficient Performance.*

Failure to Deliver Property—Measure of Damages.—Where an award of arbitrators assigned certain property to one of the parties and some also to the other, and the defendants failed to carry out the award, it was held that the plaintiffs could recover as damages the difference between the value of the thing which the defendants did not deliver as required by the award, and the value of the property which the plaintiffs were required to deliver to the defendants under it. *Gray v. Reed*, 65 Vt. 178.

Party Entitled to Time to Examine Deed before Signing.—A party will not be subjected to a forfeiture provided for in an award by refusing to accept such award, or to comply with its terms until he gets such reasonable time before signing a deed required to be made by it as will enable him to determine whether such deed is drawn up in accordance with the decision of the arbitrators. *Odum v. Rutledge, etc.*, R. Co., 94 Ala. 488.

1. *Hynes v. Wright*, 62 Conn. 325. See *Hopson v. Doolittle*, 13 Conn. 236; *Curley v. Dean*, 4 Conn. 259, 10 Am. Dec. 140; *Bridgeport v. Eisenman*, 47 Conn. 34.

In *Hynes v. Wright*, 62 Conn. 323, each party had refused to abide by the award, but the refusals were on separate days, without any meeting of the minds and without consideration. See *supra*, this title, *Ratification and Repudiation of the Award—Repudiation.*

2. *Lowes v. Kermodé*, 8 Taunt. 146, 4 E. C. L. 51; *Harries v. Thomas*, 2 M. & W. 32; *James v. Thurston*, 1 Cliff. (U. S.) 367; *Morton v. Cameron*, 3 Robt. (N. Y.) 191; *Reformed Protestant Dutch Church v. Parkhurst*, 4 Bosw. (N. Y.) 496; *Haggart v. Morgan*, 5 N. Y. 422, 55 Am. Dec. 350; *New York v. Butler*, 1 Barb. (N. Y.) 325.

Agreement Putting End to Case.—The parties may give up the case, or preclude themselves from bringing a new action by agreement. *Moscato v. Lawson*, 1 H. & W. 572; *Harries v. Thomas*, 2 M. & W. 32.

Submission Falls with Award.—Where the

award is set aside the submission falls with it. *Steere v. Brownell*, 113 Ill. 415; *Calvert v. Carter*, 18 Md. 73. See *Robinson v. Shanks*, 118 Ind. 125.

3. **Failure of Reference in Equity.**—*Cooth v. Jackson*, 6 Ves. Jr. 12; *Crawshay v. Collins*, 3 Swanst. 90.

4. **Where Matter Submitted of Essence of Contract, and there Is No Part Performance.**—*Cooth v. Jackson*, 6 Ves. Jr. 12; *Darnley v. London, etc.*, R. Co., 3 De G. J. & S. 24, 36 L. & J. Ch. 404; *Firth v. Midland R. Co.*, L. R. 20 Eq. 100, 44 L. J. Ch. 538.

Illustrations.—Where lands are to be sold at a price to be determined by arbitration, and the arbitrators fail to fix the price, the Court of Chancery will not get the price fixed by the master or some one else and compel the intended purchaser to take the lands at that price. The price as fixed by the arbitrators is the essence of the contract, and when they fail to determine it there is no contract and nothing to enforce. But if it were an agreement to take the lands at a fair valuation, it would be otherwise. *Milnes v. Gery*, 14 Ves. Jr. 400; *Pritchard v. Overy*, 1 Jac. & W. 396; *Tillet v. Charing Cross Bridge Co.*, 26 Beav. 419; *Vickers v. Vickers*, L. R. 4 Eq. 529; *Richardson v. Smith*, L. R. 5 Ch. 648.

Even where the award was agreed on and reduced to writing, but one of the parties died before it was executed, and the authority of the arbitrators was as a consequence revoked, the court refused to enforce the award. *Blundell v. Brettargh*, 17 Ves. Jr. 232.

5. **Where Matter Submitted Not of Essence of Contract, and there Is Part Performance.**—*Gourlay v. Somerset*, 19 Ves. Jr. 429; *Rowe v. Wood*, 1 Jac. & W. 316. See *Waters v. Taylor*, 15 Ves. Jr. 10; *Blundell v. Brettargh*, 17 Ves. Jr. 232.

Where certain lands were conveyed as security for a debt, the amount of which was to be determined by arbitration, on the failure of the reference by the death of an arbitrator the court referred the matter to the master to determine the amount of the debt. *Cheslyn v. Dalby*, 2 Y. & C. 170. See *Evershed v. Evershed*, 46 L. T. N. S. Ch. Div. 690.

submission is of the essence of the contract and the matter has not been determined, equity will interfere.¹

Reference Failing through Fault of Party.—So equity has interfered also when the reference has failed because of the fault of one of the parties.²

Failure as to One Party is Failure as to All.—It has been held that an award which is void as to one of the parties is void as to all.³

1. Although Matter Submitted Essential, Yet Part Performance Held Sufficient.—*Gregory v. Mighell*, 18 Ves. Jr. 328; *Dinham v. Bradford*, L. R. 5 Ch. 519.

Where a party agreed to take a lease of certain lands at a fair rent to be fixed by arbitrators, and he entered into possession of the lands, held them for years, and spent money on them, the court, on the failure of the reference, referred to the master the determination of a fair rent. *Gregory v. Mighell*, 18 Ves. Jr. 328.

But acts done by the arbitrators, such as

making surveys, etc., in the execution of their duty, do not amount to such a part performance of the award as will sustain a bill for specific performance. *Cooth v. Jackson*, 6 Ves. Jr. 12; *Blundell v. Brettargh*, 17 Ves. Jr. 232.

2. *Morse v. Merest*, 6 Madd. 26.

3. *Power v. Power*, 7 Watts. (Pa.) 205; *Nichols v. Rensselaer County Mut. Ins. Co.*, 22 Wend. (N. Y.) 125; *Belmont v. Tyson*, 3 Blatchf. (U. S.) 530.

But see *Fortune v. Killebrew* (Tex. Civ. App. 1893), 21 S. W. Rep. 986.

ARCHITECTS.

By EDWARD T. BOGGS.

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For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the titles AGENCY, vol. 1, p. 930; CONTRACTS; EXPERT AND OPINION EVIDENCE; FRAUD; MECHANICS' LIENS; RESCISSION; SPECIFIC PERFORMANCE.

I. DEFINITION AND NATURE.—An architect is a person skilled in the art of building; one who understands architecture, or whose profession it is to form plans and designs of buildings, and superintend their execution.¹

Must be Disinterested.—The architect must have no pecuniary interest in the performance of the contract,² and if he accepts commissions from the

1. Century Dictionary.

The Term Defined.—"The architect is the recognized head of the building trade. He is supposed to be especially skilled in the art of planning and designing architectural structures of every description. His duty is to draw plans and make out specifications, and generally superintend the execution of the work." Lloyd's Law of Building and Buildings (2d ed.), § 7. See also *Turner v. Haar*, 114 Mo. 335; *Brown v. Cowan*, 110 Pa. St. 592.

United States Revenue Law.—The Revenue Act of July 13, 1866, 14 Stat. at Large 121,

contains a provision that every person whose business it is to plan, design, or superintend the construction of buildings, ships, roads, bridges, canals, or railroads, shall be regarded as an architect and civil engineer; *provided*, that this shall not include a practical carpenter who labors on a building.

2. Architect must be Disinterested.—He is entitled to no other profit from his transactions in his employer's behalf than the agreed compensation or reasonable fees. Lloyd's Law of Building and Buildings (2d ed.), § 11.

Where an architect has guaranteed his

contractor he may be discharged.¹ His position is one of trust and confidence, requiring the utmost good faith towards both parties.²

II. SUBMISSION OF PLANS—1. **Submission and Acceptance**—No Stipulation as to Approval.—Unless it is clearly understood at the time that the plans are submitted subject to approval,³ an intending builder, by calling upon an architect to submit plans and specifications and receiving them, renders himself liable to pay for them, whether they are used or not.⁴

employer that the total cost of the work shall not exceed a certain sum, of which agreement the builder has no knowledge, he is an improper arbitrator, and the builder is not bound by a submission to his arbitration. *Kimberley v. Dick*, L. R. 13 Eq. 1, 41 L. J. Ch. 38, 25 L. T. 476, 20 W. R. 49. And the same ruling has been followed when the architect merely assured the owner that the building would not cost over a certain sum. *Kemp v. Rose*, 1 Giff. 258.

But where the defendants employed an architect to superintend the construction of a building of which he was one of the contractors, they could not plead that it was against public policy that he should occupy inconsistent positions, in defense of an action brought by him for services as superintendent. *Shaw v. Andrews*, 9 Cal. 73.

1. **Accepting Commissions from Contractor**—**Dismissal**.—An architect cannot, at one and the same time, be employed by the proprietor and builder and receive pay from them both; and the fact that an architect has covenanted with the builder to receive payment from him is sufficient to discharge the proprietor. *Tahrland v. Rodier*, 16 L. C. Rep. 473. And see *Norris v. Day*, 4 Y. & Coll. Exch. Eq. 475, 10 L. J. N. S. 43.

The Supreme Court of *Missouri* held an agreement by a lumber dealer to pay the superintendent of a building, whose duty it was to pass upon accounts for materials furnished, but not to make purchases, a commission on all sales of lumber made to his employers through his influence, to be against public policy and void. *Atlee v. Fink*, 75 Mo. 100, 42 Am. Rep. 385. But the same court held that words written of a supervising architect, charging him with having given work upon the building to certain parties who paid him a commission therefor, are not actionable *per se*. *Legg v. Dunleavy*, 80 Mo. 558, 50 Am. Rep. 512.

Advances to Architect by Contractor.—It has been held that advances or loans made to the architect by the builder can be proved by the owner as bearing upon the question of negligence alleged in the answer, fraud not being claimed. *Gilman v. Stevens*, 54 How. Pr. (N. Y. Super. Ct.) 197.

2. **Architect's Position One of Trust and Confidence**.—It is the duty of an architect superintending the erection of a building to act in all things relating to his principal solely for the latter's interest, and with fidelity to his employer and his trust. The law does not recognize or tolerate conduct on the part of the architect which is hostile to his principal and in the interest of an adverse party with whom he is dealing for his principal. *Lewis v. Slack*, 27 Mo. App. 119.

The nature of the duties of a building superintendent is such that it would be improper that he should be appointed or controlled by the contractor; and the two positions being inconsistent, a contract will not be implied for the employment of the contractor as superintendent of his own work. *Friedland v. McNeil*, 33 Mich. 40.

When the architect is empowered by the building contract to take possession of the building if the contractor fails to comply with the conditions of the contract, such power does not depend upon the architect's mere arbitrary discretion. *White v. Harrigan*, 41 Minn. 414.

3. **"Probationary Drawings"**.—*Moffatt v. Dickson*, 13 C. B. 543, 76 E. C. L. 543. In this case an architect agreed with the committee of visitors of a lunatic asylum to prepare the requisite probationary drawings and documents required to be submitted to the commissioners of lunacy and afterwards to the secretary of state pursuant to the statutes, and subsequently to prepare the whole of the working drawings, estimates, and specifications for an asylum to contain two hundred patients, for an agreed sum; and it was held that the term "probationary drawings" meant drawings to be approved by the committee, and, if approved, then to be submitted to the commissioners of lunacy and secretary of state; and that, it appearing that the committee had disapproved of the drawings submitted to them, there could be no recovery.

4. **No Agreement as to Approval of Plans Submitted**.—See *Nelson v. Spooner*, 2 F. & F. 613; *Marcotte v. Beaupre*, 15 Minn. 152.

Where a committee appointed by a board of school directors to procure plans for a building, selected one from the plaintiff, and directed some modifications, which he made, it was held that the directors were bound to pay for his work, though they did not finally act on his plan. *Driscoll v. Independent School Dist.*, 61 Iowa 426.

In *Kutts v. Pelby*, 20 Pick. (Mass.) 65, the plaintiff, having been requested by the defendant to prepare plans for a theatre, drew a sketch of the front, which was presented to the defendant and kept by him a week, and he, being pleased with it, directed the plaintiff to make the plans. The defendant's master builder called by defendant's request on the plaintiff and took the plans to make an estimate of the costs of the structure, kept them a week, made an estimate on them, and delivered it to the defendant. The defendant concluded not to build by those plans, and they were in the possession of the plaintiff and produced by him at the trial. It was held that the evidence proved a delivery of the plans to the defendant, and that the plaintiff

Plans Subject to Approval.—Where plans are to be submitted subject to approval, and several have been submitted and rejected, the employer is justified in procuring plans elsewhere, and need wait no longer upon the first architect.¹

Fraud—Rescission.—Where an architect has procured a contract through fraudulent representations, it may be rescinded.²

2. Submission in Competition.—Architects are frequently called upon to submit plans in competition, the one deemed most meritorious to be accepted and its designer made superintendent of construction.³ This is especially the case where large buildings of a public nature are to be erected, premiums being also offered for the next two or three plans in order of merit, to stimulate competition.⁴

was entitled to recover compensation for his services.

Acceptance of Plans.—A county, and a city within its limits, proposed to erect public buildings, the portion appropriated to the use of each to be paid for by them respectively. They jointly offered a premium for plans, and A furnished one and received the promised compensation, there being no further contract between the parties. The city and county severally adopted a resolution accepting his plans, subject to such modifications as should thereafter be determined upon, if his estimate as to the cost of construction should be verified. He brought suit against them to recover five per cent. of the estimated cost of the building, and it was held that the joint resolution did not amount to a contract, and that he was not entitled to recover, and that evidence of the value of his services in making the estimates was properly excluded, inasmuch as he failed to show that they had been rendered at the instance of the defendant. *Tilley v. Cook County*, 103 U.S. 155. See also *Allen v. Bowman*, 7 Mo. App. 29.

In *Hall v. Los Angeles County*, 74 Cal. 502, it is held that a resolution of a county board of supervisors adopting the plans submitted in pursuance of their proposal, on condition that the board receive a bid from a reliable party who would give sufficient bonds to erect the building in conformity with the plans for a specified sum, is an "adoption" of such plans within subd. 9 of § 25 of the County Government Act of 1883 of that state.

An architect devoted several years to the preparation of plans for the construction of the congressional library building, but there was no contract entered into with him by any commission or officer empowered to adopt plans, employ architects, or enter upon the construction of the building, until Act April 15, 1886, c. 50 (24 Stat. at Large, p. 12), which adopted the architect's plan. It was held that the act did not constitute a contract, but only declared the legislature's intention, and might have been rescinded by either party without liability at any time before the architect entered upon the performance of the work. *Smithmeyer v. U. S.*, 147 U.S. 342.

1. Approval.—*Moffatt v. Dickson*, 13 C. B. 543, 76 E. C. L. 543.

2. Fraud—Slander of Members of Board—Rescission.—A board of county supervisors, who have adopted the plans of an architect for the erection of a county jail, are justified in re-

scinding the contract if they have been induced to execute it through the fraudulent representations of the architect; but they cannot rescind it on the ground that the architect has slandered certain members of the board. *Hall v. Los Angeles County*, 74 Cal. 502.

3. Failure of Carrier to Deliver Plans in Time for Competition—Damages.—Where a committee for the erection of a public building advertised for the submission of plans and specifications, and offered a premium to the successful competitor who should present the same on or before a given date, and an architect prepared and forwarded a set of plans and specifications by an express company, but in consequence of the latter's negligence they were not delivered until after the specified time, it was held that the measure of damages, in an action against the express company, was not the value of the time and labor expended in making the plans and specifications, but the value of the plaintiff's chance in obtaining the premium; and that in the absence of proof of any probability that he would have obtained the premium, had his plans and specifications been delivered in time, only nominal damages could be recovered. *Adams Express Co. v. Egbert*, 36 Pa. St. 360, 78 Am. Dec. 382. See also *Watson v. Ambergate, etc., R. Co.*, 15 Jur. 448.

Agreements to Stifle Competition.—*Flanders v. Wood*, 83 Tex. 277, was a suit between architects for an accounting. It appeared that each had put in plans and specifications for the erection of a courthouse; that there was competition between the plans offered, and that it was unknown whose plan would be accepted. The architects agreed among themselves to abstain from further advocacy of their plans, and to divide the proceeds should the plan of any one of them be accepted. It was held that the promises of the parties, being mutual and simultaneous, constituted a valuable consideration for the agreement, and that it was against public policy, nor to prevent rivalry, etc., since, as the plans were not withdrawn and each competed, it was not calculated to stifle competition.

4. See *Walsh v. St. Louis Exposition, etc., Assoc.*, 101 Mo. 534; *Walsh v. St. Louis Exposition, etc., Assoc.*, 90 Mo. 459; *Tilley v. Cook County*, 103 U.S. 155.

Ownership of Plans where Prize Offered—Usage.—In order to obtain a number of plans from which to select, prizes are frequently

Rights of Successful Competitor.—Where such offers are made and a submission of plans called for, the competitor whose plans have been accepted as the best has a right of action for a refusal to employ him as architect and superintendent of the building.¹

3. Limitations on Cost of Structure—Rule Stated.—Where plans are required for a building not to exceed a certain sum, or are accepted on condition that it can be erected for a given amount, there can be no recovery by the architect unless the building can be erected for the sum named.²

Estimates of Probable Cost of Building.—And if an architect submits estimates of the probable cost of the building, he cannot recover for his plans unless the estimate is reasonably near the actual cost.³

Fees Not to be Included in Estimate.—But in such case the architect's fees cannot be regarded as part of the estimate.⁴

III. SKILL AND CARE REQUIRED—1. Defective Plans.—The public profession of an art is a representation or undertaking to all the world that the professor possesses the requisite ability and skill.⁵

Presumption.—It follows as a consequence that an architect is presumed to possess the skill and ability necessary for the practice of his profession, and will not only be liable in damages for defects in his plans,⁶ but, it seems,

offered to several deemed the most meritorious. When such is the case a question sometimes arises as to the ownership of the successful plans. In *Tilley v. Cook County*, 103 U. S. 162, the plaintiff offered to prove a custom of architects, that when prizes were offered the successful competitor remained the owner of his own designs, and that if they were adopted he was entitled to compensation therefor in addition to the prize, but the evidence was rejected on the ground that in that case the building was never erected and the plans never used.

But in *Walsh v. St. Louis Exposition, etc., Assoc.*, 101 Mo. 534, where an association invited architects to submit designs for a building, the seven deemed most meritorious to be accepted and awarded five hundred dollars each, except the one selected as the best of all, the designer of which was to be engaged as the architect, it was held that upon the tender of the award of five hundred dollars to the successful competitors the association became the owner of the plans, and was entitled to use them as it chose.

1. *Walsh v. St. Louis Exposition, etc., Assoc.*, 90 Mo. 459, *affirming* 16 Mo. App. 502.

2. **Cost of Building Exceeding Limit Named.**—*Walsh v. St. Louis Exposition, etc., Assoc.*, 101 Mo. 534.

Where various plans were drawn and presented for a church building, and that of the plaintiff was accepted upon condition that the building under his plans should be built for a certain sum, and when, on ascertaining that it could not be built for such sum, the plans were rejected, and the evidence failed to show any promise to pay for the plans, the plaintiff was held not entitled to recover for them. *Ada St. Methodist Episcopal Church v. Garnsey*, 66 Ill. 132.

3. **Actual Cost must be Reasonably Near Estimate.**—*Money Penny v. Hartland*, 1 C. & P. 352, 11 E. C. L. 414; *Smith v. Dickey*, 74 Tex. 61.

In an action by an architect whose plans,

after having been accepted, are rejected on the ground that the work cannot be done for the amount of his estimates, it is for the jury to say whether the estimates are reasonably near the actual cost. *Nelson v. Spooner*, 2 F. & F. 613. In this case an architect made plans for a schoolhouse for a board of trustees who had only one thousand three hundred and fifty pounds in their hands to pay for it. After making the plans the architect estimated the cost at one thousand five hundred and forty-five pounds, and repeatedly assured the trustees that his buildings "never exceeded the contracts," unless changes were authorized by the owners themselves. He afterwards suggested some changes which he said he thought could be included in the estimated price. Upon submitting the plans to builders for bids, the lowest bid received was for two thousand and fifty-six pounds. The trustees then refused to do anything further about the matter, and returned the drawings to the architect, who sued them for his pay. Upon the question being submitted to the jury, they disagreed as to whether the estimate was reasonably near the bids.

4. **Architect's Fees Not Included in Estimate.**—*Smith v. Dickey*, 74 Tex. 61.

5. **Representation of Requisite Skill.**—*Per Willes, J.*, in *Harmer v. Cornelius*, 5 C. B. N. S. 246, 94 E. C. L. 246.

Employer does Not Guarantee Bill of Quantities.—The mere employment of an architect to prepare plans and specifications for a house and to procure a builder to complete it, does not make him the agent of the employer to the extent of rendering the employer responsible for the accuracy of the bill of quantities furnished by the architect to the builder, and the builder, having expended much more time and materials than contemplated, cannot recover from the owner more than the contract price. *Scrivener v. Pask*, 18 C. B. N. S. 785, 114 E. C. L. 785.

6. **An Architect may be Held to Reasonable Skill as Such**, both in planning the building

cannot recover for them.¹

Plans must be Followed.—The employer, however, must, in such cases, show that the plans and specifications have been substantially followed.²

2. Care in Superintendence—Must Exercise Reasonable Care and Diligence.—An architect, required by his contract to superintend the construction of a building, must exercise reasonable care and diligence in the supervision of the work,³ and in issuing certificates thereon,⁴ and is liable to the owner for any damage

and superintending its construction, and may be liable for defects in his plans or superintendence resulting from his lack of reasonable skill and diligence, notwithstanding the adoption of his plans or the ratification of his superintendence by the acceptance of the building without objection, if the defects are patent to an expert, but latent to a nonexpert. *Shipman v. State*, 43 Wis. 381. And see *Money Penny v. Hartland*, 1 C. & P. 352, 11 E. C. L. 414, 2 C. & P. 378, 12 E. C. L. 181.

In *Schreiner v. Miller*, 67 Iowa 91, 56 Am. Rep. 339, it was held that an architect employed to furnish the plans for a building and superintend its construction, is liable for damages if, through his lack of skill or care, the foundations are so defective as to cause the walls to fall.

Mistakes in Plans Increasing Cost of Structure.

—It seems that an architect is liable for mistakes in plans and specifications which increase the cost of the building. *Erschine v. Johnson*, 23 Neb. 265.

Where, in the Building of Apartment Houses to be Heated by Steam, it appeared that the sectional area of the boiler flues for the steam-heating apparatus was largely in excess of the sectional area of the chimney flues designed to receive the smoke and gases from the boiler fires, thus preventing proper combustion in the furnace and entailing on the defendant the cost of building new chimney flues, it was held that the architects were bound to know how to proportion the chimney flues to the boilers, and could not excuse themselves by proof that they conferred with the contractor for the steam-heating apparatus, and obtained from him the dimensions of the chimney flues. *Hubert v. Aitken*, 15 Daly (N. Y.) 237.

1. Architect Recommending Building upon Unsuitable Soil.—An architect, it seems, cannot recover for his plans, even though they have been accepted by the employer, where he recommends building upon soil which he has examined, and which his knowledge and experience should have told him was unsuitable for the purpose. *Whitty v. Dillon*, 2 F. & F. 67. And see *Money Penny v. Hartland*, 1 C. & P. 352, 11 E. C. L. 414, where a similar ruling was made in the case of an engineer who failed to examine the ground for the foundation of the work, and as a result made a considerable error in his estimates.

2. Plans must be Followed—Variance.—Where an action is brought against an architect to recover damages alleged to have resulted from a defect in the plans and specifications furnished by him, the plaintiff must prove a substantial compliance with the plans

and specifications, and when a variance appears involving the integrity of the mode of construction of the affected part, and so far material that it would have been the direct cause of the injury complained of, the architect is not liable, and a submission to the jury of the question whether or not the variance did or did not cause the injury is error. *Lake v. McElfatrick*, 139 N. Y. 349, reversing (Supreme Ct.) 19 N. Y. Supp. 494.

3. Architect must Exercise Reasonable Care and Diligence.—*Shipment v. State*, 43 Wis. 381. It is the duty of the architect to exercise proper vigilance and skill in the supervision of the work; to see that it is done in the manner contemplated by the specifications, and in a good, workmanlike, and substantial manner. *Gilman v. Stevens*, 54 How. Pr. (N. Y. Super. Ct.) 197.

Joint Negligence of Contractor and Architect.

—In *Newman v. Fowler*, 37 N. J. L. 89, it was held that where a house was badly built, in consequence of the joint neglect of the contractor performing the work and the architect employed to supervise the construction, a suit founded on such neglect would lie against the architect alone, and the fact that the owner of the house refused the contractor part of the money due him, on the ground that the house was badly built, would not bar such suit.

Falling of Building—Damages.—In *Lottman v. Barnett*, 62 Mo. 159, an architect having the general charge and superintendence of the construction of a building was held responsible for the killing of a workman, caused by the falling of a wall, which resulted from the giving way of supports on which it rested, under the working of a jackscrew, although the appliance was put to work under the immediate direction of another person employed by the owner of the building while the architect was absent, but it appeared that the manager of the jackscrew was employed on the advice of the architect, and subject to his direction, and that the latter knew and approved of the method adopted for effecting the raising.

Oral Contract—Architect's Duties in Dispute.—

Where the contract of employment was oral, and the nature and extent of the architect's duties as superintendent were in controversy, an instruction which virtually left the whole matter as to what it was "proper" for the architect to do, to the judgment and caprice of the jury, unrestrained by the evidence in the case, was, under the peculiar circumstances of the case, held erroneous. *Vigant v. Scully*, 20 Ill. App. 437.

4. Architects' Certificates.—Where, by his contract, an architect is required to give

resulting from his neglect in either respect. But he is bound to use reasonable care and diligence only, and having done this he cannot be held responsible for defects in the work.¹

Matters of Detail.—It has been held that an architect, in superintending the construction of a building, is not required to see that all the minor details of the work are done properly. Under this rule, he would not be liable to the owner for failure to discover that the contractor, in putting the roof on the porch, had neglected to fasten the mortised joints with pegs.²

3. Question of Fact—Burden of Proof.—The negligence or want of skill of the architect is a question of fact and not of law,³ and the burden of proof is upon the party seeking to establish it.⁴

IV. POWERS OF ARCHITECT—1. In General—Alterations—Extra Work.—An architect superintending the erection of a building has no authority generally to make alterations in the plans and specifications and bind his employer for extra work, or to make any changes in the original contract.⁵

Accepting Different Class of Work from that Required by Contract.—He cannot bind the employer by accepting a class of work inferior to or different from that called for by the contract.⁶

certificates from time to time for a certain per cent. of the value of the work done by the contractor, he will be liable to the owner for any loss resulting from his negligence in certifying for too much work. *Irving v. Morrison*, 27 U. C. C. P. 242. But in *Vigean v. Scully*, 20 Ill. App. 437, an instruction was held erroneous in announcing that the duty was imposed upon the architect, before issuing any certificate, to make a special inspection of the work sufficient to satisfy himself that the particular work for which the certificate was asked was done properly and in accordance with the plans and specifications; that no such duty was imposed by the terms of the contract.

Monthly Estimates.—Where the superintendent is required to make monthly estimates of the work done, he cannot be required to furnish "correct and accurate estimates," monthly estimates being in their nature mere approximations. *Shipman v. State*, 43 Wis. 381.

1. *Petersen v. Rawson*, 34 N. Y. 370.

An architect in the supervision of the work is bound to exercise only reasonable care and to use reasonable means of observation and detection, and where he appears to have done this, the mere fact that inferior materials have been used by the contractor in some instances, and that the plumbing has been carelessly done, does not establish as a matter of law that he has not fully performed his contract. *Hubert v. Aitken*, 15 Daly (N. Y.) 237.

2. *Stewart v. Boehme*, 53 Ill. App. 463.

3. Negligence—Question of Fact.—*Hubert v. Aitken*, 15 Daly (N. Y.) 237.

4. The Burden of Proof is upon the party seeking to show that the architect failed to exercise ordinary care and diligence. *Gilman v. Stevens*, 54 How. Pr. (N. Y. Super. Ct.) 207.

5. Power of Architect to Change Original Contract.—*Woodruff v. Rochester, etc., R. Co.*, 108 N. Y. 39; *Baltimore Cemetery Co. v. Coburn*, 7 Md. 202; *Stuart v. Cambridge*, 125 Mass. 102; *Rex v. Peto*, 1 Y. & J. 37;

Cooper v. Langdon, 9 M. & W. 60; *Jones v. Reg.*, 7 Can. Supreme Ct. 570; *Reg. v. Starrs*, 17 Can. Supreme Ct. 118.

Illustrations.—In *Adlard v. Muldoon*, 45 Ill. 193, certain newel posts, brackets, and cornices were not furnished according to the specifications, and gas pipes were not put in some of the bedrooms as required by the contract. The architect claimed that he had deducted these omissions or set them off against extra work done. It was held, in an action by the contractor for the balance claimed to be due upon the contract, that the architect could not, unless specially authorized, change the terms of the contract, and that there could be no recovery until the specifications were complied with. And see *Bonesteel v. New York*, 22 N. Y. 162; *Burke v. Kansas City*, 34 Mo. App. 570; *Bond v. Newark*, 19 N. J. Eq. 376; *Benton County v. Patrick*, 54 Miss. 240.

A superintending architect has no power, merely by virtue of his position, and without authority from his employer, to authorize one who has a contract for the plastering to have the mortar carried to the premises instead of having it made there, or to so vary the contract as to make the employer liable to pay a higher price for the mortar than that contemplated in the contract. *McIntosh v. Hastings*, 156 Mass. 344.

A letter from an architect to a subcontractor employed in constructing a building, complaining that he is not doing his work according to contract, or following the instructions of a designated superintendent, does not authorize such subcontractor to follow the instructions of the superintendent in respect to matters expressly fixed by the specifications. *Fitzgerald v. Moran*, 141 N. Y. 419.

6. The Acceptance by the Architect of a Different Class of Work from that called for by the contract, or of inferior materials, does not bind the owner nor relieve the contractor from the agreement to perform according to plans and specifications. *Glacius v. Black*, 50 N. Y. 145, 10 Am. Rep. 449.

Employing Another Contractor.—Nor can he employ another to do work which the contractor has undertaken,¹ or substitute a subcontractor for the principal contractor, either in the performance of the work or the payment therefor.²

Subcontracts.—He has no authority to supervise the letting of subcontracts and the employment of workmen.³

Accepting Notice of Assignment of Contract.—It has been held that he is not authorized to receive notice of the assignment of the building contract, unless such authority is expressly conferred.⁴

When Constituted General Agent.—But the architect has authority to proceed in the usual way,⁵ and the employer may constitute him his agent generally for all purposes connected with the erection of the building,⁶ and under the general rule of agency that "whatever may be necessary to complete an act that an agent is authorized to perform is included within the authority of the agent,"⁷ it seems that an architect may bind his employer for extra work and materials,

In *Bond v. Newark*, 19 N. J. Eq. 376, the court said: "An architect to whom, by the contract, everything was to be referred, could not hold that a brick house was a compliance with a contract to build one of marble; or that steps of blue flag were brown stone steps; or that a wall twelve inches thick complied with a contract to make one of sixteen inches. He could determine whether the marble front, the brown stone steps, or the sixteen-inch wall were put up in a workmanlike manner, but could dispense with no substantial matter expressly required by the contract. Such approval would not entitle the contractor to recover at law."

1. Substitution of Another in Place of Principal Contractor.—An architect employed only to supervise and direct the work done by a contractor has no authority to employ another to do work on the building which the contractor has undertaken to do. Thus where the architect, upon finding that the brick piers were giving way owing to bad workmanship, ordered a subcontractor, who was furnishing stone for the building, to put in stone piers in place of the brick ones, without knowing that he was a subcontractor, and supposing that the order was really given through him to the principal contractor, it was held that the architect had no authority to engage another to do the work of the principal contractor, and the fact that the owner saw the stone piers being built, but made no objection, did not amount to an acceptance of the benefit of his labor, as he had a right to suppose that it was being done by the principal contractor. *Campbell v. Day*, 90 Ill. 363.

2. Bouton v. McDonough County, 84 Ill. 384; *Campbell v. Day*, 90 Ill. 363.

3. Subcontracts.—Where an architect is employed to "superintend the construction of" a building, and "to see that the same is built in strict conformity to the specifications and plans," he has no authority to supervise the letting of subcontracts and the employment of men. *Lewis v. Slack*, 27 Mo. App. 131.

4. Notice of Assignment of Building Contract.—An architect, whose authority is specially conferred in a written contract for a building, is not authorized to receive notice of an assign-

ment of the building contract so as to bind the owner of the building by such notice, unless such authority is expressly conferred. *Renton v. Monnier*, 77 Cal. 449.

5. An Architect Has Authority to Proceed in the Usual Way, and where an architect, employed to draw plans and specifications for a proposed building, employs a surveyor to make out the quantities, which work was to be paid for by the successful competitor for the building contract, the owners, having refused to allow the building to proceed, will be held liable to pay the surveyor for making out the quantities. *Moon v. Guardians of Poor*, 3 Bing. N. Cas. 814, 32 E. C. L. 336.

See generally the title *AGENCY*, vol. 1, p. 930.

6. The Employer may Constitute the Architect His Agent Generally for all purposes connected with the erection of the building, and that without any limitation as to the price. *Kimberley v. Dick*, L. R. 13 Eq. 1.

Facts Held Not to Amount to General Agency.—But the fact that a person has employed an architect to make plans and specifications for a house, and to do such other acts as architects usually do as such, and has engaged a contractor to do all the work and furnish all the materials, and has placed the money which has become due to the contractor in the hands of the architect to be paid on the contractor's order, does not warrant a jury in finding that the architect was made the general agent of the employer, and authorized to bind him by new contracts for purchases with other persons. *Dodge v. McDonnell*, 14 Wis. 553.

Indiana—Superintendent Appointed by County Commissioners.—It has been held in Indiana that where the board of county commissioners has power to appoint a superintendent to act for them in the supervision of work, he becomes the agent of the county for the purpose of constructing the work, and may bind the county for work done beyond that contemplated by the written contract. *Clinton County v. Hill*, 122 Ind. 215; *Gibson County v. Motherwell Iron, etc., Co.*, 123 Ind. 364; *Harrison County v. Byrne*, 67 Ind. 21.

7. Robinson v. Springfield Iron Co., 39 Hun (N. Y.) 634. And see the title *AGENCY*, vol. 1, p. 930.

and even vary from the strict letter of the original contract where necessary to render the building secure and safe.¹

Terms of Authority to be Strictly Followed.—Where the architect is authorized to order extra work and alterations in a specified manner, the employer will not be liable unless the terms of the power are strictly complied with.²

False Representations as to Authority.—And an architect falsely representing himself as having authority to bind his employer for work and materials, may be held personally liable therefor.³

2. Delegation of Authority.—A personal trust and confidence is reposed in the skill of an architect, which he cannot be permitted to delegate without express authority to do so. The maxim *delegatus non potest delegare* applies.⁴

V. DEATH OF ARCHITECT—SURVIVAL OF CONTRACT.—The contract with an architect is one the performance of which is personal to him, and the right to complete it does not survive to his executor upon his death, nor, in turn, can the other party hold the executor liable to perform it.⁵

VI. EXPERT EVIDENCE—QUALIFICATION OF ARCHITECT.—The opinion of an architect as to how long specified extra work and alterations will take, may be received.⁶

VII. REMUNERATION OF ARCHITECT—1. Rate of Compensation—Fixed Commission.—The architect is usually paid a fixed percentage or commission on the

1. Where Departure from Original Contract Warranted.—Where an architect, appointed by the board of county commissioners to supervise the construction of a courthouse, ordered the substitution of eight-inch iron pillars, in place of six-inch pillars as called for by the contract, which caused an increase in the expense, and the commissioners accepted the building, it was held that the county was liable for such extra work, although there was no agreement as to the price, and the contract was not in writing and attached to the original contract with the contractor, as provided for in such original contract. *Gibson County v. Motherwell Iron, etc., Co.*, 123 Ind. 364. But see *Stuart v. Cambridge*, 125 Mass. 102.

2. A provision in the contract that before any extra work shall be done, the contractor and superintendent shall agree thereto, and stipulate the price to be paid therefor in writing, cannot be waived by the superintendent of the building, and there can be no recovery for extra work in such case, unless such written agreement is entered into. *Ahern v. Boyce*, 19 Mo. App. 552. And see, to the same effect, *Woodruff v. Rochester, etc., R. Co.*, 108 N. Y. 39. See the title **WORKING CONTRACTS**.

3. Randell v. Trimen, 18 C. B. 786, 86 E. C. L. 786.

4. Architect Delegating Authority.—*Lloyd's Law of Building and Buildings* (2d ed.), § 12; *Lynn v. Burgoyne*, 13 B. Mon. (Ky.) 400; *Stubbs v. Holywell R. Co.*, 36 L. J. Exch. 166. See the title **AGENCY**, vol. 1, p. 972.

Delegation to Partner.—An architect made sole arbiter of matters concerning the material and character of the work, cannot delegate the power to his partner without the consent of the parties. *Wright v. Meyer* (Tex. Civ. App. 1894), 25 S. W. Rep. 1122.

5. Contract does Not Survive.—*Stubbs v.*

Holywell R. Co., L. R. 2 Exch. 311; *Hall v. Wright*, 3 El. Bl. & El. 746, 96 E. C. L. 746; *Boast v. Firth*, L. R. 4 C. P. 1, 38 L. J. C. P. 1; *Lloyd's Law of Building and Buildings* (2d ed.), § 9.

Where the performance is personal, the executors are not liable. *Taylor v. Caldwell*, 3 B. & S. 835, 113 E. C. L. 835.

But although a contract involving personal confidence is brought to an end by the death of the party confided in, it is not thereby rescinded, so as to take away the right of action already vested; as where S. was employed as consulting engineer for fifteen months to complete certain works, to be paid five hundred pounds for his services in equal quarterly instalments, and before the work was finished, and whilst two quarterly instalments which were due him, were still unpaid, he died, it was held that his personal representative was entitled to recover them. *Stubbs v. Holywell R. Co.*, L. R. 2 Exch. 311.

6. Expert Evidence.—*Campbell v. Russell*, 139 Mass. 278; *Turner v. Haar*, 114 Mo. 335; and see the titles **EXPERT AND OPINION EVIDENCE**; **WITNESSES**.

An architect who testifies that he has had experience in the erection of a large number of buildings and has been in the habit of observing the length of time required to procure materials and do the work, will be deemed competent to answer the question whether or not it would have been safe to run up the brick walls of a building in six weeks, and where he swears that he has had practical personal experience in removing the *débris* of buildings destroyed by fire, has himself had *débris* removed, and has seen it removed by others, he is shown competent to testify how long, in his opinion, it should have taken to remove *débris* to permit rebuilding to commence. *Chamberlain v. Dunlop* (Supreme Ct.), 8 N. Y. Supp. 125.

contract price of the work, which should be specified in the contract.¹

Percentage upon Estimated Cost.—If the percentage is to be upon the "estimated cost," it will be held to mean the reasonable cost of a building erected according to the plans and specifications,² and a usage among architects will not entitle him to be paid a percentage based upon his own estimates.³

Where there Is No Stipulation.—Where the contract is silent upon the subject, the architect will be entitled to a reasonable compensation.⁴

2. Who Liable for.—The obligation of paying for the plans and specifications rests upon the employer ordering them, and not upon the contractor employed in their execution.⁵

3. Lien for Fees—Statutes.—The question often arises whether an architect is entitled to a lien upon the building for his services, similar to that allowed

1. Fixed Percentage on Contract Price.—It is often provided that the architect shall receive a fixed commission or percentage on the whole contract price of the work. See *Irving v. Morrison*, 27 U. C. C. P. 242; *Shipman v. State*, 43 Wis. 381; *Raeder v. Bensberg*, 6 Mo. App. 445.

Architect Interfered with by Owner.—Where there is a contract for the plans and superintendence of a building, at a percentage on the cost, and the architect is prevented by the owner from superintending, he may treat the contract as rescinded and sue for the value of the plans furnished. *Marcotte v. Beaupre*, 15 Minn. 152.

Bankruptcy of Architect.—The plaintiff, an architect, sued for remuneration in respect of employment under a contract made in 1877, and for damages for an alleged wrongful dismissal from such employment in 1880. The plaintiff was adjudicated bankrupt in 1878, but had never obtained his discharge. It was held that the cause of action for remuneration and damages passed to the trustee, and that the proper course was to add him as coplaintiff in the action, and give him the conduct of the action. *Emden v. Carte*, 17 Ch. Div. 768, 51 L. J. Ch. 41, 44 L. T. 636, *affirming* 17 Ch. Div. 169, 50 L. J. Ch. 492, 44 L. T. 344, 29 W. R. 600.

Promise to Pay—Consideration.—In *Lingenfelder v. Wainwright Brewing Co.*, 103 Mo. 578, the architect engaged in the erection of a brewery declined to proceed with his undertaking upon discovering that the contract for the refrigerating plant had been awarded to a business rival of the refrigerating company of which he was president, took away his plans, and called off his superintendent in charge of the building. It was held that a promise by the president of the brewery company, who was in great haste to have the building completed, to pay him a commission of five per cent. upon the cost of the refrigerating plant as an inducement to resume work, was void for want of consideration.

2. Percentage on "Estimated Cost."—Where a party agrees to pay for certain plans and specifications for buildings a percentage on their "estimated cost," and there is nothing in the contract to determine the matter, the "estimated cost" will be taken to mean the reasonable cost of buildings erected in accordance with the plans and specifications. *Lambert v. Sanford*, 55 Conn. 437.

3. A Usage among Architects, especially if unknown to customers, will not entitle them to be paid for preliminary sketches and estimates on the basis of a percentage on their own estimates. Such services, unless volunteered, should be paid for, if at all, according to the time spent upon them, or according to such understanding as was had or was fairly implied from the circumstances. *Scott v. Maier*, 56 Mich. 554.

4. No Agreement as to Compensation.—*Dull v. Bramhall*, 49 Ill. 364.

In *Knight v. Norris*, 13 Minn. 473, a charge of five per cent. on the estimated cost was held customary and reasonable. And to the same effect, see *Mulligan v. Mulligan*, 18 La. Ann. 20.

An Architect Who has Performed Part of His Contract according to its terms, and is prevented from completing it by the failure of the other party, is entitled to compensation for the work performed. *Chicago v. Tilley*, 103 U. S. 146.

Schedule of American Institute of Architects.—In *Gilman v. Stevens*, 54 How. Pr. (N. Y. Super. Ct.) 197, the schedule of charges of the American Institute of Architects, namely, two and one-half per cent. upon the contemplated cost of the building, was recognized as showing the customary legitimate rate of compensation for an architect's services.

In *Smithmeyer v. U. S.*, 147 U. S. 342, it was held that the acts of the parties in accepting salaries, one of eight thousand dollars per year as architect and the other of three thousand dollars per year as principal draughtsman, indicated that the services of the plaintiffs should be estimated according to the rule of *quantum meruit*, and not according to the schedule of charges of the American Institute of Architects.

Change of Contract—Quantum Meruit.—Where an architect enters into a contract to furnish the plans and superintend the erection of a house for an agreed price, and the contract is afterwards changed so as to provide for plans for a more expensive house, but no price is agreed on for the plans, the architect, in an action upon the *quantum meruit* for his services, may prove the value of such plans and additional services rendered by him not included therein. *Marcotte v. Beaupre*, 15 Minn. 152.

5. Employer Liable for Cost of Plans.—*Webb v. School*, 3 Phila. (Pa.) 125.

mechanics and material men. The decisions upon this point are not uniform, depending, in many instances, upon the wording of the local statutes.¹

In Pennsylvania the architect is allowed a lien where he furnishes plans and specifications and superintends the erection of the building,² though not where such supervision is not given, but only plans and specifications are provided.³

And in All the Instances in Which the Lien has been Allowed, the architect also acted as superintendent.⁴

1. Lien in Favor of Architects.—*Rara Avis Gold, etc., Min. Co. v. Bouscher*, 9 Colo. 385; *St. Clair Coal Co. v. Martz*, 75 Pa. St. 384. And see the title **MECHANICS' LIENS**.

Illinois.—Under the *Illinois* statute allowing a lien for services as architect or superintendent in building, altering, repairing, or ornamenting any house or other building, or appurtenance thereto, an architect can claim no lien for keeping books, auditing accounts, and making settlements with contractors employed in the erection of buildings, nor where one performs services as a supervising architect in the improvement of grounds and accessories. *Adler v. World's Pastime Exposition Co.*, 126 Ill. 373.

Ohio.—The Laws of 1894, § 3184, of this state, which provides for a lien in favor of any person "who performs labor or furnishes machinery" for the erection, etc., of a building, applies to the services of an architect in the preparation of plans and specifications and superintendence of construction. *Phoenix Furniture Co. v. Put-in-Bay Hotel Co.*, 66 Fed. Rep. 683.

Minnesota.—**Change of Ownership.**—In *Wangenstein v. Jones* (Minn. 1895), 63 N. W. Rep. 717, where the defendant purchased an unfinished house under an agreement that the heating apparatus should be put in under the supervision of the architect who had in charge the building of the house, it was held that the labor of the architect in superintending the putting in of the apparatus was under the original contract, and that he was entitled to a lien for the same.

Nebraska.—In this state an architect who furnishes drawings and plans for an improvement on real estate, and superintends the erection of such improvements in accordance with such plans, in pursuance of a contract with the owner, is entitled to a lien upon such improvements and the real estate on which it is situate, upon complying with the mechanic's lien law of the state. *Von Dorn v. Mengedoht*, 41 Neb. 525.

2. State Bank v. Gries, 35 Pa. St. 423. In this case it is said that it seems that a mere architect, who only furnishes the plans and drawings, and performs no services in the construction of the building, is not entitled to a lien.

3. An Architect Who Simply Provides the Plans and Specifications for a building is not entitled to a lien against the building for his labor. *Price v. Kirk*, 90 Pa. St. 47. And see *Rush v. Able*, 90 Pa. St. 153; *Jones v. Shawhan*, 4 W. & S. (Pa.) 257. See also *Pennsylvania, etc., R. Co. v. Leuffer*, 84 Pa. St. 168, 24 Am. Rep. 189, as to the right of a civil engineer to

a lien upon a railroad for services rendered in its construction.

Claim must be Set Forth Distinctly.—In *Rush v. Able*, 90 Pa. St. 153, it was held that where an architect claims to have a lien for charges and fees, he must show work done for which the statute gives a lien, and such work is not shown by the name of his calling. Especially should the kind of work be set forth distinctly when it is claimed as extra work by the contractor, and a mere claim for "architect's charges and fees" is insufficient.

4. Architect Acting as Superintendent.—*Phoenix Furniture Co. v. Put-in-Bay Hotel Co.*, 66 Fed. Rep. 683; *Mulligan v. Mulligan*, 18 La. Ann. 20; *Knight v. Morris*, 13 Minn. 473; *Von Dorn v. Mengedoht*, 41 Neb. 525; *Mutual Ben. L. Ins. Co. v. Rowand*, 26 N. J. Eq. 389; *Hubert v. Aitken*, 15 Daly (N. Y.) 237; *Stryker v. Cassidy*, 76 N. Y. 50, 32 Am. Rep. 262; *State Bank v. Gries*, 35 Pa. St. 423; *Arnoldi v. Gouin*, 22 Grant's Ch. (U. C.) 314.

In *Hubert v. Aitken*, 15 Daly (N. Y.) 237, the right to the lien was not questioned. And in *Stryker v. Cassidy*, 76 N. Y. 50, 32 Am. Rep. 262, *Andrews, J.*, said: "The architect who superintends the construction of a building performs labor as truly as the carpenter who frames it, or the mason who lays the walls, and labor of a most important character. It is not any the less labor within the general meaning of the word, that it is done by a person who is fitted by special training and skill for its performance."

Ericsson v. Brown, 38 Barb. (N. Y.) 390, may at first glance seem to be in conflict with the *New York* cases cited above, but is easily distinguishable from them. It was there held that a consulting engineer, who rendered services as such, was not within the language or reason of a clause of a steamship company's charter, providing that the stockholders should be individually liable for debts due and owing to their "laborers and operatives" for services performed for the corporation. See *Gurney v. Atlantic, etc., R. Co.*, 58 N. Y. 358, where this case is distinguished. And see also *Stryker v. Cassidy*, 76 N. Y. 50, 32 Am. Rep. 262.

In *Taylor v. Gilsdorff*, 74 Ill. 359, the claim was not for services as mere architect, but as architect and superintendent. The jury found in favor of the claimant, and the court, without saying how it might be with a mere architect, who simply draws a plan for the building, declined to disturb the verdict.

Louisiana.—Under the Louisiana statute, providing that "every mechanic, workman, or other person, doing or performing any work towards the erection, construction, or finishing of any building in this state, erected under

In Kentucky and Maine a lien has been refused the architect, even though he superintended the construction of the building,¹ and also in Missouri, where he gave only general directions to the builder under whose special superintendence the structure was erected.²

ARCHIVES.—See note 3.

ARCIFINIES.—"Arcifinies" is a term applied to landed estates which have natural boundaries, such as rivers, mountains, or woods.⁴

ARDENT SPIRITS. (See also the title INTOXICATING LIQUORS.)—"Ardent spirits" are liquors obtained by distillation.⁵

ARE.—This word is the present indicative plural of the substantive verb "to be."⁶

a contract between the owner and builder, or other person, whether such work shall be performed as journeyman, laborer, cartman, subcontractor, or otherwise," shall be entitled to a lien upon the building to secure the payment therefor, it was held that a supervising architect had a lien for his fees. *Mulligan v. Mulligan*, 18 La. Ann. 20.

Canada.—In Canada it is also held that an architect is entitled to a lien under the Mechanic's Lien Act of 1874, for moneys due him for making plans and specifications for, and superintending the erection of, buildings for the owner. *Arnoldi v. Gouin*, 22 Grant's Ch. (U. C.) 314. *Proudfoot, V. C.*, in delivering the opinion in this case, said: "The duties of an architect in preparing elevations, working plans, specifications, superintending the construction of the building according to the plans, and seeing that proper material is used, etc., are essential things to be done in the construction of the work; and the architect seems to me, if not comprehended under the designation of 'builder,' to come under that of 'other person.' There is nothing to show that the person to be protected must have actually carried the stone or brick, or hewn the wood used in the building. The man who designs the building and superintends its erection as actually does work upon it as if he had carried a hod."

1. Right to Lien Denied.—*Foushee v. Grigsby*, 12 Bush (Ky.) 75; *Ames v. Dyer*, 41 Me. 397; *Raeder v. Bensberg*, 6 Mo. App. 445.

In *Ames v. Dyer*, 41 Me. 397, the plaintiffs sought to recover the value of their labor in making a set of moulds by which the ship upon which the lien was claimed was constructed, and for materials used in making the same, and it was held that the plan of the house, the model of the ship, or the mould by which the ship's timbers are formed, do not enter into the structure, and cannot be regarded as within the statutes by which liens are given in certain cases to the material men and the laborers.

2. Missouri.—In *Raeder v. Bensberg*, 6 Mo. App. 445, it was held that an architect had no lien for his services in drawing plans and specifications, and giving general directions to the builder under whose special superintendence the building was erected.

3. Texas.—The word *archives*, as used in the statutes of this state, means public records and papers required or permitted by law to be filed in public places of deposit for pres-

ervation and use as evidence of facts. *Texas Mexican R. Co. v. Jarvis*, 69 Tex. 537, *distinguishing State v. Cuellar*, 47 Tex. 306.

4. Smith v. St. Louis Public Schools, 30 Mo. 303. And in that case the court said: "Vattel says (bk. 1, p. 207), 'The river belongs to the public in whatever part of the country it flows; but the bed being abandoned, half of it is added on each side to the contiguous land, if they are *arcifinies*, that is, having a natural boundary with the right of alluvion.' Wolff says (pt. 2, c. 3, § 252), 'Landed estates are of three kinds: 1st, Those that are not limited by any precise bounds, but are only described by the quantity which they contain. 2d, Those which have fixed artificial limits—that is to say, boundaries made by the hand of man. 3d, Those which we call *arcifinies*—that is to say, which have natural boundaries, such as rivers, mountains, or woods. He who has wished that his estate should be *arcifinie* is considered as having acquired the right to take possession of alluvions, therefore the right of alluvion belongs to those whose estates are *arcifinies*, and not to others. Consequently, as an estate is not said to be *arcifinie* if there be between it and the river a public road, *not due by the estate and a part thereof*, the right of alluvion is not attached to the property of the estate.'"

See also the titles ACCRETION, vol. 1, p. 473; BOUNDARIES.

5. Worcester's Dict., quoted in *Sarlls v. U. S.*, 152 U. S. 572.

In an Indictment.—In an indictment under a statute, the term *ardent spirits* was held to mean the liquors named in the statute, viz., wine, rum, gin, brandy, whiskey, and cider spirits. *Townley v. State*, 18 N. J. L. 311.

Alcohol.—In *Wood v. State*, 34 Ark. 341, 36 Am. Rep. 523, it was held that alcohol is not *ardent* or vinous *spirits* or liquor of any kind, and that its sale is not in any manner restricted or attempted to be regulated by the statutes regulating the sale of intoxicating liquors.

6. "Who are" is in the present tense, and, fully expressed, means, "who now are." *In re Strawbridge*, 39 Ala. 375.

In the Sense of Shall or May Be.—A naturalization statute provided that all children whosoever born, whose fathers or mothers *are* or were citizens at the time of their birth, shall be deemed citizens; it was held that the act extended to children born after its

ARGUED.—See note 1.

ARGUMENT.—See note 2.

ARGUMENT OF COUNSEL.—See 2 ENCYC. OF PLEADING AND PRACTICE, p. 698.

ARISE.—Among the ordinary and most common definitions of the word “arise” are, to proceed, to issue, to spring.³

passage. The court said: “The right is restricted to children ‘whose fathers or mothers are or were citizens at the time of the birth of such children’; but the right is extended as well to cases where the birth occurred before as where it might occur after the passage of the act. Previous cases are provided for by the words ‘were,’ and subsequent cases by the words ‘are citizens at the time of their birth, etc.’ It is no objection to this construction, that the word *are* is in the present tense, and must, therefore, have a present signification. Even present time is relative. It may have been present formerly; it may be present now; or it may be present at some future period. The word *are*, therefore, although in the present tense, has, when applied to a transaction yet to come, a future signification, and is only equivalent to ‘shall or may be.’” *Barzizas v. Hopkins*, 2 Rand. (Va.) 292.

Now Are.—Where a tenant agrees to leave the premises in the same state and condition as they now *are*, the words “now *are*” may be taken as referring to the commencement of the tenancy. *White v. Nicholson*, 4 M. & G. 95, 43 E. C. L. 58.

Are Charged.—These words applied to the estates of a covenantor, as distinguished from “he will charge,” create a clear charge upon the covenantor’s lands. *Falkner v. O’Brien*, 2 B. & B. 223.

1. **A Rule of Court** provided that in all cases to be *argued*, each party must furnish to the court and opposite party printed briefs of his points and authorities. The court, in construing this rule, said: “That is, if a case ‘is to be *argued*’ by both parties, or by either party, ‘each party’ must furnish a brief. Now, the words ‘to be *argued*’ cannot mean actual argumentation, for whether the case would even get to actual argument could not be foreseen at the time for filing briefs. Nor can they refer to the individual intention or expectation of either party, for neither would have the right to close the lips of the other, and if either is to speak, the court has a right to hear, and ought to have opportunity to know, what can be said for the other. The words ‘to be *argued*’ are equivalent to the words ‘to be heard,’ *i. e.*, submitted for determination.” *Oregon R., etc., Co. v. O’Brien*, 3 Wash. Ter. 21.

2. “Before the Argument,” in a Rule of Court prescribing that exceptions must be noted and filed “at least one day before the *argument*,” was held to mean “an oral *argument* before the court;” but it was also held that “agreeing to waive *argument* before the court, and taking time to file briefs on the merits of the case, was the same in effect as an oral argument.” *State v. California Min. Co.*, 13 Nev. 210.

Where the copies of the judgment roll of the court below were to be delivered “four clear days before the day appointed for *argument*,” those words were held to refer, not to a day on which the judges met for the purpose of appointing the days for hearing *arguments*, but to the day on which the *argument* had been appointed to take place. *Parr v. Jewell*, 16 C. B. 700, 81 E. C. L. 700. See also BEFORE.

A Judge Using Any Argument in His Charge.—The words in a statute prohibiting a judge from using “any *argument* in his charge calculated to rouse the sympathy or excite the passion of the jury” do not forbid his making his charge argumentative so long as it comes within the limitation prescribed by the latter words. *Cesure v. State*, 1 Tex. App. 23.

3. *In re Bogart*, 2 Sawy. (U. S.) 405. And in that case it was held that the exception of “cases *arising* in the land or naval forces,” in the Fifth Amendment to the Constitution providing for a presentment of the grand jury in cases of capital or infamous crimes, applies to an offense committed by one while in the naval service, although the charge is not actually framed and presented until after the offender ceased to be in the service. The court said: “What does *arising* mean as here used? Certainly not merely making a statement of the preëxisting facts, which constitutes a case for judicial cognizance. * * * A case *arising* in the land or naval forces * * * appears to us to be a case proceeding, issuing, or springing from acts in violation of the naval laws and regulations committed while in the naval forces or service.”

Refers to Present or Future Time.—In *U. S. v. Heth*, 3 Cranch (U. S.) 413, Paterson, J., said: “The word *arising* refers to the present time or time to come, but cannot with any propriety relate to time past, and embrace former transactions.”

Arising during the Course of the Trial.—After an issue of fact is joined in a criminal case, every step thereafter taken for the purpose of a determination of that issue, up to and including the verdict, is a step or proceeding “*arising* during the course of the trial” within the meaning of a statute regulating motions for new trials. *People v. Turner*, 39 Cal. 371. See also *Reg. v. Martin*, Temp. & M. 78. See ENCYC. OF PLEADING AND PRACTICE, title NEW TRIAL.

Cases Arising under the Constitution. (See also the title UNITED STATES COURTS.)—Upon the construction of the words “*arising* under,” as used in the provisions of the United States Constitution, conferring jurisdiction upon United States courts, the court, in *U. S. Bank v. Roberts*, 2 Fed. Cas. 728, No. 934, 4 Conn. 323, said: “It was said, in argument for the defendant, that the words ‘*arising* under’ must be understood to mean

ARMED.—See note 1.

ARM OF THE SEA. (See the title NAVIGABLE WATERS; as to jurisdiction over, see the title ADMIRALTY JURISDICTION, vol. 1, p. 649; as to NUNCUPATIVE WILLS, see the title NUNCUPATIVE WILLS.)—This phrase

‘growing out of, created by, or brought into being by,’ the laws of the United States. Let the case before us be tested by this definition. The bank itself, its capacity to purchase the bill of exchange, its right of property in the bill, and the sum of money therein expressed, all grew out of, were created and brought into being by, the act of Congress creating the corporation. But for the act of Congress the case before us could not have existed. It is palpable that when the case involves the very right of property given and created by an act of Congress, as in this instance, it is ‘a case arising under the Constitution and laws of the United States.’ We are of opinion that, to bring the case within the judicial power of the United States, it need not be of an unmixed character. If the *principal right, the right of property*, in the subject in controversy, is given or created by an act of Congress, made in pursuance of the Constitution, it is sufficient.”

Fines Arising under Revenue Laws. (See also the title REVENUE LAWS.)—A conspiracy to defraud the United States of the duties on certain imported goods is not “a crime arising under the revenue laws,” and the persons charged therewith cannot be prosecuted therefor, unless they are indicted within three years next after the alleged committing thereof. The court said: “Specific acts which are violations of the laws made to protect the revenue may be said to be crimes arising under the revenue laws, as are those in the third and fourth counts; but a conspiracy to defraud the government, though it may be directed to the revenue as its object, is punishable by the general law against all conspiracies, and can hardly be said, in any just sense, to arise under the revenue laws.” U. S. v. Hirsch, 100 U. S. 33.

Cause of Action shall have Arisen.—Where an action by an administrator was barred unless “commenced within one year after the cause of action shall have arisen,” it was held that no cause of action can arise or exist in favor of an administrator until he comes into existence as such, and that a suit brought within one year after his appointment is not barred. Andrews v. Hartford, etc., R. Co., 34 Conn. 57.

When Cause of Action Arises, see the title LIMITATION OF ACTIONS.

Where Cause of Action Arose—Venue. (See also ENCYC. OF PLEADING AND PRACTICE, title VENUE.)—Where a statute provided that actions must be tried in the county where the cause or some part thereof arose, it was held that the expression “where the cause of action arose,” meant where a debt was contracted, and not the place of the failure to pay the debt. Steele v. Rutherford, 70 N. Car. 139.

Cases Arising under Treaties, in the constitution, are cases in which a party’s right grows out of, or is protected by, a treaty. Owings v. Norwood, 5 Cranch (U. S.) 348. See the titles UNITED STATES COURTS; TREATIES.

“Cases Arising in a Justice’s Court” is synonymous with “actions originally commenced” in that court. Cook v. Nellis, 18 N. Y. 127.

Arising or Accruing within the United Kingdom.—As used in the English income-tax statute, Lopes, L. J., said that the words “profits arising or accruing to any person residing in the United Kingdom,” mean profits coming to his hands or received by him in the United Kingdom. Colquhoun v. Brooks, 21 Q. B. Div. 64.

Accrue in the Sense of Arise.—See Emerson v. Steamboat Shawano City, 10 Wis. 435. And see ACCRUE, vol. 1, p. 479.

1. Armed Prowlers.—A statute provided that armed prowlers who should make an attack upon any peaceable citizen of the state, should suffer death. In construing the term “armed prowlers,” the court said: “The words ‘armed prowlers,’ as used in the third section of said act, mean armed persons, (though called by some other name) who are wandering or roving about over the country, for the purpose of plundering or robbing the people, or for the purpose of plunder.” Vaughn v. State, 3 Coldw. (Tenn.) 102.

Armed Vessel—Distinguished from One Equipped for Warlike Purposes.—In construing a statute prohibiting the equipment of a foreign vessel for war, Bramwell, B., thus distinguished between an armed vessel and one equipped for warlike purposes: “The probable intent was to use sufficiently comprehensive words, and to avoid such a question as whether a ship was armed, strictly speaking, and to make it enough if she was equipped for warlike purposes. * * * By armed I suppose it would be meant ordinarily that she had cannon, but if she had a fighting crew, muskets, pistols, powder, shot, cutlasses, and boarding appliances, she might well be said to be equipped for warlike purposes, though not armed.” Atty.-Gen. v. Sillem, 2 H. & C. 537.

Same—British Armed Vessel of War.—So under an act permitting any person to destroy “any British armed vessel of war,” it was held not necessary that she should have any particular or specified armament. If she belonged to the British navy, and was used for hostile purposes, being armed with muskets, pikes, cutlasses, etc., it was enough to bring her within the intention of the act. Parlin v. U. S., 1 Ct. of Cl. 174.

Schooner Not Armed.—A schooner having on board but one musket, a few ounces of powder, and a few balls, and possessing but little capacity for offense, was held not to be an armed vessel. Murray v. Schooner Charming Betsy, 2 Cranch (U. S.) 121.

Armed Force.—A statute providing that the sheriff, in case of a riot, may call out an armed force, if necessary, does not authorize the sheriff to command the services of the state militia. Chapin v. Ferry, 3 Wash. 386. See also the title POSSE COMITATUS.

designates a navigable body of water where the tide flows and reflows, and so far only as the tide flows and reflows.¹ But "it does not follow that any creek or rivulet in which the tide ebbs and flows, and which may be used at certain tides by small boats for individual convenience, is to be dignified with the appellation of an arm of the sea."²

ARMORIAL BEARINGS.—See ARMS; and the title PEDIGREE.

ARMS. (See also the titles CONCEALED WEAPONS; CONSTITUTIONAL LAW; WEAPONS.)—The term "arms," in its most comprehensive signification, includes every description of weapon or thing which may be used offensively or defensively.³

CONSTITUTIONAL PROVISIONS.—The Constitution of the United States provides that the right of the people to keep and bear arms shall not be infringed; and this, or a similar provision, has been adopted in many of the states. The term "arms," as used in these provisions, has received judicial construction in several cases, the question usually arising in determining the constitutionality of statutes forbidding the carrying of concealed weapons. The constitutionality of such statutes in general will be treated fully under the title CONCEALED WEAPONS. Other questions which may have arisen under these provisions will receive treatment under the title CONSTITUTIONAL LAW. The cases given here on the subject are confined to those in which the court dwelt upon the meaning of the term "arms."⁴

1. *Adams v. Pease*, 2 Conn. 484; *Hubbard v. Hubbard*, 8 N. Y. 199; *Bridgewater Trustees v. Bootle-cum-Linacre*, L. R. 2 Q. B. 7.

2. *Glover v. Powell*, 10 N. J. Eq. 223.

Long Island Sound was held to be an *arm of the sea* "within the common-law acceptation of the term, being navigable tide water, * * * and more specifically an *arm of the sea* than mere rivers, bays, or inlets; because, in addition to its tide water and navigable quality, it is without the territorial limits of any county." *The Sloop Martha Anne*, Olc. Adm. 21.

3. *State v. Buzzard*, 4 Ark. 21.

Loaded Arms.—On indictment for attempts to discharge "loaded arms," under Stat. 9 Geo. IV., c. 31, §§ 11 and 12, the following were held not to be "loaded arms:" A pistol loaded with gunpowder and balls, but with its touch-hole so plugged that it could not by any possibility be fired; a tin box, sent to a person, containing gunpowder and two detonators intended to ignite the powder when any one should open the box. *Rex v. Harris*, 5 C. & P. 159, 24 E. C. L. 254; *Rex v. Mountford*, 7 C. & P. 242, 32 E. C. L. 502.

Arms to Aid Prisoner's Escape. (See also the title ESCAPE.)—Sending a prisoner an instrument of writing informing him that he has a friend, and can be released from confinement, is no violation of a statute prohibiting the conveying to any person lawfully imprisoned of "any disguised instrument, arms, or other thing proper or useful to aid any prisoner in his escape." *Hughes v. State*, 6 Ark. 131.

4. **Limited Meaning of the Word.**—In *Andrews v. State*, 3 Heisk. (Tenn.) 179, 8 Am. Rep. 8, upon the question of what is embraced by the term arms, as used in the constitutional provision, the court said: "We must look at the nature of the thing itself, the right to keep which is guaranteed. It is arms; that is, such weapons as are properly designated as such, as the term is understood in the popular language of the country, and such as are adapted

to the ends indicated above; that is, the efficiency of the citizen as a soldier, when called on to make good 'the defense of a free people;' and these arms he may use as a citizen, in all the usual modes to which they are adapted, and common to the country. What, then, is he protected in the right to keep and thus use? Not everything that may be useful for offense or defense; but what may properly be included or understood under the title of arms, taken in connection with the fact that the citizen is to keep them as a citizen. Such, then, as are found to make up the usual arms of the citizen of the country, and the use of which will properly train and render him efficient in defense of his own liberties, as well as of the state. Under this head, with a knowledge of the habits of our people, and of the arms in the use of which a soldier should be trained, we would hold, that the rifle of all descriptions, the shotgun, the musket, and repeater, are such arms, and that under the constitution the right to keep such arms cannot be infringed or forbidden by the legislature. Their use, however, to be subordinated to such regulations and limitations as are or may be authorized by the law of the land, passed to subserve the general good, so as not to infringe the right secured and the necessary incidents to the exercise of such right." See also *Aymette v. State*, 2 Humph. (Tenn.) 154.

The provisions of article 2, § 5, of the Constitution of the state of *Arkansas*, securing to the citizens the right to keep and bear arms for their common defense, relates to such arms as are used for purposes of war, and does not prevent the legislature from prohibiting the wearing of such weapons as are not used in civilized warfare, and would not contribute to the common defense. *Fife v. State*, 31 Ark. 455, 25 Am. Rep. 556. See also *State v. Buzzard*, 4 Ark. 21.

Same—Arms of Militiaman.—In *English v.*

The word "arms" also means coats-of-arms, escutcheons, crests, cognizances of families.¹

ARMY. (See the titles CONSTITUTIONAL LAW; COURT MARTIAL; INTERNATIONAL LAW; MARTIAL LAW; MILITARY LAW; MILITIA; PRESIDENT; WAR.)—An army is a body of men whose business is war.²

AROMATIC.—A quality possessed by liquor.³

AROUND.—See note 4.

ARRAIGNMENT. (For a full treatment of the subject, see vol. 2 ENCYC. OF PLEADING AND PRACTICE, p. 760.)—Arraignment is the calling of the prisoner to the bar of the court to answer to the matter charged against him in the indictment.⁵

State, 35 Tex. 476, 14 Am. Rep. 374, it is said that "the word *arms*, in the connection we find it in the Constitution of the United States, refers to the *arms* of a militiaman or soldier, and the word is used in its military sense. The *arms* of the infantry soldier are the musket and bayonet; of cavalry and dragoons, the sabre, holster pistols, and carbine; of the artillery, the field piece, siege gun, and mortar, with side *arms*. The terms dirks, daggers, slungshots, sword canes, brass knuckles, and bowie knives, belong to no military vocabulary. Were a soldier on duty found with any of these things about his person, he would be punished for an offense against discipline."

In *Hill v. State*, 53 Ga. 472, McKay, J., said that he was of the opinion that the word *arms*, as used in the constitutional provision, evidently meant the *arms* of a militiaman, the weapons ordinarily used in battle.

But in *Nunn v. State*, 1 Ga. 251, the court held *arms* to extend to other weapons. The court said: "The right of the whole people, old and young, men, women, and boys, and not militia only, to keep and bear *arms* of every description, and not such merely as are used by the militia, shall not be infringed, curtailed, or broken in upon in the smallest degree. * * * Lexington, Concord, Camden, River Raisin, Sandusky, and the laurel-crowned field of New Orleans plead eloquently for this interpretation."

1. *Rapalje and Lawrence L. Dict.*

"**Arms of This Territory.**"—*Arms*, in a statute enacting that the "*arms* of this territory" should be engraved on notarial seals, was held to mean "the armorial ensigns of a state or political community, intended to distinguish it from others, which is usually transferred to its national flag or banner. Yet perhaps a public flag cannot always be considered as a true indication of the *arms* of the country to which it belongs; for most countries have two banners—the one borne by vessels of war, and the other by those engaged in commerce." *Kirksey v. Bates*, 7 Port. (Ala.) 534, 31 Am. Dec. 722.

2. *Burroughs v. Peyton*, 16 Gratt. (Va.) 475. The court in that case distinguishes "militia" and *army* as follows: "It will be observed that a broad distinction is made in the constitution between the 'militia,' and the *armies* referred to in it: the powers conferred upon Congress, and denied to the states, in reference to the one, being widely different from the powers conferred and

denied in reference to the other. And, indeed, the two words could not properly have been used to convey the same idea. An *army* is a body of men whose business is war; the militia, a body of men composed of citizens occupied ordinarily in the pursuits of civil life, but organized for discipline and drill, and called into the field for temporary military service when the exigencies of the country require it." See also the title MILITIA.

Whether the Word Includes Naval or Marine Service.—In *In re Bailey*, 2 Sawy. (U. S.) 200, it was held that the word *armies*, as used in the acts of Congress, does not include marines. To the same effect, see *Matter of Chamavis* (Super. Ct.), 21 N. Y. Supp. 104, in which case it was held that the act of Congress allowing an alien, who had enlisted in the *army* of the United States and been honorably discharged, to become a citizen without a previous declaration of intention, and on proof of one year's residence, did not apply to aliens who had served in the navy.

But in *Matter of Stewart*, 7 Robt. (N. Y.) 635, the court came to a contrary decision. See also the title NATURALIZATION.

3. **Trade-mark.**—"The word *aromatic* is employed as expressive of one of the qualities of the plaintiff's liquor, and therefore cannot be claimed as a trade-mark." *Burke v. Cassin*, 45 Cal. 480, 13 Am. Rep. 204.

4. **Around in the Sense of On.**—The word *around*, as used in a covenant providing that a fence *around* said piece of land was to remain as it was, was held to mean "on." *Hartung v. Witte*, 59 Wis. 295.

5. *Whitehead v. Com.*, 19 Gratt. (Va.) 643; *Goodin v. State*, 16 Ohio St. 346; U. S. v. *Curtis*, 4 Mason (U. S.) 236.

"The *arraignment* of the prisoner," according to Lord Coke, "is to take order that he appear, and, for the certainty of the person, to hold up his hand and to plead a sufficient plea to the indictment or other record." Co. Litt. 263a. See also *Com. v. Hardy*, 2 Mass. 303.

Parts of Arraignment.—In *Elick v. Territory*, 1 Wash. Ter. 138, the court said: "An *arraignment* consists of three parts. 1. Calling the prisoner to the bar by his name, and requesting him to hold up his hand, or do some other act of identification. 2. Reading the indictment to him in such language as to convey to his mind the nature of the charge against him. 3. Demanding of him whether he is guilty or not guilty. 1 Chitty's Criminal Law, pp. 282-4; 1 Roscoe's Evidence,

ARRANGEMENT.—The natural meaning of the word "arrangement" is setting in order.¹

ARRAS. (See the title MARRIAGE SETTLEMENTS.)—"Arras," a term of the civil law, signifies that which the husband gives the woman on account of marriage.²

ARRAY. (As to challenges to the array, see the title JURY AND JURY TRIAL; and see ENCYC. OF PLEADING AND PRACTICE, title JURY AND JURY TRIAL.)—"Array" is the whole body of persons summoned to attend the court as they are arrayed or arranged on the panel.³

ARREARS.—Money due and owing; as, where calls on stock are not paid when due, the holder is said to be in arrears.⁴

p. 224; 2 Hale 219; 1 Bouvier's Law Dictionary, p. 120." And in that case it was held that none of these parts could be omitted, nor could counsel waive them.

An *arraignment*, as technically defined, consists of three parts: the calling the prisoner to hold up his hand, the reading over the indictment to him in English, and the asking him whether he is guilty or not guilty. Goodin v. State, 16 Ohio St. 347.

Asking Prisoner How He should be Tried.—In State v. Weber, 22 Mo. 321, it is said: "Since the doctrine of *arraignment* has been maintained, I will state my views upon it somewhat more at length. The term *arraignment* means the calling of the defendant to the bar of the court to answer the accusation contained in the indictment (2 Lord Hale's Pleas of the Crown, p. 216). *Arraigne* is *ad rationem ponere*, to call to account or answer. Lord Hale says that *arraignment* consists of three things: 'First, the calling the prisoner to the bar by his name, and commanding him to hold up his right hand, which, though it may seem a trifling circumstance, yet it is of importance, for, by holding up his hand, *constat de persona indictati*, and he owns himself to be of that name; second, reading the indictment distinctly to him in English, that he may understand his charge; third, demanding of him whether he be guilty or not guilty, and if he pleads not guilty the clerk joins issue with him, *cul prist*, and enters the prisoner's plea, then demands how he will be tried; the common answer is, 'by God and the country,' and thereupon the clerk enters *po. se.*, and prays to God to send him a good deliverance.' Now, we find it is not necessary to go through the ceremony of holding up the hand in the case of a peer; nor is it absolutely necessary in the case of a common person, it being sufficient that it appears to the court who is the person indicted (Lord Delamere's Case, State Trials, vol. 4, p. 211; and Lord Mohun's Case, State Trials, same vol., p. 508). Now, all that is mentioned as the third ingredient of an *arraignment* is never put upon the record in our courts; nor is it necessary to ask the prisoner how he will be tried. His plea of not guilty must, as a matter of course, be tried by a jury. In our country the trial by *battel* was never recognized nor allowed, hence it never became necessary to ask the prisoner how he would be tried; there was but one way to try his guilt or innocence, that was by a jury."

1. Tetley v. Taylor, 1 El. & Bl. 540, 72 E. C. L. 540. And in that case the court held that from the context the words "*arrangements* by deed" might include compositions with creditors.

Verdict of a Jury.—Under a statute providing that where the owners of lands should have, in their *arrangements* with a railroad company, agreed to receive compensation, the railroad company should have certain rights as against the owners, it was held that the verdict of a jury and the receipt of compensation under such verdict might be deemed an *arrangement* within the meaning of the statute. Parke, B., said: "The term *arrangement* is a very wide and indefinite one, and does not necessarily mean a positive agreement between the company and the party." Manning v. Eastern Counties R. Co., 12 M. & W. 252.

Agreement in Writing.—The word *arrangement* may import an agreement in writing. Cave v. Hastings, 7 Q. B. Div. 125.

Authority to Give Mortgage.—A testamentary power enabling trustees to wind up the testator's affairs, and in so doing to make any sales and *arrangements* they should judge expedient, was held to authorize them to give a mortgage on the realty. *In re Jones*, 34 S. J. 11; Stroud's Judicial Dictionary.

2. Cutter v. Waddingham, 22 Mo. 254.

3. Durrah v. State, 44 Miss. 796.

4. Kahn v. St. Joseph Bank, 70 Mo. 262.

Arrears of Rent.—Under a devise of "*arrears* of rent and interest due at my death," an annuity due at the testator's death passes. Hele v. Gilbert, 2 Ves. 430.

Arrears of Taxes.—*Arrears* means something behind in payment; it implies a duty and a default; therefore, taxes cannot be in *arrears* until the rate is fixed. Corbett v. Taylor, 23 U. C. Q. B. 454. See the title TAXATION.

Affidavit in Distress for Rent. (See also the title DISTRESS.)—In Hollingsworth v. Willis, 64 Miss. 152, it was held that the words "rent in *arrear*," used in an affidavit in distress for rent, mean the same as "rent due and in *arrear*," the statutory words. The court said: "The definition of the word *arrear* as given by Webster is, 'That which is behind in payment, or which remains unpaid though due.' Worcester's is, 'That which remains unpaid after it is due.'"

Dues.—According to a provision in the constitution of a benevolent society, a benefit certificate of life insurance was not forfeited for nonpayment of the local dues until the mem-

ber was more than six months in *arrears*. The by-laws of a local lodge provided that the members should pay into the treasury as dues a certain sum per year, payable semi-annually, at the last stated meetings in June and December. It was held that under these provisions of the constitution and by-laws, the dues were not demandable in advance at the beginning of the term for which they were leviable, but at the end of that term, and did not become in *arrears* until after that time, although they might have been paid, and in practice were paid, before that date. The court said: "The officer of the lodge introduced as a witness testifies that the dues were not payable in advance, but at the end of each term, and this is clearly the meaning of the rules of the lodge already quoted. Each lodge has the power to regulate that matter for itself, may make the dues payable in advance, or at the end of the period for which they are leviable; but the pay day does not come until the time fixed for it, and they cannot, in the nature of the words used to impose the forfeiture insisted upon, be in *arrears* until that day is past, whatever day it be. The fact that the members may pay the dues at any time during the term, that is to say, in advance of the day fixed for obligatory payment, does not at all affect the question; nor does the fact, if it be so, that most of the members do pay before that final day of reckoning the charge, affect it; nor does the opinion of the members or of the officers of the lodge, or of the lodge itself, affect it. *** The officers of Constantine Lodge, No. 23, only say that members may pay before the end of the term, and do, but not that they must pay before that date. If any local lodge should wish to make the dues payable in advance, it can do so, and may fix any day of payment it chooses, but it cannot alter the plain meaning of the words 'in *arrears*,' and declare a sum owing to it to be in *arrears* before it is finally and absolutely demandable and payable as a matter of fixed obligation as to time of payment; not, at least, when these words become a part of any contract the order makes, whether with a member or other person. But Constantine Lodge has not undertaken to do that, for, under its by-law No. 35 the dues are payable, in express terms, 'at the end of each semi-annual term,' and not sooner. It has no power to declare them in *arrears* before that time, except by changing the by-law so that the pay day shall come at an earlier date. The member, when the end of the semi-annual term is reached and is past, is, by the by-law, 'declared' or deemed to be 'in *arrears*,' but the six-months grace allowed by the endowment rank begins at that time, and does not end there as has been supposed.

"That this is always the fixed and technical meaning of *arrears*, is too plain for argument. The oldest lexicographer of law terms known to me defines the word as coming 'from the French *arrière*; *retro*; behind; money unpaid at the due time, as rent behind.' Cowell Law Dict. h. t. To the same effect are all the dictionaries: Jac. Dict.; Bouv. Law Dict.; Abb. Law Dict.; Soule Syn.; Roget's Thes.; Webster's Dict.; Worcester's Dict. The same meaning is developed if we examine the legal signification of the words 'due' or 'dues,' and 'accrue,' and the like, in their relation to this idea of being 'in *arrears*.' The word 'due,' unlike *arrears*, has more than one signification, and expresses two distinct ideas, and this distinction is important in relation to its use in these rules and regulations. 'At times it signifies a simple indebtedness, without reference to the time of payment. *Debitum in presenti, solvendum in futuro*. At other times it shows that the day of payment has passed.' Scudder v. Coryell, 5 N. J. Law 340, 345. It is evidently used in the rules and regulations of this order in the first of these significations, and not at all in the second; and hence there is some confusion of ideas perhaps in their interpretation. But there is no such ambiguity about the word *arrears*, as has been shown by its definition. The cases of Moss v. Gallimore, 1 Doug. 279, and Birch v. Wright, 1 Term R. 378, and many others in the law concerning real property, illustrate this meaning, when used to express that 'rent is in *arrears*,' etc. Always, it must be past due to be 'in *arrears*.' Also the case of Mundt v. Sheboygan R. Co., 31 Wis. 451, construing a statute for the protection of laborers which required that notice should be given 'within thirty days after such claim or demand shall have accrued,' is instructive. It was there held that a claim for wages already earned and payable, but which, by the custom of the railroad company and its laborers, were to be paid on the fifteenth day of the next month, as a pay day, did not accrue until that pay day arrived, and that this custom became a part of the contract. Here the disputed dues for the term commencing January first and ending June thirtieth did not become finally payable until the latter date, after which only did they become 'in *arrears*,' and, as Wiggins died before the six months indulgence expired, his policy was not forfeited by the very terms of the contract itself." Wigin v. Knights of Pythias, 31 Fed. Rep. 123.

Principal does Not Pass.—By the bequest of the *arrears* of a mortgage it was held that the mortgage itself did not pass, but only that which might be due for interest. Hamilton v. Lloyd, 2 Ves. Jr. 416.

ARREST.

By J. D. KENNY.

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CROSS-REFERENCES.

For matters of PROCEDURE, see the ENCYCLOPÆDIA OF PLEADING AND PRACTICE, *titles* BAIL AND RECOGNIZANCE, *vol. 3, p. 158; ESCAPE; EXECUTIONS; FALSE IMPRISONMENT; HABEAS CORPUS; MALICIOUS PROSECUTION; WARRANTS.*

As to Exemption from Arrest of Sovereigns, see the title INTERNATIONAL LAW.

Ministers and Ambassadors, see the titles INTERNATIONAL LAW; *MINISTERS AND AMBASSADORS.*

Consuls, see the title CONSULS.

Legislators, see the title CONSTITUTIONAL LAW.

Parties, Witnesses, Judicial Officers, etc., see the title IMPRISONMENT FOR DEBT AND IN CIVIL ACTIONS.

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the titles ASSAULT AND BATTERY; BAIL; CONSPIRACY; CONSTABLES;

CONSTITUTIONAL LAW; CORONER; CRIMINAL LAW; ESCAPE; EXECUTIONS; EXTRADITION; FALSE IMPRISONMENT; HABEAS CORPUS; HOMICIDE; JUSTICE OF THE PEACE; MALICIOUS PROSECUTION; RECOGNIZANCE; SEARCHES AND SEIZURES; SELF-DEFENSE; SHERIFF; SUNDAY; WARRANTS; UNITED STATES MARSHALS.

I. DEFINITION.—An arrest is the taking of a person into the custody of the law.¹ It has also been judicially defined as the taking, seizing, or detaining the person of another; touching or putting hands upon him, in the execution of process, or any act indicating an intention to arrest.²

II. WHAT CONSTITUTES.—1. In General.—An arrest, in the strict legal sense of the term, involves three elements: authority, intention, and a restraint of the person.

The Authority must exist. Without it there may be a false imprisonment,³ but not an arrest. This authority may be either real or assumed.⁴

The Intention.—There must be an intention, understood by the one arrested, to accomplish the arrest.⁵

1. Arrest Defined.—Century Dict.

2. The court, by Baldwin, J., in *U. S. v. Benner*, 1 Baldw. (U. S.) 239. See also *Hart v. Flynn*, 8 Dana (Ky.) 191; *Gentry v. Griffith*, 27 Tex. 462.

"The word 'arrest' is more properly used in civil cases, and 'apprehension' in criminal." The court in *Montgomery County v. Robinson*, 85 Ill. 176, adopting the definition of Bouvier's Law Dictionary.

Other Definitions.—"Arrest (*arrestum*) cometh of the French word *arrestor*, to stop or stay. It is a restraint of a man's person, obliging him to be obedient to the law, and is defined to be the execution of a command of some court of record or officer of justice." Jacob's Law Dict. See *Legrand v. Bedinger*, 4 T. B. Mon. (Ky.) 540; *French v. Bancroft*, 1 Met. (Mass.) 504; *Rhodes v. Walsh*, 55 Minn. 552.

"A restraint of a man's person obliging him to be obedient to the law; and it is defined to be the execution of the command of some court of record or officer of justice. An arrest is the beginning of an imprisonment, where a man is first taken and restrained of his liberty, by power or color of a lawful warrant; also it signifies the decree of a court by which a person is arrested." Tomlins Law Dict., tit. Arrest.

"The term 'arrest' has a technical meaning, applicable in legal proceedings. It implies that a person is thereby restrained of his liberty by some officer or agent of the law, armed with lawful process, authorizing and requiring the arrest to be made." *Per Merimion, J.*, in *Lawrence v. Buxton*, 102 N. Car. 129.

"Arrest signifies a restraint of the person, a restriction of the right of locomotion, which cannot be implied in the mere notification, or summons on petition, or any other service of such process, by which no bail is required, nor restraint of personal liberty." *Hart v. Flynn*, 8 Dana (Ky.) 190. See also *Lawson v. Buzines*, 3 Harr. (Del.) 416.

"The arresting of an offender, and the retaking of him on fresh pursuit after an escape, constitute but one effective arrest." *Cooper v. Adams*, 2 Blackf. (Ind.) 294.

An arrest is detention of the person, *Huntington v. Shultz*, Harp. (S. Car.) 452, 18 Am. Dec. 660; and implies force, *Hamilton v. Com.*, 3 P. & W. (Pa.) 148.

Arrest in Admiralty.—The term "arrest" is the technical term used in admiralty process to indicate an actual seizure of property. *Pelham v. Rose*, 9 Wall. (U. S.) 103.

3. Imprisonment Not under Authority.—It is an act of imprisonment for the officer of a bank to lock the door upon a visitor remaining within the bank after the closing hour, thereby restraining him of his liberty, although the latter knew the closing hour. *Woodward v. Washburn*, 3 Den. (N. Y.) 369.

Stopping a person on the high road and compelling him to give up papers before allowing him to pass constitutes such an imprisonment. *Bloomer v. State*, 3 Sneed (Tenn.) 66. See also *Hays v. People*, 1 Hill (N. Y.) 351; *Smith v. State*, 7 Humph. (Tenn.) 43; *Herring v. State*, 3 Tex. App. 108.

Carrying out to Sea Not Imprisonment.—Where a visitor on board a ship has reasonable warning, and an opportunity to leave the ship, but neglects to do so, and is carried out to sea, it is not imprisonment. *Spoor v. Spooner*, 12 Met. (Mass.) 281.

4. Haskins v. Young, 2 Dev. & B. (N. Car.) 527, 31 Am. Dec. 426.

5. Intention.—*Jones v. Jones*, 13 Ired. (N. Car.) 448; *Journey v. Sharpe*, 4 Jones (N. Car.) 165.

A Consciousness of Restraint in the party arrested or detained is essential to constitute an arrest. *Herring v. Boyle*, 1 C. M. & R. 377.

The Mere Delivery to the Sheriff of a Ca. Sa. against a prisoner in his custody, is not, *ipso facto et eo instanti*, an arrest, so as to place the defendant in custody on the execution, and render the sheriff liable in case he should escape. *Tracy v. Whipple*, 8 Johns. (N. Y.) 379.

Whether an Arrest Made by an Officer Is Legal or Not depends on the intent and understanding of the parties at the time. *Jones v. Jones*, 1 Jones (N. Car.) 491.

Notice of Arrest and of the official character of the person attempting the arrest, should be

Restraint is necessary. A restriction of the right of locomotion is the most characteristic element of the arrest.¹

given either expressly or by implication, and without such notice mere physical restraint will not constitute arrest. *Mackalley's Case*, 9 Coke 65*b*; *Yates v. People*, 32 N. Y. 509, 4 Fost. 312; 1 East P. C., bk. 5, § 71; *Rex v. Ricketts*, 3 Campb. 68.

Where No Notice Necessary.—But the prisoner need not be told if the circumstances are such that he must necessarily know why he is being arrested. *Rex v. Howorth*, 1 Moo. C. C. 207.

Personating Officer.—And where one personates an officer, and induces the defendant to go with him under the belief that he is being legally arrested, it is a technical arrest that will make the arresting party liable in law. *Wood v. Lane*, 6 C. & P. 774, 25 E. C. L. 645.

1. Restraint Necessary.—*Brown v. Ibbetson*, 9 Ir. Law Rep. 66; *Hender v. Robins*, 1 H. & W. 204. See *French v. Bancroft*, 1 Met. (Mass.) 502.

The mere personal service of a notice or summons by which no bail is required, and which occasions no restraint of personal liberty, is not an arrest. "Arrest signifies a restraint of the person, a restriction of the right of locomotion." *Hart v. Flynn*, 8 Dana (Ky.) 190.

Nor is the service of even a writ of *capias ad respondendum*, by delivering a copy to the defendant, an arrest. It is no more than a mere citation or notice to appear. *Huntington v. Shultz*, Harp. (S. Car.) 452, 18 Am. Dec. 660.

Illustrations.—Where a person was detained by force long enough to compel him to deliver up a check which he was trying to convert to his own use, it was held an illegal detention and arrest. *Harvey v. Mayne*, 6 Ir. Rep. C. L. 417.

In the very recent case of *Forsyth v. Goden*, 32 Can. L. J. 288, the facts were these: The plaintiff and the defendant had a disagreement, and the defendant called up by telephone a police officer, who, when he arrived, said to the defendant: "Is this the man?" After hearing the particulars of the trouble the officer said to the plaintiff: "You will have to come along with me to the police station." No other language was used and no resistance made. The plaintiff, defendant, and officer went together to the police station, and there talked the matter over with the chief. No information was laid, and the plaintiff was not detained further. The officer swore that he did not make an arrest. The judge ruled, however, that the fact of arrest is a question of law, and that if an officer, known to be such, takes charge of a man, and the man reasonably thinks from the conduct of the officer that he is under arrest, there is in fact an arrest.

Arrest is not constituted by the bailiff's going to the door of the person against whom a writ is directed, telling him that he has a writ against him, but without entering the house or touching the accused, and then going away upon his promising to give bail the next day, which he does. *Perrin v. Joyce*, 6 U. C. Q. B. O. S. 300.

Entering a room and locking the door is enough to constitute an arrest. *Williams v. Jones*, Cas. temp. Hardw. 301; *Grainger v. Hill*, 4 Bing. N. Cas. 212, 33 E. C. L. 328.

An arrest is effected if an officer lays his hand upon a person whom he has authority to arrest, for the purpose of arresting him, although he may not succeed in holding or stopping him. *Whitehead v. Keyes*, 3 Allen (Mass.) 495, 81 Am. Dec. 672.

Going with Officer for Another Purpose Not an Arrest.—Where an officer who held an execution called upon a debtor, who told him that he would not pay the judgment debt but would go to jail unless the creditor controlled the execution, and the officer thereupon told him that the judgment creditor was at a certain place where the jail was, and the debtor then said that he wished to see him, and, at the officer's request, got into his wagon to go with him to the place where the jail was, to be committed if no arrangement was made with the creditor, and on their way there they met the creditor, who took the debtor from the officer against his protest unless his fees were paid, it was held that this was no arrest, and did not discharge the debtor, and that an arrest subsequently was legal and valid. *Foster v. Collamer*, 10 Vt. 466.

Reading Warrant Not an Arrest.—Where an officer reads a warrant to a person, and requests him to appear before a magistrate, and leaves him without taking him into custody, it is not an arrest. *Baldwin v. Murphy*, 82 Ill. 485.

Ability to Effect Arrest Necessary.—An officer having a warrant against A, went to him in his yard, and, being at some distance, told him he had a warrant and said he arrested him; A, having a pitchfork in his hand, kept off the officer, and retreated into his house and shut the door against the officer. It was held not to be an arrest. *Genner v. Sparks*, 6 Mod. 173.

Informing One to be Arrested of Authority Not an Arrest.—Where an officer who had a warrant for the arrest of a person named therein, went to his house and told him that he had an order for his arrest, and read the summons to him, and left the bond with him on his promise that he would call the next day and settle the matter, but did not bring him in any way under restraint, it was held that inasmuch as the officer had not, and did not attempt to have, the person named in the order within his control, there was no arrest, and therefore a return of the order "not served" did not render the officer liable for a false return. *Lawrence v. Buxton*, 102 N. Car. 129.

Mere Ability to Hold Not an Arrest.—Where two bailiffs had a warrant for the arrest of the defendant, and could have arrested him if they chose, even if he had endeavored to get away, but did not do so or produce the warrant and act on it, it was held that this did not constitute an arrest, and that the party might afterwards be arrested for the same cause without a judge's order. *Hender v. Robins*, 1 H. & W. 204.

2. Manual Touching.—An arrest is effected when the party is brought within the power of the officer, an actual manual touching not being essential.¹ The

1. Arrest Accomplished when Party within Officer's Power.—Freeman on Executions (2d ed.), § 460; Dalton's Justice, c. 170.

England.—Horner v. Battyn, Buller's N. P. 626; Wingfield's Case, Cro. Car. 251; Russen v. Lucas, 1 C. & P. 153, 11 E. C. L. 351; Grainger v. Hill, 4 Bing. N. Cas. 212, 33 E. C. L. 328; Warner v. Riddiford, 4 C. B. N. S. 205, 93 E. C. L. 205.

United States.—U. S. v. Benner, 1 Baldw. (U. S.) 239; Johnson v. Tompkins, 1 Baldw. (U. S.) 571.

Alabama.—Field v. Ireland, 21 Ala. 240.
Arkansas.—Floyd v. State, 12 Ark. 43, 54 Am. Dec. 250.

Delaware.—Murphy v. Countiss, 1 Harr. (Del.) 143; Lawson v. Buzines, 3 Harr. (Del.) 416.

Georgia.—Courtoy v. Dozier, 20 Ga. 369.

Kentucky.—Hart v. Flynn, 8 Dana (Ky.) 190.

Maine.—Strout v. Gooch, 8 Me. 126.

Massachusetts.—Mowry v. Chase, 100 Mass. 85.

Michigan.—Brushaber v. Stegemann, 22 Mich. 266.

Missouri.—State v. Green, 66 Mo. 631.

New Hampshire.—Pike v. Hanson, 9 N. H. 491; Emery v. Chesley, 18 N. H. 198.

New York.—Gold v. Bissell, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480; Woodward v. Washburn, 3 Den. (N. Y.) 369; Searls v. Viets, 2 Thomp. & C. (N. Y.) 224.

North Carolina.—Jones v. Jones, 13 Ired. (N. Car.) 448; Haskins v. Young, 2 Dev. & B. (N. Car.) 527, 31 Am. Dec. 426.

Tennessee.—Smith v. State, 7 Humph. (Tenn.) 43; Bloomer v. State, 3 Sneed (Tenn.) 66.

Texas.—Herring v. State, 3 Tex. App. 108.

Vermont.—Lyon v. Rood, 12 Vt. 233; McNeice v. Weed, 50 Vt. 728.

Compare Genner v. Sparks, 1 Salk. 79; Berry v. Adamson, 6 B. & C. 528, 13 E. C. L. 245; Huntington v. Blaisdell, 2 N. H. 317.

Case of Searls v. Viets.—In the leading case of Searls v. Viets, 2 Thomp. & C. (N. Y.) 224, there is a review of the principal English and American cases on this topic. Potter, J., said: "I have not been able to find any real conflict between English and American authorities as to what constitutes an arrest. By all the authorities a person may or may not be arrested without a manual or actual touching by the officer. Each case must depend upon its own peculiar circumstances. Bare words alone will not make an arrest if the party resists the arrest. This was held in Genner v. Sparks, 1 Salk. 79. Genner, a bailiff, had a warrant against Sparks, and went to him in his yard and told him he had a warrant for him, and said, 'I arrest you.' Sparks had a fork in his hand, and kept the bailiff from touching him. Neither the power to arrest nor the words 'I arrest you' made an arrest; but the court said if the bailiff had touched him that had been an arrest, and the bailiff might have pursued him, broken open his house, or had an attachment and rescous against him. See also Russen v. Lucas,

1 C. & P. 153, 11 E. C. L. 351; Chinn v. Morris, 2 C. & P. 361, 12 E. C. L. 171. In another case, however, in Horner v. Battyn, Buller's N. P. 626, it was held that the words 'You are my prisoner,' 'I have a writ against you,' was a sufficient arrest, where the prisoner submitted, turned back, and went with the officer, though there was no touching; but it was also said, if the defendant, instead of going with the bailiff, had fled from him, the words and the warrant would not have made an arrest. To the same effect, see also Pocock v. Moore, R. & M. 321, 21 E. C. L. 449. In the case of Arrowsmith v. Le Mesurier, 2 B. & P. N. R. 211, Sir James Mansfield, Ch. J., says: 'I suppose an arrest can take place without an actual touch;' and refers to the case of Williams v. Jones, Cas. temp. Hardw. 298, where a bailiff comes into a room and tells the defendant he arrests him and locks the door; that is an arrest without touching, for he is in the custody of the officer. 'But,' the chief justice remarks, 'here the plaintiff went voluntarily before the magistrate. The warrant was made no other use of than as a summons. The constable brought a warrant, but did not arrest the plaintiff.' So the case of Berry v. Adamson, 6 B. & C. 528, 13 E. C. L. 245. 'A sheriff's officer, to whom process was given, sent a message to the defendant and asked him to fix a time, and call and give bail, and he accordingly fixed a time, went and gave bail. Held that this was not an arrest, although the party suing out the writ had no cause of action. And it was said that an action for the arrest would not lie.' Lord Ch. J. Tenterden held that the plaintiff had been neither actually nor constructively arrested. The American authorities which are claimed to be in conflict are Gold v. Bissell, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480. In this case the constable took the warrant, went to Bissell, and informed him what he had. Bissell submitted without a manual touching, went with the constable about half a mile, procured a person to become his bail next day, and did appear and give bail. The court, per Ch. J. Savage, say: 'We understand the law to be well settled that no manual touching of the body is necessary to constitute an arrest and imprisonment. It is sufficient if the party be within the power of the officer and submits to the arrest.' I am unable to see any conflict between the English cases and this. So, too, the case of Mowry v. Chase, 100 Mass. 79. * * * The judge charged that no actual force or manual touching of the body was necessary to constitute an arrest; that if the officer had a precept which authorized an arrest, and gave defendant to understand that he was arrested thereon, or under restraint, and if the defendant did so understand and submitted to the custody and control of the officer, and the defendant's movements were directed by the officer, no matter for how short a time, this was a legal arrest. On appeal the court held this charge to be sound. The jury found an arrest. * * * We are also referred to Pike v. Hanson,

merest touch, however, without restraint will suffice to constitute an arrest.¹

9 N. H. 491. That was the case of an officer with a collector's warrant for the payment of taxes, with power of arrest. He called upon the plaintiff, after having given her due notice; being in the room with her, called upon her to pay her tax, which she declined doing until arrested. He then told her he arrested her, but did not lay his hand upon her, and thereupon she paid the tax. In an action for false imprisonment, the case being carried to the court in banc, all the English authorities above cited, as well as the case of *Gold v. Bissell*, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480, were reviewed, and this was held to be a sufficient arrest to sustain an action. The judge questions, but does not condemn, *Arrowsmith v. Le Mesurier*, 2 B. & P. N. R. 211. He distinguishes it from the other cases by saying there was no declaration of arrest by the officer, and that the warrant was, in fact, only used as a summons, and says if it cannot be sustained upon this distinction, it must be regarded as of doubtful authority. The case of *Emery v. Chesley*, 18 N. H. 202, adopts the law as laid down in the preceding case. It is seen, upon a review of the preceding cases, though each differs from the others, that but one rule can be laid down as to what 'constitutes an arrest, which, if unlawful, is sufficient to maintain an action for false imprisonment.' I think by the modern practice, as drawn from the cases, that an actual manual touching of the body is not required, but only whatever is equivalent, amounting to a restraint of liberty of the person, as when the officer, or other person who claims the right to exercise the power of arrest, is in possession of a precept which authorizes or directs an arrest, and gives notice of the intention to execute it; or if the officer goes for the purpose of executing his process, and has the party in his presence and power, if the party so understands it, and in consequence thereof submits and allows the officer to direct his movements without resistance, as by going before a magistrate by direction of the officer, that amounts to an arrest, though the officer did not touch his body."

Pretended Warrant.—Arrest is constituted where there has been submission to an authority over one's person, asserted by virtue of a pretended warrant. *Haskins v. Young*, 2 Dev. & B. (N. Car.) 527, 31 Am. Dec. 426.

Evidence of Arrest.—In an action for false imprisonment it appeared that R., a constable, having a warrant for the plaintiff and his sons, issued by a justice, met the plaintiff and one of his sons in a wagon. R. said: "I have a warrant for you and your two sons." Plaintiff asked for what. R. replied: "For stealing pumpkins." Plaintiff started to get out of the wagon, and R. said: "You can go home and get your horses put up, and take your tea and come down." Plaintiff went home, took his tea, employed a lawyer, and with him and his two sons went to R.'s, and calling out R. said: "Here's your prisoners." R. said: "You move on, and I will overtake you." They went on, and R. overtook them as they

got to the house of the justice. The matter was then, after discussion, adjourned to another day without bail, and on the adjourned day the plaintiff appeared, an examination was had, and the justice discharged the case. It was held that the evidence showed an arrest of the plaintiff. *Searls v. Viets*, 2 Thomp. & C. (N. Y.) 224.

Mixed Question of Law and Fact.—What constitutes a legal arrest is a mixed question of law and fact, and the court should, in instructing the jury, explain to them what constitutes such arrest, and not leave it entirely to them to decide from the evidence whether the particular arrest is legal or not. *Musco v. Com.*, 14 Va. L. J. 26.

Mere Words with Power.—Commanding a party to submit to arrest constitutes an arrest. *Com. v. Sheriff*, 1 Grant's Cas. (Pa.) 187.

Where an officer executed a warrant by merely reading it to the person against whom it was directed, while she was sick in bed, this was held to constitute an actual arrest. *Shannon v. Jones*, 76 Tex. 141.

Actual Manual Touching Is Not Necessary.—An arrest and imprisonment may be made by a demonstration of violence only, or by restraining a person in his own house or room, or on the highway, or in an open field, as well as by confining him within the walls of a prison. *Lib. Ass.* (22 Edw. III.), p. 104, pl. 85; *Pike v. Hanson*, 9 N. H. 491; *Brushaber v. Stegemann*, 22 Mich. 268; *Hill v. Taylor*, 50 Mich. 549; *Grainger v. Hill*, 4 Bing. N. Cas. 212, 33 E. C. L. 328; *Johnson v. Tompkins*, 1 Baldw. (U. S.) 602. See *Bird v. Jones*, 7 Q. B. 742, 53 E. C. L. 742.

A full service of a writ against the body, so far as such service is material to the plaintiff's suit, is constituted by arresting the body and exhibiting the process. Furnishing a copy of the writ on the requirement of the party arrested, is a matter wholly between the law and the officer. *McNeice v. Weed*, 50 Vt. 728.

Manual seizure of the person is not always necessary, but there must be such actual manual contact or something equivalent thereto. Where there is no personal coercion or deprivation of liberty, there is no arrest. *Hill v. Taylor*, 50 Mich. 549.

1. 1 Chit. Crim. Law *48; 2 Black. Comm. *287; *Genner v. Sparks*, 6 Mod. 173, 1 Salk. 79; *Hampshire v. Godfrey*, 7 Mod. 288; *Sandon v. Jerirs*, 4 Jur. N. S. 737, 5 Jur. N. S. 860; *Russen v. Lucas*, 1 C. & P. 153, 11 E. C. L. 351; *George v. Radford*, 3 C. & P. 464, 14 E. C. L. 391, M. & M. 244; *Lawson v. Buzines*, 3 Harr. (Del.) 416; *Legrand v. Bedinger*, 4 T. B. Mon. (Ky.) 540; *Whithead v. Keyes*, 3 Allen (Mass.) 501, 81 Am. Dec. 672; *Huntington v. Blaisdell*, 2 N. H. 317; *Emery v. Chesley*, 18 N. H. 198; *Gold v. Bissell*, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480.

Another may Aid.—The physical act may be done by another at the officer's direction, and it suffices. *Blatch v. Archer*, Cowp. 65. But in either case the touching must be with the intent to make the arrest. *Jones v. Jones*, 13 Ired. (N. Car.) 448.

Mere Words.—Except in the case of a submission, there must be either a physical touching or restraint, mere words addressed to the person said to be arrested not being sufficient.¹ Such words are enough, however, if there is also submission to one who has the apparent power of carrying his design into effect.²

3. Submission.—In order that submission may take the place of an actual touching and render the arrest complete, it must be real³ and made while the person arrested is in the power of the one arresting.⁴

1. No Submission—Mere Words Not Sufficient.—Bishop's New Crim. Proc., § 157; Sewell's Law of Sheriff 129; Allen on Sheriffs 96; Atkinson's Sheriff's Law 178; Genner v. Sparks, 6 Mod. 173, 1 Salk. 79; Williams v. Jones, Cas. temp. Hardw. 298; Russen v. Lucas, 1 C. & P. 153, 11 E. C. L. 351; Whithead v. Keyes, 3 Allen (Mass.) 495, 81 Am. Dec. 672; Hill v. Taylor, 50 Mich. 549; Woodward v. Washburn, 3 Den. (N. Y.) 369; Searls v. Viets, 2 Thomp. & C. (N. Y.) 224.

Where there was a question as to whether a certain person was arrested on a particular occasion, so as to make his bond for the prison bounds good, it was held that where a person resists an arrest some manual touching of his body is necessary to consummate the arrest, but that where he makes no resistance such touching is not necessary. McCracken v. Ansley, 4 Strobb. (S. Car.) 1.

2. Submission—Mere Words without Touching or Restraint.—An arrest is constituted by anything which subjects one to the actual control of another, whether there is manual contact or not. See U. S. v. Benner, 1 Baldw. (U. S.) 240; Field v. Ireland, 21 Ala. 240; Strout v. Gooch, 8 Me. 127; Brushaber v. Stegemann, 22 Mich. 267; Gold v. Bissell, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480.

See Lawson v. Buzines, 3 Harr. (Del.) 416, where the court, by Harrington, J., said: "To constitute a legal arrest the officer must lay his hand on the defendant or otherwise take possession of his person. He must make him his prisoner in an unequivocal form." Compare Murphy v. Countiss, 1 Harr. (Del.) 143.

3. Nature of Submission Requisite.—Horner v. Battyn, Buller's N. P. 626; Berry v. Adamson, 6 B. & C. 528, 13 E. C. L. 245; Reg. v. Nugent, 11 Cox C. C. 64; Courtoy v. Dozier, 20 Ga. 369; Strout v. Gooch, 8 Me. 127; Mowry v. Chase, 100 Mass. 85; Emory v. Chesley, 18 N. H. 198; Gold v. Bissell, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480; Haskins v. Young, 2 Dev. & B. (N. Car.) 527, 31 Am. Dec. 426; Mead v. Young, 2 Dev. & B. (N. Car.) 521.

Bona Fide Submission.—That a submission is bona fide may be evidenced by words or by acts, such as giving bonds; words of arrest by the officer, not repudiated by words of protest or by acts showing resistance, will constitute an arrest, so far as the rights and liabilities of all parties are concerned. Reynolds v. Matthews, 2 Jur. 989; Emery v. Chesley, 18 N. H. 198. See the facts in Reg. v. Nugent, 11 Cox C. C. 64.

Illustrations.—Where a warrant was given to an officer with orders to arrest the defendants, which the officer said he did by notifying them that he had a warrant, and they submitted to the arrest, and the officer accompanied them to

their home, remained there all night with them, and went with them before the magistrate next day, it was held that this constituted an arrest, although they were not actually deprived of their liberty or personally guarded by the officer or any posse. Courtoy v. Dozier, 20 Ga. 369.

Where a bailable *capias* had been issued, and the deputy sheriff went to the defendant and asked him to find bail, and they then went together to look for bail, which they found, and a bond was executed, this was held to constitute an arrest. Morse v. Teetzel, 1 Ont. Pr. 369.

As to where the accused was held to be duly arrested, although the sheriff had not touched him, because he had gone to the sheriff's house as desired, and had remained there, though without any restraint, until discharged, see McIntosh v. Demaray, 5 U. C. Q. B. 343.

Where an officer and the execution debtor were together, and the debtor stated that he had surrendered, and thereupon the officer declared he had appointed a third person to be his keeper, this was held sufficient evidence of a submission to an arrest. Strout v. Gooch, 8 Me. 126.

An arrest is constituted where there has been a submission to an authority over one's person, asserted by virtue of a pretended warrant. Haskins v. Young, 2 Dev. & B. (N. Car.) 527, 31 Am. Dec. 426; Gold v. Bissell, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480.

Where a woman refused to pay a tax until she was arrested, stating that it was illegal, and the officer thereupon told her that he arrested her, without, however, touching her person, these words were held to constitute an arrest which made him liable in damages in an action for assault and false imprisonment brought by the woman, the tax being held illegal. Pike v. Hanson, 9 N. H. 491.

In Arrowsmith v. Le Mesurier, 2 B. & P. N. R. 211, the court, by Mansfield, C. J., said: "I can suppose that an arrest may take place without an actual touch, as if a man be locked up in a room; but here the plaintiff went voluntarily before the magistrate. The warrant was made no other use of than as a summons. The constable brought a warrant but did not arrest the plaintiff. How can a man's walking freely to a magistrate prove him to be arrested?" This decision would imply that submission does not do away with the necessity of actual physical restraint and manual touching. But this ruling was *dissented from* in Warner v. Riddiford, 4 C. B. N. S. 205, 93 E. C. L. 205, where the rule in Grainger v. Hill, 4 Bing. N. Cas. 212, 33 E. C. L. 328, was held to be sounder law.

4. When Submission must Occur.—Berry v.

III. PROCESS—1. In Civil Cases.—The method by which an arrest may be made in civil cases is either on mesne or final process.¹

a. MESNE PROCESS.—The object of an arrest made on mesne process is to compel the defendant to appear in the cause.²

b. FINAL PROCESS.—When an arrest is made on final process it is for the purpose of taking the body of the defendant in execution upon a judgment of some court, and when so taken the judgment is conditionally satisfied,³ and a subsequent release of the debtor is an absolute satisfaction of the judgment.⁴

Anderson, 6 B. & C. 528, 13 E. C. L. 245; Horner v. Battyn, Buller's N. P. 62b; Baldwin v. Murphy, 82 Ill. 485.

The Officer must Intend to Arrest.—Arrow-smith v. Le Mesurier, 2 B. & P. N. R. 211.

A Mere Notice of Process Sent by a Third Party is not an arrest, even if the defendant accepted it and gave bail. Berry v. Adamson, 6 B. & C. 528, 13 E. C. L. 245.

If an Officer Has a Writ of Attachment against a Person Attending Court as a suitor, but recognizes his privilege, this does not amount to an arrest. Wheeler v. Barry, 6 Vt. 579.

1. The mesne process at common law was called a writ of *capias ad respondendum*; the final, a writ of *capias ad satisfaciendum*. 3 Black. Comm. *281, *415; Tidd Pr. (Amer. ed.), pp. 122, 952.

The early English statutes, enlarging the right of arrest, provided for arrest on mesne process only, but the courts assumed that, whenever arrest on mesne process was allowed, the defendant might be arrested on final process as well. Freeman on Executions (2d ed.), § 451; 3 Black. Comm. *281, 282.

2. **Arrest on Mesne Process.**—Tidd Pr. (Amer. ed.), p. 122; 3 Black. Comm. *290, 414.

The Object of the Arrest being only to compel an appearance, the defendant was, under the former English practice, entitled to be released on furnishing special bail to appear, his appearance being effected by furnishing bail to the action—that is, to pay any judgment that might be entered against him in the action. 3 Black. Comm. *290, 291.

The writ of *capias ad respondendum* appears originally to have been a writ by the court to compel obedience to its summons, which, in theory, though not in practice, was served upon the defendant before the *capias* was issued, and in contempt of which the defendant was, by fiction of law, supposed to stand when the *capias* was issued. 3 Black. Comm. *287.

Where a defendant was in custody under a writ of *capias ad respondendum*, the plaintiff could not, after judgment, proceed against his body, unless he first charged him in execution, and if he failed to do so, within two terms after judgment, the defendant was entitled to be released. U. S. v. Griswold, 6 Sawy. (U. S.) 255.

Where Judgment in an Action has been Perfected against the defendant, and he has been charged in execution, a provisional order of arrest issued thereon is extinguished, and it is thereafter of no force or validity; it is not revived by a reversal of the judgment. Accordingly it was held that, upon such reversal, the relators who were held in confinement under the

execution could not be held under the order of arrest, but were entitled to their discharge. As to whether a new order of arrest may be obtained, *quære*. People v. Bowe, 81 N. Y. 43, reversing People v. Bowe, 20 Hun (N. Y.) 85. See Arnold v. Thomas, 2 How. Pr. (N. Y. Supreme Ct.) 91.

At Common Law, an execution, either against the body or the property, might issue, of course, within a year and a day from the entry of the judgment. 3 Black. Comm. *421; 2 Bac. Abr. *693.

Statutes Generally Provide the Time in which the body of a defendant arrested on mesne process must be charged in execution. U. S. v. Griswold, 6 Sawy. (U. S.) 255.

3. **Arrest on Final Process.**—Where the body of the defendant is taken on a *ca. sa.* the judgment is satisfied conditionally; that is, no proceedings can be had upon it while the defendant is held. Freeman on Executions, § 462.

Discharge of Judgment.—Ordinarily the taking of the body in execution was considered a discharge of the judgment and a satisfaction of the debt while the defendant remained in custody. U. S. v. Griswold, 6 Sawy. (U. S.) 259; 3 Black. Comm. *415; Sunderland v. Loder, 5 Wend. (N. Y.) 59; Jackson v. Benedict, 13 Johns. (N. Y.) 533; Wakeman v. Lyon, 9 Wend. (N. Y.) 241; Chapman v. Hatt, 11 Wend. (N. Y.) 41; Beatty v. Beatty, 2 Johns. Ch. (N. Y.) 430.

A Judgment at Common Law for the Payment of Money might be enforced by an execution against the body, called a *capias ad satisfaciendum*, in all cases in which the defendant might have been arrested in the first instance upon a *capias ad respondendum*, and the purpose and effect of it was to keep the body of the debtor in close custody until the judgment was satisfied. 3 Black. Comm. *414, 415; U. S. v. Griswold, 6 Sawy. (U. S.) 258.

4. **The Common-law Rule**, as applied both in England and in the United States, is that the creditor, by issuing a *capias ad satisfaciendum*, chooses the body of the debtor in preference to his lands or goods as a satisfaction of his debt. By making an arrest he secures to himself the satisfaction he has chosen, and is thereby estopped from resorting to any other mode of execution. As long as he holds the body in custody he is in possession and receipt of a continuing satisfaction; and when, with his consent, the body is released, he confesses that his satisfaction is complete, and the debt for which he demanded it thereby extinguished, and if the release is accompanied by any agreement, with the debtor or third parties acting for him, such agreement, whatever

c. MODE OF OBTAINING.—The right to arrest in civil cases is determined by the local law, and in most jurisdictions, as a prerequisite to the issuance of mesne process, the plaintiff is required to file an affidavit setting forth sufficient cause for making the arrest within the provisions of the statute,¹ and

may be its terms, is a new and original contract, which in no way affects the completeness of the satisfaction previously received. 3 Black. Comm. *415; Freeman on Executions (2d ed.), §§ 462, 464. See generally the following cases:

England.—Williams v. Cutteris, Cro. Jac. 136; Foster v. Jackson, Hob. 57; Vigers v. Aldrich, 4 Burr. 2482; Jaques v. Withy, 1 T. R. 557; Birch v. Sharland, 1 T. R. 715; Da Costa v. Davis, 1 B. & P. 242; Clark v. Clement, 6 T. R. 525; Tanner v. Hague, 7 T. R. 416; Blackburn v. Stupart, 2 East 243; Goodman v. Chase, 1 B. & Ald. 297; Cohen v. Cunningham, 8 T. R. 123; Eales v. Fraser, 6 M. & G. 755; 46 E. C. L. 755; Ballam v. Price, 2 Moore 235; 4 E. C. L. 418; Denton v. Godfrey, 11 Jur. 800; *Ex p.* Knowell, 13 Ves. Jr. 192.

United States.—U. S. v. Stansbury, 1 Pet. (U. S.) 573; Snead v. McCoull, 12 How. (U. S.) 407; Magniac v. Thomson, 15 How. (U. S.) 281; U. S. v. Watkins, 4 Cranch (C. C.) 271.

Massachusetts.—King v. Goodwin, 16 Mass. 63.

New York.—Cooper v. Bigalow, 1 Cow. (N. Y.) 56; Lathrop v. Briggs, 8 Cow. (N. Y.) 171; Ransom v. Keyes, 9 Cow. (N. Y.) 128; Crary v. Turner, 6 Johns. (N. Y.) 51.

Pennsylvania.—Sharpe v. Speckenagle, 3 S. & R. (Pa.) 463.

South Carolina.—Eggart v. Barnstine, 3 McCord (S. Car.) 162.

Virginia.—Windrum v. Parker, 2 Leigh (Va.) 361; Noyes v. Cooper, 5 Leigh (Va.) 186.

In the Year Book 33 Hen. VI., p. 48, 1455, it is said: "Suppose a man recover against me and take my body in execution, he shall have neither *elegit* nor *fi. fa.*, nor any other execution, because this amounts in law to satisfaction."

And in 13 Hen. VII., p. 1, it appears: "If in a *ca. sa.* the sheriff return *cepi corpus* the plaintiff shall never have another *ca. sa.*, for he learns from the return of the sheriff that he was in execution, and then he had the object of his suit."

The statute 21 Jac. I., c. 24, gave the creditor a further remedy against the estate of a deceased debtor whose body had been taken in execution, and there are other cases in which the common law has been modified by statute.

Escape.—By the early common law an escape was as effectual a discharge of the arrested person as a release, Year Book 33 Hen. VI., p. 47; but the law now is that an escaped debtor may be taken on a new *ca. sa.* Whiteacres v. Hankinson, Cro. Car. 75; Jaques v. Withy, 1 T. R. 557. See Allanson v. Butler, 1 Sid. 330; Buxton v. Home, 1 Show. 174; Mounson v. Cleyton, Cro. Car. 240; 1 Rolle's Abr. 901, 902.

Where there are more defendants than one the escape of one, or his discharge without the plaintiff's consent, will not prevent the other

from being taken on *ca. sa.* unless the debt has been satisfied. Whiteacres v. Hankinson, Cro. Car. 75; Crawley v. Lidgate, Cro. Jac. 338; 1 Rolle's Abr. 896; Mounson v. Cleyton, Cro. Car. 240; Nadin v. Battie, 5 East 147. See Denton v. Godfrey, 11 Jur. 800; Palethorpe v. Leshar, 2 Rawle (Pa.) 272.

Cases of Rescue depend upon the same principle as cases of escape. Jaques v. Withy, 1 T. R. 557.

A Second Ca. Sa. may Issue where an imprisoned debtor has procured his discharge by fraud or abuse of the forms of law, for in such a case it is assumed that the defendant was never legally out of custody. The same principle governs in case of escape. Baker v. Ridgway, 2 Bing. 41, 9 E. C. L. 311, 9 Moore 114; Holbrook v. Champlin, Hoffm. Ch. (N. Y.) 148. See *infra*, this title, *Second Arrest*.

1. How Process Obtained.—The requirements of the affidavit are governed by statute. In some states it may not be made by an attorney, *Ex p.* Hartley, 5 Ark. 32; in others it may be so made, Wilson v. Nettleton, 12 Ill. 61.

Information and Belief.—Under some statutes it has been held that a creditor must swear positively, of his own knowledge, as to the existence and amount of his claim. Herwig v. Beach, 15 La. Ann. 261; Herf v. Shulze, 10 Ohio 263; Crane v. Fish, 2 Miles (Pa.) 165; Hewitt v. Nicholson, 2 Miles (Pa.) 322. Compare Com. v. Fritz, 2 Miles (Pa.) 336. See also Lewis v. Brackenridge, 1 Blackf. (Ind.) 112.

In the absence of any express statutory provisions as to whether the affidavit must state the knowledge of the affiant, or whether a statement of information and belief is sufficient, it has been held that it must in general state the affiant's knowledge. McGilvery v. Morehead, 2 Cal. 607; Meddaugh v. Williams, 48 Mich. 172; De Long v. Briggs, 47 Mich. 624; Whitlock v. Roth, 5 How. Pr. (N. Y. Supreme Ct.) 143; Satow v. Reisenberger, 25 How. Pr. (N. Y. Supreme Ct.) 164; Union Bank v. Mott, 9 Abb. Pr. (N. Y. Supreme Ct.) 106.

But the affidavit may be on information and belief if it states the source whence information was derived, and where the informants reside, if the residence of such informants be so remote that their sworn affidavits cannot be had in time to make a successful arrest. City Bank v. Lumley, 28 How. Pr. (N. Y. C. Pl.) 397; Whitlock v. Roth, 5 How. Pr. (N. Y. Supreme Ct.) 143; Crandall v. Bryan, 15 How. Pr. (N. Y. Supreme Ct.) 48; Matoon v. Eder, 6 Cal. 57.

If the information is derived from documents, this should be stated, and the documents presented with the application or copies of them furnished. De Nierth v. Sidner, 25 How. Pr. (N. Y. C. Pl.) 419; Newell v. Doran, 21 How. Pr. (N. Y. Supreme Ct.) 427.

The validity of the process depends upon the validity of the affidavit. If the affidavit is defective the writ is void. Hauss v. Kohlar,

also to enter into a bond to indemnify the defendant in case the arrest is adjudged to be unauthorized.¹

2. In Criminal Cases.—The party who knows or suspects that a public offense has been committed, goes before a magistrate or other officer competent to issue warrants of arrest, together with such witnesses as he may produce, and lays before him his information and that of his companions, setting forth the grounds on which the application for a warrant is based. The form and requisite of the complaint—whether it should be in writing and under oath—and of the warrant—the description of the offense and the offender, the direction and authority, the seal—and kindred matters, are treated elsewhere in this work.²

3. Execution of Process—*a.* **GENERAL RULE.**—An officer to whom a proper warrant has been directed is bound to proceed with reasonable diligence and secrecy to execute it.³ It may, however, be executed at any time until the

25 Kan. 640; *Tennent v. Weymouth*, 25 Kan. 21; *Devries v. Summit*, 86 N. Car. 126; *McGilvery v. Morehead*, 2 Cal. 607; *Meddaugh v. Williams*, 48 Mich. 172; *Towers v. Kingston*, 1 Browne (Pa.) 33; *Lewis v. Brackenridge*, 1 Blackf. (Ind.) 112; *Hitchcock v. Baker*, 2 Allen (Mass.) 431.

Facts Appearing on Face of Record.—In *New York* no affidavit is necessary in order to arrest the defendant on final process where the facts warranting arrest appear on the face of the record and are essential to support the judgment. *Freeman on Executions* (2d ed.), § 453; *Richtmeyer v. Remsen*, 38 N. Y. 206; *Niver v. Niver*, 19 Abb. Pr. (N. Y. Supreme Ct.) 14; *Elwood v. Gardner*, 45 N. Y. 349; *Keeler v. Clark*, 18 Abb. Pr. (N. Y. Supreme Ct.) 154.

Extrinsic Facts on the Record.—But if the facts necessary to warrant an arrest are extrinsic to the cause of action and need not appear on the face of the record, an affidavit averring such facts is necessary, and process of arrest must be sued out before judgment. *Freeman on Executions* (2d ed.), § 452; *Atocha v. Garcia*, 15 Abb. Pr. (N. Y. Supreme Ct.) 303; *Elwood v. Gardner*, 45 N. Y. 349.

Execution for Costs.—No affidavit is necessary in case of an arrest upon an execution for costs. *Gibbs v. Taylor*, 143 Mass. 187.

An Agent of the Plaintiff may Sue Out Process for the arrest of the defendant, and so the wife of a plaintiff in a civil action may make an affidavit to hold the defendant to bail. *Ex p. Harlan*, 39 Ala. 563.

Amendment of Affidavit.—An affidavit in proceedings for the arrest and bail of a debtor may be amended in the discretion of the court, when it contains the names of the parties, specifies the amount of indebtedness, and avers the statutory ground for issuing the order of arrest, no matter how defective the statements therein contained may be. *Light v. Canadian County Bank*, 2 Okla. 543. See *ENCYC. OF PLEADING AND PRACTICE*, titles *BAIL AND RECOGNIZANCE*, vol. 3, p. 158; *EXECUTIONS*.

1. For Liability on the Bond to Secure the Order of Arrest, and necessity therefor before order of arrest is issued, and its requirements, see generally the following cases:

United States.—*Cole v. Tollison*, 40 Fed. Rep. 303.

Kentucky.—*Burnsides v. Blythe*, 11 B. Mon. (Ky.) 6.

Louisiana.—*Weingerter v. White*, 5 La. Ann. 487; *Block v. Maxwell*, 10 La. Ann. 5; *Keane v. Fisher*, 10 La. Ann. 261.

Maryland.—*Coward v. Bohun*, 1 Har. & J. (Md.) 538.

New York.—*Hallen v. Jones*, 1 Misc. Rep. (N. Y. City Ct.) 192; *Moses v. Waterbury Button Co.*, 37 N. Y. Super. Ct. 393; *Keck v. Gross*, 6 Misc. Rep. (Brooklyn City Ct.) 438; *Sutorius v. North* (C. Pl.), 36 N. Y. St. Rep. 873, 20 Civ. Pro. Rep. (N. Y.) 162; *Sutorius v. Dunstan* (Super. Ct.), 36 N. Y. St. Rep. 685, 20 Civ. Pro. Rep. (N. Y.) 241; *Furber v. McCarthy* (Supreme Ct.), 36 N. Y. St. Rep. 212, 20 Civ. Pro. Rep. (N. Y.) 229; *Seaver v. Moore*, 1 Hun (N. Y.) 305; *Squire v. Flynn*, 8 Barb. (N. Y.) 169; *Barker v. Russell*, 11 Barb. (N. Y.) 303; *Irwin v. Judd*, 20 Hun (N. Y.) 562; *Steinbock v. Evans*, 122 N. Y. 551; *Richardson v. Craig*, 1 Duer (N. Y.) 666; *Elston v. Potter*, 9 Bosw. (N. Y.) 636; *Tracy v. Veeder*, 35 How. Pr. (N. Y. Supreme Ct.) 209; *Pember v. Schaller*, 58 How. Pr. (N. Y. Marine Ct.) 511; *Schuyler v. Englert*, 62 How. Pr. (N. Y. Marine Ct.) 479.

North Carolina.—*Rowark v. Homesley*, 68 N. Car. 91.

Oregon.—*Paddock v. Hume*, 6 Oregon 82.

Pennsylvania.—*McClelland v. Smith*, 12 Pa. St. 303; *Gall v. Molessa*, 3 Pa. Dist. Rep. 537.

2. For a Detailed Discussion of these matters, see the title *WARRANTS*.

3. Execution of Process.—1 *Chitty Crim. Law* 47, 48; *Dalton's Justice* 169; *Dickenson v. Brown*, *Peake N. P.* 234; *Middleton v. Price*, 1 Wils. 17; *U. S. v. Scroggins*, 3 Woods (U. S.) 529; *Watson v. Watson*, 9 Conn. 140, 23 Am. Dec. 324. See *Reg. v. Wyatt*, 2 Ld. Raym. 1196; *U. S. v. Fayette County*, 2 Abb. (U. S.) 274; *Lamb v. Dillard*, 94 Ga. 206; *State v. Curtis*, 1 Hayw. (N. Car.) 471.

A Certain Discretion is Given an officer in making an arrest, but not to the extent of abandoning his legal duty. *Firestone v. Rice*, 71 Mich. 377, 15 Am. St. Rep. 266.

A Prosecuting Attorney cannot Control in any way the action of an officer in executing process. The officer may take his advice, but is not released from responsibility if he fails in his duty in not acting on it. *Beecher v.*

object for which it was issued has been fully satisfied.¹

A Warrant Obtained for an Undue Purpose will nevertheless constitute a sufficient authority to justify execution, even though this fact was known to the officer.²

A Neglect or Refusal to Execute by an officer whose duty it is to execute warrants is an indictable offense, and it is no excuse that the warrant was irregular.³

b. NOTICE OF OFFICER'S AUTHORITY.—Officers not commonly known as such, officers acting outside their proper jurisdiction, and private persons, must show their warrants when demand is made by the person arrested; otherwise a resistance will be justified.⁴

Anderson, 45 Mich. 543; U. S. v. Scroggins, 3 Woods (U. S.) 529.

Officer Not Liable after Return.—An officer does not become liable for failing to proceed with a warrant after its return. *Com. v. Roark*, 8 Cush. (Mass.) 210.

Officer must Do His Whole Duty.—But the rule of law both in civil and criminal proceedings is that the officer must show that he has done all that it was his duty to do in executing the process, and he is liable if he does not show that he has returned it. In criminal cases a warrant ought to contain a command to the officer to make a return of such warrant, and he should act under it, but even if it contain no such command it will not excuse him from not making a return. *Tubbs v. Tukey*, 3 Cush. (Mass.) 438, 50 Am. Dec. 744. But see *Leighton v. Hall*, 31 Ill. 108, 83 Am. Dec. 205; *Morris v. Kasling*, 79 Tex. 141.

An officer is bound to use all reasonable and proper personal exertion to capture a person for whose arrest he has a writ, and if he fails to make an arrest when he might and ought to do so, he will be liable in an action for negligence in not doing it. *Whithead v. Keyes*, 3 Allen (Mass.) 495, 81 Am. Dec. 672.

1. Warrant in Force until Fully Executed.—In *Dickenson v. Brown*, Peake N. P. 234, the court, by Lord Kenyon, said that the warrant of a magistrate was not returnable at any particular time, but that it continued in force until it was fully executed and obeyed, although it was seven years, provided the magistrate so long lived. See *Reg. v. Marsden*, L. R. 1 C. C. 131. See the title WARRANTS.

Warrant Void after Time when Returnable.—It was held in *Stoyel v. Lawrence*, 3 Day (Conn.) 1, that an arrest under process after the time when it is made returnable is a trespass and void. See *Prescott v. Wright*, 6 Mass. 20.

2. Watson v. Watson, 9 Conn. 141, 23 Am. Dec. 324; *State v. Weed*, 21 N. H. 262, 53 Am. Dec. 188; *Webber v. Gay*, 24 Wend. (N. Y.) 485; *People v. Cooper*, 13 Wend. (N. Y.) 379; *State v. James*, 80 N. Car. 370.

Knowledge of Want of Jurisdiction.—A ministerial officer is protected in the execution of process regular and legal on its face, though he has knowledge of facts rendering it void for want of jurisdiction. *People v. Warren*, 5 Hill (N. Y.) 440. See also *1 East P. C.* 310; 3 Stark. Ev. 1446; *Underwood v. Robinson*, 106 Mass. 296; *Meeds v. Carver*, 8 Ired. (N. Car.) 298, and the title PUBLIC OFFICERS.

3. Crouther's Case, Cro. Eliz. 654; 1 Hale P. C. 581. See also the title PUBLIC OFFICERS.

Must Execute Proper Writ without Inquiry.—

An officer must execute a writ issued by a court of competent jurisdiction, which is placed in his hands, without inquiring into the regularity of the proceedings on which it is grounded. *Cody v. Quinn*, 6 Ired. (N. Car.) 191, 44 Am. Dec. 75. See *Mackale's Case*, Cro. Jac. 280; *Jaques v. Cesar*, 2 Saund. 100.

Void Process Alone an Excuse.—A sheriff cannot excuse himself from serving a process because it is erroneous or irregular. He can only do so when it is absolutely void. *Stoddard v. Tarbell*, 20 Vt. 321; *Whitehall Bank v. Pettes*, 13 Vt. 395, 37 Am. Dec. 600. And see *Watson v. Watson*, 9 Conn. 141, 23 Am. Dec. 324, where the officer knew that the plaintiff had no cause of action, but was yet bound to serve the process. See further *Albee v. Ward*, 8 Mass. 79.

4. Notice of Officer's Authority—England.—*Rex v. Ricketts*, 3 Campb. 68; *Rutland's Case*, 6 Coke 52b; *Mackalley's Case*, 9 Coke 65b, Cro. Jac. 279; *Rex v. Davis*, 7 C. & P. 785, 32 E. C. L. 736.

United States.—U. S. v. *Fayette County*, 2 Abb. (U. S.) 275.

Massachusetts.—*Com. v. Field*, 13 Mass. 321. **New York.**—*Bellows v. Shannon*, 2 Hill (N. Y.) 86; *Arnold v. Steeves*, 10 Wend. (N. Y.) 514; *Frost v. Thomas*, 24 Wend. (N. Y.) 418.

North Carolina.—*State v. Garrett*, Winst. (N. Car.) 144, 84 Am. Dec. 359; *State v. Curtis*, 1 Hayw. (N. Car.) 471; *State v. Kirby*, 2 Ired. (N. Car.) 201; *State v. Bryant*, 65 N. Car. 327.

Pennsylvania.—*Russell v. Shuster*, 8 W. & S. (Pa.) 309; *Com. v. Deacon*, 8 S. & R. (Pa.) 49; *Brooks v. Com.*, 61 Pa. St. 352, 100 Am. Dec. 645.

Notice may Be Either Express or Implied.—*State v. Spaulding*, 34 Minn. 361; *Bellows v. Shannon*, 2 Hill (N. Y.) 86; *State v. Bryant*, 65 N. Car. 327; *Brooks v. Com.*, 61 Pa. St. 352, 100 Am. Dec. 645.

Duty of Officer to Make Known His Warrant.—In *Bellows v. Shannon*, 2 Hill (N. Y.) 92, the court, by Bronson, J., said: "An officer is bound to give the substance of the warrant or process, to the end that the party may know for what cause he is arrested and take the proper legal measures to discharge himself. This is, however, where the party submits to the arrest, and not where he makes resistance before the officer has time to give the information. Although the officer is not bound to exhibit the warrant, especially where there may be reason to apprehend that it will be lost or destroyed, yet I cannot doubt that it is

A Known Public Officer, within the limits of his jurisdiction, is not required to show his warrant, but he should, if demanded, state the substance of it to the party upon whom service is made.¹

his duty to inform the party, where such is the fact, that he has a warrant, or to make known in some other way that he comes in his character as an officer to execute legal process, and not leave the party to suppose that he is assailed by a wrongdoer." See also *Fost. Cr. L.* 310; *1 Russ. on Cr.* 451; *1 East P. C.* 319; *2 Hale P. C.* 116, note; *State v. Phinney*, 42 Me. 384.

Officer Not Known must Show Authority.—When an officer not generally known makes an arrest he must show his authority when demanded, or he may be resisted. *State v. Curtis*, *1 Hayw. (N. Car.)* 471; *Arnold v. Steeves*, *10 Wend. (N. Y.)* 514.

A Special Deputy or a Private Person to whom a warrant is addressed is bound to show his warrant, or the arrest is illegal. *Com. v. Field*, *13 Mass.* 321; *Frost v. Thomas*, *24 Wend. (N. Y.)* 418; *Arnold v. Steeves*, *10 Wend. (N. Y.)* 515; *State v. Kirby*, *2 Ired. (N. Car.)* 201; *State v. Curtis*, *1 Hayw. (N. Car.)* 471; *Burton v. Wilkinson*, *18 Vt.* 186, *46 Am. Dec.* 145.

Whether Warrant must Always be Shown on Demand.—The most prudent course is to show the warrant always when demanded. *Mackalley's Case*, *9 Coke* 65*b*; *Hodges v. Marks*, *Cro. Jac.* 485; *Com. v. Field*, *13 Mass.* 321. See *Hall v. Roche*, *8 T. R.* 188, where it was said, without being expressly decided, that the warrant should be produced in all cases if demanded. See also *Codd v. Cabe*, *1 Exch. Div.* 352; *People v. Shanley*, *40 Hun (N. Y.)* 478; and the note following.

Knowledge of Warrant by Party Arrested.—Section 173, *N. Y. Code of Crim. Pro.*, requires an officer arresting under a warrant to show it if required. Under this statute it was held that the fact that the party being arrested knew that a warrant had been issued, and that the officer was a police officer, was not a sufficient compliance with the statute, the warrant not then being in the officer's possession. *People v. Shanley*, *40 Hun (N. Y.)* 477. See *Gen. Stat. Mass.*, c. 158, § 1.

In *State v. Garrett*, *Winst. (N. Car.)* 144, *84 Am. Dec.* 359, it was held that an officer making an arrest is bound to show his warrant and to read it if required, but that if the party being arrested knew of the process and its contents, and had his mind made up beforehand to resist, then the officer was not bound to produce his warrant on demand.

Resistance Excusable—Instances.—Where a man was accosted suddenly by three officers at night who were unknown to him, and who did not inform him that they had a warrant for his arrest, or in fact have one, he was not liable for presenting a gun at them for the purpose of resisting them and securing his retreat. *White v. State*, *29 Tex. App.* 530.

Y. was pursued by a shouting mob in the night, threatening his life. In his flight he was seized by an officer, whom he killed. Y. was indicted for murder and convicted. On appeal the court said, in granting a new trial:

"In the progress of the trial it soon became a material inquiry whether the prisoner was aware of the character of his pursuer. There was no proof of actual knowledge, and then occurred the inquiry whether the jury might not be warranted to infer his knowledge from attending circumstances. Hence the proof of the officer's uniform and the prisoner's defective vision, the street lamp, and the vicinity thereto of the prisoner at the time of the killing, all these circumstances became of vital consequence, for if there was nothing from which the prisoner's knowledge of the official character of the deceased might be inferred, the measure of the offense charged would descend from murder into one of the degrees of manslaughter. * * * And there was no evidence that he demanded him to surrender, or that he told him he arrested him. There was no evidence that he personally knew the officer." *Yates v. People*, *32 N. Y.* 509.

Resistance before Purpose Stated.—If a person resists and kills the officer before he can state his purpose, the slayer is guilty of murder. *Mackalley's Case*, *9 Coke* 65*b*.

Reading the Warrant is notice of the officer's authority. *State v. Green*, *66 Mo.* 631.

Possession should be Retained.—An officer is not required to part with the possession of his warrant. *1 East P. C.* 319; *Hall v. Roche*, *8 T. R.* 188.

Necessary Force to Secure Repossession.—If he allows a prisoner to take it into his hand to read it, and he refuses to return it, the officer may use necessary force to repossess it. *Rex v. Mitton*, *3 C. & P.* 31, *14 E. C. L.* 196, *Moo. & M.* 107.

Verbal Notice.—When an officer says: "I arrest you in the king's name," it is sufficient notice, day or dark. *Mackalley's Case*, *9 Coke* 65*b*. See also *Russell on Crimes* 839, 840.

An officer not in uniform told the prisoners: "You are my prisoners; surrender," at the same time he pointed a gun at them. It was held that these words were sufficient notice of his character. *People v. Pool*, *27 Cal.* 572.

1. 2 Hale P. C. 116; *Hawk. P. C.*, c. 13, § 28.

England.—*Rex v. Woolmer*, *1 Moo. C. C.* 334; *Rex v. Gordon*, *1 East P. C.* 352.

Alabama.—*King v. State*, *89 Ala.* 43, *18 Am. St. Rep.* 89; *Williams v. State*, *44 Ala.* 41.

California.—*People v. Pool*, *27 Cal.* 572.

Delaware.—*State v. Wetherall*, *5 Harr. (Del.)* 487; *State v. Townsend*, *5 Harr. (Del.)* 487.

Georgia.—*Johnson v. State*, *30 Ga.* 426.

Indiana.—*Kernan v. State*, *11 Ind.* 471.

Iowa.—*State v. Freeman*, *8 Iowa* 428, *74 Am. Dec.* 317.

Kentucky.—*Jamison v. Gaernett*, *10 Bush (Ky.)* 221.

Massachusetts.—*Com. v. Irwin*, *1 Allen (Mass.)* 587; *Com. v. Cooley*, *6 Gray (Mass.)* 356; *Com. v. McLaughlin*, *12 Cush. (Mass.)* 615; *Com. v. Coughlin*, *123 Mass.* 436.

Michigan.—*Drennan v. People*, *10 Mich.* 169.

The Official Character of an officer is presumed to be known to the party arrested; and if the officer wears a known uniform or exhibits his badge of office, the presumption may be said to be conclusive.¹

Minnesota.—State v. Spaulding, 34 Minn. 361.

Missouri.—State v. Green, 66 Mo. 631.

New York.—Arnold v. Steeves, 10 Wend. (N. Y.) 514.

North Carolina.—State v. Curtis, 1 Hayw. (N. Car.) 471; State v. Garrett, Winst. (N. Car.) 144, 84 Am. Dec. 359.

Ohio.—Wolf v. State, 19 Ohio St. 248.

Tennessee.—Lewis v. State, 3 Head (Tenn.) 127.

Texas.—Plasters v. State, 1 Tex. App. 673.

Vermont.—State v. Caldwell, 2 Tyler (Vt.) 214.

Distinction between Arrests for Felony and for Other Causes.—Even though the arrest is made by one who is apparently an officer, yet if the ground of the arrest is an offense less than felony, or if the arrest be in a civil action, the officer must have the warrant in his possession, and must show it when demanded. *Galliard v. Laxton*, 2 B. & S. 363, 110 E. C. L. 363; *Codd v. Cabe*, 1 Exch. Div. 352; *Croom v. State*, 85 Ga. 718; *Webb v. State*, 51 N. J. L. 189; *People v. Shanley*, 40 Hun (N. Y.) 478.

The ground for this distinction is thus stated by Denman, J., in *Codd v. Cabe*, 1 Exch. Div. 352: "The general rule is, that in felony, a police constable may arrest without a warrant, that in offenses of a lesser degree he cannot; it follows, therefore, that when a warrant has been issued for an offense punishable upon summary conviction, the officer executing it ought to have it in his possession, ready to be produced if it is asked for. In *Galliard v. Laxton*, 2 B. & S. 363, 110 E. C. L. 363, the distinction was drawn between arrests for felony and arrests for other matters; and it is plain from that case that arrests for offenses less than felony stand upon the same footing as arrests upon civil process." In the same case, Mellor, J., said: "Whenever a warrant has been issued to arrest a person charged with an offense in respect of which he cannot be apprehended without a warrant, the police officer must have the warrant in his possession at the time when he executes it; if he has not, the arrest will be illegal."

See also *infra*, this section, *Warrant must Be in Officer's Possession*.

Successive Steps.—The order of arrest in such cases is, first, the arrest; second, the explanation; third, the reading of the warrant. *Com. v. Cooley*, 6 Gray (Mass.) 356. See *U. S. v. Fayette County*, 2 Abb. (U. S.) 274; *Shovlin v. Com.*, 106 Pa. St. 369.

"The accused is required to submit to the arrest, to yield himself immediately and peaceably into the custody of the officer, who can have no opportunity, until he has brought his prisoner into safe custody, to make him acquainted with the cause of his arrest, and the nature, substance, and contents of the warrant under which it is made. These are obviously successive steps. They cannot all occur at the same instant of time. The explanation

must follow the arrest, and the exhibition and perusal of the warrant must come after the authority of the officer has been acknowledged, and his power over his prisoner acquiesced in." *Court, by Merrick, J., in Com. v. Cooley*, 6 Gray (Mass.) 356. See also *Rex v. Allen*, 17 L. T. N. S. 222; *Boyd v. State*, 17 Ga. 194; *State v. Garrett*, Winst. (N. Car.) 144, 84 Am. Dec. 359.

Refusal to Exhibit does Not Make Officer a Trespasser, even where it is the officer's duty to exhibit his process when demanded, if he shows that he has a regular legal process in his possession which justified the arrest. *Arnold v. Stevens*, 10 Wend. (N. Y.) 514. But see *People v. Shanley*, 40 Hun (N. Y.) 478; and the preceding paragraphs in this note.

Similarly an Arrest under an Illegal Warrant, where the Officer Has a Legal One, will not render him liable as for false imprisonment, for the sufficiency of the authority which he then has, and not his acts or declarations concerning it, decides the lawfulness of the arrest. *State v. Kirby*, 2 Ired. (N. Car.) 201.

But compare *Hall v. Roche*, 8 T. R. 187. In this case the court, by Kenyon, C. J., said: "If it be established as law by the cases cited that it is not necessary to show the warrant to the party arrested who demands to see it, I will not shake those authorities, but I cannot forbear observing that if it be so established, it is a most dangerous doctrine, because it may affect the party criminally in case of any resistance, and if homicide ensues the legality of the warrant enters materially into the merits of the question. I do not think that a person is to take it for granted that another, who says he has a warrant against him without producing it, speaks truth. It is very important that in all cases where an arrest is made by virtue of a warrant, the warrant (if demanded at least) should be produced."

Effect of Not Showing—Rearrest.—The fact that the officer omits to exhibit or declare his authority does no more than deprive him of the protection which the law throws around its ministers while in the lawful discharge of their official duty. Where a person who has been arrested escapes from an officer without demanding his warrant, his right to require the officer to show his authority is practically gone upon his rearrest. *State v. Phinney*, 42 Me. 384.

1. Presumptive Notice of Officer's Authority.—*Rex v. Woolmer*, 1 Moo. C. C. 334; *Rex v. Gordon*, 1 East P. C. 352; *People v. Pool*, 27 Cal. 572; *Com. v. Tobin*, 108 Mass. 426, 11 Am. Rep. 375; *Yates v. People*, 32 N. Y. 509; *Wolf v. State*, 19 Ohio St. 248.

Evidence of Official Character—Acting Town Marshal.—Testimony that at the time a person was killed, he wore a badge, carried a policeman's baton, and was acting as town marshal, was held competent evidence of the official character of such deceased person. *Martin v. State*, 89 Ala. 115, 18 Am. St. Rep. 91.

Uniform and Insignia.—Notice of the officer's

Circumstances Attending the Arrest may be such as to give the party adequate notice of the intention of the party arresting, in which case verbal or other notice would be not only unnecessary, but superfluous.¹

c. **MUST ARREST PERSON NAMED IN WARRANT.**—An officer, in executing a warrant of arrest, must arrest the person named therein, in order to be justified, and no other.²

authority may be implied from his uniform and insignia of office. *Yates v. People*, 32 N. Y. 509. See *Com. v. Tobin*, 108 Mass. 426, 11 Am. Rep. 375; *In re Acker*, 66 Fed. Rep. 290.

No Particular Form of Words Is Necessary to give notice of official character. It is enough that the officer and his business be known. Where an officer used the words, "You are my prisoner," it was held competent evidence of notification by him of his business. *State v. Spaulding*, 34 Minn. 361.

Every one is bound to know the character of an officer acting within his proper jurisdiction. *State v. Townsend*, 5 Harr. (Del.) 487.

Power by Law to Arrest without Warrant.—In case of arrest without a warrant an officer empowered by law to make such arrest is not required to give the party he is about to arrest notice that he is going to make the arrest, and that he is legally empowered to make it, before the arrest is actually made. *Shovlin v. Com.*, 106 Pa. St. 369.

1. Circumstances Sufficient Notice.—When the circumstances disclose the officer's purpose, resistance will be illegal. *Rex v. Howorth*, 1 Moo. C. C. 207; *Rex v. Payne*, 1 Moo. C. C. 378; *Pew's Case*, Cro. Car. 183; *Mackalley's Case*, 9 Coke 656; *Lewis v. State*, 3 Head (Tenn.) 147.

Poacher need Have No Notice.—When a game-keeper finds a poacher in a wood, the circumstances are sufficient notice of an intention to apprehend. The poacher may fairly presume that the keeper has such intention, especially if he runs and is pursued by the keeper. *Rex v. Davis*, 7 C. & P. 785, 32 E. C. L. 736.

Apprehension in the Commission—Fresh Pursuit.—A party apprehended in the actual commission of an offense, or upon fresh pursuit thereafter, must know the reason why he is apprehended, and notice of the officer's character and intention is not, therefore, necessary. *Rex v. Howorth*, 1 Moo. C. C. 207; *Rex v. Hunt*, 1 Moo. C. C. 93. See *Cahill v. People*, 106 Ill. 621; *Com. v. Tobin*, 108 Mass. 426, 11 Am. Rep. 375; *Roberts v. State*, 14 Mo. 138, 55 Am. Dec. 97; *State v. Belk*, 76 N. Car. 10.

Where one is committing a felony he may be arrested by an officer without being informed of the charge, *State v. Mowry*, 37 Kan. 369; *Wolf v. State*, 19 Ohio St. 248; or where he has just committed a felony and is trying to escape, *People v. Pool*, 27 Cal. 572. The reason why notice is not required in such cases is because the criminal must know the reason why he is being arrested. *Rex v. Payne*, 1 Moo. C. C. 378. Notice of the charge and intention to arrest may be shown by some incidental matter. *Gordon's Case*, 1 East P. C. 315.

Where the prisoner was found in a garden

at night by a policeman, who, without informing the prisoner that he belonged to the police force, pursued and caught him, and the jury found that the prisoner had been engaged in wilfully and maliciously cutting certain flowers from plants or roots in the garden with intent to steal them, on a case reserved it was held that the policeman had authority to arrest the prisoner. *Rex v. Fraser*, 1 Moo. C. C. 419.

2. The Arrest of a Person under a Wrong Name cannot be justified, although he was in fact the person intended, unless it is proved that he was as well known by one name as the other. *Mead v. Haws*, 7 Cow. (N. Y.) 332; *West v. Cabell*, 153 U. S. 78. See also the title WARRANTS.

Omission of Christian Name.—In *Rex v. Hood*, 1 Moo. C. C. 281, a warrant of arrest in which the Christian name was omitted and no reason for the omission given, was held to be bad. See also *Prell v. McDonald*, 7 Kan. 426. *Aliter* where the warrant states that the Christian name is unknown. *Graham v. State*, 28 Tex. App. 582.

The Reason of the Rule is that ministerial officers should not be called on to judge questions of identity or misnomer. In *Money v. Leach*, 3 Burr. 1742, Lord Mansfield said: "It is not fit that the receiving or judging of the information should be left to the discretion of the officer. The magistrate ought to judge, and should give certain directions to the officer."

Private Person Assisting Officer Protected.—But though an officer is not justified in arresting a person by a wrong name, a private person, when called upon for assistance to make such an arrest by a known public officer, will be protected. *McMahan v. Green*, 34 Vt. 72, 80 Am. Dec. 665.

Arrest in Another Judicial District.—It was held in *Williams v. Tidball* (Arizona 1885), 8 Pac. Rep. 351, that a United States marshal was justified in making an arrest under a warrant, issued by a United States commissioner who resided in another judicial district than that in which the alleged offense was committed, which described the party by a fictitious name, when as a fact the person arrested was the person against whom the complaint was filed. But see *People v. Allison* (Colo. App. 1895), 39 Pac. Rep. 903.

Wrong Name in Ca. Sa. does Not Invalidate.—In *Hammond v. People*, 32 Ill. 446, 83 Am. Dec. 286, it was held that a person might be lawfully arrested under a *ca. sa.* sued out upon a judgment entered by default against a party by his Christian name alone, or by a name which he did not bear, and by which he had never been known, where the summons in the action had been served on the party intended to be sued, although the writ also ran in the wrong name.

Mistake No Excuse.—This rule is so inflexible that the officer will not ordinarily be excused where, through mistake, a person of the same name as that in the warrant is arrested by him.¹

Officer Misled by Party Arrested.—The rule is otherwise, however, where the party by his own acts has misled the officer and induced him to make the arrest.² In such case the prisoner may be held after he has notified the officer of the mistake only so long as may be reasonably necessary, under all the circumstances, to ascertain the true identity of the party to the officer's satisfaction.³

d. WARRANT MUST BE IN OFFICER'S POSSESSION.—It is not enough for the protection of the officer that a warrant was properly issued and delivered to him; he must have it in his possession at the time of the arrest in order to be justified.⁴

1. *Coote v. Lighworth*, Moore K. B. 457. In this case the plaintiff brought false imprisonment against the defendant, who justified for that he had a warrant to arrest J. D. He asked the plaintiff what was his name, and he answered that his name was J. D.; *per quod* he arrested him. The plaintiff demurred, and it was adjudged for the plaintiff, upon the ground that the defendant ought at his peril to have taken notice of the party. See also *Thurbane's Case*, Hardr. 323.

The authority of these cases seems to be somewhat weakened by the decisions cited in the following note.

2. **Party Arrested on His Own Misrepresentation**—*Dunston v. Paterson*, 2 C. B. N. S. 495, 89 E.C. L. 495, 26 L. J. C. P. 267; *Freeman v. Cooke*, 2 Exch. 654, 18 L. J. Exch. 114.

A writ of *ca. sa.* was lodged with the sheriff for the arrest of T. W., and he arrested H. W. instead, as the real debtor, and brought him to the establishment of the plaintiff, whose foreman told him that H. W. was the real debtor. H. W. was afterwards liberated, and having brought his action against the sheriff recovered damages from him for false imprisonment. The sheriff then brought action against the plaintiff in execution for having made false and wilful misrepresentations through his foreman, whereby he was induced to keep H. W. in custody, and it was held that there was nothing proved to connect the plaintiff in the execution with the statements of his foreman, and that they were not false and wilful, as they were made in answer to the sheriff's inquiries and when made were believed to be true. *Kinahan v. Modyn*, 3 Ir. Crim. Law Rev. 565, 6 Ir. Jur. O. S. 76.

3. *Dunston v. Paterson*, 2 C. B. N. S. 495, 89 E. C. L. 495, 26 L. J. C. P. 267.

4. **Possession of Warrant.**—*Galliard v. Laxton*, 2 B. & S. 363, 110 E. C. L. 363, 9 Cox C. C. 127; *Reg. v. Chapman*, 12 Cox C. C. 4; *Codd v. Cabe*, 1 Exch. Div. 352; *Robbins v. Hender*, 3 D. P. C. 543; *Rex v. Whalley*, 7 C. & P. 245, 32 E. C. L. 502; *Rex v. Patience*, 7 C. & P. 775, 32 E. C. L. 730; *R. v. Broadfoot*, Fost. 154; *Dixon's Case*, 1 East P. C. 313; *Cook v. Nethercote*, 6 C. & P. 741, 25 E. C. L. 627; *Hooper v. Lane*, 6 H. L. Cas. 443; *State v. Phinney*, 42 Me. 384; *Com. v. Cooley*, 6 Gray (Mass.) 350; *Drennan v. People*, 10 Mich. 169; *State v. Spaulding*, 34 Minn. 361;

State v. Lovell, 23 Iowa 304; *Webb v. State*, 51 N. J. L. 189; *Hall v. O'Malley*, 49 Tex. 70.

Arrest for Misdemeanor.—In order to justify an arrest, even by an officer under a warrant, for a misdemeanor, it is necessary that he should have the warrant with him at the time. *Reg. v. Chapman*, 12 Cox C. C. 4.

General Warrant must Be in Possession of the Officer Arresting.—A warrant was issued by a justice of a county, directed to the constable of the township, and generally to all her majesty's officers of the peace in and for the county, commanding them, or some of them, forthwith to apprehend G., and convey him before two justices to answer for not obeying a bastardy order for payment of money. The warrant was delivered to the superintendent of police, and was subsequently in possession of D., one of the police constables. Afterwards, D. and S., police constables, while on duty in uniform, arrested G. under the warrant, but they had it not in their possession at the time of the arrest, it being at the station house. G. was rescued by several persons, who assaulted the constables, whereupon informations for the rescue and assault were laid against the parties by the constables, and at the hearing before the justices the complaint as to the rescue was withdrawn, and that for the assault proceeded with, and the parties were convicted. It was held that the conviction was bad, as the arrest by the constables was illegal, they not having the warrant in their possession at the time. *Galliard v. Laxton*, 9 Cox C. C. 127.

A man was summoned to answer an information charging him with trespass. As he did not appear in obedience to the summons a general warrant was issued for his apprehension. A police officer, one of those to whom the warrant was directed, but not having it in his possession, attempted to arrest the man, who thereupon committed an assault upon him. It was held that the man could not be convicted upon an information charging him with assaulting a police officer in the execution of his duty. *Codd v. Cabe*, 1 Exch. Div. 352.

The Texas Code Crim. Proc., act 257, provides that when a warrant of arrest is being executed, the person accused shall always be informed under what authority the arrest is made; and under articles 239-244, which authorize the telegraphing of warrants from one

2. **EXECUTION BY FORCE**—(1) *General Rule*.—Physical force or violence cannot lawfully be used by an officer in making an arrest, unless resistance is opposed,¹ in which case he may use just so much force, and no more, as will be reasonably necessary to overcome the opposition,² or prevent an escape.³

county to another, an arrest is illegal, unless the officer at the time of making it has the warrant in his possession. *Cabell v. Arnold* (Tex. Civ. App. 1893), 22 S. W. Rep. 62.

Private Person Assisting Officer Protected.—When a private person is called upon for assistance in making an arrest, by an officer who has a warrant in his possession, the private person is justified in making such arrest, though he himself is not in actual possession of the warrant. *Com. v. Black*, 12 Pa. Co. Ct. Rep. 31, 2 Pa. Dist. Rep. 46.

Two Officers Acting Together.—Where two officers are acting together the possession of the warrant by one is sufficient justification for both. *People v. Durfee*, 62 Mich. 487; *Sweet v. Negus*, 30 Mich. 406.

An Arrest under a Tax Warrant is illegal, unless the officer has the warrant with him at the time, so that he can exhibit it if required. *Smith v. Clark*, 53 N. J. L. 197.

1. **When Force Justifiable in General.**—*Findlay v. Pruitt*, 9 Port. (Ala.) 195; *Rhodes v. King*, 52 Ala. 272; *State v. Mahon*, 3 Harr. (Del.) 568; *Wright v. Keith*, 24 Me. 158; *Murdock v. Ripley*, 35 Me. 472; *Shovlin v. Com.*, 106 Pa. St. 369; *Beaverts v. State*, 4 Tex. App. 175; *Skidmore v. State*, 43 Tex. 93; *Giroux v. State*, 40 Tex. 97. See *Nicolls v. Ingersoll*, 7 Johns. (N. Y.) 145; *Fulton v. Staats*, 41 N. Y. 498.

The Burden of Proving Excessive Force is on the party arrested. *Henry v. Lowell*, 16 Barb. (N. Y.) 268. See *Kreger v. Osborn*, 7 Blackf. (Ind.) 74; *Wright v. Keith*, 24 Me. 158. Compare *Loring v. Aborn*, 4 Cush. (Mass.) 608.

2. **Must Not Use Excessive Force.**—*Levy v. Edwards*, 1 C. & P. 40, 11 E. C. L. 306; *Harrison v. Hodgson*, 10 B. & C. 445, 21 E. C. L. 109; *Kreger v. Osborn*, 7 Blackf. (Ind.) 74; *Wright v. Keith*, 24 Me. 158; *Murdock v. Ripley*, 35 Me. 472; *Hannen v. Edes*, 15 Mass. 347; *Shovlin v. Com.*, 106 Pa. St. 369; *Golden v. State*, 1 S. Car. 292; *State v. Quin*, 3 Brev. (S. Car.) 515; *Skidmore v. State*, 43 Tex. 93; *Beaverts v. State*, 4 Tex. App. 175. See also *Cockcroft v. Smith*, 2 Salk. 642; *Fleetwood v. Com.*, 80 Ky. 2; *State v. Dierberger*, 96 Mo. 666, 9 Am. St. Rep. 380; *People v. Carlton*, 115 N. Y. 618; *State v. Bland*, 97 N. Car. 438; *State v. Wood*, 1 Bay (S. Car.) 351; *State v. Lazarus*, 1 Mill. Const. (S. Car.) 34; *Mesmer v. Com.*, 26 Gratt. (Va.) 976.

If he uses more force than is necessary he is guilty of assault and battery. *Golden v. State*, 1 S. Car. 292; *Beaverts v. State*, 4 Tex. App. 175.

See also the title **ASSAULT AND BATTERY**.

Discretion of the Officer.—The amount of force and the employment of the usual means in making the arrest and detention, when within the compass of the means ordinarily resorted to for securing one found committing a criminal act, must be left to the discretion and judgment of the officer, when, actuated by no

ill-will or malevolent impulse, he is engaged in discharging a public and official duty. *State v. McNinch*, 90 N. Car. 695; *State v. Pugh*, 101 N. Car. 737, 9 Am. St. Rep. 44.

Illustrations.—An officer was conducting a prisoner to the calaboose when the latter stopped, refused to go further, and tried to get away, whereupon the officer struck him over the head with his pistol. There was no evidence that the prisoner was assaulting the officer, and it was proved that aid was within call, but not sought by the officer. It was held that the officer was guilty of aggravated assault. *Skidmore v. State*, 2 Tex. App. 20. See *Reg. v. Hagan*, 8 C. & P. 167, 34 E. C. L. 338.

An officer, when neither life nor person was endangered, killed a prisoner from a desire to prevent his escape. It was held to be murder in the second degree. *Caldwell v. State*, 41 Tex. 87.

He must not strike the prisoner, except in necessary self-defense. *Skidmore v. State*, 43 Tex. 93; *Kreger v. Osborn*, 7 Blackf. (Ind.) 74.

Where a person when fighting is ordered to desist by a peace officer, and told to consider himself under arrest, and he refuses to do so, it is such a resistance as will justify an officer in using force to compel him. *State v. Pugh*, 101 N. Car. 737, 9 Am. St. Rep. 44.

Two Ingredients, Duty and Necessity.—Two ingredients must concur in order to justify a peace officer in killing a person who resists him while making an arrest, and who could not otherwise be made amenable: 1st. The constable must be in direct discharge of his duty. 2d. He must not have used mortal force until there was an inevitable necessity for it. *Rex v. Damit*, 1 Cr. & Dix C. C. (Ir.) 166.

The rule is, "The warrant must be executed peaceably if you can, forcibly if you must." *State v. Garrett*, Winst. (N. Car.) 144, 84 Am. Dec. 359. See *U. S. v. Fayette County*, 2 Abb. (U. S.) 265.

Officer must know that a Felony has been Committed.—Where a constable who was employed to guard a wood shot at a man, who, instead of stopping on being called upon by him to do so, fled, and the constable was subsequently indicted for shooting at the man with intent to do grievous harm, and on the trial it was proved that stealing the wood amounted to felony, it was nevertheless held that the constable was properly convicted of shooting with intent to do grievous bodily harm, because at the time he fired the fact that a felony had been committed was unknown to him. *Reg. v. Dodson*, 14 Jur. 1051.

3. **Killing to Prevent Escape.**—*People v. Carlton*, 115 N. Y. 618. And the power of doing so is not limited to those who are present or who first come to the knowledge of the crime, for where fresh pursuit is made or the hue and cry raised, all those who join are under the

(2) *Handcuffing Prisoner*.—Handcuffing a prisoner by an officer having him in charge is never justified, except it be necessary in order to prevent an escape.¹

(3) *Killing to Effect Arrest*.—(a) **Felony**.—Any officer or private person may kill another who is committing or has committed a felony, provided the killing is necessary to prevent the commission in the one case,² or to arrest the felon in the other.³ Again, if his own life is threatened by the felon while

protection of the law. 1 East P. C. 298; 1 Hale P. C. 489; Fost. 271; 2 Hale P. C. 75, 76, 91, 101, 102; 2 Hawk. P. C., c. 12, § 1.

1. A Prisoner should Always be Treated with Consideration.—2 Hawk. P. C., c. 28, § 1; Habersham v. State, 56 Ga. 61; Ryan v. Donnelly, 71 Ill. 100; State v. Graham, 74 N. Car. 646, 21 Am. Rep. 493; Lewis v. Raleigh, 77 N. Car. 229; Skidmore v. State, 43 Tex. 93.

And as a rule he should be neither bound nor handcuffed. Burns Justice, Arraignment, referring to 2 Hale P. C. 219; 2 Hawk. P. C., c. 28, § 1; 4 Black. Comm. 322.

Handcuffing.—Wright v. Court, 4 B. & C. 596, 10 E. C. L. 412, 6 D. & R. 623; State v. Stalcup, 2 Ired. (N. Car.) 50; State v. Belk, 76 N. Car. 10; State v. Sigman, 106 N. Car. 728. See Firestone v. Rice, 71 Mich. 377, 15 Am. St. Rep. 266.

Repeated Escapes Cause for Handcuffing.—An officer is justified in handcuffing a prisoner who has escaped twice, and is not liable for an assault for having done so. State v. Sigman, 106 N. Car. 728.

Officer's Discretion.—In State v. Stalcup, 2 Ired. (N. Car.) 50, Gaston, J., commenting on an instruction which directed the jury to determine whether "a man of ordinary prudence would not have deemed it necessary and proper to secure the prisoner by tying him," for doing which the accused constable then on trial had been indicted for an abuse of authority, said: "The act of tying is therefore within the limits of the officer's authority, and of the propriety and necessity of adopting this mode of securing the prisoner the officer is the judge, and the jury cannot supervise the correctness of his judgment. He will indeed be liable, although he does not transcend his powers, if he grossly abuses them, and whether he did or not so abuse them was the proper inquiry to be submitted to the jury." See also State v. Pendergrass, 2 Dev. & B. (N. Car.) 365, 31 Am. Dec. 416.

The Ancient Rule was "that when prisoners came to the bar to be tried, their irons ought to be taken off, so that they be not in any torture while they make their defense, be their crime ever so great." High Treason Case, J. Kel. 7, 10; Bracton 1e; De Caron, c. 18, § 3; Flet. 1, c. 31; 1 Britt., c. 5; 2 Hale P. C. 219.

The Principle Acted on was that a prisoner at the trial should have the unrestrained "use of his reason and all advantages, to clear his innocence." Lyster's Case, 6 St. Tr. 230, 245; 16 Howell's St. Tr. 94.

In the United States the same principle has been adopted, but in certain cases where the peace of the court or the safe custody of the prisoner demands it, the court may order the accused to be manacled or handcuffed. People v. Harrington, 42 Cal. 165, 10 Am. Rep.

296; Upstone v. People, 109 Ill. 169; Territory v. Kelly, 2 N. Mex. 292; Lee v. State, 51 Miss. 566; State v. Kring, 1 Mo. App. 438, 64 Mo. 591; State v. Smith, 11 Oregon 205; Poe v. State, 10 Lea (Tenn.) 673; Matthews v. State, 9 Lea (Tenn.) 128, 42 Am. Rep. 667; Rainey v. State, 20 Tex. App. 472.

Discretion of the Court.—In Faure v. State, 58 Ala. 74, it was held that it was a mere matter of discretion with the court whether the prisoner at the bar should be fettered or not.

Rule Applied when Jury Charged.—In Waite's Case, 1 Leach C. C. 36, the prisoner at the time for arraignment desired that his irons might be taken off, but the court informed him that they had no authority for that purpose until the jury was charged to try him. He accordingly pleaded not guilty, and, being put upon his trial, the court immediately ordered his fetters to be knocked off.

2. Killing to Prevent Felony.—Dill v. State, 25 Ala. 15; Oliver v. State, 17 Ala. 587; State v. Roane, 2 Dev. (N. Car.) 58.

A Well-grounded Belief that a Known Felony is About to be Committed will extenuate a homicide committed to prevent it; but such a reasonable ground of belief will not extenuate a homicide committed in pursuit by an individual of his own accord. State v. Rutherford, 1 Hawks. (N. Car.) 457, 9 Am. Dec. 658.

Not Justified as a Punishment.—And though a homicide may be justified to prevent a threatened felony, it will not be justified when inflicted as a punishment for one already committed. State v. Roane, 2 Dev. (N. Car.) 58; Ruloff v. People, 45 N. Y. 213.

3. Homicide to Arrest Felon.—1 Russell on Crimes (9th Am. ed.) 857; 1 East P. C. 298; 1 Hawk. P. C., § 11, p. 81.

England.—Reg. v. Dadson, 2 Den. C. C. 35; Rex v. Howorth, 1 Moo. C. C. 207; Rex v. Williams, 1 Moo. C. C. 387.

United States.—U. S. v. Rice, 1 Hughes (U. S.) 560; U. S. v. Fayette County, 2 Abb. (U. S.) 265; U. S. v. Travers, 2 Wheel. Cr. Cas. (U. S. Circuit Ct.) 490.

Alabama.—Dill v. State, 25 Ala. 15; Morton v. Bradley, 30 Ala. 683; Williams v. State, 44 Ala. 41; Clements v. State, 50 Ala. 117.

Arkansas.—Carr v. State, 43 Ark. 99; Thomas v. Kinkead, 55 Ark. 502, 29 Am. St. Rep. 68.

California.—People v. Adams, 85 Cal. 231. **Delaware.**—State v. Mahon, 3 Harr. (Del.) 568; State v. O'Neil, 1 Houst. Cr. Cas. (Del.) 468.

Kentucky.—Hawkins v. Com., 14 B. Mon. (Ky.) 318, 61 Am. Dec. 147, note; Head v. Martin, 85 Ky. 480.

Louisiana.—Duperrier v. Dautrive, 12 La. Ann. 664.

Michigan.—Pond v. People, 8 Mich. 150.

making the arrest he may lawfully kill the felon.¹ Nevertheless, if a felon can be arrested otherwise, it is not lawful to kill him.² He may not therefore be lawfully killed after he has ceased to resist.³

(b) **Misdemeanor.**—It is never lawful to kill or inflict great bodily harm merely to effect the arrest of one charged with a misdemeanor; but if, by reason of resistance, the officer or person lawfully arresting is threatened with death or bodily harm, he may lawfully inflict the like death or harm upon the other.⁴

Mississippi.—*Jackson v. State*, 66 Miss. 89, 14 Am. St. Rep. 542.

Missouri.—*State v. Green*, 66 Mo. 631.

New York.—*Conraddy v. People*, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 234.

North Carolina.—*State v. Garrett*, Winst. (N. Car.) 144, 84 Am. Dec. 359; *State v. Roane*, 2 Dev. (N. Car.) 58; *State v. Rutherford*, 1 Hawks (N. Car.) 457, 9 Am. Dec. 658.

Ohio.—*Wolf v. State*, 19 Ohio St. 248.

Pennsylvania.—*Brooks v. Com.*, 61 Pa. St. 352, 100 Am. Dec. 645.

South Carolina.—*Arthur v. Wells*, 2 Mill Const. (S. Car.) 314; *State v. Anderson*, 1 Hill (S. Car.) 327; *Golden v. State*, 1 S. Car. 292.

Virginia.—*Mesmer v. Com.*, 26 Gratt. (Va.) 976.

The Rule is stated in 1 East P. C. 298 as follows: "If a felony be committed and the felon fly from justice, or a dangerous wound be given, it is the duty of every man to use his best endeavors for preventing an escape, and if in the pursuit the felon be killed, where he cannot be otherwise overtaken, the homicide is justifiable. This rule is not confined to those who are present, so as to have ocular proof of the fact, or to those who first come to the knowledge of it; for if in these cases fresh suit be made, and *a fortiori* if hue and cry be levied, all who join in aid of those who began the pursuit are under the same protection of the law. The same rule holds if a felon, after arrest, break away as he is carrying to gaol, and his pursuers cannot retake without killing him. But if he may be taken in any case without such severity, it is at least manslaughter in him who kills him; and the jury ought to inquire whether it were done of necessity or not."

Notice to Person Arrested.—The person arrested must have notice of the authority to arrest, in order that the other may be justified in killing him. *Williams v. State*, 44 Ala. 41.

An officer may use all force necessary in making an arrest upon a criminal charge, even to the taking of life. *State v. Dierberger*, 96 Mo. 666, 9 Am. St. Rep. 380.

In *Carr v. State*, 43 Ark. 99, it was held that if a felon resist arrest or fly, so that he cannot possibly be taken alive by those who pursue him, whether private persons or public officers, with or without a warrant, he may be lawfully slain by them.

Before an officer is justified in taking the life of a person whom he is endeavoring to arrest without a warrant, he must be prepared to show that a felony was actually committed. His own belief, on whatsoever reasonable grounds, will not justify the homicide. *Conraddy v. People*, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 234.

1. *State v. Anderson*, 1 Hill (S. Car.) 327.

2 C. of L.—54

2. **Not Lawful to Kill, where Arrest Possible Otherwise.**—1 East P. C. 298; *Reg. v. Murphy*, 1 Cr. & Dix C. C. (Ir.) 20; *Rex v. Scully*, 1 C. & P. 319, 11 E. C. L. 407; *Williams v. State*, 44 Ala. 41; *Carr v. State*, 43 Ark. 99; *York v. Com.*, 82 Ky. 360; *Gardiner v. Thibodeau*, 14 La. Ann. 742; *McCutcheon v. Angelo*, 14 La. Ann. 34; *Jackson v. State*, 66 Miss. 89, 14 Am. St. Rep. 542.

3. **To Kill a Man after Resistance has Ceased**, or if the person making the arrest does so without authority, is manslaughter at least, and if the blood has had time to cool may be murder. 1 East P. C. 277; *Goffe's Case*, 1 Vent. 216; *Conraddy v. People*, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 234; *James v. State*, 44 Tex. 314; *Mitchell v. State*, 12 Ark. 50, 54 Am. Dec. 253.

So long as a person who is charged with murder is endeavoring peaceably to avoid arrest, those in pursuit are not justified in killing him; it is only when he puts in jeopardy the lives of those endeavoring to arrest him that he may be lawfully killed. *State v. Anderson*, 1 Hill (S. Car.) 327.

4. **Misdemeanor.**—1 Whart. Cr. Law, §§ 404-406.

England.—*Reg. v. Dadson*, 14 Jur. 1051.

United States.—*U. S. v. Fayette County*, 2 Abb. (U. S.) 265; *U. S. v. Clark*, 31 Fed. Rep. 710.

Alabama.—*Williams v. State*, 44 Ala. 41; *Clements v. State*, 50 Ala. 117.

Arkansas.—*Thomas v. Kinkead*, 55 Ark. 502, 29 Am. St. Rep. 68.

Kentucky.—*Head v. Martin*, 85 Ky. 480; *Dilger v. Com.*, 88 Ky. 550, 11 Ky. L. Rep. 67.

New York.—*Conraddy v. People*, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 234.

North Carolina.—*State v. Bryant*, 65 N. Car. 327; *State v. Sigman*, 106 N. Car. 728.

South Carolina.—*State v. Anderson*, 1 Hill (S. Car.) 327.

Tennessee.—*Reneau v. State*, 2 Lea (Tenn.) 720, 31 Am. Rep. 626.

Texas.—*Caldwell v. State*, 41 Tex. 86; *Wright v. State*, 44 Tex. 645; *Tiner v. State*, 44 Tex. 128.

Resistance to Arrest for Misdemeanor.—If an officer in making an arrest for a misdemeanor is resisted, he may apply force to accomplish the arrest, and if it becomes necessary to kill the offender to save his own life or person from great bodily harm, he may do so. *State v. McNally*, 87 Mo. 644.

An excise officer, being in the execution of his office, had seized, with the assistance of another person, two smugglers in the act of landing whiskey from the Scottish shore, contrary to law; the deceased had surrendered himself quietly into the hands of the officer,

(c) In Civil Cases.—A Private Person can never lawfully make an arrest in a civil

but shortly afterwards, when the officer was off his guard, assaulted him violently with an ash stick, which cut his head severely in several places, and he lost much blood, and was greatly weakened in the struggle which succeeded; the officer, fearing the deceased would overpower him, and having no other means of defending himself, discharged a pistol at the deceased's legs, in the hopes of deterring him from any further attack, but the discharge did not take effect, and the deceased prepared to make another assault; seeing this, the officer warned him to keep off, telling him he must shoot him if he did not; but the deceased disregarded the warning, and rushed toward him to make a fresh attack; and he thereupon fired a second pistol and killed him. Holroyd, J., told the jury: "An officer must not kill for an escape, where the party is in custody for a misdemeanor; but if the prisoner had reasonable ground for believing himself to be in peril of his own life, or of bodily harm, and no other weapon was at hand to make use of, or if he was rendered incapable of making use of such weapon by the previous violence that he had received, then he was justified. If an affray arises and blows are received, and weapons used in heat, and death ensues, although the party may have been at the commencement in the prosecution of something unlawful, still it would be manslaughter in the killer. In this case it is admitted that the custody was lawful. The question is whether, under all circumstances, the deceased being in the prosecution of an illegal act, and having made the first assault, the prisoner had such reasonable occasion to resort to a deadly weapon to defend himself as any reasonable man might fairly and naturally be expected to resort to." *Forster's Case*, 1 Lewin C. C. 187, 1 Russell on Crimes (9th Am. ed.) 859.

An Attempt to Escape will not justify killing. *Reneau v. State*, 2 Lea (Tenn.) 721, 31 Am. Rep. 626; 2 Bish. Cr. L., §§ 648-649; 1 Wharton Cr. L., §§ 404-406.

Officer Acting without Warrant in Misdemeanor Case.—O. committed an assault and battery, but not in the presence of C., a police officer. C. arrested O. without a warrant, and while taking him to the station house O. escaped, C. pursued, and, O. being likely to make good his escape, C. shot him, from the effects of which he died. C. was indicted for murder, and convicted of manslaughter in the fourth degree. Upon appeal the court said: "The prisoner, although an officer, was acting without a warrant. No warrant had been issued by or to any one against the deceased. Nor had he committed any offense in the view or presence of the officer. Under such circumstances, to justify taking life, even if the jury were satisfied of the necessity of the homicide to prevent an escape, it must be shown that a felony had actually been committed. The distinction is marked between cases of misdemeanor and of felony. It is only in the latter that a homicide is justifiable by any person acting without a warrant, even when it is

the only means to prevent the escape of the criminal. When no warrant is out for the offender, even an officer cannot take his life to prevent his escape, upon his own belief of the commission of a felony, however reasonable ground he may have for such a belief. If he acts without a warrant he must be prepared to show the fact of the felony in order to justify taking the life of a person whom he is endeavoring to arrest or to secure." *Conraddy v. People*, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 235.

Where a police officer without a warrant arrested a man who was guilty of an offense, and in preventing an escape struck and killed the prisoner, these facts would at least warrant a verdict of involuntary manslaughter in the commission of an unlawful act. *O'Connor v. State*, 64 Ga. 125, 37 Am. Rep. 58.

Resistance.—In misdemeanor the officer has no right to kill the offender unless he resists with violence. *Williams v. State*, 44 Ala. 41; *Clements v. State*, 50 Ala. 117.

When Killing Justified.—He must secure his prisoner, if possible, without resort to deadly weapons. Killing to prevent the escape of a person in custody for misdemeanor is unlawful. *Reneau v. State*, 2 Lea (Tenn.) 720, 31 Am. Rep. 626; *Forster's Case*, 1 Lewin C. C. 187.

Mr. Russell says, 1 Russell on Crimes (9th Am. ed.) 747: "Though in cases civil or criminal, an officer may repel force by force, where his authority to arrest or imprison is resisted, and will be justified in so doing if death should be the consequence, yet he ought not to come to extremities upon every slight interruption, nor without a reasonable necessity. (4 Black. Comm. *180.) And if he should kill where no resistance is made, it will be murder; and it is presumed that the offense would be of the same magnitude if he should kill a party after the resistance is over and the necessity has ceased, provided that sufficient time has elapsed for the blood to have cooled. (1 East P. C., c. 5, § 63, p. 297.) And again, though where a felon flying from justice is killed by the officer in the pursuit, the homicide is justifiable if the felon could not be otherwise overtaken (1 Hale 481; 4 Black. Comm. *179; *Fost.* 271), yet where a party is accused of a misdemeanor only, and flies from the arrest, the officer must not kill him, though there be a warrant to apprehend him, and though he cannot otherwise be overtaken; and if he do kill him it will in general be murder. (*Fost.* 271; 1 Hale 481.)"

Firing at Fugitive an Assault—Intention.—Where an officer attempted to capture a person charged with misdemeanor, who had escaped, and fired a pistol at him, the ball from which passed close to his body, it was held that he was guilty of an assault, no matter what his intention might have been in shooting at the fugitive. It was also held that after the escape of a prisoner charged with a misdemeanor, an officer cannot use any means to recapture him except such as he might lawfully use in making the first arrest. *State v. Sigman*, 106 N. Car. 728.

Distinction Not Applied to Military Offenses.—

action, and, therefore, has no authority to take life or inflict great bodily harm to effect that object.¹

An Officer, However, may "repel force with force, and need not give back," in case of resistance, and if death unavoidably ensue in the struggle he will be justified.²

(a) **While Flying from Arrest.**—A person fleeing from arrest for having committed a felony may be killed by an officer, if he cannot be otherwise secured,³ but he cannot lawfully be killed while fleeing in case of a mere misdemeanor, unless it be of a flagrant kind that may turn out to be a felony.⁴ Nor is an officer justified in shooting a person who is endeavoring

The common-law distinction between felonies and misdemeanors does not apply to military offenses. *U. S. v. Clark*, 31 Fed. Rep. 710.

Rule as to Private Person—Inferior Felony.—Where a private person attempts to arrest a person guilty of a capital offense, such as murder or rape, he may kill him if he resists or flees; but he is not justified in killing a person guilty of a felony of inferior grade, such as theft, if he does not resist, but only attempts to flee. *State v. Bryant*, 65 N. Car. 327.

Resistance with Arms.—Where a person charged with misdemeanor resists with arms an officer attempting to arrest him and having a warrant, and is killed by the officer who has not used unnecessary force to apprehend him, the homicide is justifiable. *State v. Garrett*, Winst. (N. Car.) 144, 84 Am. Dec. 359.

1. 1 East P. C. 306.

2. 1 East P. C. 306; 1 Hale P. C. 481; *Calfield v. —*, 1 Rolle 189.

3. **Killing an Escaping or Fleeing Felon.**—A felon who escapes or flees may be killed by an officer to prevent his breaking away, but if he can be otherwise overtaken it is manslaughter. 1 East P. C. 291; 1 Hale P. C. 481, 489; 2 Hale P. C. 75, 76, 91, 101, 102; *Foster* 271, 309; *Stat. 9 Anne*, c. 16; 1 Hawk., c. 28, § 11; 2 Hawk., c. 12, § 1; 4 Black. Com. *180; *Rex v. Finnerly*, 1 Cr. & Dix C. C. (Ir.) 167, note; *Macalkey's Case*, 9 Coke 65b; *Carr v. State*, 43 Ark. 99; *Conraddy v. People*, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 234.

Killing a fleeing felon when he cannot otherwise be taken is lawful by common law and under the *Mississippi* Code, § 2878; *Jackson v. State*, 66 Miss. 89, 14 Am. St. Rep. 542. See *State v. Garrett*, Winst. (N. Car.) 144, 84 Am. Dec. 359.

Knowledge of the Felony.—But an officer or watchman placed on guard may not shoot a man for stealing if he did not know at the time that a felony was being committed by him. *Reg. v. Dadson*, 1 Eng. L. & Eq. 566, 14 Jur. 1051, 2 Den. C. C. 35.

Voluntary Escape—Rearrest.—Where an arrest has once been lawfully made, and the arrested person tries to break away, the officer is bound to retake him, even though he has voluntarily permitted him to escape. The reason of this rule is because the police ought not to be deprived of any right by an escape of whatever kind from custody under criminal process. *Clark v. Cleveland*, 6 Hill (N. Y.) 344; *Arnold v. Steeves*, 10 Wend. (N. Y.) 515; *Gano v. Hall*, 42 N. Y. 67; *Dickinson v. Brown*, 1 Esp. 218, *Peake N. P.* 234; *Butt v. Jones*, *Gow* 99, 5 E. C. L. 473. But see

Doyle v. Russell, 30 Barb. (N. Y.) 300, *disapproving Clark v. Cleveland*, 6 Hill (N. Y.) 344.

Statutory Provisions—Escaped Convict.—The right given, under section 10, article 2215, *Paschal's Dig. (Miss.)*, to an officer having the custody of a prisoner convicted of a felony, to take life to prevent the escape of the prisoner, does not extend to an officer attempting to rearrest an escaped penitentiary convict. *Wright v. State*, 44 Tex. 645.

4. **Misdemeanors.**—2 Bishop's New Crim. Law, §§ 647, 649; 1 East P. C. 302; 1 Hale P. C. 481.

England.—*Reg. v. Dadson*, 14 Jur. 1051, 2 Den. C. C. 35.

Alabama.—*Middleton v. Holmes*, 3 Port. (Ala.) 424; *Handley v. State*, 96 Ala. 48, 38 Am. St. Rep. 81.

Arkansas.—*Carr v. State*, 43 Ark. 99; *Thomas v. Kinkead*, 55 Ark. 502, 29 Am. St. Rep. 68.

Delaware.—*State v. O'Niel*, 1 Houst. Cr. Cas. (Del.) 468.

Louisiana.—*Duperrier v. Dautrive*, 12 La. Ann. 664.

Mississippi.—*Jackson v. State*, 66 Miss. 89, 14 Am. St. Rep. 542.

North Carolina.—*State v. Roane*, 2 Dev. (N. Car.) 58; *Copeland v. Parker*, 3 Ired. (N. Car.) 515.

Texas.—*Brady v. Price*, 19 Tex. 285.

Compare Reneau v. State, 2 Lea (Tenn.) 720, 31 Am. Rep. 626.

In Civil Suits if the party fly or escape and the officer is not able to overtake him, and by the use of a deadly weapon intentionally kills him in the pursuit, it will amount to murder. 1 Hale. 481; *Fost.* 271; 1 East P. C. c. 5, § 74, pp. 306, 307.

In a civil case one who tries to evade arrest may not be killed, unless he puts in jeopardy the life of the one trying to arrest him. *State v. Anderson*, 1 Hill (S. Car.) 327.

Impressing Seamen—England.—In the case of impressing seamen, if the party fly it is said that "the killing by the officer in the pursuit to overtake him would be manslaughter at least and in some cases murder, according to the rules which govern the case of misdemeanors, paying attention, nevertheless, to those usages which have prevailed in the sea service in this respect, so far as they are authorized by the courts which have ordinary jurisdiction over such matters, and are not expressly repugnant to the laws of the land." 1 East P. C., c. 5, § 75, p. 308; *Rex v. Borthwick*, *Doug.* 207.

Misdemeanor and Breach of the Peace.—In

to escape, when an attempt to arrest him is illegal.¹

An **Unlawful Arrest** vests no authority in the one arresting; hence one so arrested may lawfully escape if possible;² and he has the right in such case to use as much force as may be necessary to regain his liberty, even to the actual taking of life.³

Submission to an Unlawful Arrest is not a waiver of the right to resist or to escape; *a fortiori* this is true where such arrest has been coerced.⁴

(4) **Breaking Doors**—(a) **In Civil Cases**.—The doctrine that "every man's house is his castle" applies to civil cases only;⁵ in making a civil arrest an

making arrest in cases of misdemeanor and breach of the peace (with the exception, however, of some cases of flagrant misdemeanors) it is not lawful to kill the party accused if he fly from arrest, though he cannot otherwise be overtaken, and though there be a warrant to apprehend him, and generally speaking it will be murder; but under some circumstances it may amount only to manslaughter if it appear that death was not intended. *Fost.* 271; 1 *East P. C.*, c. 5, § 70, p. 302.

Escape after Actual Arrest.—The law does not allow an officer to kill a person in order to prevent his escape after an actual arrest, for the reason that the law values human life too much to allow a misdemeanant to be killed while fleeing to escape arrest, he being an unresisting party and merely trying to escape. *Rex v. Reason*, 1 *Str.* 500; *Rex v. Finnerty*, 1 *Cr. & Dix*, C. C. (Ir.) 167, note; *Foster's Case*, 1 *Lew. C. C.* 167; *Caldwell v. State*, 41 *Tex.* 86; *State v. Rutherford*, 1 *Hawks* (N. Car.) 457, 9 *Am. Dec.* 658. See 1 *Hale P. C.* 481; *Fost.* 271; 1 *Russell on Crimes* 857; *Head v. Martin*, 85 *Ky.* 480; *State v. Bryant*, 65 *N. Car.* 327.

Compare 2 *Bishop New Crim. Law*, §§ 647, 650; *Bishop New Crim. Pro.*, § 161; *State v. Sigman*, 106 *N. Car.* 728; *Wright v. State*, 44 *Tex.* 645.

1. *Lacy v. State*, 7 *Tex. App.* 403.

Illegal Officer—Murder.—If an officer make an arrest out of his proper district (except as he may be authorized by some act of Parliament), or if an officer have no warrant or authority at all, he is no legal officer, nor entitled to the special protection of the law; and if he purposely kill the party for not submitting to such illegal arrest, it will be murder in all cases, at least where an indifferent person acting in the like manner, without any such pretense, would be guilty to that extent. 1 *East P. C.*, c. 5, § 78, p. 312.

2. *Rex v. Curran*, 3 *C. & P.* 397, 14 *E. C. L.* 368; *State v. Ward*, 5 *Harr.* (Del.) 496; *Alford v. State*, 8 *Tex. App.* 545.

Rearrest after Escape.—Escape from an unlawful arrest gives no authority to rearrest. *Rex v. Curvan*, 1 *Moo. C. C.* 132.

Unlawful Arrest a Continuous Assault.—It was held in *Alford v. State*, 8 *Tex. App.* 545, that an unlawful arrest is a continuous assault, and the right to resist continues throughout the unlawful detention, and is not limited to the time at which it is attempted or accomplished, and the right of resistance may be exercised by another in behalf of the person detained as well as by himself, and with the force necessary to effect the release or escape of such detained person.

3. **Force Lawful to Escape Unlawful Arrest**.—*England*.—*Reg. v. Tooley*, 2 *Ld. Raym.* 1296; *Rex v. Patience*, 7 *C. & P.* 775, 32 *E. C. L.* 730; *Reg. v. Phelps*, *C. & M.* 180, 41 *E. C. L.* 103; *Rex v. Thompson*, 1 *Moo. C. C.* 80; *Reg. v. Chapman*, 12 *Cox C. C.* 4.

Alabama.—*Noles v. State*, 26 *Ala.* 31, 62 *Am. Dec.* 711.

Connecticut.—*State v. Scheele*, 57 *Conn.* 307, 14 *Am. St. Rep.* 106.

Delaware.—*State v. Oliver*, 2 *Houst.* (Del.) 604.

Illinois.—*Rafferty v. People*, 69 *Ill.* 115, 18 *Am. Rep.* 601.

Kentucky.—*Creighton v. Com.*, 83 *Ky.* 142, 4 *Am. St. Rep.* 143.

Massachusetts.—*Com. v. Carey*, 12 *Cush.* (Mass.) 246.

Missouri.—*Roberts v. State*, 14 *Mo.* 146, 55 *Am. Dec.* 97; *State v. Underwood*, 75 *Mo.* 230.

North Carolina.—*State v. Belk*, 76 *N. Car.* 10.

Tennessee.—*Tackett v. State*, 3 *Yerg.* (Tenn.) 392, 24 *Am. Dec.* 582.

Texas.—*James v. State*, 44 *Tex.* 314; *Tiner v. State*, 44 *Tex.* 128; *Goodman v. State*, 4 *Tex. App.* 349; *Johnson v. State*, 5 *Tex. App.* 47; *Ross v. State*, 10 *Tex. App.* 455, 38 *Am. Rep.* 643; *Dyson v. State*, 14 *Tex. App.* 454; *Jones v. State*, 26 *Tex. App.* 1; *Myers v. State*, *Tex. Crim. App.* March 2, 1895.

Virginia.—*Briggs v. Com.*, 82 *Va.* 554.

4. *Roberson v. State*, 53 *Ark.* 516; *Alford v. State*, 8 *Tex. App.* 545. See *State v. Phinney*, 42 *Me.* 384; *Wood v. Kinsman*, 5 *Vt.* 588.

5. **The Rule that Every Man's House Is His Castle** applies to civil, not to criminal, proceedings. 2 *Freeman on Executions* (2d ed.), § 265; *Semayne's Case*, 5 *Coke*, 91b; *Bowles's Case*, 11 *Coke* 82b; *Anonymous*, 6 *Mod.* 105; *Barnard v. Bartlett*, 10 *Cush.* (Mass.) 501, 57 *Am. Dec.* 123, and note; *Keith v. Johnson*, 1 *Dana* (Ky.) 604, 25 *Am. Dec.* 167, and note; *People v. Hubbard*, 24 *Wend.* (N. Y.) 369, 35 *Am. Dec.* 628, and note; *Burton v. Wilkinson*, 18 *Vt.* 186, 46 *Am. Dec.* 145.

Every one can assemble his friends to defend his house against violence, because *domus sua est unicuique tutissimum refugium*. *Bowles's Case*, 11 *Coke* 82b.

A Guest may Interpose force to prevent an entry, the owner not being within the house. *Curtis v. Hubbard*, 4 *Hill* (N. Y.) 437, 40 *Am. Dec.* 292.

As to What Is a Dwelling House, see *Bishop on Statutory Crimes*, §§ 279, 283; *Fitch v. Loveland*, *Kirby* (Conn.) 386; *Williams v. Spencer*, 5 *Johns.* (N. Y.) 352.

officer cannot lawfully break the outer door of a dwelling house.¹

Stratagem may be Employed to procure the opening of the outer door,² but if an officer enters by stealth, or procures the opening of the door by false pretenses, followed by violence, he is a trespasser.³

The Protection of the Outer Door extends to the owner, his family, domestics, and proper goods, and to permanent boarders and lodgers; but it does not extend to strangers and visitors in the house.⁴

In *Semayne's Case*, 5 Coke 91b, it was resolved that when any house is recovered by any real action or by *ejectione firmæ*, the sheriff may break the house and deliver the seisin or possession to the defendant or plaintiff, for the words of the writ are *habere facias possessionem* or *seisinam*, etc., and after judgment it is not the house in right and judgment of law of the tenant or defendant. See also *Keith v. Johnson*, 1 Dana (Ky.) 604, 25 Am. Dec. 167. See *Howe v. Butterfield*, 4 Cush. (Mass.) 302, 50 Am. Dec. 785.

1. Civil Cases—Breaking Outer Doors.—3 Bl. Com. 288.

England.—*White v. Wiltshire*, 2 Rolle 137; *Cook's Case*, Cro. Car. 537; *Semayne's Case*, 5 Coke 91b; Anonymous, 6 Mod. 105, case 147; *Buckingham v. Francis*, 11 Moore 40, 22 E. C. L. 406; *Kerby v. Denby*, 1 M. & W. 336.

Delaware.—*Boggs v. Vandyke*, 3 Harr. (Del.) 288.

Illinois.—*Snydacker v. Brosse*, 51 Ill. 357, 99 Am. Dec. 551.

Indiana.—*M'Gee v. Given*, 4 Blackf. (Ind.) 18.

Kentucky.—*Calvert v. Stone*, 10 B. Mon. (Ky.) 152; *Keith v. Johnson*, 1 Dana (Ky.) 605, 25 Am. Dec. 167.

Massachusetts.—*Heminway v. Saxton*, 3 Mass. 222; *Widgery v. Haskell*, 5 Mass. 155, 4 Am. Dec. 41.

New York.—*Curtis v. Hubbard*, 4 Hill (N. Y.) 437, 40 Am. Dec. 292; *Glover v. Whittenhall*, 6 Hill (N. Y.) 597; *People v. Hubbard*, 24 Wend. (N. Y.) 369, 35 Am. Dec. 628.

Vermont.—*Hooker v. Smith*, 19 Vt. 151, 47 Am. Dec. 679; *State v. Hooker*, 17 Vt. 658.

One may Take Life in Defense of His Dwelling House.—A man may close his dwelling house against intruders, including officers who come to attach his person or goods on civil process, and he may defend it, even to the extent of taking life. *Oystead v. Shed*, 13 Mass. 520, 7 Am. Dec. 172; *Cook's Case*, Cro. Car. 537.

Resisting Unlawful Entry.—Where a sheriff, in attempting to execute a civil process, breaks the outer door of the dwelling house of the execution debtor in order to arrest the body of the debtor on the execution, it is an unlawful act, and the debtor will be justified in committing an assault upon the sheriff in order to defend himself against such arrest. *State v. Hooker*, 17 Vt. 658. See further, *Trapshaw's Case*, 1 Leach (C. C.) 427; *Rogers' Case*, 1 Leach (C. C.) 89; *Carrell's Case*, 1 Leach (C. C.) 237; *Tracy v. Talbot*, 6 Mod. 214; *Lee v. Gansel*, Cowp. 1; *Stedman v. Crane*, 11 Met. (Mass.) 295.

Fraudulent Concealment—Vacant House.—A dwelling house which is vacated or used fraudulently in order to conceal the property of the owner from execution may be lawfully

broken into in order to make an arrest. *Stitt v. Wilson*, Wright (Ohio) 505.

Sureties for Good Behavior.—The outer door may also be broken on a process against one to find sureties for his good behavior. Anonymous, S. F. Moore 606; 1 Chit. Crim. Law *58; 2 Hawk. P. C., c. 14, § 3.

2. Stratagem to Effect Entry.—*Rex v. Backhouse*, Loftt. 61. See *Hitchcock v. Holmes*, 43 Conn. 528.

3. Stealth—False Pretenses Followed by Violence.—*Seyman v. Gresham*, Cro. Eliz. 908; *Parke v. Evans*, Hob. 620; *Waterhouse v. Saltmarsh*, Hob. 263; *Biscop v. White*, Cro. Eliz. 759; *Lee v. Gansel*, Cowp. 1; *Boggs v. Vandyke*, 3 Harr. (Del.) 288; *Haggerty v. Wilber*, 16 Johns. (N. Y.) 288, 8 Am. Dec. 321.

Analogy to Burglarious Entry.—A sheriff entering a house in such a way as in burglary would constitute a sufficient breaking and entering is a trespasser. It is enough if the door be closed; he has no right even to lift the latch. *Rex v. Backhouse*, Loftt. 61; *Penton v. Brown*, 1 Keb. 698; *Walker v. Fox*, 2 Dana (Ky.) 404; *Buckingham v. Francis*, 11 Moore 40, 22 E. C. L. 406; *Ratcliffe v. Burton*, 3 B. & P. 223; *Nash v. Lucas*, L. R. 2 Q. B. 590; *Curtis v. Hubbard*, 1 Hill (N. Y.) 336; *Ilsey v. Nichols*, 12 Pick. (Mass.) 270, 22 Am. Dec. 425. Compare *Ryan v. Shilcock*, 7 Exch. 72, 21 L. J. Exch. 55; *Tutton v. Darke*, 5 H. & N. 647.

Entering to Distrain for Rent.—In *Ryan v. Shilcock*, 7 Exch. 72, it was held that a landlord might open the outer door in order to distrain for rent, by any of the usual means adopted by those having access to the building; he might open the door by turning the key, lifting the latch, or by drawing back the bolt.

So he may enter through an open window in order to distrain. *Tutton v. Darke*, 5 H. & N. 647.

4. To Whom the Privilege Extends.—*Cook's Case*, Cro. Car. 537; *Semayne's Case*, 5 Coke 91b; 3 Black Comm. *288; *Oystead v. Shed*, 13 Mass. 520, 7 Am. Dec. 172; *State v. Smith*, 1 N. H. 346; *Bell v. Clapp*, 10 Johns. (N. Y.) 263, 6 Am. Dec. 339; *Curtis v. Hubbard*, 1 Hill (N. Y.) 336, 4 Hill (N. Y.) 437, 40 Am. Dec. 292; *Hawkins v. Com.*, 14 B. Mon. (Ky.) 318, 61 Am. Dec. 147.

Fraudulent Domicil No Protection.—Residence of a person must be *bona fide* in a house for the protection of the outer door to extend to him or his goods. A domicil existing by fraud does not protect a person from arrest. *Gordon v. Clifford*, 28 N. H. 402.

As to Who Are Residents in their own dwellings, and who in the house of a third person (lodgers, etc.), see *King v. Rogers*, 11 Moore 40; *King v. Trapshaw*, 11 Moore 429; *King*

Effect of a Previous Arrest.—Nor even in civil cases will the castle protect the owner if he has previously been touched by the officer by way of arrest.¹

Reentry—Breaking to Get Out.—Where once an officer has entered a house lawfully in order to make an arrest, he may break the outer door in order to reënter if necessary.² And so when once in he may break the outer door in order to get out.³

Breaking Inner Door.—After getting within the outer door, either of a debtor or of a third person, an officer may break the inner door in order to execute civil process.⁴

Barns, Stores, etc., Not Privileged.—The privilege of the outer door being limited to the castle, an officer may break either the inner or outer doors of barns,

v. Carrel, 11 Moore 237; *Oystead v. Shed*, 13 Mass. 520, 7 Am. Dec. 172; *Swain v. Mizner*, 8 Gray (Mass.) 182, 69 Am. Dec. 244; *Williams v. Spencer*, 5 Johns. (N. Y.) 352; *Tracy v. Talbot*, 6 Mod. 214, 2 Woods Add. Torts 124, note 1.

1. **Previous Arrest.**—The privilege of the outer door is confined to arrests in the first instance, for if a man legally arrested (and laying hands on the prisoner and pronouncing the words of arrest constitute an actual arrest) escapes from the officer, and takes shelter in his own house, the officer may, upon fresh pursuit, break open the outer door in order to retake him, having first given due notice of his business, and demanded admission, and having been refused. If it is not, however, on fresh pursuit, it seems that the officer should have a warrant from a magistrate. 1 Hale P. C. 459; 1 East P. C. 324; 2 Hawk. P. C., c. 14, § 9; 1 Chit. Crim. Law *51; *Genner v. Sparks*, 6 Mod. 173, 1 Salk. 79; *Anonymous*, Lofft. 390; *Semayne's Case*, 5 Coke 91b, *Fraser's note*; *Sandon v. Jervis*, 4 Jur. N. S. 737, 5 Jur. N. S. 860; *Snydacker v. Brosse*, 51 Ill. 357, 99 Am. Dec. 551. See *Cahill v. People*, 106 Ill. 621.

2. **Reentry.**—*Genner v. Sparks*, 6 Mod. 173.

In general, after the arrest has been made, outer doors may be broken to retake. *Fish v. Fish*, cited in 2 Rolle 138; 3 Black. Comm. 288; *Anonymous*, 7 Mod. 8, case 6; *Sandon v. Jervis*, El. Bl. & El. 935, 96 E. C. L. 935; *Saunders v. Millward*, 4 Harr. (Del.) 246; *Glover v. Whittenhall*, 6 Hill (N. Y.) 597; *Allen v. Martin*, 10 Wend. (N. Y.) 301, 25 Am. Dec. 564. See *Aga Kurboolie Mahomed v. Reg.*, 4 Moo. P. C. 239; *State v. Armfield*, 2 Hawks (N. Car.) 246, 11 Am. Dec. 762; *State v. Thackam*, 1 Bay (S. Car.) 358; *Haggerty v. Wilber*, 16 Johns. (N. Y.) 287, 8 Am. Dec. 321; *M'Gee v. Given*, 4 Blackf. (Ind.) 18, note.

3. **Breaking Doors to Get Out.**—*Pugh v. Griffith*, 7 Ad. & El. 827, 34 E. C. L. 233. Or his associates may break in to rescue him. *White v. Wiltshire*, 2 Rolle 137; 1 Chit. Crim. Law *58; *Genner v. Sparks*, 6 Mod. 173; 2 Hawk. P. C., c. 14, § 11; 1 Hale P. C. 459.

4. **Breaking Inner Doors.**—*Morrish v. Murrey*, 13 M. & W. 52; *Lee v. Gansel*, Cowp. 1; *Hutchison v. Birch*, 4 Taunt. 619; *Rex v. Bird*, 2 Show. 87; *Levitt v. Dymoke*, Ir. R. 3 C. L. 1; *Lloyd v. Sandilands*, 8 Taunt. 250, 4 E. C. L. 92; *Boot v. Cooper*, cited in 1 T. R. 535; *Smith*

v. Butler, Comb. 326; *Ratcliffe v. Burton*, 3 B. & P. 229; *Prettyman v. Dean*, 2 Harr. (Del.) 494; *Hubbard v. Mace*, 17 Johns. (N. Y.) 127; *Haggerty v. Wilber*, 16 Johns. (N. Y.) 287, 8 Am. Dec. 321; *State v. Thackam*, 1 Bay (S. Car.) 358.

Breaking upon Suspicion.—But a sheriff is not justified in breaking even the inner door of a stranger merely upon suspicion that a defendant is there, for in such a case his justification depends on his finding the defendant; and in the other case it does not so depend, because the defendant's own house is the most probable place to find him. *Johnson v. Leigh*, 6 Taunt. 246; *Cooke v. Birt*, 5 Taunt. 765.

Forcing Inner Doors, Windows, etc.—An officer may break the window of a room to effect arrest, after entering the outer door. *Lloyd v. Sandilands*, 8 Taunt. 250, 4 E. C. L. 92.

Illness does Not Protect against Forcing Inner Doors.—*Smith v. Butler*, Comb. 326.

As to What Are Outer and What Inner Doors, see *Hopkins v. Nightingale*, 1 Esp. 99; *Whalley v. Williamson*, 7 C. & P. 294, 32 E. C. L. 512; *Stedman v. Crane*, 11 Met. (Mass.) 295.

Entry to Rented Part.—Where a person having rented out part of his house reserves for himself and occupies an inner room, an officer is justified, on finding the outer door open, in breaking the inner door of the room so occupied and reserved, in order to arrest the owner. *Williams v. Spencer*, 5 Johns. (N. Y.) 352. See *Fitch v. Loveland*, Kirby (Conn.) 380; *Lee v. Gansel*, Cowp. 1.

Where a building is rented in distinct portions to several tenants who occupy and control their respective tenements exclusively, and use a stairway and entry in common, an officer who has gained admission to the building through the outer door of the entry is not justified in breaking open the door of one of the rooms of a tenant who occupies all the rooms on both sides of the entry of one of the floors of the house, in order to attach the property or person of a third person therein. *Swain v. Mizner*, 8 Gray (Mass.) 182, 69 Am. Dec. 244.

Where the Usual Entrance to the Defendant's House Was the Back Door, the front door being fastened for the most part, and the sheriff entered in the night through the back door when it was open and then broke the inner door of a room in which the defendant and his family were, and arrested him, it was held to be a lawful arrest. *Hubbard v. Mace*, 17 Johns. (N. Y.) 127.

stores, or other buildings appurtenant to, but not the dwelling of, the debtor.¹

Execution after Unlawful Entry Invalid.—A *ca. sa.* or a *fi. fa.* executed by breaking outer doors was originally held valid and the injured party left to his action of trespass,² but such is not now the law.³

Breaking Door of Third Person.—An officer may break open the door of a third person to attach the goods or body of the defendant in the process,⁴ but in order to be justified the defendant must be there.⁵

Outer Door Open.—An officer in making a civil arrest may, of course, enter the dwelling house of the person to be arrested, if the outer door is open.⁶

(b) **In Criminal Cases.**—"No man can have a castle against the king;"⁷ therefore, where a warrant has been duly issued for the arrest of a person charged with any indictable wrong, the officer may break the outer door of his dwelling house in order to arrest him,⁸ but there must be a notification of his

1. Barns, Stores, and the Like.—Penton *v.* Brown, 1 Keb. 698, Sid. 186, pl. 11; Whalley *v.* Williamson, 7 C. & P. 294, 32 E. C. L. 512; Haggerty *v.* Wilber, 16 Johns. (N. Y.) 287, 8 Am. Dec. 321; Fullerton *v.* Mack, 2 Aik. (Vt.) 415; Burton *v.* Wilkinson, 18 Vt. 186, 46 Am. Dec. 145; Fullam *v.* Stearns, 30 Vt. 443; Solinsky *v.* Lincoln Sav. Bank, 85 Tenn. 368; Stearns *v.* Vincent, 50 Mich. 209, 45 Am. Rep. 37; McLennon *v.* Richardson, 15 Gray (Mass.) 74, 77 Am. Dec. 353.

Room Occupied as Both Store and Dwelling.—Where a building which contained but one room was occupied both as a store and as a dwelling, and the sheriff broke the door in order to levy an execution, it was held that he was not justified in doing so. Welsh *v.* Wilson, 34 Minn. 92.

Upper Story a Dwelling, Lower Story a Store.—But where the upper story of a building is a dwelling, and the lower a store, the officer may break the outer door of the lower story in order to make an arrest. Stearns *v.* Vincent, 50 Mich. 209, 45 Am. Rep. 37.

2. Year Book 18 Edw. IV., p. 4, pl. 14, which says: "Catesby came to the bar and showed how a *fi. fieri facias* was directed to the sheriff of Middlesex, to cause execution to be made for one J. upon a recovery by the said J. against B.; and afterwards the said B. put all his goods into a chest, closed and locked; and afterwards the sheriff broke the outer door of the house and took the goods away with him, etc. And whether the sheriff had done any wrong, etc., Littleton and all his companions held that the party might have a writ of trespass against the sheriff for the breaking of the house, notwithstanding the *fi. fieri facias*, for the *fi. fieri facias* shall not excuse him of the breaking of the house, but of the taking of the goods only." See Semayne's Case, 5 Coke 93b; Lee *v.* Gansel, Cowp. 6.

3. Curtis *v.* Hubbard, 4 Hill (N. Y.) 437, 40 Am. Dec. 292; People *v.* Hubbard, 24 Wend. (N. Y.) 369, 35 Am. Dec. 628; Ilsley *v.* Nichols, 12 Pick. (Mass.) 270, 22 Am. Dec. 425.

4. Breaking Doors of House of Third Person.—If an offender fly to another's house, it may be broken into even upon a civil process. 1 Chit. Crim. Law 57; 2 Hale P. C. 117.

England.—Semayne's Case, 5 Coke 91b.
Connecticut.—State *v.* Shaw, 1 Root (Conn.) 134.

Kentucky.—Walker *v.* Fox, 2 Dana (Ky.) 404; Hawkins *v.* Com., 14 B. Mon. (Ky.) 318, 61 Am. Dec. 147.

Massachusetts.—Com. *v.* Reynolds, 120 Mass. 190, 21 Am. Rep. 510; Oystead *v.* Shed, 13 Mass. 520, 7 Am. Dec. 172.

New York.—Allen *v.* Martin, 10 Wend. N. Y. 300, 25 Am. Dec. 564; Curtis *v.* Hubbard, 1 Hill (N. Y.) 336; Bell *v.* Clapp, 10 Johns. (N. Y.) 263, 6 Am. Dec. 339.

South Carolina.—DeGraffenreid *v.* Mitchell, 3 McCord (S. Car.) 506, 15 Am. Dec. 648.

Vermont.—Burton *v.* Wilkinson, 18 Vt. 186, 46 Am. Dec. 145.

Bail may enter the house of a third person to take his principal. Sheers *v.* Brooks, 2 H. Bl. 120. See the title BAIL.

5. 2 Hale P. C. 117; Semayne's Case, 5 Coke 93b; Morrish *v.* Murrey, 13 M. & W. 52; Ratcliffe *v.* Burton, 3 B. & P. 229; Hawkins *v.* Com., 14 B. Mon. (Ky.) 318, 61 Am. Dec. 147. See Cooke *v.* Birt, 5 Taunt. 765.

Breaking on Suspicion.—An officer may not break the outer door of a third person on the mere suspicion that the debtor or his goods are within. Johnson *v.* Leigh, 6 Taunt. 246.

And on a writ of *hominem replegiando* it was held that the sheriff may not break the outer door of a stranger, unless the man he was commanded to take is there. Stanhope *v.* Dawson, 2 Lutw. 1428.

6. When Outer Door Already Open.—Semayne's Case, 5 Coke 91b. See Allen *v.* Martin, 10 Wend. (N. Y.) 301, 25 Am. Dec. 564.

The *English* rule is that the sheriff may lift the latch of the outer door, or enter the house in the ordinary way, and make a good arrest. 2 Add. Torts. (Wood's ed.), p. 122.

The rule in the *United States* is that the officer may not enter without license, unless the outer door be open. Boggs *v.* Vandyke, 3 Harr. (Del.) 288; Curtis *v.* Hubbard, 4 Hill (N. Y.) 437, 40 Am. Dec. 292.

If the officer gets in, in the absence of evidence, it will not be presumed that he broke in. Kneas *v.* Fidler, 2 S. & R. (Pa.) 263.

7. Semayne's Case, 5 Coke 91b; Com. *v.* Reynolds, 120 Mass. 196, 21 Am. Rep. 510.

8. Breaking Outer Doors.—Russell on Crimes (9th Am. ed.) 840; Hawk. P. C., bk. 2, c. 14, § 3; 1 Hale P. C. 459.

England.—Semayne's Case, 5 Coke 91b; Maleverer *v.* Spinke, 1 Dyer 36b.

Connecticut.—State *v.* Shaw, 1 Root (Conn.)

business and a demand of entry on his part, and a refusal of admittance by the other, before he is justified in so doing.¹

Rearrest after Escape.—In the case of a criminal who escapes to his dwelling house after having been once lawfully arrested, notification of purpose need not be given, nor admittance refused, but the officer may proceed at once to break and enter.²

Breaking Outer Doors of Another's House after Admittance Refused.—An officer acting under a criminal warrant may break the outer door of another person's house, after he has been refused admittance, in order to arrest the person against whom the warrant is directed, if he has reasonable ground for believing that he is there.³

134; *Kelsy v. Wright*, 1 Root (Conn.) 83; *Fitch v. Loveland*, Kirby (Conn.) 386.

Illinois.—*Cahill v. People*, 106 Ill. 621.

Kentucky.—*Hawkins v. Com.*, 14 B. Mon. (Ky.) 318, 61 Am. Dec. 147.

Massachusetts.—*Com. v. Irwin*, 1 Allen (Mass.) 587; *Com. v. Reynolds*, 120 Mass. 190, 21 Am. Rep. 510; *McLennon v. Richardson*, 15 Gray (Mass.) 74, 77 Am. Dec. 353; *Barnard v. Bartlett*, 10 Cush. (Mass.) 501, 57 Am. Dec. 123.

New Hampshire.—*State v. Smith*, 1 N. H. 346.

New York.—*Bell v. Clapp*, 10 Johns. (N. Y.) 263, 6 Am. Dec. 339; *Williams v. Spencer*, 5 Johns. (N. Y.) 352.

Lifting a Latch, under such circumstances, amounts to breaking of the door just as much as if the person making the arrest were to force one bolted with iron. *Ratcliffe v. Burton*, 3 B. & P. 223.

The House in Which One Dwells, though Inhabited by Others also, may be broken into in the same way. *Hawkins v. Com.*, 14 B. Mon. (Ky.) 318, 61 Am. Dec. 147.

Indictable Wrong—Lawful Warrant.—The right to break outer doors to arrest criminals "extends to every sort of indictable wrong, where the party is acting under a lawful warrant, and to all arrests for past offenses, whether by officers or private persons." 1 Bish. Cr. Pr., § 196, 197.

Suspicion of Felony—Without Warrant.—And it may be said that the doors may be broken open, and arrests made, upon suspicion of felony, whether with or without a warrant, if the party refuses to open the outer door on being demanded. 1 Hale P. C. 583.

Officer may Not Loiter in House to Await Return.—But an officer, after being admitted into a house, may not lawfully loiter therein to await the return of the person he wants to arrest. If he does so for an unreasonable time he becomes a trespasser *ab initio*. *Howard v. Gossett*, C. & M. 380, 41 E. C. L. 210.

1. Demand of Admittance and Refusal—England.—2 Hawk. P. C., c. 14, § 3-7; 1 Hale P. 583; 1 Chit. Crim. Law, 52, 53; *Launock v. Brown*, 2 B. & Ald. 592; *Burdett v. Abbott*, 14 East 1; *Semayne's Case*, 5 Coke 91b; *R. v. Curtis*, Post. 135; *Lloyd v. Sandilands*, 8 Taunt. 250, 4 E. C. L. 92; *Waterhouse v. Saltmarsh*, Hob. 263a.

Connecticut.—*State v. Shaw*, 1 Root (Conn.) 134; *Kelsy v. Wright*, 1 Root (Conn.) 83.

Massachusetts.—*Com. v. Reynolds*, 120 Mass. 190, 21 Am. Rep. 510.

New Hampshire.—*State v. Smith*, 1 N. H. 346.

New York.—*Bell v. Clapp*, 10 Johns. (N. Y.) 263, 6 Am. Dec. 339.

2. Rearrest after Escape—Notification.—*Allen v. Martin*, 10 Wend. (N. Y.) 300, 25 Am. Dec. 564; *Oystead v. Shed*, 13 Mass. 520, 7 Am. Dec. 172; *Genner v. Sparks*, 6 Mod. 173, 1 Salk. 79.

Escape.—If the criminal escapes, the officer may break open the doors of his house to rearrest him. *Cahill v. People*, 106 Ill. 621; *Com. v. McGahey*, 11 Gray (Mass.) 194.

Fresh Pursuit.—Where the pursuit is fresh, and the party is consequently aware of the object of the officer, the outer door of the house of such party may be broken open by the officer without making known his business, demanding admission and receiving refusal. *Allen v. Martin*, 10 Wend. (N. Y.) 300, 25 Am. Dec. 564.

First Arrest Illegal.—But the officer will not be authorized to break open doors in order to retake a prisoner in any case where the first arrest has been illegal. 1 East P. C., c. 5, § 87, p. 324.

Therefore, where an officer had made an illegal arrest on civil process, and was obliged to retire by the party's snapping a pistol at him several times, and afterwards returned with assistants who attempted to force the door, when the party within shot one of the assistants, it was ruled to be only manslaughter. *Stevenson's Case*, 10 St. Tr. 462.

To justify breaking doors to rearrest for an escape from an original arrest, for which the breaking of doors was not allowable, the first arrest must have been lawful and complete, otherwise there could have been no escape. 2 Bishop's New Crim. Law, §§ 1074, 1077, 1094; *Genner v. Sparks*, 6 Mod. 174, 1 Salk. 79.

And it makes no difference that the officer consented to the escape, for he had no right to do so. 2 Bishop's New Crim. Law, § 1104.

3. Breaking Outer Doors of Another's House.—*Foster's Crown Law* 321; 1 East Pleas of the Crown 323, 324; 1 Deacon's Criminal Law 57; 2 Russell on Crimes (7th ed.) 628; *Kelsy v. Wright*, 1 Root (Conn.) 83; *Com. v. Reynolds*, 120 Mass. 190, 21 Am. Rep. 510; *Barnard v. Bartlett*, 10 Cush. (Mass.) 501, 57 Am. Dec. 123; *State v. Smith*, 1 N. H. 346; *Bell v. Clapp*, 10 Johns. (N. Y.) 263, 6 Am. Dec. 339.

An officer having a criminal warrant for the arrest of a person whom he believes, and has reasonable cause to believe, to be in another person's house, may, after being admitted

Breaking Inner Doors.—The right to break open doors to make arrest in criminal cases includes the right to break inner doors.¹

Felony Committed or Dangerous Wound Given.—In case a felony has been committed or a dangerous wound inflicted, the outer door may be broken to arrest the offender by an officer without a warrant.²

within the outer door of such house, search the premises for the offender in a reasonable manner, although such offender is not then in the house. *Com. v. Irwin*, 1 Allen (Mass.) 587.

An officer may break into the dwelling house of a third person if he has in his possession a warrant for the arrest of a particular individual, and has reasonable grounds for believing that the person he is looking for is there, although the owner says that he is not. *State v. Mooring*, 115 N. Car. 709.

But *Chitty 1 Crim. Law* 58, *citing* 2 Hale P. C. 47, *Semayne's Case*, 5 Coke 91b; *Johnson v. Leigh*, 1 Marsh. 565, 6 Taunt. 246, says that the officer is a trespasser if the person sought is not in the house.

It should be observed that in all cases where the doors of strangers are broken open upon the supposition of the person sought being within, it must be at the peril of finding him there, unless as it seems where the parties act under the sanction of a magistrate's warrant. 2 Hale 103; *Fost.* 321; 1 East P. C., c. 5, § 87, p. 324.

In *Hawkins v. Com.*, 14 B. Mon. (Ky.) 318, 61 Am. Dec. 147, it was held that unless the person to be arrested is in the house at the time, and unless consent is given, a sheriff cannot lawfully break the outer or inner doors to enter and search the dwelling of a third person in order to arrest a criminal, and if consent is given for such an entry and search it may be withdrawn.

Officer must Demand Admission.—Where an officer wishes to enter a house or room where he supposes a criminal to be secreted, but without sufficient reason to convince a reasonable person, he should always first demand permission to enter. *Semayne's Case*, 5 Coke 91b; *Lee v. Gansel*, Cowp. 1; *Ratcliffe v. Burton*, 3 B. & P. 228; *Haggerty v. Wilber*, 16 Johns. (N. Y.) 287, 8 Am. Dec. 321; *Hubbard v. Mace*, 17 Johns. (N. Y.) 127.

In the case of a misdemeanor a previous demand of admission is always absolutely requisite. *Launock v. Brown*, 2 B. & Ald. 593; *McLennon v. Richardson*, 15 Gray (Mass.) 74, 77 Am. Dec. 353.

Fraud of Owner.—Mr Smith, in the note to *Semayne's Case*, 1 Smith's Lead. Cas. 114, says: "There may, perhaps, be another case in which the sheriff might justify entering the house of a stranger upon bare suspicion, viz., if the stranger were to use fraud and to inveigle the sheriff into a belief that the defendant was concealed in his house, for the purpose of favoring his escape while the officers should be detained in searching, or for any other reason, it might be held that he could not take advantage of his own deceit, so as to treat the sheriff who entered under the false supposition thus induced as a trespasser; or perhaps such conduct might be held to amount to a license to the sheriff to enter."

It certainly is reasonable in such a case that the party should not be permitted to show that in fact the defendant was not concealed in the house, and this would be in accordance with the principles established by *Pickard v. Sears*, 6 Ad. & El. 469, 33 E. C. L. 115; *Heane v. Rogers*, 9 B. & C. 577, 17 E. C. L. 449; *Kieran v. Sanders*, 6 Ad. & El. 515, 33 E. C. L. 135; and *Gregg v. Wells*, 10 Ad. & El. 90, 37 E. C. L. 54.

Upon Verbal Order of Magistrate.—If a prisoner has been arrested without a warrant, by order of a justice of the peace, for an assault committed in his presence, a constable may be ordered by such justice to pursue and re-arrest such offender without a warrant; and after a demand and refusal he may break open the door of a third person's house where the accused has concealed himself. *Com. v. McGahey*, 11 Gray (Mass.) 194.

1. Inner Doors.—*Lee v. Gansel*, Cowp. 1; *Ratcliffe v. Burton*, 3 B. & P. 229; *Rex v. Bird*, 2 Show. 87; *Smith v. Butler*, Comb. 326; *Hawkins v. Com.*, 14 B. Mon. (Ky.) 318, 61 Am. Dec. 147.

Where A let a house, except one room, which he reserved for himself, and occupied separately, and, the outer door of the house being open, a constable broke open the door of the inner room occupied by A in order to arrest him, it was held that trespass would not lie against the constable. *Williams v. Spencer*, 5 Johns. (N. Y.) 352.

If the party whom the officer is about to arrest or the goods which he is about to seize be within the house at the time, he may break open any inner doors or windows to search for them without demanding admission. *Per Gibbs, J.*, *Hutchison v. Birch*, 4 Taunt. 619.

But it seems that if the party against whom the process is issued be not within the house at the time, the officer must demand admission before he will be justified in breaking open an inner door. *Ratcliffe v. Burton*, 3 B. & P. 223.

For Definition of Inner Doors, see *Lee v. Gansel*, Cowp. 1; *Williams v. Spencer*, 5 Johns. (N. Y.) 352; *Fitch v. Loveland*, Kirby (Conn.) 386.

2. 1 Hale P. C. 583. See *Com. v. McGahey*, 11 Gray (Mass.) 194.

Breach of Peace—Door Unfastened.—An officer has a right to enter, and without a warrant, any house the door of which is unfastened, and in which there is a noise amounting to a breach of the peace, and to arrest any person disturbing the peace there in his presence. *Com. v. Tobin*, 108 Mass. 426, 11 Am. Rep. 375; *Com. v. Hastings*, 9 Met. (Mass.) 259.

Affray in House.—If there be an affray in a house, and manslaughter or bloodshed is likely to ensue, a constable having notice of it, and demanding entrance, and being refused, and the affray continuing, may break open the

A **Private Person** may do likewise without a warrant, but in such case mere suspicion will not justify a breaking; the offense must actually have been committed.¹

Contempt Process may be served by breaking outer doors as in criminal cases.²

(c) **Under Search Warrants.**—An officer acting under a search warrant lawfully granted is justified in breaking doors,³ even those of a third person;⁴ but the warrant must be strictly followed in every particular.⁵

The authorities seem to make no distinction between the rights and

doors to keep the peace. 2 Hale P. C. 95; Hawk. P. C., bk. 2, c. 14, § 8.

Disorderly Drinking—Unseasonable Hour.—And if there be disorderly drinking or noise in a house at an unseasonable hour of the night, especially in inns, taverns, or alehouses, the constable or his watch demanding entrance, and being refused, may break open the doors to see and suppress the disorder. 2 Hale P. C. 95; 1 East P. C. 322.

1. **Fresh Pursuit by Private Person.**—A private person in fresh pursuit may force an entrance to a house under circumstances which authorize him to make an arrest. 4 Black. Com. 293; Brooks v. Com., 61 Pa. St. 352, 100 Am. Dec. 645.

To Prevent Murder.—He may break in a house and arrest a person to prevent murder. Hancock v. Baker, 2 B. & P. 260.

Committing Assault to Defend Person Within.—But he cannot force an entrance and commit an assault in defense of a person therein. Rockwell v. Murray, 6 U. C. Q. B. 412.

On Mere Suspicion.—Nor can he do so on mere suspicion, or kill the suspected person to prevent his escape. Brooks v. Com., 61 Pa. St. 352, 100 Am. Dec. 645; State v. Bryant, 65 N. Car. 327.

2. **For Contempts.**—Russell on Crimes (9th Am. ed.) 840; Anonymous, Willes 459; Briggs Case, 1 Rolle 336; Burdett v. Abbott, 14 East 157, 5 Dow. 165, 4 Taunt. 410, where the process of contempt proceeded upon the order of the House of Commons.

3. **Breaking Open Doors under Search Warrant.**—1 Chit. Crim. Law 57; Cooper v. Booth, 3 Esp. 135; Kneas v. Fidler, 2 S. & R. (Pa.) 263. See Elsee v. Smith, 1 D. & R. 97, 16 E. C. L. 19; Entick v. Carrington, 2 Wils. 284; Samuel v. Payne, Doug. 359; Bell v. Clapp, 10 Johns. (N. Y.) 263, 6 Am. Dec. 339.

Necessity for Demand.—It appears that in civil cases doors or locks cannot be broken in proceeding under a search warrant until a demand of admission or for the keys has first been made. 2 Hale P. C. 151; Ratcliffe v. Burton, 3 B. & P. 223.

Not Extended to Criminal Process.—But this rule does not extend to the case of criminal process, nor to cases where there is nobody present upon whom a demand may be made. Androscoggin R. Co. v. Richards, 41 Me. 238.

4. 2 Hale P. C. 117; 2 Hawk. P. C., c. 14, § 3; Semayne's Case, 5 Coke 91b.

5. **Search Warrant to be Strictly Followed.**—Entick v. Carrington, 2 Wils. 275; State v. Spencer, 38 Me. 30; Humes v. Taber, 1 R. I. 464; Grumon v. Raymond, 1 Conn. 40, 6 Am. Dec. 200.

Place to be Searched must be Specified.—The warrant must specify the building or place to be searched, and if the officer searches any other he is a trespasser. Delanoy v. Cannon, 10 East 328; Scandover v. Warne, 2 Campb. 270; McGlinchy v. Barrows, 41 Me. 74; Flaherty v. Longley, 62 Me. 420; Jones v. Fletcher, 41 Me. 255; Com. v. Certain Intoxicating Liquors, 140 Mass. 287; State v. Robinson, 33 Me. 564.

Specified Articles—Quantity—Evidence.—If the warrant requires the officer to seize a specified article he must take that and no other, though he will not be limited to a specified quantity, and he may take such articles as may furnish evidence of the validity of the goods stolen. Crozier v. Cundey, 6 B. & C. 232, 13 E. C. L. 154, 9 D. & R. 224; State v. Brennan's Liquors, 25 Conn. 278; Reed v. Rice, 2 J. J. Marsh. (Ky.) 44, 19 Am. Dec. 122.

Corresponding Goods.—And an officer will not be liable if he seizes goods other than, but which correspond with and come within the description of, those specified in the warrant. Stone v. Dana, 5 Met. (Mass.) 98; Gray v. Davis, 27 Conn. 447.

Constitution and Bills of Rights.—When search warrants comply with the Constitution and bills of rights of the United States and the several states, they are constitutional and valid. See generally State v. Spencer, 38 Me. 30; Allen v. Colby, 47 N. H. 544; Com. v. Dana, 2 Met. (Mass.) 329; Dwinells v. Boynton, 3 Allen (Mass.) 310; Com. v. Certain Intoxicating Liquors, 6 Allen (Mass.) 596, 13 Allen (Mass.) 52; Downing v. Porter, 8 Gray (Mass.) 539; Robinson v. Richardson, 13 Gray (Mass.) 454; Grumon v. Raymond, 1 Conn. 40, 6 Am. Dec. 200; Santo v. State, 2 Iowa 165, 63 Am. Dec. 487.

Duty of Officer.—It is the duty of the officer to comply with all the terms of the warrant, which generally command the bringing of the goods, if found, and some person named. 2 Hale P. C. 151; Stone v. Dana, 5 Met. (Mass.) 98; Com. v. Kennard, 8 Pick. (Mass.) 133.

Under the law of *Missouri* a properly drawn search warrant should not contain a clause of arrest of the person. If the facts stated in the sworn application for such a warrant constitute a charge of crime, the magistrate may issue a separate warrant of arrest. Still, if in such a case he inserts an order of arrest in the search warrant it would be mere irregularity and would not invalidate the warrant. Boeger v. Langenberg, 97 Mo. 390, 10 Am. St. Rep. 322.

For a Full Discussion of the requisites of a search warrant, see the title SEARCHES AND SEIZURES.

duties of officers in the matter of breaking doors to execute civil process, whether the person or the goods of a man be sought to be taken.¹

4. Right to Summon Bystanders.—Where an officer has a right to make an arrest in criminal cases, acting either with or without a warrant, he may summon bystanders to assist him, and they are thereby clothed with the necessary authority to make the arrest.²

When a person is called upon by an officer to assist him in making an arrest, he cannot refuse to act until he is satisfied that the officer is acting legally. He is protected by the official character of the officer so long as he confines himself to the order and direction of the officer, although the arrest proves to be illegal.³

1. See *Ilsley v. Nichols*, 12 Pick. (Mass.) 270, 22 Am. Dec. 425.

2. **Officer Summoning Bystanders to Assist Him**—*Alabama*.—*Coleman v. State*, 63 Ala. 93; *Martin v. State*, 89 Ala. 115, 18 Am. St. Rep. 91.

Arkansas.—*Mitchell v. State*, 12 Ark. 50, 54 Am. Dec. 253.

Indiana.—*State v. Deniston*, 6 Blackf. (Ind.) 277.

New York.—*Coyles v. Hurin*, 10 Johns. (N. Y.) 85.

North Carolina.—*State v. Shaw*, 3 Ired. (N. Car.) 20.

Pennsylvania.—*Comfort v. Com.*, 5 Whart. (Pa.) 437.

South Carolina.—*State v. Hailey*, 2 Strobb. (S. Car.) 73.

Vermont.—*McMahan v. Green*, 34 Vt. 69, 80 Am. Dec. 665.

What the Officer Says under Such Circumstances may be given in evidence in justification. *Martin v. State*, 89 Ala. 115, 18 Am. St. Rep. 91.

Calling in Military.—Officers may in extreme cases call in the military to aid in effecting an arrest. 1 Ch. Crim. Law 49; *Burdett v. Colman*, 14 East 163.

In Criminal Cases.—The power conferred by statute in the different jurisdictions, upon sheriffs and other officers, to call for aid in executing criminal process, is but an affirmation of the rule of the common law. See *McMahan v. Green*, 34 Vt. 69, 80 Am. Dec. 665.

In Civil Cases.—The right to call for aid in civil cases does not exist where there is no breach of the peace or other criminal offense, and those who interfere, or aid the officers in such cases, are liable. *Reg. v. Phelps*, C. & M. 180, 41 E. C. L. 103; *McMahan v. Green*, 34 Vt. 69, 80 Am. Dec. 665. But see *May v. Proby*, Cro. Jac. 419. In enforcing writs of execution, the sheriff must take an effective force. 8 Bac. Abr., tit. Sheriff, N.; *Bell v. North*, 4 Litt. (Ky.) 133.

Pennsylvania.—But in case resistance is made in the service of a *capias ad respondendum* for debt, issued by a justice of the peace, under Penn. Act, March 20, 1810, the constable may raise the posse, as the sheriff may on writs of mesne process, and whoever refuses to aid him may be indicted. *Comfort v. Com.*, 5 Whart. (Pa.) 437. See 6 Bac. Abr. 169; *May v. Proby*, Cro. Jac. 419.

3. Duty and Liability of Person Assisting.—*Firestone v. Rice*, 71 Mich. 377, 15 Am. St. Rep. 266; *Reed v. Rice*, 2 J. J. Marsh. (Ky.)

44, 19 Am. Dec. 122; *McMahan v. Green*, 34 Vt. 69, 80 Am. Dec. 665; *Hooker v. Smith*, 19 Vt. 151, 47 Am. Dec. 679; *State v. Shaw*, 3 Ired. (N. Car.) 20.

There Are Authorities to the Contrary, however. See *Mitchell v. State*, 12 Ark. 50, 54 Am. Dec. 253; *Elder v. Morrison*, 10 Wend. (N. Y.) 128, 25 Am. Dec. 548; *Oystead v. Shed*, 12 Mass. 506.

In *Dougherty v. State* (Ala. 1895), 17 So. Rep. 393, on a trial for failure to assist an officer in making an arrest, the evidence was that the person to be arrested, a negro, ran into the store of the defendant, where there was a crowd of negroes who were disposed to aid him, and that the defendant was unarmed, and when summoned by the officer to assist him, he refused. A refusal by the trial court to charge that if, under the circumstances, an attempt to arrest or aid therein would have been futile and dangerous to the defendant, it was the duty of the jury to acquit, was held error.

Subsequent Illegal Act of Officer.—Where a stranger comes in aid of an officer doing a lawful act, but the officer, by reason of some subsequent unlawful act, becomes a trespasser *ab initio*, the stranger does not for that reason become a trespasser. *Parkes v. Mosse*, Cro. Eliz. 181; *Girling's Case*, Cro. Car. 446.

Person Assuming to Act Not Known Officer.—*Indiana*.—In *Dietrichs v. Schaw*, 43 Ind. 175, it was held that though a private person, acting under a known officer, might justify although the officer's act was illegal, yet where the person making the arrest is not a known officer, but only assumes to act by special appointment, persons aiding this supposed officer are bound to know whether he has proper authority to make the arrest or not, and if he is a trespasser for want of authority those aiding him are trespassers also.

Warrant Issued upon False Affidavit.—In *State v. James*, 80 N. Car. 370, it was held that the protection afforded by a regular precept in the hands of an officer extends to all who aid him in its execution, and this applies, although the process is issued upon a false affidavit made by a person who so assists the officer.

Where a Notary Public Authorized a Special Constable to execute a warrant by an indorsement thereon signed by him as "notary public," it was held that the fact that he did not add to such indorsement "*ex officio* justice of the peace," did not excuse a private person who refused to aid the special constable in making the arrest, as he was bound to know

A refusal to assist the officer is indictable.¹

5. Taking Articles of Property from Person.—An officer making a lawful arrest is bound to take from the arrested person any articles that may be used in evidence against him,² but he cannot take money from the prisoner unless it is connected with the offense with which he is charged.³ The mere fact that

that the notary was *ex officio* a justice. *Coleman v. State*, 63 Ala. 93.

Officer at a Distance.—A person assisting an officer must be, to some extent, under his command, but the officer need not necessarily be present. *Coyles v. Hurtin*, 10 Johns. (N. Y.) 85; *Com. v. Field*, 13 Mass. 321.

A constable cannot give a warrant to his son, and have it executed by him while he is himself a quarter of a mile away. *Rex v. Patience*, 7 C. & P. 775, 32 E. C. L. 730; *Rex v. Whalley*, 7 C. & P. 245, 32 E. C. L. 502.

1. Refusal to Assist Indictable.—1 East P. C. 80; *Reg. v. Brown, C. & M.* 314, 41 E. C. L. 175; *State v. Deniston*, 6 Blackf. (Ind.) 277; *Coyles v. Hurtin*, 10 Johns. (N. Y.) 85; *Comfort v. Com.*, 5 Whart. (Pa.) 437; *State v. Hailey*, 2 Strobb. (S. Car.) 73.

Requisites of Indictment.—But in such cases the indictment must show what the process was, that it was legal, in the hands of a proper officer, and the mode of execution, and that the defendant was informed of the official character of the officer. *State v. Hailey*, 2 Strobb. (S. Car.) 73; *State v. Shaw*, 3 Ired. (N. Car.) 20; *Rex v. Freeman*, 2 Stra. 1226; *Rex v. Osmer*, 5 East 306; *State v. Deniston*, 6 Blackf. (Ind.) 277; 2 Chit. Crim. Law 145, note 151.

Presence of Officer.—Where a sheriff, having a warrant to apprehend several persons who had riotously assembled together and committed an assault, etc., came to the house where they were assembled, and, being resisted and unable to make the arrest, commanded A and others to guard the house in which the persons were assembled and prevent their escape while he went to the next town, about four miles distant, to enable him to execute the warrant, it was held that A and the others were bound to aid and assist the sheriff on his order or summons in preserving the peace or apprehending the offenders, and that the sheriff was to be deemed constructively present so as to justify A and the others in arresting the offenders during his temporary absence for the purpose of getting further assistance, of which fact the jury were to decide, and that if A and the others so ordered by the sheriff to assist him during his temporary absence for such purpose should permit or assist the offenders to escape, they would be liable to punishment. *Coyles v. Hurtin*, 10 Johns. (N. Y.) 85.

2. Taking Articles from Person for Purposes of Evidence.—Wharton's Crim. Plead., § 60; Roscoe Crim. Ev. 211.

England.—*Dillon v. O'Brien*, 16 Cox C. C. 245; *Rex v. O'Donnell*, 7 C. & P. 138, 32 E. C. L. 469; *Rex v. Jones*, 6 C. & P. 343, 25 E. C. L. 431; *Rex v. Burgiss*, 7 C. & P. 488, 32 E. C. L. 596; *Rex v. Kinsey*, 7 C. & P. 447, 32 E. C. L. 578; *Rex v. Rooney*, 7 C. & P. 515, 32 E. C. L. 608.

Alabama.—*Ex p. Hurn*, 92 Ala. 102, 25 Am. St. Rep. 23.

Georgia.—*Day v. State*, 63 Ga. 669; *Woolfolk v. State*, 81 Ga. 551; *Richmond, etc., R. Co. v. Childress*, 82 Ga. 719.

Iowa.—*Commercial Exch. Bank v. McLeod*, 65 Iowa 665, 54 Am. Rep. 36; *Pomroy v. Parmelee*, 9 Iowa 140, 74 Am. Dec. 328; *Patterson v. Pratt*, 19 Iowa 358.

New Hampshire.—*Closson v. Morrison*, 47 N. H. 483, 93 Am. Dec. 459.

North Carolina.—*State v. Johnson*, 67 N. Car. 55.

Vermont.—*Spalding v. Preston*, 21 Vt. 9, 50 Am. Dec. 68.

Compare People v. McCoy, 45 How. Pr. (N. Y. Supreme Ct.) 216.

Search for Weapon.—And if the officer fears violence or an attempt to escape, he may search the prisoner and take from him any implement that might assist him in such an attempt. But this right does not exist where the arrest is submitted to and there is no reason to fear an attempt at escape, as in the case of an arrest for mere drunkenness. *Leigh v. Cole*, Cox C. C. 329.

Examination of Person.—Where the defendant while in another state was arrested by certain persons sent for the purpose of ascertaining whether he was the person named in an indictment, and, if so, to take steps for his removal to answer the indictment, and they requested permission to make an examination of the person's body to identify him, and he refused and was then handcuffed, and the examination made by force and against his will, it was held that the persons who made such examination could testify on the trial of the defendant as to the scars and marks they found on the defendant, and that the testimony did not fall within the constitutional inhibition that "No person in any criminal prosecution shall be compelled to testify against himself." *O'Brien v. State*, 125 Ind. 38.

Comparing Footprints.—As to forcing a prisoner to compare his bare feet with tracks found, see *State v. Graham*, 74 N. Car. 646, 21 Am. Rep. 493; *Walker v. State*, 7 Tex. App. 245, 32 Am. Rep. 595; *State v. Jacobs*, 5 Jones (N. Car.) 259; *State v. Sanders*, 68 Mo. 202, 30 Am. Rep. 782; *Stokes v. State*, 5 Baxt. (Tenn.) 619, 30 Am. Rep. 72. See the title EXPERIMENTS (IN EVIDENCE).

3. Taking Money from Prisoner.—*Rex v. O'Donnell*, 7 C. & P. 138, 32 E. C. L. 469; *Rex v. Barnett*, 3 C. & P. 600, 14 E. C. L. 475; *Rex v. Jones*, 6 C. & P. 343, 25 E. C. L. 431; *Rex v. Kinsey*, 7 C. & P. 447, 32 E. C. L. 578; *Rex v. Rooney*, 7 C. & P. 505, 32 E. C. L. 608; *Reg. v. Johnson*, 11 Mod. 62.

The reason of the rule against taking a prisoner's money is because it would be an infringement of his personal liberty and would impair his means of defense. Where a

the prisoner has committed a crime and been arrested therefor has no effect on his property rights; the goods taken from him are still his property.¹

6. Stopping Train to Execute Process.—It has been held that an officer having a writ by which he is commanded to arrest the body of the defendant, a railroad engineer, may lawfully stop a train of cars run by such engineer for the purpose of making the arrest.²

7. Time of Making Arrest.—By the common law, process might be executed at any hour of the day or night.³

The Act 29 Car. 2, c. 7, § 6, made it unlawful to serve on "the Lord's Day" any "writ, process, warrant, order, judgment, or decree, except in cases of treason, felony, or breach of the peace."⁴

prisoner who was indicted for uttering two forged promissory notes, one for twenty-nine pounds and another for twenty-six pounds, when called upon to plead applied to the judge to order twenty-eight sovereigns found on him to be restored, and there was reason to believe that twenty-six of the sovereigns found on him when arrested were the proceeds of the forged note of twenty-six pounds, the judge ordered two sovereigns to be given back to the prisoner and the others to be retained in the custody of the court. *Rex v. Burgiss*, 7 C. & P. 488, 32 E. C. L. 596. See also *Rex v. Rooney*, 7 C. & P. 515, 32 E. C. L. 608.

Where a defendant who had been committed to prison to await his trial had a sum of money taken from him by the constable who brought him to jail, on the pretense of paying with it the cost of conveying him to prison and maintaining him there until his trial, the judge at the assizes caused the money to be restored to the prisoner. *Reg. v. Bass*, 2 C. & K. 822, 61 E. C. L. 822.

Money Useful as Evidence.—Money can lawfully be taken from a prisoner only when there is probable ground for believing that it is connected with the offense charged, or where it is identified as that stolen, or can be used in evidence against the prisoner. *Ex p. Hurn*, 92 Ala. 102, 25 Am. St. Rep. 23; *Houghton v. Bachman*, 47 Barb. (N. Y.) 388.

The court will not order that money taken from a prisoner charged with high treason be restored to him, unless it is shown that such money forms no part of the evidence against him. *Reg. v. Frost*, 9 C. & P. 129, 38 E. C. L. 70.

1. Arrest does Not Affect Property Rights.—*Rickers v. Simcox*, 1 Utah 33; *Ex p. Craig*, 4 Wash. (U. S.) 710.

The officer holds such things as have been taken from the prisoner, only for the purposes of the law. Whenever the original taking has been wrongful, the court will order the property at the proper time to be returned to the prisoner.

England.—*Price v. Messenger*, 2 B. & P. 158; *Bell v. Oakley*, 2 M. & S. 261; *Entick v. Carrington*, 2 Wils. 291; *Rex v. Jones*, 6 C. & P. 343, 25 E. C. L. 431; *Reg. v. Pierce*, 6 Cox C. C. 117; *Bullock v. Dunlap*, 2 Exch. Div. 43; *Reg. v. Roberts*, L. R. 9 Q. B. 77, 12 Cox C. C. 574; *Reg. v. Bass*, 2 C. & K. 822, 61 E. C. L. 822; *Rex v. Burgiss*, 7 C. & P. 488, 32 E. C. L. 596; *Rex v. Barnett*, 3 C. & P. 600, 14 E. C. L. 475; *Rex v. O'Donnell*, 7 C. & P. 138, 32 E. C. L. 469.

United States.—*Ex p. Craig*, 4 Wash. (U. S.) 710.

Maine.—*Thatcher v. Weeks*, 79 Me. 547.

New York.—*Houghton v. Bachman*, 47 Barb. (N. Y.) 388.

Vermont.—*Spalding v. Preston*, 21 Vt. 9, 50 Am. Dec. 68.

2. Stopping Train to Execute Process.—*St. Johnsbury, etc., R. Co. v. Hunt*, 60 Vt. 588, 6 Am. St. Rep. 138. In this case the court, by Powers, J., said: "It is conceded * * * that an officer having proper process might lawfully stop a train to arrest its engineer in a criminal proceeding, but the argument is that in civil proceedings the consequences are, or in conceivable cases might be, so detrimental to the public using the railroad, the court should hold on grounds of public policy that the right does not exist. * * * It is admitted that an officer might stop a stagecoach to arrest the driver. * * * If the question is one of public policy it must apply generally to public carriers. But we think the right to arrest cannot be defeated upon any considerations that public policy forbids its exercise in the case of locomotive engineers. The command of the process is the voice of the law speaking to the officer. It is the order of the State of Vermont to do the act complained of. There is no room for the doctrine of public policy in such a case. It is illogical and absurd to say that the command of the law cannot be executed because on grounds of public convenience or expediency the court thinks it better to nullify the law."

3. Arrest may be Made by Day or Night.—*Com. Dig., Exec., c. 5*; 2 Hale P. C. 113, 114; 1 Russell on Crimes 840; 1 Hawk. P. C., c. 31, § 60; *Semayne's Case*, 5 Coke 91b; *Mackalley's Case*, 9 Coke 66b; *State v. Brennan's Liquors*, 25 Conn. 278; *Wright v. Keith*, 24 Me. 158; *State v. Smith*, 1 N. H. 346. See *Hildreth v. Brigham*, 12 Allen (Mass.) 71.

Upon an execution for costs only, an arrest may be made after sunset without authority from a magistrate. *Stone's Case*, 129 Mass. 156.

In *State v. Smith*, 1 N. H. 346, the court, by Woodbury, J., said: "As civil process can be executed in the night as well as the day, no ground exists for a more rigorous rule of construction in relation to criminal process, and in 1 East C. L. 324, c. 5, § 88, it is well observed that such process may be executed 'at night as well as by day, and therefore killing the bailiff or other officer on pretense of his coming at an unseasonable hour would be murder.'"

4. Sunday Arrests under English Statute.—

Since the act, arrests made in *England*, unless within its exceptions, are absolutely void, and cannot be cured by any waiver, express or implied, of the party.¹

In the *United States* criminal warrants may be both issued and executed on the Sabbath,² but it is otherwise with warrants of arrest in civil cases.³

8. Where Process must be Executed.—Independent of Statute, a warrant has no efficacy beyond the limits of the county or district of the authority issuing it.⁴

3 Chit. Gen. Pr. 75 (Am. ed.); 3 Russell on Crimes (6th ed.), p. 110; *Lyford v. Tyrrel*, 1 Anstr. 85; *Wilson v. Tucker*, 1 Salk. 78; *Brookes v. Warren*, 2 W. Bl. 1273; *Rawlins v. Ellis*, 16 M. & W. 172.

The effect of this legislation has been to make illegal all Sunday arrests, except for treason, felony, or breach of the peace. *Wells v. Gurney*, 8 B. & C. 769, 15 E. C. L. 336; *Goddard v. Harris*, 7 Bing. 320, 20 E. C. L. 147, 5 M. & P. 122; *Ledwith v. Catchpole*, Cald. 291; *Rex v. Myers*, 1 T. R. 265; *Anonymous*, Willes 459.

A person convicted by justices on a penal statute cannot be apprehended on Sunday for nonpayment of the penalty. *Rex v. Myers*, 1 T. R. 265.

Nor can a rule *nisi* for an attachment for nonpayment of a sum of money pursuant to the master's allocatur be served on Sunday. *McIlleham v. Smith*, 8 T. R. 86.

Arrest after Escape.—One wrongfully escaped on another day may be rearrested on Sunday without a warrant. *Mod. Cre.* 231; *Moore's Case*, 2 Ld. Raym. 1028; *Atkinson v. Jameson*, 5 T. R. 25; *Parker v. Moor*, 2 Salk. 626; *Lidford v. Thomas*, 6 Mod. 96.

But a person cannot be arrested on Sunday after a voluntary escape. *Featherstonehough v. Atkinson*, Barnes 373; *Rayner v. Sharp*, Cooke 33. See also *Atkinson v. Jameson*, 5 T. R. 25.

Bail.—Nor can bail to the sheriff seize the principal on Sunday in order to surrender him. *Brookes v. Warren*, 2 W. Bl. 1273. But see *Anonymous*, 6 Mod. 231; *Ex p. Gibbons*, 1 Atk. 239.

Conspiracy.—An arrest can be made on Sunday for a criminal conspiracy, it being a breach of the peace. *Rawlins v. Ellis*, 16 M. & W. 172.

Rescue—Contempt.—The same is true in case of rescue, it being a contempt. *Anonymous*, Willes 459.

So a person may be arrested on Sunday on the lord chancellor's warrant, on an order of commitment for contempt, but not upon an attachment for the nonperformance of an award. *Rex v. Myers*, 1 T. R. 265.

An arrest for contempt made on Sunday is not contrary to the 29 Car. 2, c. 7, § 6, prohibiting arrest on Sunday save for treason, felony, breach of the peace. A contempt is in the nature of a breach of the peace. *Ex p. Whitchurch*, 1 Atk. 55. See *Anonymous*, Willes 459.

1. *Wilson v. Tucker*, 1 Salk. 78; *Featherstonehough v. Atkinson*, Barnes 373; *Rex v. Myers*, 1 T. R. 265; *Taylor v. Phillips*, 3 East 156; *Morgan v. Johnson*, 1 H. Bl. 628; *Lyford v. Tyrrel*, 1 Anstr. 85; *Wells v. Gurney*, 8 B. & C. 769, 15 E. C. L. 336; *Atkinson v. Jameson*, 5 T. R. 25; *Ex p. Eggington*, 18 Jur. 224; *Parker v. Moor*, 2 Salk. 626, 6 Mod. 95, 2 Ld. Raym. 1028.

2. **Arrest on Sunday—American Rule.**—*Watts v. Com.*, 5 Bush (Ky.) 309; *State v. Douglas*, 69 Ind. 544.

In *Keith v. Tuttle*, 28 Me. 326, the court, by Whitman, C. J., said: "There is no prohibition, either at common law or by statute, of the service of process in criminal cases on the Lord's Day, except in so far as the service of the same might be unnecessary on that day."

In *Pearce v. Atwood*, 13 Mass. 324, it was held that the statute against unnecessary traveling on the Lord's Day does not authorize a justice of the peace to receive a complaint and issue a warrant for a violation of that law merely by traveling on the Lord's Day, and that an arrest made on that day, pursuant to a warrant so issued, is illegal, and the officer making it a trespasser.

In *McLennon v. Richardson*, 15 Gray (Mass.) 74, 77 Am. Dec. 353, it was held that a constable may not forcibly enter a shop at midnight preceding the Lord's Day without a warrant or previous demand, and arrest the owner and others for the sale of intoxicating liquors and gaming, although he uses such force only as is necessary.

City Ordinance.—In *New York* a person cannot be arrested on Sunday without a warrant for violating a corporation ordinance. *Wood v. Brooklyn*, 14 Barb. (N. Y.) 425. See *Davis v. American Soc., etc.*, 75 N. Y. 362.

In *Chicago* an arrest may be made for keeping a tippling house open on Sunday against the city ordinance. *Main v. McCarty*, 15 Ill. 441.

For a Full Discussion of the question of Sunday arrests in criminal proceedings, see the title SUNDAY.

3. See *Clayton v. Scott*, 45 Vt. 386; *King v. Strain*, 6 Blackf. (Ind.) 446; *Stern's Appeal*, 64 Pa. St. 447.

For a Full Discussion of the question of arrests on Sunday in civil proceedings, see the title SUNDAY.

4. **No Authority beyond Jurisdiction.**—2 Hale P. C. 115; 1 Chit. Crim. Law 48; *Lawson v. Buzines*, 3 Harr. (Del.) 416; *Hoffman v. Prout*, 4 Har. & M. (Md.) 165; *People v. Cassels*, 5 Hill (N. Y.) 165; *Moak v. DeForrest*, 5 Hill (N. Y.) 605; *Ex p. Graham*, 3 Wash. (U. S.) 456.

Provision is Usually Made by Statute for the service of process outside the jurisdiction. *Krug v. Ward*, 77 Ill. 603; *Leyenberger v. Paul*, 12 Ill. App. 638; *Sturm v. Potter*, 41 Ind. 181; *Blake v. Burke*, 42 Md. 45; *Parrish v. State*, 14 Md. 238; *Papineau v. Bacon*, 110 Mass. 319; *Gainey v. Parkman*, 100 Mass. 316; *Com. v.*

At common law, an officer cannot arrest a person outside of his precinct, even though the offense was committed within it.¹

Wolcott, 110 Mass. 67; Doyle v. Russell, 30 Barb. (N. Y.) 300; Dusenbury v. Keiley, 85 N. Y. 383; People v. Shaver, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 45; Johnston v. State, 2 Yerg. (Tenn.) 58; Com. v. Jailer, 1 Grant's Cas. (Pa.) 218.

An officer of one county can serve a warrant in another county only where it is indorsed by a magistrate of the latter county, or by the county clerk of the former county, as provided by Rev. Stat. 1889, art. 4024. State v. Dooley, 121 Mo. 591.

In Johnston v. State, 2 Yerg. (Tenn.) 58, the court, by Whyte, J., said: "Were a felon only to be arrested on a warrant to be issued by the magistrate of the county where the felony was committed, it would necessarily in many instances produce a failure of justice, and facilitate the means of escape. All that is necessary is that the proceedings be pursuant to the statute of 1715, c. 16, which has been complied with in this case."

Under the Pennsylvania Act of 1842, § 5, as amended by Act of July 8, 1885, a warrant of arrest can only issue in the county where the crime was committed, and the defendant must be brought to trial at the place where the offense was committed. A warrant issued in violation of this rule is void. Weber v. Goldenberg, 48 Leg. Int. (Pa.) 24.

But where a warrant is issued in the proper county in Pennsylvania it can be served in any county of the state. Weber v. Oldenberg, 27 W. N. C. (Pa.) 371.

In Com. v. Jailer, 1 Grant's Cas. (Pa.) 218, it was held that a judge of one county has no authority to issue his warrant for the arrest or removal of a person charged with having committed a misdemeanor in another county, but that it was otherwise in case of a felony.

In Indiana, when a person charged with misdemeanor has left the county in which the offense has been committed and the warrant for his arrest issued, he may be arrested by a constable of the said county or any other county of the state, upon attaching a certificate of the clerk of the county in which the warrant was issued, stating that the justice who signed and issued the warrant was duly commissioned and qualified as such, and that his signature is genuine. Sturm v. Potter, 41 Ind. 181.

Federal Writs.—It is not lawful to arrest a person in one circuit on attachment from the circuit court of another circuit. The jurisdiction of the district courts is limited territorially in respect to the person or thing proceeded against. The process of the court is confined within the limits of the district in which the party is required to appear. There is no provision of law for the removal of the person arrested without the district to the district in which he is required to appear. Ex p. Graham, 3 Wash. (U. S.) 456. See U. S. v. Shepard, 1 Abb. (U. S.) 431.

As to the Requisites of the Indorsement of Warrants under the various statutes, see the title WARRANTS.

1. Officer Has No Authority out of His Precinct.—Bigelow on Torts, p. 142; Lawson v. Buzines, 3 Harr. (Del.) 416; Rex v. Weir, 1 B. & C. 288, 8 E. C. L. 125; Rex v. Chandler, 1 Ld. Raym. 581; Blatcher v. Kemp, 1 H. Bl. 15, note.

The sheriff of one county cannot make an arrest in another county, except on fresh pursuit in case of an escape, nor can he detain in such other county an arrested prisoner, except under a writ of habeas corpus. Page v. Staples, 13 R. I. 306; Hammond v. Taylor, 3 B. & Ald. 408, 5 E. C. L. 329; Avery v. Seely, 3 W. & S. (Pa.) 494.

Where a person was subpoenaed in Kansas as a witness for the state, and before attendance in court went to Nebraska and entered into business there, and an attachment issued against him for contempt, and the sheriff went to Nebraska and arrested him there and brought him back to Kansas, where he was convicted of contempt, it was held that the whole proceeding was unlawful, and that he should be discharged. State v. Simmons, 39 Kan. 262.

Alabama.—A policeman in Alabama may make an arrest anywhere within the county, and is not confined to the city or town for which he is appointed. Williams v. State, 44 Ala. 41.

Massachusetts.—Under a *capias* in a criminal case a constable is authorized by the Massachusetts statute to make an arrest outside the town but within the same county and within the jurisdiction of the court which issued the warrant. Sullivan v. Wentworth, 137 Mass. 233.

California.—Under a warrant issued and directed generally to any sheriff, marshal, etc., a deputy sheriff who is also a deputy United States marshal may arrest a person in a county other than that in which the offense was committed. Ex p. Sternes, 82 Cal. 245.

Illinois.—It was held that unless a person against whom a warrant has been issued for a criminal offense has fled from the county, he cannot lawfully be arrested in another county by an officer of the county in which the offense was committed. Krug v. Ward, 77 Ill. 603. See Leyenberger v. Paul, 12 Ill. App. 638.

Georgia.—By the Georgia Code, § 4721, a sheriff who makes an arrest under a warrant from another county is bound to carry the accused to the county in which the offense was committed, although the accused offers to waive examination and tenders a bond for his appearance in such county for trial. The provision of the statute is mandatory and must be literally performed. Lamb v. Dillard, 94 Ga. 206.

Texas.—Texas Rev. Stat., § 2363, provides that the marshal of an incorporated town shall have like power and authority as the sheriff for the arrest of offenders within the county; and, consequently, he may arrest beyond the limits of the town for a felony committed within the county, but not within the town. Newburn v. Durham (Tex. 1895), 31 S. W. Rep. 195.

One who assumes to execute either a writ or a warrant must be a legal officer for that purpose, or the deputy of such an officer. If an arrest is attempted out of the proper district, or without warrant or authority, the one so attempting will not be entitled to the protection of the law. If he is killed in sudden combat in effecting the arrest, the crime will be but manslaughter.¹

9. Execution of Concurrent Writs.—A plaintiff cannot act at the same time upon writs of *ca. sa.* and *fi. fa.* issued concurrently out of the same court.²

10. Fraud in Executing.—A lawful act cannot be done in an unlawful manner; therefore, though stratagem may be used to effect an arrest, fraud or misrepresentation is not countenanced by the law, and in an arrest so effected the service will be set aside.³

1. Killing Officer Acting Illegally.—1 Hale 457-459; 1 East P. C., c. 5, § 80, pp. 312-314; 1 Russ. on Cr. 823; Krug v. Ward, 77 Ill. 603; Kindred v. Stitt, 51 Ill. 401; Ressler v. Peats, 86 Ill. 275; Sturm v. Potter, 41 Ind. 181.

The portions of this subject relating to murder and manslaughter will be fully treated under the title HOMICIDE.

It has been ruled that homicide committed upon a bailiff attempting to execute a writ within an exclusive liberty, such writ not having a *non-omittas* clause, will not amount to murder. Rex v. Mead, 2 Stark. 205, 3 E. C. L. 378.

It has been held that if the constable of the vill of A come into the vill of B to suppress some disorder, and in the tumult the constable be killed in the vill of B, this will only be manslaughter, because he had no authority in B as constable. 1 Hale 459. But it was considered that if the constable of the vill of A had a particular precept from a justice of the peace, directed to him by name or by his name of office as constable of A, to suppress a riot in the vill of B, or to apprehend a person in the vill of B, for some misdemeanor within the jurisdiction and consuance of the justice of the peace, and in pursuance of that warrant he went to arrest the party in B, and in executing his warrant was killed in B, this amounted to murder. 1 Hale 459; 2 Hawk. P. C., c. 13, §§ 27, 30.

2. Concurrent Writs.—Rex v. Blake, 2 N. & M. 312, 28 E. C. L. 359; Carlin v. Conroy, 5 Ir. R. C. L. 535. See Hayden v. Shearman, 4 Ir. R. C. L. 169; Dowdall v. Kelly, 4 Ir. R. C. L. 527; Manning v. Baker, 1 Ir. Jur. N. S. 515; Tinde v. Handcock, 7 Ir. R. C. L. 356; Elam v. Rawson, 21 Ga. 139; McDonald v. Wilkie, 13 Ill. 22, 54 Am. Dec. 423; *In re Grey's Petition*, 41 Kan. 461; Trafton v. Gardiner, 39 Me. 501; Rockford, etc., R. Co. v. Boody, 56 N. Y. 456; Chapman v. Dyett, 11 Wend. (N. Y.) 31, 25 Am. Dec. 598; Turner v. Walker, 3 Gill & J. (Md.) 377, 22 Am. Dec. 329.

Where a *fi. fa.* and a *ca. sa.* were issued together and a small sum only was levied under the former, and before the return was made the defendant was taken in execution under the *ca. sa.*, the court discharged her out of custody. Fennell v. Dempsey, 1 Ir. Jur. O. S. (Ir.) 64.

If a sheriff makes a seizure under a *fi. fa.* the plaintiff cannot take the defendant in execution under a writ of *ca. sa.* until the writ of *fi. fa.* is returned, although he abandons the

seizure of the goods. A sheriff having seized under a *fi. fa.* has no power to abandon the seizure, but must make return to the writ. Sugone v. Hovenden, 7 Ir. Crim. Law Rep. 318.

In McDonald v. Wilkie, 13 Ill. 22, 54 Am. Dec. 423, it was held that a justice of the peace cannot issue an execution against the body of a defendant, before an execution against the property has been issued and returned unsatisfied, except in cases of judgments in actions of trespass and trover.

Where the Sureties on a Promissory Note have paid a judgment and *fi. fa.* going against the principal and sureties jointly, they have no right to arrest the principal on a *ca. sa.* issued after the return of the *fi. fa.* Elam v. Rawson, 21 Ga. 139.

Where an Officer has Returned an Attachment on the writ he cannot arrest the defendant upon the same process afterwards, although the attachment proves ineffectual. Trafton v. Gardiner, 39 Me. 501.

New York.—The sheriff is not bound, under 2 N. Y. Rev. Stat. 523, to take part of the goods replevied unless he can find them all, but if he does so he cannot arrest the defendant on the same writ at the same time. An *alias* should be issued for the part not taken on the first, and the remainder taken or defendant arrested on that. Lowrey v. Mansfield, 3 How. Pr. (N. Y. Supreme Ct.) 88.

3. Arrest Effected by Fraud.—Rex v. Backhouse, Lofft 61; Arnold v. Tourtellot, 13 Pick. (Mass.) 172; Cook v. Brown, 125 Mass. 503, 28 Am. Rep. 259; Goupil v. Simonson, 3 Abb. Pr. (N. Y. Supreme Ct.) 474; Seaver v. Robinson, 3 Duer (N. Y.) 622, 2 Abb. Pr. (N. Y.) 554; Carpenter v. Spooner, 2 Sandf. (N. Y.) 717; Baker v. Wales, 35 N. Y. Super. Ct. 403; Metcalf v. Clark, 41 Barb. (N. Y.) 47; Higgins v. Dewey (C. Pl.), 14 N. Y. Supp. 894, 27 Abb. N. Cas. (N. Y.) 8; Union Sugar Refinery v. Mathiesson, 2 Cliff. (U. S.) 304. See also Phelps v. Goddard, 1 Tyler (Vt.) 60, 4 Am. Dec. 720; Wanzer v. Bright, 52 Ill. 35; Williams v. Bacon, 10 Wend. (N. Y.) 636; Snelling v. Watrous, 2 Paige (N. Y.) 314; Carpenter v. Spooner, 2 Sandf. (N. Y.) 717; Stein v. Valkenhuysen, El. Bl. & El. 65, 96 E. C. L. 65; Grainger v. Hill, 4 Bing. N. Cas. 212, 33 E. C. L. 328; Heywood v. Collinge, 9 Ad. & El. 268, 36 E. C. L. 136.

In Iisley v. Nichols, 12 Pick. (Mass.) 270, 22 Am. Dec. 425, the court, by Shaw, C. J., after reviewing a number of cases, said: "These cases, therefore, seem to establish the general

11. Execution by Officer de Facto.—An arrest made by a *de facto* officer is as lawful and effective as if made by one fully qualified,¹ and where a private person is summoned by a *de facto* officer to assist him in making the arrest of a person violating the law in their presence, he is justified in making such arrest in good faith, and if killed it will be murder.²

12. Execution by Special Bailiff or Deputy.—To create a person a special constable and justify him in making an arrest, the writ must be specially directed to him by name.³

principle that a valid and lawful act cannot be accomplished by any unlawful means, and whenever such unlawful means are resorted to, the law will interpose and afford some suitable remedy, according to the nature of the case, to restore the party injured by these unlawful means to his rights.”

It was held in *Smith v. Meyers*, 1 Thomp. & C. (N. Y.) 665, that where a defendant is brought into the state for the purpose of arresting him by the use of any scheme, pretense, subterfuge, fraud, enterprise, or design, the arrest will be set aside unless it is warranted by the law of the land, and the validity of the arrest will not depend upon the good faith or correctness of those making it, but upon the lawful character of the act itself.

But where a person was brought within the jurisdiction from another state by force, without authority, and then rearrested and proper steps taken for his custody and trial, it was held that such forcible arrest was no defense to an indictment against him for a crime committed within the jurisdiction into which he was so brought by force. *State v. Ross*, 21 Iowa 467. See *In re Dows*, 1 Phila. (Pa.) 234; *People v. Rowe*, 4 Park. Cr. Rep. (Buffalo Super. Ct.) 253; *Ex p. Scott*, 9 B. & C. 446, 17 E. C. L. 416; *Rex v. Marks*, 3 East 157; *Ex p. Krans*, 1 B. & C. 258, 8 E. C. L. 110; *State v. Brewster*, 7 Vt. 121; and the case of *Hooper v. Lane*, 6 H. L. Cas. 443, where the question as to when a person can be detained who has been unlawfully arrested is fully discussed.

1. Officer de Facto.—In *Joseph v. Cawthorn*, 74 Ala. 411, the court, by Somerville, J., said: “There is no distinction in law between the official acts of an officer *de jure* and those of an officer *de facto*. So far as the public and third parties are concerned, the acts of the one have precisely the same force and effect as the acts of the other. The only difference between the two is that the latter may be ousted from his office by a direct proceeding against him in the nature of *quo warranto*, and the former cannot. Their official acts are equally valid. The rule is one which is dictated alike by principles of justice and public policy. It would be a great hardship if innocent persons were made to suffer by the unknown negligence of officials who under color of office were daily holding themselves out to the public as officers *de jure*.”

The Rule Applies to All Officers Alike, whether judicial, executive, or ministerial. *Milward v. Thatcher*, 2 T. R. 87; *People v. White*, 24 Wend. (N. Y.) 527; *Sheehan's Case*, 122 Mass. 446, 23 Am. Rep. 374; *State v. Carroll*, 38 Conn. 449, 9 Am. Rep. 409; *Mallett v. Uncle Sam Gold*, etc., Min. Co., 1 Nev. 188, 90 Am. Dec. 484.

But there cannot be an officer *de jure* and one *de facto* in possession of the same office at the same time. *Boardman v. Halliday*, 10 Paige (N. Y.) 232; *Conover v. Devlin*, 15 How. Pr. (N. Y. Supreme Ct.) 479. See *O'Brian v. Kirwin*, Cro. Jac. 552; *Harris v. Jays*, Cro. Eliz. 699.

Nor can there be two *de facto* officers in the same office at the same time. *Conover v. Devlin*, 15 How. Pr. (N. Y. Supreme Ct.) 479.

See further, as to the general rule, *Weatherford v. State*, 31 Tex. Crim. Rep. 530, 37 Am. St. Rep. 828; *Cox v. Houston*, etc., R. Co., 68 Tex. 230; *Thompson v. Johnson*, 84 Tex. 548; *McKinney v. O'Connor*, 26 Tex. 14; *Petersilea v. Stone*, 119 Mass. 465, 20 Am. Rep. 335; *Gregg Tp. v. Jamison*, 55 Pa. St. 468; *Trenton Com'r's v. McDaniel*, 7 Jones (N. Car.) 107. See the title DE FACTO OFFICERS.

2. Weatherford v. State, 31 Tex. Crim. Rep. 530, 37 Am. St. Rep. 828.

Third persons, in order to be justified for making an arrest, are only required to show that they did so upon the demand of a *de facto* officer, but the officer himself must aver and prove that he was duly commissioned and qualified. *Schlencker v. Risley*, 4 Ill. 483, 38 Am. Dec. 100; *Hardesty v. Taft*, 23 Md. 513, 87 Am. Dec. 584.

3. Bailiff or Deputy.—*Dietrichs v. Schaw*, 43 Ind. 175. And it was further held in this case that to comply with the requirements of the local statute, which are mandatory in this particular, the appointment to act as such special constable in that particular case must be noted by the justice on this docket. See also *Benningshoof v. Finney*, 22 Ind. 101.

It was held in *U. S. v. Jailer of Fayette County*, 2 Abb. (U. S.) 265, that a United States marshal has power to appoint a special bailiff to execute a particular process. The court, by Ballard, J., said: “The authority to appoint a special bailiff to execute a particular process is recognized by all the authorities as appertaining to the sheriff.”

South Carolina.—The provision of the South Carolina Gen. Stat., art. 864, which authorizes a trial justice to appoint a constable to act by virtue of such appointment “only on particular occasions to be specified in writing,” is sufficiently complied with by an indorsement on a warrant of arrest appointing a person a special constable “to execute the within process.” *State v. Hallback*, 40 S. Car. 298.

Colorado.—In the *Union Depot*, etc., Co. v. *Smith*, 16 Colo. 361, it was held that where a person in the employ of a depot company makes an arrest for a supposed violation of an ordinance, the company cannot justify the arrest on the ground that he holds a commission from the mayor; it must prove that there

13. Disposition of Prisoner.—It is a well established principle that it is the duty of an officer, after making an arrest, to take the prisoner before a proper magistrate within a reasonable time.¹ And a warrant which does

was an appointment as required by law, and that all the steps necessary thereto were taken.

Kentucky.—In the *Sergeant of Ct. of Appeals v. George*, 5 Litt. (Ky.) 199, the court, by Mills, J., said: "That a principal sheriff or sergeant may appoint a general deputy cannot be doubted. It is also true that a deputy cannot appoint a general deputy or confer any authority upon him to act as such. But a deputy or bailiff may empower another to do a particular act, and the act, if done in pursuance thereof, is valid."

Massachusetts.—In *Com. v. Field*, 13 Mass. 321, it was held that the sheriff might appoint one his aid without writing, and that in executing civil process such aid was entitled to the protection of the law to the same extent as the sheriff, although not in his sight, provided both were pursuing one business or object. See *Blatch v. Archer*, Cowp. 63.

Delaware.—Where a constable received a warrant for the arrest of a person and was unable to execute it himself, but delivered it to another constable who gave it to a private person to execute, it was held that as the second constable had no authority under the warrant he could not depute any. *State v. Ward*, 5 Harr. (Del.) 496.

Michigan.—The authority of a deputy must be in writing. *People v. Moore*, 2 Dougl. (Mich.) 1.

A **Special Bailiff** cannot make an arrest outside of his jurisdiction without a warrant. *Com. v. Hastings*, 9 Met. (Mass.) 259; *Butolph v. Blust*, 41 How. Pr. (N. Y. Supreme Ct.) 481.

A **Deputy Constable** who has been sworn and who has an appointment in writing, although his appointment has not been filed in the office of the clerk of the County Court, as required by statute, may execute process of arrest. *State v. Underwood*, 75 Mo. 230.

1. Prisoner to be Taken before Magistrate in Reasonable Time.—2 Hale P. C. 95, 119; 1 Chit. Crim. Law 24; *Wright v. Court*, 4 B. & C. 596, 10 E. C. L. 412; *Reg. v. Derby*, Fortes. 140; *People v. Fick*, 89 Cal. 144; *Burke v. Bell*, 36 Me. 321; *Brock v. Stimson*, 108 Mass. 521, 11 Am. Rep. 390; *Phillips v. Fadden*, 125 Mass. 198; *Com. v. Cheney*, 141 Mass. 102, 55 Am. Rep. 448; *Tubbs v. Tukey*, 3 Cush. (Mass.) 438, 50 Am. Dec. 744; *Stetson v. Packer*, 7 Cush. (Mass.) 562; *Green v. Kennedy*, 46 Barb. (N. Y.) 16.

In *Butler v. Washburn*, 25 N. H. 260, the court, by Eastman, J., said: "An officer must be the judge of the time at which he will start for the jail, and the state of the weather in which he will go. He has a right to start at any hour he may choose, or his business require, and in such weather as he may find at the time, provided he does not needlessly expose the prisoner's health or do him a personal injury. It will not answer to restrict an officer in these particulars, and no specific rules can be laid down without seriously interfering with the rights and duties of an officer. To

fix and limit the hours in which he may travel, or to say that he is to be governed by any particular temperature in the weather, would be alike impracticable. He must exercise his judgment in these matters, and it is a sufficient protection to the prisoner to hold the officer liable for any needless exposure or unnecessary personal injury."

In *Long v. Wood*, 78 Ky. 392, it was held that a person arrested under a *capias pro fine* in a different county than that from which it was issued should be taken to the jail of the county from which the *capias* was issued.

In *New York*, previous to the revised statutes, a constable had a right to retain a prisoner for a reasonable time while making a *bona fide* effort to find a magistrate to hear the case. The revised statutes fixed the period at twelve hours. *Arnold v. Steeves*, 10 Wend. (N. Y.) 515.

Probable Cause for Arrest.—Where there is probable cause for the arrest of a person he may be lawfully detained for a reasonable time when he has neglected to offer any satisfactory security for his appearance at the time appointed for his examination. *Wheeler v. Nesbitt*, 24 How. (U. S.) 544.

Removal—Danger of Riot.—Where an officer has arrested a prisoner and there is danger of a riot at the commitment trial, the officer may, with the magistrate's consent, take the prisoner to another district. A sheriff may also place a prisoner for the night in a jail where other prisoners not under bond are kept, when it is impossible to bring him before a justice on the night of his arrest. *Wiggins v. Norton*, 83 Ga. 148.

Authority of Police Captain—New York.—In *Schneider v. McLane*, 4 Abb. App. Dec. (N. Y.) 156, the court, by Davies, C. J., said: "A person accused of a felony or misdemeanor when the police courts are not open is to be brought before the captain of the police, and if he is satisfied that there is reasonable ground for the complaint he may cause the party accused to be detained until the next morning, and it would be the duty of the sergeant of the police having charge of the police station to obey such order, and detain the party accordingly. But it is to be observed that this authority is conferred only in the event that the party accused is charged with the commission of a felony or misdemeanor, and the captain shall be satisfied upon inquiry that there is reasonable ground for the charge. In no other event or contingency is the authority for detention to be exercised."

Assaulting Officer—Defense.—The unlawful omission of an officer to take a prisoner before a magistrate is no defense to a charge for assaulting the officer in resisting the arrest. *Com. v. Tobin*, 108 Mass. 426, 11 Am. Rep. 375. See *Wilder v. Holden*, 24 Pick. (Mass.) 8; *Williams v. Babbitt*, 14 Gray (Mass.) 142, 74 Am. Dec. 670.

Officer Remaining in House.—An officer cannot lawfully remain an unreasonable time in a

not contain such a direction to the officer is bad.¹

Proper Magistrate.—Who is the proper magistrate is a question determined by local statutes, which generally provide that the prisoner shall be brought before any magistrate having jurisdiction of the offense;² though in some jurisdictions he must be brought before the justice who issued the warrant.³

Statutory Arrests without Warrant are sometimes provided, in which case the statute takes the place of the warrant;⁴ hence, if such a statute provides for a specific disposition of the prisoner, the officer, in order to be justified, must comply as in the case of a warrant.⁵

14. Return of Process.—The officer must make due return of the warrant as

person's house in possession of goods taken by him in execution. *Ash v. Dawney*, 8 Exch. 237; *Rowley v. Rice*, 11 Met. (Mass.) 337.

Officer Receiving Penalty from Party Arrested.—In *Twilley v. Perkins*, 77 Md. 252, it is held that where an officer making an arrest for violation of an ordinance, instead of taking the party before a magistrate to be dealt with according to the direction of the statute authorizing the ordinance and providing for the collection of the penalty by suit, or failing in that, then by commitment, puts him to the alternative of paying a certain sum of money as the penalty or of going to jail forthwith, he is liable for false imprisonment to the extent that he so holds him in custody, but that if, after the legal arrest, the party is willing to pay and does pay the sum as the penalty prescribed, rather than be taken before a justice, he will have no cause of action.

On Arrest without a Warrant.—When an officer makes an arrest without a warrant he should, without unreasonable delay, convey the prisoner before the nearest magistrate authorized to receive an affidavit and issue a warrant, and the imprisonment of the arrested person beyond the time reasonably necessary for that purpose would be illegal. *Johnson v. Americus*, 46 Ga. 80. See *Flinn v. Graham*, 3 Pittsb. (Pa.) 195; *Phillips v. Fadden*, 125 Mass. 108; *Brock v. Stimson*, 108 Mass. 520, 11 Am. Rep. 390.

One arrested for an affray without a warrant may be retained in custody until the affray is over. 1 Chit. Crim. Law *23, 24; *McCullough v. Com.*, 67 Pa. St. 30.

On Arrest by a Private Person without Warrant, if for treason or felony, the prisoner may be delivered over to an officer, lodged in jail, or taken before a committing magistrate. 1 Chit. Crim. Law 20; 1 Hale P. C. 589; 2 Hale P. C. 77, 81; 2 Hawk. P. C., c. 13, § 7, c. 16, § 3; *Rome v. London Pianoforte Co.*, 13 Cox C. C. 211.

If the arrest is made for an affray committed in his presence he may hold the prisoner in custody until the affray is over, after which he may deliver him over to an officer or place him in jail. 1 Chit. Crim. Law 20; 2 Hawk. P. C., c. 13, § 8; *Com. v. Deacon*, 8 S. & R. (Pa.) 47.

Custody by a private person, after a legal arrest without a warrant, becomes illegal if protracted for an unreasonable time, and whether the time was reasonable or not is a question for the jury, under proper instructions from the court as to the promptness which the law ex-

acts in conveying the party arrested before a magistrate. *Habersham v. State*, 56 Ga. 61.

In *Com. v. Deacon*, 8 S. & R. (Pa.) 47, the court, by Gibson, J., said: "Although the authorities are not decisive on this subject, they go a considerable length to establish the right of a constable to deposit a prisoner arrested without warrant in the common jail for safe keeping, till he can be carried before a magistrate. Even a private person, who may have apprehended another for treason or felony, may convey him to the jail of the county, although it is said the safer course is to cause him, as soon as convenience will permit, to be brought before a justice of the peace, and I cannot see any reason why a private person should not have the same authority on an arrest during an affray which has taken place in his presence."

One arrested by a private person may be held in custody only for a reasonable time. *Habersham v. State*, 56 Ga. 61; *Potter v. Swindle*, 77 Ga. 419; *Ocean Steamship Co. v. Williams*, 69 Ga. 251.

A Watchman Who has Arrested a Person should deliver him over at once to an officer; he will thus be discharged from any liability for an escape. 1 Chit. Crim. Law 24; *Dalton's Justice*, c. 104.

1. The Magistrate.—*Reg. v. Downey*, 7 Q. B. 281, 53 E. C. L. 281. In this case the warrant was issued by a judge, directed to the governor of a jail, constables, etc., directing them to apprehend and take a party against whom a bill for misdemeanor had been found at quarter sessions, "and him safely keep to the end that he may become bound and find sufficient sureties to answer the said indictment and be further dealt with according to law;" and it was held to be bad because it did not direct that the party should be brought before some judge or justice to be bound.

2. *Com. v. Wilcox*, 1 Cush. (Mass.) 503; *Ex p. Branigan*, 19 Cal. 133.

3. *People v. Fuller*, 17 Wend. (N. Y.) 211. See *Batchelder v. Currier*, 45 N. H. 460.

4. *Warner v. Grace*, 14 Minn. 487.

5. *Papineau v. Bacon*, 110 Mass. 319; *Brock v. Stimson*, 108 Mass. 520, 11 Am. Rep. 390; *Gainey v. Parkman*, 100 Mass. 316; *Com. v. Tobin*, 108 Mass. 426, 11 Am. Rep. 375; *Mason v. Lothrop*, 7 Gray (Mass.) 354; *Kennedy v. Favor*, 14 Gray (Mass.) 200; *Stetson v. Packer*, 7 Cush. (Mass.) 562; *State v. Parker*, 75 N. Car. 249, 22 Am. Rep. 669; *Weston v. Carr*, 71 Me. 356. See *Washington Com'rs v. Frank*, 1 Jones (N. Car.) 436.

therein required, after execution, in order that he may be justified for the action taken by him under it.¹

Custody of Prisoner.—Until one who has been arrested has been either bailed, committed, or discharged, he remains in the custody of the officer making the arrest, who is responsible for him.²

Warrant Retained by Officer.—Possession of the warrant may be retained by the officer as evidence in his own justification, it being only necessary that he make return to the authority issuing the warrant what he has done in pursuance of the commands therein.³

15. Rearrest on Same Warrant.—When one has been arrested and recognized to appear in court at a certain time, and does not so appear, in order that he may be rearrested a second warrant must issue; the original warrant will not suffice.⁴

Arrest after Return Day.—Similarly, in civil cases, an arrest cannot be made under a warrant after the return day.⁵

16. Authority cannot be Delegated.—An officer cannot delegate his authority to a private person.⁶

IV. ARREST IN CIVIL CASES UNDER STATUTORY PROVISIONS.—The right to arrest in civil cases is at the present day largely regulated by constitutional and statutory provisions. Imprisonment for debt is generally abolished by these provisions; but the right to arrest and imprison in cases of fraud, in certain actions founded on tort, and in some other cases, still exists. A discussion of

1. Officer must Make Return.—Reg. v. Davis, 1 L. & C. C. C. 64, 8 Cox C. C. 486; Slomer v. People, 25 Ill. 70, 76 Am. Dec. 786; Tubbs v. Tukey, 3 Cush. (Mass.) 438, 50 Am. Dec. 744; Stone v. Dana, 5 Met. (Mass.) 98; Brock v. Stimson, 108 Mass. 520, 11 Am. Rep. 390; Smith v. Gates, 21 Pick. (Mass.) 55; Coffin v. Vincent, 12 Cush. (Mass.) 98; Russell v. Hanscomb, 15 Gray (Mass.) 166; Munroe v. Merrill, 6 Gray (Mass.) 236; Williams v. Babbitt, 14 Gray (Mass.) 141, 74 Am. Dec. 670.

For Further Discussion of this branch of the subject, see the title WARRANTS.

2. Custody of Prisoner.—2 Hale P. C. 120; Hodges v. State, 8 Ala. 55; People v. Beauchamp, 49 Cal. 41; People v. Williams, 59 Cal. 674; Turner v. State, 70 Ga. 765; State v. Black, 42 La. Ann. 861; Com. v. Morihan, 4 Allen (Mass.) 585.

3. Officer may Retain Warrant.—Reg. v. Wyatt, 2 Ld. Raym. 1189; Reg. v. Davis, 1 L. & C. C. C. 64; Slomer v. People, 25 Ill. 70, 76 Am. Dec. 786; Stone v. Dana, 5 Met. (Mass.) 98; Tubbs v. Tukey, 3 Cush. (Mass.) 438, 50 Am. Dec. 744; Brock v. Stimson, 108 Mass. 520, 11 Am. Rep. 390.

A return of rescue is a good return of a mesne process of arrest, but not of a final. In the latter case the sheriff must call in aid the *posse comitatus*. Buckminster v. Applebee, 8 N. H. 546.

4. Rearrest.—See 2 Hawk. P. C., c. 13, § 9; State v. Queen, 66 N. Car. 615; Doyle v. Russell, 30 Barb. (N. Y.) 300; State v. Downs, 8 Ind. 42. Compare Clark v. Cleveland, 6 Hill (N. Y.) 349; Rex v. Williams, 1 Moo. C. C. 387.

In Dickinson v. Brown, 1 Esp. 218, where a person was arrested under a warrant and brought before a magistrate in order to make him find sureties to indemnify the parish, and was let go on promising to find them, the

question arose whether in case he neglected to find them he could be again arrested under the same warrant or whether it was *functus officio*. It was held that it was not, that it continued in full force until its purpose was completed. And on motion for a new trial the King's Bench refused the rule, but "it appeared to be rather on the ground of the plaintiff's having consented that the warrant should remain in force until the second surety for the parish was perfected, than as holding the second arrest under the warrant to be legal." See Mayhew v. Parker, 8 T. R. 110.

5. Arrest after Return Day—Civil Cases.—Stoyel v. Lawrence, 3 Day (Conn.) 1; Prescott v. Wright, 6 Mass. 20. See Perkins v. Woolaston, 1 Salk. 321; Ellis v. Jackson, Sid. 229; Maud v. Barnard, 2 Burr. 812.

6. Delegation—Son of Constable.—A constable having a warrant to apprehend A, gave it to his son, who, in attempting to make the arrest, was stabbed by A with a knife which he happened to have in his hand at the time, the constable then being in sight, but a quarter of a mile off. It was held that his arrest was illegal, and that, had death ensued, this would have been manslaughter only, unless it were shown that A had prepared the knife beforehand to resist the illegal violence. Rex v. Patience, 7 C. & P. 775, 32 E. C. L. 730. See Rex v. Whalley, 7 C. & P. 245, 32 E. C. L. 502; Com. v. Field, 13 Mass. 321; State v. Ward, 5 Harr. (Del.) 496.

Where the board of prison commissioners of Massachusetts directed their secretary to issue an order for the arrest of a prisoner who had been at liberty on a permit, it was held not to be a delegation of power to the secretary, but a direction to him to perform a ministerial duty. Conlon's Case, 148 Mass. 168.

this subject will be found elsewhere in this work.¹

V. ARREST WITHOUT WARRANT—1. In General.—The Constitution of the United States declares that the people shall “be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,” and that “no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”² Except in the cases where the public security requires it, an arrest without warrant has never been lawful; this exception has been recognized only in felony, and in breaches of the peace committed in the presence of the one arresting.³

1. See the title **IMPRISONMENT FOR DEBT AND IN CIVIL CASES**. See also, for the rules governing imprisonment in the federal courts, the title **UNITED STATES COURTS**. And as regards the arrest of nonresidents, see the title **CONFLICT OF LAWS**.

2. **Unlawful Searches and Seizures.**—U. S. Const., 4th Amendment.

The meaning of the above provision, and similar provisions in state constitutions, has been generally held to be, not that no arrest can be made without a warrant, but that no arrest unauthorized by law can be made. *North v. People*, 139 Ill. 91; *Sandford v. Nichols*, 13 Mass. 286, 7 Am. Dec. 151; *Burroughs v. Eastman*, 101 Mich. 419; *Mayo v. Wilson*, 1 N. H. 54; *State v. Weed*, 21 N. H. 262, 53 Am. Dec. 188. See also the title **CONSTITUTIONAL LAW**.

In *Wakely v. Hart*, 6 Binn. (Pa.) 316, the court, by Tilghman, C. J., said: “But it is nowhere said that there shall be no arrest without warrant. To have said so would have endangered the safety of society. The felon who is seen to commit murder or robbery must be arrested on the spot or suffered to escape. So, although not seen, yet if known to have committed a felony and pursued with or without a warrant, he may be arrested by any person. And even where there is only probable cause of suspicion, a private person may, without warrant, at his peril, make an arrest. I say at his peril, for nothing short of proving the felony will justify the arrest. These are principles of the common law, essential to the welfare of society, and not intended to be altered or impaired by the constitution.”

Statutes.—For the right to arrest without warrant as affected by statute, see *Simmons v. Milligen*, 2 C. B. 524, 52 E. C. L. 524; *In re Carr*, 3 Sawy. (U. S.) 316; *Com. v. Coughlin*, 123 Mass. 436; *Phillips v. Fadden*, 125 Mass. 198; *State v. Grant*, 76 Mo. 236; *Ballard v. State*, 43 Ohio St. 340; *Ex p. Sherwood*, 29 Tex. App. 334; *Jacobs v. State*, 28 Tex. App. 79; *Johnson v. State*, 5 Tex. App. 43; *Corbett v. Sullivan*, 54 Vt. 619.

To be Strictly Construed.—A statute enlarging the right must be strictly construed. *Ramsey v. Foy*, 10 Ind. 493; *State v. Dale*, 3 Wis. 795.

Constitutionality of Statutes.—A statute authorizing an arrest without a warrant of persons suspected of traveling unnecessarily on the Lord's Day has been held constitutional, and not a violation of the article in the bill of rights, providing that no person shall be ar-

rested or imprisoned but by the judgment of his peers or the law of the land, or of the article against illegal searches and seizures, the latter article being intended not to restrain the legislature from authorizing arrests without warrant, but to guard against the abuse of warrants issued by magistrates. *Mayo v. Wilson*, 1 N. H. 53. See also *Williams v. State*, 44 Ala. 41; *Jones v. Root*, 6 Gray (Mass.) 435; *Mason v. Lathrop*, 7 Gray (Mass.) 354.

But in *Minnesota* a provision of a city ordinance, establishing a fire department, which authorized any member of the common council or any fire warden to arrest and detain until the fire was extinguished any person who, at a fire, should, without sufficient excuse, refuse to obey an order or direction given by a person duly authorized to order or direct, was held void as being repugnant to the constitutional provision that no person shall be deprived of his liberty without due process of law, or without trial by jury. *Judson v. Reardon*, 16 Minn. 431. See also *Pinkerton v. Vosburg*, 78 Mich. 573, 18 Am. St. Rep. 473.

3. **Warrant Generally Necessary—Exceptions.**—*In re Way*, 41 Mich. 304; *Quinn v. Heisel*, 40 Mich. 576; *Drennan v. People*, 10 Mich. 169; *People v. Haley*, 48 Mich. 495.

A warrant need not issue prior to arresting a person who openly commits a breach of the peace. *Boutte v. Emmer*, 43 La. Ann. 980.

In *In re Way*, 41 Mich. 304, the court, by Campbell, C. J., said: “It must not be forgotten that there can be no arrest without due process of law. An arrest without warrant has never been lawful except in those cases where the public security requires it; and this has only been recognized in felony, and in breaches of the peace committed in presence of the officer.”

In *Quinn v. Heisel*, 40 Mich. 576, the court, by Marston, J., said: “There is little danger of being misled by the cases in which it is held an officer may make arrests to prevent a threatened breach of the peace. The interposition in the case of merely threatened violence is not for the purpose of an arrest in the ordinary sense, but as a peace officer to prevent a disturbance or breach of the peace under a present menace of violence.” *Citing Reg. v. Mabel*, 9 C. & P. 474, 38 E. C. L. 189; *Timothy v. Simpson*, 1 C. M. & R. 757; *Grant v. Moser*, 5 M. & G. 123, 44 E. C. L. 74; *Baynes v. Brewster*, 2 Q. B. 384, 42 E. C. L. 724; *Wheeler v. Whiting*, 9 C. & P. 262, 38 E. C. L. 111; *Howell v. Jackson*, 6 C. & P. 723, 25 E. C. L. 617; *Knot v. Gay*, 1 Root (Conn.) 66; *State v. Brown*,

2. By Peace Officers—*a.* ON SUSPICION OF FELONY OF OFFICER'S OWN KNOWLEDGE.—An officer may lawfully arrest without a warrant one whom he has reasonable ground to suspect of having committed a felony, even though in point of fact the one arrested is altogether innocent, and no felony has been committed by any one.¹

5 Harr. (Del.) 507; Com. v. Carey, 12 Cush. (Mass.) 252; McCullough v. Com., 67 Pa. St. 32; Russell v. Shuster, 8 W. & S. (Pa.) 309.

In *Drennan v. People*, 10 Mich. 169, it was held that a constable may lawfully make an arrest without having a warrant in his possession, although he knows that one has been issued for the arrest of the person for felony. But he ought to notify the person arrested of the facts, or at least of the offense for which he is arrested.

See further *infra*, this section, *By Peace Officers—For Affrays and Other Offenses in Officer's Presence*.

Where the state punishes an offense by imprisonment in the state prison, unless it is expressly declared to be a misdemeanor, such offense must be considered as a felony so far as the right of an officer to arrest without process is concerned. *Firestone v. Rice*, 71 Mich. 377, 15 Am. St. Rep. 266.

An officer can exercise his authority to arrest without a warrant outside of his jurisdiction in cases of felony. See *Lancaster v. Lane*, 19 Ill. 242; *Boyleston v. Kerr*, 2 Daly (N. Y.) 220; *Reg. v. Mabel*, 9 C. & P. 474, 38 E. C. L. 189; *O'Brian v. State*, 12 Ind. 369.

An officer's authority to make arrests without a warrant, is limited to treason, felony, and breach of the peace. *State v. Oliver*, 2 Houst. (Del.) 585; *Reg. v. Walker, Dears. C. C.* 358; *Galliard v. Laxton*, 2 B. & S. 363, 110 E. C. L. 363; *Reg. v. Chapman*, 12 Cox C. C. 4; *Tiner v. State*, 44 Tex. 128.

1. Felony—Early English Authorities.—The first statement of the rule occurs in Year Book 7 Hen. IV., Hilary Term, pl. 35. This was followed by Ward's Case 1636, Clayton 44, and the first judicial decision in which it was laid down is in *Samuel v. Payne*, Doug. 359. See also, as enunciating the doctrine, *Beckwith v. Philby*, 6 B. & C. 635, 13 E. C. L. 287; *Davis v. Russell*, 5 Bing. 354, 15 E. C. L. 463; *Ledwith v. Catchpole*, Cald. 291; *Cowles v. Dunbar*, 2 C. & P. 565, 12 E. C. L. 265; *Davis v. Russell*, 2 M. & P. 590; *Lawrence v. Hedger*, 3 Taunt. 14; *Hobbs v. Branscomb*, 3 Campb. 420; *Rex v. Woolmer*, 1 Moo. C. C. 334.

It is immaterial whether the suspicion arise out of information given by another, as in *Samuel v. Payne*, Doug. 359, or whether it arise out of the officer's own knowledge, as in *Ledwith v. Catchpole*, Cald. 291. See, on this point, 2 Hale P. C. 84, 89, 91; 2 Hawk., bk. 2, c. 12, 13; *Levy v. Edwards*, 1 C. & P. 40, 11 E. C. L. 306; *Reg. v. Light*, 27 L. J. M. C. 1; *Lawrence v. Hedger*, 3 Taunt. 14.

Power of Officers and Individuals Compared.—At common law the power of a peace officer to apprehend and detain offenders is much greater than that of private persons, for they may exercise all the powers of the latter, and their right to apprehend persons indicted for felony is undoubted. 1 East P. C. 298, 300.

And they may, which private persons cannot do, arrest persons on a reasonable suspicion of felony, even though no crime has in fact been committed. *Samuel v. Payne*, Doug. 359, 1 East P. C. 301; 2 Hale P. C. 83, 84, 89; *Beckwith v. Philby*, 6 B. & C. 635, 13 E. C. L. 287.

A "reasonable suspicion" cannot in the nature of things be accurately defined. A charge of felony by a person not evidently untrustworthy is enough to justify the arrest. 1 East P. C. 302.

Authorities in the United States.—The leading cases in the United States, establishing the rule of the text, are:

Connecticut.—*Knot v. Gay*, 1 Root (Conn.) 66; *Wrexford v. Smith*, 2 Root (Conn.) 171.

Delaware.—*State v. Crocker*, 1 Houst. Cr. Cas. (Del.) 434; *State v. Oliver*, 2 Houst. (Del.) 585.

Georgia.—*Long v. State*, 12 Ga. 293; *Boyd v. State*, 17 Ga. 194.

Illinois.—*Shanley v. Wells*, 71 Ill. 78; *Marsh v. Smith*, 49 Ill. 396; *Rafferty v. People*, 69 Ill. 111, 18 Am. Rep. 601; *Dodds v. Board*, 43 Ill. 95; *Bryan v. Bates*, 15 Ill. 87.

Indiana.—*Vandever v. Mattocks*, 3 Ind. 479; *Scircle v. Neeves*, 47 Ind. 289.

Iowa.—*Hutchinson v. Sangster*, 4 Greene (Iowa) 340.

Massachusetts.—*Com. v. Carey*, 12 Cush. (Mass.) 246; *Com. v. McLaughlin*, 12 Cush. (Mass.) 615; *Rohan v. Sawin*, 5 Cush. (Mass.) 281.

Michigan.—*Quinn v. Heisel*, 40 Mich. 576; *Drennan v. People*, 10 Mich. 169; *Allor v. Wayne County*, 43 Mich. 76; *People v. McLean*, 68 Mich. 480.

Missouri.—*State v. Underwood*, 75 Mo. 231; *State v. Grant*, 76 Mo. 236; *Roberts v. State*, 14 Mo. 138, 55 Am. Dec. 97; *State v. Roberts*, 15 Mo. 28.

New York.—*Holley v. Mix*, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702; *Phillips v. Trull*, 11 Johns. (N. Y.) 486; *Burns v. Erben*, 40 N. Y. 463; *Minehan v. Thomas*, 9 N. Y. Wkly. Dig. 32; *Fulton v. Staats*, 41 N. Y. 498; *Tupper v. Morin*, 25 Abb. N. Cas. (N. Y. Supreme Ct.) 398; *Turner v. McCarthy*, 4 E. D. Smith (N. Y.) 250; *People v. Adler*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 249.

North Carolina.—*Brockway v. Crawford*, 3 Jones (N. Car.) 433, 67 Am. Dec. 250; *State v. Belk*, 76 N. Car. 10; *Neal v. Joyner*, 89 N. Car. 287; *State v. McNinch*, 90 N. Car. 695; *Yount v. Carney*, 91 N. Car. 559.

Pennsylvania.—*Brooks v. Com.*, 61 Pa. St. 352, 100 Am. Dec. 645; *Wakely v. Hart*, 6 Binn. (Pa.) 316; *Russell v. Shuster*, 8 W. & S. (Pa.) 308; *McCarthy v. DeArmitt*, 99 Pa. St. 63.

Tennessee.—*Eanes v. State*, 6 Humph. (Tenn.) 53, 44 Am. Dec. 289; *Lewis v. State*, 3 Head (Tenn.) 127.

Must Act with Discretion.—But an officer is not omnipotent, and must exercise his

Texas.—Alford *v.* State, 8 Tex. App. 545; Tiner *v.* State, 44 Tex. 128.

Vermont.—In *re* Powers, 25 Vt. 261.

Wisconsin.—Keenan *v.* State, 8 Wis. 132.

Statutory Felony.—The right of an officer to arrest upon suspicion of felony, without a warrant, exists in the case of a statutory felony as well as in the case of a felony at common law. Firestone *v.* Rice, 71 Mich. 377, 15 Am. St. Rep. 266.

Escape need Not be Suspected.—An attempt has been made to limit the power of an officer to make an arrest upon suspicion of felony, by allowing him to arrest only when there is reason to suspect that the party accused would otherwise escape. But see *contra*, Davis *v.* Russell, 5 Bing. 354, 15 E. C. L. 463; Rohan *v.* Sawin, 5 Cush. (Mass.) 281.

The Fact that an Indictment has been Found against a person is sufficient ground. Rex *v.* Woolmer, 1 Moo. C. C. 334; Rex *v.* Hunt, 1 Moo. C. C. 93; Rex *v.* Curran, 3 C. & P. 397, 14 E. C. L. 368; Reg. *v.* Price, 8 C. & P. 282, 34 E. C. L. 390; Rex *v.* Weir, 1 B. & C. 288, 8 E. C. L. 125; R. *v.* Allen, 17 L. T. N. S. 222; Boyd *v.* State, 17 Ga. 194; State *v.* Ferguson, 2 Hill (S. Car.) 619, 27 Am. Dec. 412.

Probable Cause in Malicious Prosecution as Test of Suspicion.—And broadly it may be said that what amounts to probable cause in cases of malicious prosecution will amount to such reasonable grounds for suspicion of felony as will justify and require an officer to make an arrest. See Reg. *v.* Dadson, T. & M. 385, 2 Den. C. C. 35, where a felony actually had been committed, but the constable not being aware of it, and not having reasonable grounds for suspicion in his own mind, it was held that he was not justified in making the arrest.

Where there is Nothing to Justify Belief in Guilt.—If the circumstances do not justify a belief that a person is guilty of felony, even though a felony has been committed, then an arrest without a warrant is unlawful. Hogg *v.* Ward, 3 H. & N. 417. See further, Beckwith *v.* Philby, 6 B. & C. 635, 13 E. C. L. 287; Hill *v.* Yates, 8 Taunt. 182, 4 E. C. L. 62; Davis *v.* Russell, 5 Bing. 354, 15 E. C. L. 463; Rohan *v.* Sawin, 5 Cush. (Mass.) 281; Cryer *v.* State, 71 Miss. 467, 42 Am. St. Rep. 473; Brockway *v.* Crawford, 3 Jones (N. Car.) 433, 67 Am. Dec. 250.

Facts Giving Rise to Reasonable Ground must be Known at Time of Arrest.—The reasonable ground must consist of facts in the possession of the officer at the time the arrest was made, not such as may have afterwards come to his notice. Swaim *v.* Stafford, 4 Ired. (N. Car.) 398. But see Adams *v.* Lisher, 3 Blackf. (Ind.) 241, 25 Am. Dec. 102; Hickam *v.* Griffin, 6 Mo. 37.

In Adams *v.* Lisher, 3 Blackf. (Ind.) 241, 25 Am. Dec. 102, the court, by Stevens, J., said: "It is immaterial whether the defendant knew him guilty or not, if he can now prove the fact that he was guilty; or if he can even prove that there was probable cause to

suspect him of being guilty, it is sufficient for him."

Character of Officer Question of Law.—Whether a person attempting to make an arrest without a warrant was a peace officer and authorized to make the arrest or not, is a question of law for the court, not of fact for the jury. Creighton *v.* Com., 83 Ky. 142, 4 Am. St. Rep. 143.

What Is Probable Cause.—And what is probable cause, when the facts are conceded, is also a question of law for the court. White *v.* McQueen, 96 Mich. 249; Perry *v.* Sulier, 92 Mich. 72; Huntington *v.* Gault, 81 Mich. 155.

The jury must judge of the reasonableness of the grounds upon which the officer acted. State *v.* McNinch, 90 N. Car. 695; Harris *v.* Atlanta, 62 Ga. 291; Cochran *v.* Toher, 14 Minn. 385.

But if an arrest be for a past act, whether misdemeanor or felony, it can be made without warrant only when the officer has grounds of reasonable suspicion, such as would justify him at common law in arresting for a past felony. State *v.* Grant, 76 Mo. 236.

Danger of Escape may be Shown.—An officer may arrest without a warrant when he shows satisfactory reasons for his belief of the fact and the guilt of the suspected party, and that delay in procuring a warrant might enable him to escape. In such case, proof of the actual commission of the crime is not necessary. Neal *v.* Joyner, 89 N. Car. 287.

No Danger of Escape Necessary.—An officer is not bound to procure a warrant before arresting a person whom he has probable cause to believe guilty of felony, even though there may be no reason to fear the escape of such person in consequence of the delay in procuring the warrant. Wade *v.* Chaffee, 8 R. I. 224, 5 Am. Rep. 572. But compare O'Connor *v.* State, 64 Ga. 127, 37 Am. Rep. 58; Ross *v.* State, 10 Tex. App. 455, 38 Am. Rep. 643; Staples *v.* State, 14 Tex. App. 136.

Arrest of One Receiving Stolen Goods.—When a constable or other peace officer has reasonable grounds for believing that a certain person has received or aided in the concealment of stolen goods, he may arrest him without a warrant, and detain him a reasonable time in order to secure him, so that he may be brought to answer a complaint for the offense. Rohan *v.* Sawin, 5 Cush. (Mass.) 281.

Rule Applies in Petty Larceny.—An officer is justified in arresting a person without a warrant upon suspicion of petty larceny. Herman *v.* Seneschal, 11 W. R. 184; Orchard *v.* Roberts, 12 W. R. 253; State *v.* Grant, 76 Mo. 236; Drennan *v.* People, 10 Mich. 169; People *v.* Wilson, 55 Mich. 506.

Arrest by Deputy.—When a special deputy United States marshal has been appointed under the United States Rev. Stat., § 2021, to maintain order at a congressional election, he may, where there is probable cause for believing that a person is aiding and counseling one to vote who has no legal right to vote, arrest him without a warrant. *Ex p.* Morrill, 35 Fed. Rep. 261.

discretion in a legal manner and use all reasonable means to avoid mistakes.¹

Crime must Be Felony.—The officer will not be protected unless the crime in question be a technical felony.²

Recapture.—An officer may recapture an escaped convict without a warrant.³

b. ON INFORMATION OF THIRD PERSONS.—An officer may also arrest without a warrant a person upon suspicion of felony, upon the information of a third person, but the informant must be a credible person, and the charge or accusation must amount in fact to a technical felony.⁴

A deputy constable whose appointment has not been filed as required by law is justified in arresting a person upon suspicion of felony. *State v. Underwood*, 75 Mo. 230. See *Com. v. Cheney*, 141 Mass. 102, 55 Am. Rep. 448; *Neal v. Joyner*, 89 N. Car. 287; *Matter of Henry*, 29 How. Pr. (N. Y. Supreme Ct.) 185; *City Bank v. Bangs*, 2 Edw. Ch. (N. Y.) 95.

Assault on One Assisting Escape.—An officer will be justified for an assault upon one endeavoring to assist the arrested person to escape, without showing that such person was guilty of the offense charged. *Doering v. State*, 49 Ind. 56, 19 Am. Rep. 669.

Contents of Plea of Justification.—A plea in justification of an arrest on suspicion of felony without a warrant should set forth the grounds of the suspicion, so that the court may judge of them, and determine whether they afford probable cause or not. *Wade v. Chaffee*, 8 R. I. 224, 5 Am. Rep. 572; *Mure v. Kaye*, 4 Taunt. 34; *Boynton v. Tidwell*, 19 Tex. 118.

Duty of Officer after Arrest.—It is the duty of an officer to select, safely keep, and bring a supposed felon before a magistrate, and he cannot stop to make inquiries about him. *Firestone v. Rice*, 71 Mich. 377, 15 Am. St. Rep. 266.

Governor's Proclamation as Sufficient Information.—An officer arresting a supposed felon without a warrant must, in order to be justified, act in good faith and upon grounds of probable suspicion that the person arrested is the actual felon. What is a reasonable ground of suspicion, is a mixed question of law and fact. The governor's official proclamation that a felony has been committed, and offering a reward for the arrest of the felon, is not to be disregarded because published in a newspaper if so required by law. *Eanes v. State*, 6 Humph. (Tenn.) 53, 44 Am. Dec. 289. See *1 Russell on Crimes* 503, 504; 2 Stark. Ev. 439, 440; *Roberts v. State*, 14 Mo. 138, 55 Am. Dec. 97.

1. Officer must Use Diligence to Avoid Mistakes.—*Filer v. Smith*, 96 Mich. 347, 35 Am. St. Rep. 603. See *Sugg v. Pool*, 2 Stew. & P. (Ala.) 196; *Doering v. State*, 49 Ind. 56, 19 Am. Rep. 669; *Stanton v. Hart*, 27 Mich. 541; *Holley v. Mix*, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702; *Wade v. Chaffee*, 8 R. I. 224, 5 Am. Rep. 572.

The peace officer should also make such inquiries as his experience teaches him are best suited to ascertain the nature of the offense, and there are few that are without special directions how to act in such cases. *Roscoe's Cr. Ev.* (10th ed.) 264.

Belief must Be Actual.—Neither an officer nor private citizen is authorized to make an arrest without a warrant in the absence of actual belief based upon specific facts which create probable cause of suspicion. *People v. Burt*, 51 Mich. 199.

2. Rule Applies to Felony Only.—*Rex v. Thompson*, 1 Moo. C. C. 80; *Griffin v. Coleman*, 4 H. & N. 265.

If the apprehension be upon information of another, such other must state all the facts necessary to constitute a felony. *Rex v. Ford*, R. & R. C. C. 329; *Bowditch v. Balchin*, 5 Exch. 378; *Rex v. Curran*, 1 Moo. C. C. 132; *Com. v. Carey*, 12 Cush. (Mass.) 246; *Com. v. McLaughlin*, 12 Cush. (Mass.) 618.

In *Bowditch v. Balchin*, 5 Exch. 378, it was held that a police constable of the city of London had no power under the 2 and 4 Vict., c. 44, to take a person into custody merely on suspicion of misdemeanor.

Arrest without Warrant under Michigan Statute.—Where a newspaper article stated that certain persons boarded a street car drunk, and refused to pay their fare, and that the conductor and motorman attempted to put them off, that a fight ensued, and a female passenger got injured by jumping from the car, it was held that there was nothing in the article to justify an arrest without a warrant on the ground that a felony had been committed under *How. Stat. (Mich.)*, arts. 9274, 9275, which makes it criminal to obstruct or impede the operation of a railroad by wilful or malicious act or intimidation. *White v. McQueen*, 96 Mich. 249.

See further, *infra*, this section, *On Information of Third Persons*.

Modern Statutes—Rule Extended to Misdemeanors.—By some modern statutes the common-law rule as to the arrest by officers without warrant, in cases of treason, felony, and breach of the peace, is made applicable to other and lesser offenses and misdemeanors. *Ballard v. State*, 43 Ohio St. 340.

See *infra*, this title and division, subdivision *For Affrays, etc., in Officer's Presence*.

3. Recapture.—This was the rule of the common law, and always applies where there is no statute bearing directly upon it. See *Ex p. Sherwood*, 29 Tex. App. 334; *Wallace v. State*, 20 Tex. App. 360.

Where a convict has been released from imprisonment, voluntarily, by a warden of the penitentiary, it is unlawful, and an officer may, without a warrant, rearrest such convict. *Simpson v. State*, 56 Ark. 8.

4. On Information of Third Persons.—*Ledwith v. Catchpole*, Cald. 291; *Rex v. Curran*, 1 Moo. C. C. 132; *Ex p. Sherwood*, 29 Tex. App. 334. See *Rex v. Birnie*, 1 M. & Rob. 160; *Castro v. DeUriarte*, 16 Fed. Rep. 93; *Cahill v. People*, 106 Ill. 621; *Doering v. State*, 49 Ind. 56, 19 Am. Rep. 669; *Rohan v. Sawin*, 5 Cush. (Mass.) 281; *Malcolmson v. Scott*, 56 Mich. 459; *Eanes v. State*, 6 Humph. (Tenn.) 53, 44 Am. Dec. 289.

c. FOR AFFRAYS AND OTHER OFFENSES IN OFFICER'S PRESENCE—Common-law Power to Arrest for Breach of Peace.—Officers being conservators of the peace by virtue of their office have, at common law, the right to arrest without warrant all persons who are guilty of a breach of the peace.¹

Liability of Person Making Charge.—If an officer without a warrant arrests a person upon charge of felony, which is made by a third party, the officer will be justified, but the person making the charge will be liable for the arrest if no felony was committed and if the charge is false. *Holley v. Mix*, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702; *Burns v. Erben*, 40 N. Y. 463; *Farnam v. Feeley*, 56 N. Y. 451; *Hawley v. Butler*, 54 Barb. (N. Y.) 490.

The fact that the information given an officer upon which he arrests a person turns out untrue makes the informer liable to the party arrested, unless it appears that the crime has been committed and that the informer had reasonable cause to believe that the person actually arrested was the guilty person; but the law does not go so far as to require the informer to show that the arrested person is guilty of the charge. *Benham v. Vernon*, 5 Mackey (D. C.) 18.

If Arrest Lawful in Fact, Belief of Prisoner Immaterial.—On an indictment for wounding with intent to prevent the lawful apprehension of the prisoner, the evidence was that the prosecutor, a police constable, went with a brother officer, both being in plain clothes, and with two other policemen in uniform, to a public house, and told the prisoner that he was wanted on a charge of highway robbery; the prosecutor had no warrant, but from information he had received he thought it his duty to apprehend the prisoner. The prisoner asked him for further information relative to the charge, which he refused to give, and the prisoner then told him that he would not go to the station house unless he was told why and by what authority he was apprehended, and he wounded the officer on his proceeding to apprehend him. It was objected that the prisoner must be aware at the time that the apprehension was lawful, and there was nothing here to show that that was the fact. *Talfourd, J.*, held that to support this charge it was enough that the prisoner was lawfully apprehended. If the apprehension was in fact lawful, the question whether or not the prisoner believed it to be lawful could not be permitted to be considered. The prisoner was not to erect a tribunal in his own mind to decide whether he was legally accused or not. He was taken into custody by an officer of the law, and it was his duty to obey the law. *R. v. Bentley*, 4 Cox C. C. 406.

Texas.—An officer is authorized by the Tex. Pen. Code, art. 322, to arrest without warrant, and he may lawfully do so when the offense is committed within his knowledge and also when information is given him by a credible person, even when he had time and opportunity to procure a warrant. *Jacobs v. State*, 28 Tex. App. 79.

Tex. Code Crim. Pro., art. 227, authorizes an officer to arrest without a warrant a person who has been shown to have shot and wounded

another and who is endeavoring to escape. *Stewart v. State* (Tex. Crim. App. 1894), 26 S. W. Rep. 203.

Reason of Rule.—The reason why an officer may lawfully act without a warrant upon the information of another is that when such a grave charge as felony is made he must act at once, or justice would be brought to a stand and defeated. *Cowles v. Dunbar*, 2 C. & P. 565, 12 E. C. L. 265; *Samuel v. Payne*, Doug. 359; *Hough v. Marchant*, Moo. & M. 510, 22 E. C. L. 370; *Hobbs v. Branscomb*, 3 Campb. 420.

No Technical Charge Necessary.—An officer may take into custody and hold a person who has been arrested for felony, by a private person, though the charge need not be in technical form. *Rex v. Ford*, R. & R. C. C. 329; *Hedges v. Chapman*, 2 Bing. 523, 9 E. C. L. 508.

Charge of Accomplice.—Where the charge is made by the accomplice of the suspected person, an arrest by the officer without a warrant may be unlawful. *Isaacs v. Brand*, 2 Stark. 167, 3 E. C. L. 362.

No Arrest for Breach of Peace on Information.—It has been held that an arrest made without a warrant for a breach of the peace, committed out of the officer's sight and merely upon information of a third person, is illegal. *People v. Johnson*, 86 Mich. 175, 24 Am. St. Rep. 116. See also the next subdivision of this title, *For Affrays, etc., in Officer's Presence.*

Connecticut.—The information derived by an officer from the complaint made by a grand juror, under the Connecticut practice, which is always addressed by name to a particular magistrate and properly the identical magistrate by whom the warrant is signed, is not such information as will justify an officer, when the warrant proves void, in arresting a person without a warrant, under the provisions of the Act of 1867, c. 132, which empower him to arrest a person "where taken in the act or upon the speedy information of others." *Perry v. Johnson*, 37 Conn. 32.

1. **As to What Is a Breach of the Peace**, see the title BREACH OF THE PEACE.

Right to Arrest for Breach of Peace.—By the common law, constables and watchmen had, from ancient times, authority to arrest without a warrant those who were engaged in an affray or a breach of the peace committed in their presence, and to detain them until they could find securities. 3 Russell on Crimes (6th Inter. ed.), p. 83.

England.—*Reg. v. Prebble*, 1 F. & F. 325; *Rex v. Bright*, 4 C. & P. 387, 19 E. C. L. 434; *Rex v. Smith*, 6 C. & P. 136, 25 E. C. L. 319; *Rex v. Hems*, 7 C. & P. 313, 32 E. C. L. 523; *Reg. v. Mabel*, 9 C. & P. 474, 38 E. C. L. 189; *Howell v. Jackson*, 6 C. & P. 723, 25 E. C. L. 617.

United States.—*U. S. v. Pignel*, 1 Cranch (C. C.) 310; *U. S. v. Hart*, Pet. (C. C.) 392.

Statutory Power to Arrest for Other Offenses.—Peace officers are frequently empow-

Alabama.—*Martin v. State*, 89 Ala. 115, 18 Am. St. Rep. 91.

Delaware.—*State v. Crocker*, 1 *Houst. Cr. Cas.* (Del.) 434; *State v. Brown*, 5 *Harr. (Del.)* 505; *State v. Russell*, 1 *Houst. Cr. Cas. (Del.)* 122.

Illinois.—*Shanley v. Wells*, 71 *Ill.* 78.

Indiana.—*Pow v. Beckner*, 3 *Ind.* 475; *Vandever v. Mattocks*, 3 *Ind.* 479.

Louisiana.—*Boutte v. Emmer*, 43 *La. Ann.* 980; *State v. Guy*, 46 *La. Ann.* 1441.

Massachusetts.—*Com. v. Tobin*, 108 *Mass.* 426, 11 *Am. Rep.* 375.

Michigan.—*People v. Johnson*, 86 *Mich.* 175, 24 *Am. St. Rep.* 116; *People v. Haley*, 48 *Mich.* 495; *People v. Bartz*, 53 *Mich.* 493; *People v. Rounds*, 67 *Mich.* 482; *Davis v. Burgess*, 54 *Mich.* 514, 52 *Am. Rep.* 828; *Quinn v. Heisel*, 40 *Mich.* 576.

Missouri.—*State v. Dierberger*, 96 *Mo.* 666, 9 *Am. St. Rep.* 380.

New York.—*People v. Pratt*, 22 *Hun. (N. Y.)* 300; *Sternack v. Brooks*, 7 *Daly (N. Y.)* 142.

North Carolina.—*State v. McAfee*, 107 *N. Car.* 812.

Pennsylvania.—*Com. v. Deacon*, 8 *S. & R. (Pa.)* 47; *McCullough v. Com.*, 67 *Pa. St.* 30.

Rhode Island.—*Douglass v. Barber*, 18 *R. I.* 459.

South Carolina.—*City Council v. Payne*, 2 *Nott & M. (S. Car.)* 475; *State v. Sims*, 16 *S. Car.* 486; *State v. Bowen*, 17 *S. Car.* 58.

Texas.—*Pratt v. Brown*, 80 *Tex.* 608; *Ross v. State*, 10 *Tex. App.* 455, 38 *Am. Rep.* 643; *Staples v. State*, 14 *Tex. App.* 136.

Vermont.—*In re Powers*, 25 *Vt.* 261.

An Officer Who has been Duly Appointed, but Not Sworn, may not alone command the peace, but enforce it, and he has a right to arrest any one committing a breach of the peace in his presence. *State v. Dierberger*, 96 *Mo.* 666, 9 *Am. St. Rep.* 380.

When officers, although not known as such to the common law, are expressly authorized by statute, or by municipal ordinance, to conserve the peace, they have all the common-law authority of peace officers, and may without warrant take into custody those who violate such law or ordinance in their presence. *Veneman v. Jones*, 118 *Ind.* 41, 10 *Am. St. Rep.* 100.

Constable—Arrest to Compel Sureties of the Peace.—A constable cannot himself arrest a person in order to take sureties of the peace, for he cannot administer an oath. *Sharrock v. Hannemer*, *Cro. Eliz.* 376.

Some authorities hold that a constable has the power to make an arrest in order to take the prisoner before a magistrate, that he may take the sureties of the peace. 2 *Hale P. C.* 89, 3 *Campb. N. P. Cas.* 421; *Williams v. Dempsey*, 1 *East* 306, note. But see *contra*, 2 *Coke's Inst.* 52; 1 *East P. C.* 305; *Hawkins' P. C.*, bk. 2, c. 12, § 20; *Brookes' Abr.*, tit. "Faux Impt." 6; *Roscoe's Cr. Ev.* (10th ed.) 264; 1 *Russell on Crimes* (5th ed.) 304, 724; *Reg. v. Tooley*, 2 *Ld. Raym.* 1301; *Coupey v. Henley*, 2 *Esp.* 540. See *Timothy v. Simpson*, 1 *C. M. & R.* 757; *Reg. v. Carey*, 14 *Cox C. C.* 214.

Force Which may be Employed in Arrest.—

A peace officer has the right to arrest without a warrant for a misdemeanor, where the arrest is made *flagrante delicto*, and he is possessed of the same powers in making such an arrest, and is authorized to employ the same force, and to resort, if necessary, to the same extreme measures in overcoming resistance, as in case of a felony. *State v. McNally*, 87 *Mo.* 644.

Character of the Offense to Warrant Arrest.—

A breach of the peace must have proceeded far enough to sustain proceedings against the person, to authorize his arrest without a warrant. *Quinn v. Heisel*, 40 *Mich.* 576.

Fraudulently changing a check given at a restaurant for a meal, and substituting one for a smaller sum, and paying the latter, is not a breach of the peace within the rule which will justify an arrest without a warrant. *Boyleston v. Cerr*, 2 *Daly (N. Y.)* 220.

A past breach of the peace, or one which is merely threatened, does not justify an arrest without a warrant. *Quinn v. Heisel*, 40 *Mich.* 576. But see *Spalding v. Preston*, 21 *Vt.* 9, 50 *Am. Dec.* 68.

Disturbing Religious Meeting.—

Disturbing a religious meeting is a breach of the peace, which justifies an officer in making an arrest without a warrant. *Vanderver v. Mattocks*, 3 *Ind.* 479; *Hutchinson v. Sangster*, 4 *Greene (Iowa)* 340.

Disturbing School.—

An officer may, without a warrant, arrest a person who is guilty of a breach of the public peace by wilfully interrupting and disturbing a school, in violation of *Rhode Island Pub. Stat.*, c. 241, art. 7, if the offense is committed in his presence. *Douglass v. Barber*, 18 *R. I.* 459.

Shouting, etc., at Night.—

A person shouting and making a noise at night may be arrested without a warrant. *State v. Russell*, 1 *Houst. Cr. Cas. (Del.)* 122.

Drunkenness and shouting on the public streets is a breach of the peace, which will justify an officer in making an arrest without a warrant. *People v. Johnson*, 86 *Mich.* 175, 24 *Am. St. Rep.* 116. See also the note immediately following.

Discharging Firearms.—

Wantonly discharging firearms in the streets is a breach of the peace, which justifies an arrest without a warrant. *People v. Bartz*, 53 *Mich.* 493.

Preventing Municipal Work.—

An officer is authorized in making an arrest without a warrant where an attempt has been made by force to prevent the servants of a municipality from laying pipe in the streets. *Crosland v. Shaw* (*Pa.* 1888), 12 *Atl. Rep.* 849.

Wilfully Torturing Animals.—

A railroad policeman is justified in arresting, without a warrant, upon the Sabbath Day, a person who is found torturing sheep in the custody of the railway company. *Corbett v. Sullivan*, 54 *Vt.* 619.

Breaking the Door of a Lodger, in the exercise of a claim of right to pass through, is a breach of the peace, which will justify an arrest. *Taaf v. Kyne*, 9 *Mo. App.* 15.

Assaulting Officer.—An officer is justified in

ered by statute to arrest without warrant for other violations of the criminal laws committed in their presence.¹

arresting, without a warrant, a person who makes an assault on him while he is endeavoring to prevent an impending breach of the peace. *Levy v. Edwards*, 1 C. & P. 40, 11 E. C. L. 306; *Montgomery v. Sutton*, 67 Iowa 497; *McIntyre v. Raduns*, 46 N. Y. Super. Ct. 123; *Misley v. State*, 23 Tex. App. 409. See also *Davis v. Burgess*, 54 Mich. 514, 52 Am. Rep. 828.

Offense must Be in Officer's Presence.—A town constable has no authority to arrest a person without a warrant, unless the breach of the peace has been committed in his presence. *State v. Crocker*, 1 Houst. Cr. Cas. (Del.) 434.

Breach of Peace out of Officer's Sight.—When an officer is out of sight of the parties engaged in breaking the public peace, and in another street one hundred and fifty feet away, he has no authority to arrest them without a warrant. *People v. Johnson*, 86 Mich. 175, 24 Am. St. Rep. 116.

Breach in Officer's Hearing, but out of Sight.—Where a man struck his wife with a heavy stick, so close to an officer that the officer could hear what was said and the sound of the blow, it was held to be a breach of the peace committed in the officer's presence, although the officer could not at the time see them on account of the darkness. *State v. McAfee*, 107 N. Car. 812. See also *Ramsey v. State*, 92 Ga. 53; *Dilger v. Com.*, 88 Ky. 550.

1. Right under Statute to Arrest without Warrant—England.—*Cook v. Nethercote*, 6 C. & P. 741, 25 E. C. L. 627; *Clifford v. Brandon*, 2 Campb. 358; *Derecourt v. Corbishley*, 5 El. & Bl. 188, 85 E. C. L. 188, 32 Eng. L. & Eq. 186; *Wheeler v. Whiting*, 9 C. & P. 262, 38 E. C. L. 111; *Reg. v. Phelps*, C. & M. 180, 41 E. C. L. 103; *Coward v. Baddeley*, 4 H. & N. 478; *Reg. v. Light*, *Dears. C. C.* 332, 7 Cox C. C. 389; *Mackale's Case*, Cro. Jac. 279; *Noden v. Johnson*, 16 Q. B. 218, 71 E. C. L. 218, 2 Eng. L. & Eq. 201; *Booth v. Hanley*, 2 C. & P. 288, 12 E. C. L. 130; *Reg. v. Gwilt*, 11 Ad. & El. 587, 39 E. C. L. 177, 3 P. & D. 176; *Rex v. Curran*, 3 C. & P. 397, 14 E. C. L. 368; *Rex v. Howorth*, 1 Moo. C. C. 207; *Butt v. Conant*, Gow. 84, 5 E. C. L. 472.

United States.—*Ex p. Morrill*, 35 Fed. Rep. 261; *U. S. v. Hart*, Pet. (C. C.) 390.

Connecticut.—*Knot v. Gay*, 1 Root (Conn.) 66.
Delaware.—*State v. Russell*, 1 Houst. Cr. Cas. (Del.) 122; *State v. Brown*, 5 Harr. (Del.) 505; *State v. Lafferty*, 5 Harr. (Del.) 491.

Georgia.—*Johnson v. State*, 30 Ga. 430.
Illinois.—*Smith v. Donelly*, 66 Ill. 464; *Shanley v. Wells*, 71 Ill. 78; *Main v. McCarty*, 15 Ill. 441; *Bryan v. Bates*, 15 Ill. 87; *Cahill v. People*, 106 Ill. 621.

Indiana.—*Vandever v. Mattocks*, 3 Ind. 479; *Pow v. Beckner*, 3 Ind. 475.

Kentucky.—*Jamison v. Gaernett*, 10 Bush (Ky.) 221.

Louisiana.—*Tujacque v. Weisheimer*, 15 La. Ann. 276.

Maine.—*Burke v. Bell*, 36 Me. 317.

Maryland.—*Roddy v. Finnegan*, 43 Md. 490.

Massachusetts.—*Com. v. Hastings*, 9 Met. (Mass.) 259.

Michigan.—*People v. Haley*, 48 Mich. 495; *People v. Rounds*, 67 Mich. 482.

Minnesota.—*State v. Cantieny*, 34 Minn. 1; *Wahl v. Walton*, 30 Minn. 506.

Missouri.—*Roberts v. State*, 14 Mo. 138, 55 Am. Dec. 97; *State v. Roberts*, 15 Mo. 28; *State v. McNally*, 87 Mo. 644.

New York.—*Stage Horse Cases*, 15 Abb. Pr. N. S. (N. Y. C. Pl.) 62; *Butolph v. Blust*, 41 How. Pr. (N. Y. Supreme Ct.) 481; *People v. Pratt*, 22 Hun (N. Y.) 300; *Willis v. Warren*, 1 Hilt. (N. Y.) 590; *Boyleston v. Kerr*, 2 Daly (N. Y.) 220; *Burns v. Erben*, 40 N. Y. 463; *Phillips v. Trull*, 11 Johns. (N. Y.) 486; *Meyer v. Clark*, 41 N. Y. Super. Ct. 107.

North Carolina.—*State v. Freeman*, 86 N. Car. 683; *State v. Belk*, 76 N. Car. 10.

Ohio.—*White v. Kent*, 11 Ohio St. 550; *Wolf v. State*, 19 Ohio St. 248.

Pennsylvania.—*Brooks v. Com.*, 61 Pa. St. 352, 100 Am. Dec. 645; *Com. v. Deacon*, 8 S. & R. (Pa.) 47; *McCullough v. Com.*, 67 Pa. St. 30.

South Carolina.—*State v. Bowen*, 17 S. Car. 58; *City Council v. Payne*, 2 Nott & M. (S. Car.) 475.

Tennessee.—*Lewis v. State*, 3 Head (Tenn.) 127.

Texas.—*Ross v. State*, 10 Tex. App. 455, 38 Am. Rep. 643.

Vermont.—*In re Powers*, 25 Vt. 261; *Spalding v. Preston*, 21 Vt. 9, 50 Am. Dec. 68.

Municipal Ordinances.—Power to a city corporation to make ordinances for the security of good order or government of the place, to appoint or elect officers to carry out ordinances, authorizes the appointment of city guards or police officers or peace officers, and such officers may arrest without a warrant persons engaged in breaches of the peace, when such a course is not repugnant to the general law of the state. *Johnson v. State*, 30 Ga. 430; *State v. Lafferty*, 5 Harr. (Del.) 491; *Bryan v. Bates*, 15 Ill. 87; *Main v. McCarty*, 15 Ill. 441; *Jamison v. Gaernett*, 10 Bush (Ky.) 221; *Com. v. Hastings*, 9 Met. (Mass.) 259; *State v. Cantieny*, 34 Minn. 1; *State v. Freeman*, 86 N. Car. 683; *White v. Kent*, 11 Ohio St. 550; *City Council v. Payne*, 2 Nott & M. (S. Car.) 475; *State v. Bowen*, 17 S. Car. 58. But see *State v. Belk*, 76 N. Car. 10.

Where an officer, under a city ordinance, arrests without a warrant, it is incumbent on him, when sued for trespass therefor, to show by satisfactory evidence that the offense was in fact committed in his presence. An offer to prove that he had received information which led him to make the arrest in good faith is properly rejected. *Shanley v. Wells*, 71 Ill. 78.

An arrest without a warrant is not lawful in a prosecution for the recovery of a penalty for violating a city ordinance. *Philadelphia v. Campbell*, 11 Phila. (Pa.) 163. See *Wood v. Brooklyn*, 14 Barb. (N. Y.) 425.

Concealed Weapons.—Under a statute which

Time when Arrest must be Made.—The arrest must be made at the time of the

makes it the duty of the marshal of a municipality to arrest any person "in the act of committing an offense," etc., and to "arrest and detain any person found violating any law," etc., the marshal is authorized without warrant to arrest a person found on the public streets of the corporation carrying concealed weapons contrary to law, although he has no previous personal knowledge of the fact, if he acts *bona fide*, and upon such information as induces an honest belief that the person arrested is in the act of violating the law. *Ballard v. State*, 43 Ohio St. 340; *Jacobs v. State*, 28 Tex. App. 79. But see *State v. Holcomb*, 86 Mo. 371.

Gambling.—Where the offender in question is openly and notoriously engaged in breaking the law, as, for example, where he is maintaining a gambling table in a public place, it is sufficient for the officer to announce his official position and demand a surrender. If this is refused, he may use force to secure his prisoner. *Shovlin v. Com.*, 106 Pa. St. 369.

An arrest for gambling may be made without a warrant after an entry to the house has been obtained without force. *Willis v. Warren*, 1 Hilt. (N. Y.) 590.

Vagrancy.—A common prostitute is not a vagrant in *New York* unless she has no lawful means of support. *People v. Forbes*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 611.

Nor is an officer justified in arresting, without a warrant, one accused of being a common prostitute. *In re Way*, 41 Mich. 299. See *Pinkerton v. Verberg*, 78 Mich. 573, 18 Am. St. Rep. 473; *People v. Pratt*, 22 Hun (N. Y.) 300; *Ex p. Birchfield*, 52 Ala. 378. *Contra*, *Shafer v. Mumma*, 17 Md. 336, 79 Am. Dec. 656.

Under the ordinances of the city of *St. Louis*, a person may be lawfully arrested for vagrancy, without a warrant; but where a person who has been charged as a vagrant, and released on condition that he leave the place in which he is arrested within a specified time, fails to do so, an officer is not justified in arresting him without a warrant, because he still finds him there. *Roberts v. State*, 14 Mo. 138, 55 Am. Dec. 97. See *Jones v. State*, 14 Mo. 409.

An arrest without a warrant for vagrancy is usually unlawful. *In re Way*, 41 Mich. 299. To justify it there must be strong ground of suspicion. *Reg. v. Tooley*, 2 Ld. Raym. 1296; *Lawrence v. Hedger*, 3 Taunt. 14; *Roberts v. State*, 14 Mo. 138, 55 Am. Dec. 97.

See the title VAGRANCY.

Indecent Exposure.—The public exhibition of obscene pictures or indecent exposure of the person are offenses which will justify an officer in making an arrest without a warrant. *State v. Freeman*, 86 N. Car. 683.

Drunken Persons.—A police officer arresting a person without a warrant, for being intoxicated in a public street, is not liable criminally therefor, if he acted in good faith and had reasonable cause to believe such person to be intoxicated; and the subsequent conviction or

acquittal of the person so arrested is not conclusive. *Com. v. Cheney*, 141 Mass. 102, 55 Am. Rep. 448; *Com. v. Presby*, 14 Gray (Mass.) 65; *Com. v. Coughlin*, 123 Mass. 436.

Massachusetts Public Stat., c. 207, § 25, requires a police officer arresting a person for drunkenness to make a complaint, and where he fails to do so the person arrested may waive the provision and cannot afterwards hold the officer responsible if he requests his discharge with the understanding that he is to release the officer from any claim for damages to which he might be entitled by reason of the officer having failed to make the complaint. *Joyce v. Parkhurst*, 150 Mass. 243.

Public and boisterous drunkenness, when committed in the presence of the officer, is a good ground for arrest without a warrant. See in addition to the authorities above cited the following cases: *State v. Lafferty*, 5 Harr. (Del.) 491; *State v. Russell*, 1 Houst. Cr. Cas. (Del.) 122; *Shanley v. Wells*, 71 Ill. 78; *Bryan v. Bates*, 15 Ill. 87; *Main v. McCarty*, 15 Ill. 442; *Phillips v. Fadden*, 125 Mass. 198; *Com. v. Coughlin*, 123 Mass. 436; *Roberts v. State*, 14 Mo. 138, 55 Am. Dec. 97; *People v. Pratt*, 22 Hun (N. Y.) 300; *State v. Freeman*, 86 N. Car. 683; *Thomas v. Ashland*, 12 Ohio St. 127; *White v. Kent*, 11 Ohio St. 550; *State v. Bowen*, 17 S. Car. 58; *City Council v. Payne*, 2 Nott & M. (S. Car.) 475; *Mosley v. State*, 23 Tex. App. 409; *Pratt v. Brown*, 80 Tex. 608.

In *Com. v. O'Connor*, 7 Allen (Mass.) 583, the court, by Bigelow, C.J., said: "The crime of drunkenness is a purely statutory offense, and no authority exists to arrest a person who may be guilty of it, without a warrant, except that which is expressly conferred by statute."

Entering Houses.—An officer has a right, by virtue of his office and without warrant, to enter any house, the door of which is unfastened, in which there is a noise amounting to a breach of the peace, and to arrest any person disturbing the peace there in his presence. *Com. v. Tobin*, 108 Mass. 426, 11 Am. Rep. 375; *Com. v. Hastings*, 9 Met. (Mass.) 259.

Homicide in Effecting Arrest without Warrant.—An officer who attempts to make an arrest without a warrant is not entitled to the protection due to an officer who performs his duties under process, and though he commits a homicide in self-defense, he will not be justified unless a public offense has been committed in his presence, or he has reasonable ground for believing that the prisoner had committed a felony. *Roberson v. State*, 53 Ark. 516.

General Power of Peace Officer to Stop Criminal Act.—A peace officer has a right to stop a criminal act in process of commission, either by arresting those engaged therein, *Ross v. Leggett*, 61 Mich. 445, 1 Am. St. Rep. 608; *Ex p. Morrill*, 35 Fed. Rep. 261; or by seizing and detaining the instruments of crime, *Spalding v. Preston*, 21 Vt. 9, 50 Am. Dec. 68; *Reg. v. Light*, *Dears. C. C.* 332, 7 Cox C. C. 389; *Shanley v. Wells*, 71 Ill. 78; *O'Connor v. Bucklin*, 59 N. H. 589.

offense or immediately after its commission,¹ or upon fresh pursuit, while the

In *O'Connor v. Bucklin*, 59 N. H. 589, it was held that *New Hampshire* Gen. Law, c. 254, § 3, which enacts that "any officer, upon view of any crime," etc., may arrest without a warrant, implies that he has the right to arrest upon view of such acts as show a reasonable ground of arrest, and also that he has the right to take from the offender any tools or weapons that might aid his escape, or any means he may have to procure the same, and to hold them until they can be properly returned.

When an Officer may Not Arrest without Warrant.—There are, however, limits to the power of an officer to arrest without warrant for offenses committed in his presence. Cruelty to animals does not justify an officer in making an arrest without a warrant. *Hopkins v. Crowe*, 7 C. & P. 373, 32 E. C. L. 546. But see *Corbett v. Sullivan*, 54 Vt. 619. Nor erecting a post in a public street, although it is a nuisance. *Danovan v. Jones*, 36 N. H. 246.

Where a person is peddling fruit in violation of a city ordinance an officer is not justified in arresting him without a warrant, especially if the arrest is not made upon actual view of the offense. *Pittston v. Dimond*, 7 Kulp (Pa.) 431.

Loud talking in the streets will not justify an arrest without warrant. *Hardy v. Murphy*, 1 Esp. 294; *Reg. v. Mabel*, 9 C. & P. 474, 38 E. C. L. 189. Nor will conversing with a notorious thief in the street. *Stocken v. Carter*, 4 C. & P. 477, 19 E. C. L. 482. Nor turning to the wall on a "particular occasion." *Booth v. Hanley*, 2 C. & P. 288, 12 E. C. L. 130.

An arrest without a warrant is not lawful for not obeying a bastardy order for the payment of money, although the warrant has been made out. *Galliard v. Laxton*, 9 Cox C. C. 127; *Hall v. Roche*, 8 T. R. 187.

Where the ordinance authorizes the arrest, without a warrant, of a person "found drunk in the streets, hallooing or making an unusual noise," mere blind drunkenness will not justify his arrest without a warrant. Nor is an officer justified in arresting a person, without a warrant, for obstructing the sidewalk and refusing to move on. Where an officer's power to arrest without a warrant is strictly limited to cases where an offense has been committed in his view, or where he knows it to have been committed and has reasonable grounds to fear an escape, he must determine at his peril whether an offense has been committed or not. *State v. Hunter*, 106 N. Car. 796.

1. Interval of Time after Commission of Offense.—*Wheeler v. Whiting*, 9 C. & P. 262, 38 E. C. L. 111; *Main v. McCarty*, 15 Ill. 442; *Krulevitz v. Eastern R. Co.*, 143 Mass. 228; *Webb v. State*, 51 N. J. L. 189; *Meyer v. Clark*, 41 N. Y. Super. Ct. 107; *Taylor v. Strong*, 3 Wend. (N. Y.) 384; *State v. Sims*, 16 S. Car. 486.

An arrest without a warrant for a breach of the peace must be made within a short time after the offense is committed. Two hours afterwards is too late. *Butolph v. Blust*, 5

Lans. (N. Y.) 84; *Reg. v. Walker*, Dears. C. C. 358, 23 L. J. M. C. 123, 6 Cox C. C. 371, 25 Eng. L. & Eq. 589.

In *Wahl v. Walton*, 30 Minn. 506, it was held that five hours afterwards was too late. See *Shanley v. Wells*, 71 Ill. 78.

Where an officer departs from the scene and comes back after peace has been restored, he cannot arrest without a warrant. *Reg. v. Walker*, 25 Eng. L. & Eq. 589, Dears. C. C. 358, 6 Cox C. C. 371; *Reg. v. Marsden*, L. R. 1 C. C. 133, 37 L. J. M. C. 80; *Clifford v. Brandon*, 2 Campb. 371; *Roberts v. State*, 14 Mo. 138, 55 Am. Dec. 97; *State v. Roberts*, 15 Mo. 28. See *Com. v. Hastings*, 9 Met. (Mass.) 259.

Illustrations.—In *Reg. v. Light*, Dears. C. C. 332, the defendant was convicted on an indictment charging him with assaulting a constable in the execution of his duty. It appeared that the constable, whilst standing outside the defendant's house, saw him take up a shovel, and hold it in a threatening attitude over his wife's head, and heard him at the same time say, "If it was not for the policeman outside I would split your head open." About twenty minutes after, the defendant left the house, saying that he would leave his house altogether, and he was then taken into custody by the policeman, who had no warrant. It was on this apprehension that the assault took place, and it was held that the policeman was justified under the circumstances in apprehending the defendant, and that the conviction was right. The court, no doubt, in this case, were strongly actuated by the feeling that the policeman, as always happens on such occasions, is placed in a very difficult position. When a man has recently committed an act of violence the court might very well be extremely unwilling to say that in no view could the peace officer reasonably believe that he was about to commit another similar act, and so be justified in apprehending him. Much, in such a case, ought to be presumed in favor of an officer of justice, and it is a point upon which the opinion of the jury might be very properly taken. See *Baynes v. Brewster*, 11 L. J. M. C. 5, which is in accordance with this view.

A. went to a house at night, demanding to see the servant. He was told to depart, and would not. A constable was sent for, and A. went from the house to the garden. When the constable arrived A. said that if a light appeared at the windows he would break them; upon which the constable took him into custody. It was held that the constable was not justified in so doing. *Rex v. Bright*, 4 C. & P. 387, 19 E. C. L. 434.

On Immediate Pursuit.—The arrest may be made on fresh pursuit or as soon after the breach as may be practicable. *Hanway v. Boulton*, 4 C. & P. 350, 19 E. C. L. 415, 1 M. & Rob. 15; *People v. Pool*, 27 Cal. 572; *Taylor v. Strong*, 3 Wend. (N. Y.) 386.

After Affray Is Over.—In *Main v. McCarty*, 15 Ill. 442, it was held that the arrest might be made after peace was restored and the affray

offender is fleeing from the scene of the crime.¹

Arrest for Threatened Breach of Peace.—An officer may also interfere to prevent a threatened breach of the peace.²

Power to Arrest in Case of Misdemeanor.—In no case can an arrest be made for a

over, or upon the information of an officer who had been present witnessing the disturbance and after it was at an end.

Wife Beating.—If an officer, having been attracted by a noise or the outcry of the woman where a person is beating his wife, arrives during the progress of the beating or immediately after, he may arrest the man without a warrant. *Ramsey v. State*, 92 Ga. 53.

City Marshal.—A city marshal may without a warrant arrest persons who are committing a breach of the peace in his presence; but where he is not present, but hurries upon the scene after the affray is over, and the public peace is restored, and the guilty person has left there, and all that he knows of the affray is what he hears from the bystanders who witnessed it, he cannot then pursue and arrest the persons charged with the offense without first procuring a warrant. *State v. Lewis*, 50 Ohio St. 179.

Resisting Unlawful Arrest.—Where a thief who had not been caught in the act had been arrested by an officer and posse, without a warrant, it was held that he was justified in using his whip to compel them to release his horse and avoid the arrest. *Massie v. State*, 27 Tex. App. 617. See *Meuly v. State*, 26 Tex. App. 307.

Time Which may Elapse.—In *State v. Lewis*, 50 Ohio St. 179, the court, by Bradbury, C. J., said: "How soon after the offense had been committed should the information be communicated, to authorize the officer to act without the sanction of a warrant, and how soon thereafter must he proceed to make the arrest? A satisfactory answer to these questions is not readily found. If such power was absolutely necessary to preserve the public peace, an objection to it founded upon its extent and uncertainty should yield to that necessity. But it may well be doubted whether this power of apprehension for a mere misdemeanor, upon information only, and without warrant, in view of the temper and notions of our people in regard to their personal rights, and the opinion, so often, however unjustly, entertained by the public, respecting the discretion of a large class of peace officers, would not tend to disturb rather than promote the public peace. We think therefore the statute under consideration, even if it stood alone, should not be construed to authorize a marshal of a city or village to arrest without warrant for a mere misdemeanor not committed in his presence." The authorities upon this point were carefully considered in this case.

Danger of Escape.—It has been said that to justify an arrest without warrant for a mere misdemeanor it must appear that the accused will escape if time is wasted in procuring a warrant. *O'Connor v. State*, 64 Ga. 125, 37 Am. Rep. 58; *Ross v. State*, 10 Tex. App. 455, 38 Am. Rep. 643; *Staples v. State*, 14 Tex. App. 136. But the right has in some cases been held absolute and not dependent on the probability

of escape. *Rohan v. Sawin*, 5 Cush. (Mass.) 281; *Holley v. Mix*, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702.

1. Arrest upon Fresh Pursuit.—*Roscoe Crim. Ev.* 754; *Rex v. Curran*, 3 C. & P. 397, 14 E. C. L. 368; *Hanway v. Boulton*, 4 C. & P. 350, 19 E. C. L. 415; *Rex v. Davis*, 7 C. & P. 785, 32 E. C. L. 736; *Rex v. Payne*, 1 Moo. C. C. 378; *Rex v. Whithorne*, 3 C. & P. 394, 14 E. C. L. 366; *People v. Pool*, 27 Cal. 572. See *City Bank v. Bangs*, 2 Edw. Ch. (N. Y.) 103; *Holley v. Mix*, 3 Wend. (N. Y.) 353, 20 Am. Dec. 702.

Where a felony, which has been committed at night, is discovered in the morning, an officer is justified in immediately following and arresting the felon, for it is held to be a fresh pursuit within the meaning of *Mississippi Code*, art. 3026, which authorizes an arrest under such circumstances without a warrant. *White v. State*, 70 Miss. 253.

A thief who has no fixed dwelling in the country may be pursued and arrested without a warrant while he is trying to escape with property on his person which he has stolen the night before. *Morris v. Kasling*, 79 Tex. 141.

A plea of justification in a case of an arrest without warrant, for misdemeanor, while the pursuit was continuing, which stated that the arrest took place while the offense "was still recent, and as soon after as they conveniently might and could," was held to be unlawful as leaving it uncertain whether or not the offense and arrest formed a continuous transaction. Such a plea should set out all the circumstances, under which the arrest was made, in sufficient detail to enable the question of its legality to be tried on demurrer. *Murphy v. McClelland*, 5 Ir. R. C. L. 440.

2. Preventing Breach of Peace.—In order to justify an arrest by a town marshal an actual breach of the peace is not necessary; he may act upon reasonable probabilities and arrest persons in order to prevent a threatened breach of the peace. *Hayes v. Mitchell*, 80 Ala. 183.

An officer may interfere to prevent a breach of the peace, for one great use of public officers is to "nip mischief in the bud," *Rex v. Hems*, 7 C. & P. 312, 32 E. C. L. 522; and he may do so at any time until the danger is over. *Reg. v. Light*, 7 Cox C. C. 389; *Com. v. Deacon*, 8 S. & R. (Pa.) 47.

Or he may arrest bystanders who are making trouble. *Levy v. Edwards*, 1 C. & P. 40, 11 E. C. L. 306; *White v. Edmunds*, *Peake N. P.* 89; *Coyles v. Hurtin*, 10 Johns. (N. Y.) 85. See also *Timothy v. Simpson*, 1 C. M. & R. 757; *Ingle v. Bell*, 1 M. & W. 516; *Price v. Seeley*, 10 Cl. & F. 28; *Luther v. Borden*, 7 How. (U. S.) 1; *Martin v. State*, 89 Ala. 115, 18 Am. St. Rep. 91; *Quinn v. Heisel*, 40 Mich. 576; *Pinkerton v. Verberg*, 78 Mich. 573, 18 Am. St. Rep. 473; *O'Connor v. Bucklin*, 59 N. H. 589.

misdeemeanor by an officer without a warrant, unless the offense has been committed in his presence;¹ nor can he arrest without a warrant for a misdemeanor which does not amount to a breach of the peace.²

d. FOR PAST OFFENSES.—An arrest without a warrant, even if made by an officer, for a past misdemeanor is unlawful,³ unless the arrest is made

1. **Must Be in Officer's Presence.**—1 East P. C. 305; 2 Hawk. P. C., c. 13, § 8; 1 Russ. on Crimes (8th ed.) 410, 805.

England.—Bowditch v. Balchin, 5 Exch. 378; Timothy v. Simpson, 1 C. M. & R. 757; Reg. v. Carey, 14 Cox C. C. 214; Rex v. Thompson, 1 Moo. C. C. 80; Rex v. Bright, 4 C. & P. 387, 19 E. C. L. 434; Cook v. Nethercote, 6 C. & P. 741, 25 E. C. L. 627; Reg. v. Tooley, 2 Ld. Raym. 1301; Coupey v. Henley, 2 Esp. 540; Baynes v. Brewster, 2 Q. B. 375, 42 E. C. L. 720; Reg. v. Mabel, 9 C. & P. 474, 38 E. C. L. 189; Grant v. Moser, 5 M. & G. 123, 44 E. C. L. 74.

United States.—Bright v. Patton, 5 Mackey (D. C.) 534, 60 Am. Rep. 396.

Indiana.—Pow v. Beckner, 3 Ind. 479.

Maryland.—Black v. State, 2 Md. 376.

Massachusetts.—Com. v. McLaughlin, 12 Cush. (Mass.) 618; Com. v. Carey, 12 Cush. (Mass.) 246.

Michigan.—Ross v. Leggett, 61 Mich. 445, 1 Am. St. Rep. 608; People v. Haley, 48 Mich. 495; People v. McLean, 68 Mich. 480; *In re* Way, 41 Mich. 299; Quinn v. Heisel, 40 Mich. 576.

Missouri.—Roberts v. State, 14 Mo. 138, 55 Am. Dec. 97.

New Jersey.—State v. Beekman, 27 N. J. L. 124, 72 Am. Dec. 352; Webb v. State, 51 N. J. L. 189.

New York.—People v. Smith, 5 Cow. (N. Y.) 258; Phillips v. Trull, 11 Johns. (N. Y.) 486.

Ohio.—State v. Lewis, 50 Ohio St. 179.

A Sheriff cannot Confer upon His Deputy Authority to arrest in another place, without a warrant, a person whom he is endeavoring to arrest for a misdemeanor. People v. McLean, 68 Mich. 480.

Extent of Power in Case of Misdemeanor.—There is no distinction, as to the power to apprehend, between one kind of misdemeanor and another, as between a breach of the peace, and fraud; but the rule is general that in all cases of misdemeanor there is no power to apprehend after the misdemeanor has been committed. 1 Russ. on Cr. (10th Am. ed.) 808.

Breaking and entering the ticket office of a railroad company in the daytime with the intention of stealing, but not actually doing so, is only a misdemeanor under *Massachusetts* Rev. Stat., c. 126, § 13, and an arrest by an officer without a warrant for such an offense, where it has been previously committed, is illegal, and killing the officer attempting the arrest is only manslaughter. Com. v. Carey, 12 Cush. (Mass.) 246.

If a peace officer, who does not see the offense committed, makes an arrest for a misdemeanor without a warrant, it is illegal. Pinkerton v. Verberg, 78 Mich. 573, 18 Am. St. Rep. 473.

A city marshal, under *Missouri* statute, has

no authority to make arrests for an offense not committed in his presence, without a warrant. State v. Underwood, 75 Mo. 230.

Unless an offender is taken in the act he cannot be arrested without a warrant, issued upon complaint upon oath, and before a magistrate. State v. Dill, 9 Houst. (Del.) 495.

An arrest should not only be made upon the spot, but it ought to be made before the breach of the peace has entirely ceased. Baynes v. Brewster, 2 Q. B. 375, 42 E. C. L. 720.

An arrest for a misdemeanor is unlawful if made without a warrant, merely upon the authority of a letter from a police officer in another state. Scott v. Eldridge, 154 Mass. 25.

Under the early *English* authorities it was sometimes contended that peace officers had a right to arrest misdemeanants and disturbers of the peace after the affray. See 2 Hale P. C. 90. But that this principle no longer prevails, may be seen from the authorities cited in this note.

2. **There must Be a Breach of the Peace.**—Unless the authority be expressly given, an officer cannot legally make an arrest without a warrant for a mere statutory misdemeanor which does not amount to a breach of the peace, although committed in his presence. Com. v. Wright, 158 Mass. 149; Danovan v. Jones, 36 N. H. 246; Wood v. Brooklyn, 14 Barb. (N. Y.) 425; Philadelphia v. Campbell, 11 Phila. (Pa.) 163.

In Butolph v. Blust, 5 Lans. (N. Y.) 84, it was held that neither a justice nor a constable can arrest a person without a warrant, except for felony or breach of the peace, and that to do so is unlawful in the case of a mere misdemeanor. See Boyleston v. Kerr, 2 Daly (N. Y.) 220.

A statute imposing a penalty of fifty dollars upon each offense for the sale of intoxicating liquors does not make the offense a misdemeanor, and it is of too low a grade to bring it within the rule that an arrest can be made without a warrant for an offense, immediately after its commission. Meyer v. Clark, 41 N. Y. Super. Ct. 107.

Legislature may Change the Rule.—The legislature, however, if it sees fit, may authorize arrest to be made without a warrant for misdemeanors, committed in the presence of an officer, other than such as amount to breaches of the peace. Burroughs v. Eastman, 101 Mich. 419. See Stage Horse Cases, 15 Abb. Pr. N. S. (N. Y. C. Pl.) 62.

3. **Past Offenses.**—*England.*—Reg. v. Marsden, L. R. 1 C. C. 131; Fox v. Gaunt, 3 B. & Ad. 798, 23 E. C. L. 187; Coupey v. Henley, 2 Esp. 540; Reg. v. Walker, 25 Eng. L. & Eq. 589, 6 Cox C. C. 371; Sharrack v. Hannemer, Cro. Eliz. 375; Reg. v. Spencer, 3 F. & F. 854; Reg. v. Lockley, 4 F. & F. 155; Samuel v. Payne, Doug. 559; Wright v. Court, 4 B. & C. 596, 10 E. C. L. 412.

within a reasonable time afterwards;¹ or unless it is an assault liable to end in felony by the death of the injured person.² Nor is an officer at any time justified in arresting a person on mere suspicion of misdemeanor.³

e. **DISPOSITION OF PERSON ARRESTED WITHOUT WARRANT.**—A person arrested without a warrant should be brought immediately and without delay before the nearest magistrate. When so brought, the magistrate may proceed to hear the case, no process being required to give jurisdiction over the person of the accused.⁴

United States.—Kurtz *v.* Moffitt, 115 U. S. 499.

Illinois.—Shanley *v.* Wells, 71 Ill. 78.

Indiana.—Doering *v.* State, 49 Ind. 56, 19 Am. Rep. 669.

Massachusetts.—Com. *v.* Carey, 12 Cush. (Mass.) 246; Com. *v.* McLaughlin, 12 Cush. (Mass.) 615; Rohan *v.* Sawin, 5 Cush. (Mass.) 281; Com. *v.* O'Conner, 7 Allen (Mass.) 584; Com. *v.* Wright, 158 Mass. 149.

Michigan.—Pinkerton *v.* Verberg, 78 Mich. 573, 18 Am. St. Rep. 473; Ross *v.* Leggett, 61 Mich. 445, 1 Am. St. Rep. 608.

Missouri.—State *v.* Davidson, 44 Mo. App. 513; Taaffe *v.* Slevin, 11 Mo. App. 507; State *v.* Underwood, 75 Mo. 231; State *v.* Holcomb, 86 Mo. 371; Roberts *v.* State, 14 Mo. 138, 55 Am. Dec. 97.

New Jersey.—Webb *v.* State, 51 N. J. L. 189.

Pennsylvania.—Com. *v.* Bryant, 9 Phila. (Pa.) 595.

Tennessee.—Eanes *v.* State, 6 Humph. (Tenn.) 53, 44 Am. Dec. 292.

See Bright *v.* Patton, 5 Mackey (D. C.) 538, 60 Am. Rep. 396; State *v.* Dill, 9 Houst. (Del.) 495; People *v.* McLean, 68 Mich. 480.

Can Arrest without Warrant, Only for Past Felony.—An officer's right to make an arrest without a warrant is limited, for past offenses, to cases of felony. Derecourt *v.* Corbishley, 5 El. & Bl. 188, 85 E. C. L. 188; Galliard *v.* Laxton, 2 B. & S. 363, 110 E. C. L. 363; Reg. *v.* Mabel, 9 C. & P. 474, 38 E. C. L. 189; State *v.* Brown, 5 Harr. (Del.) 505; Com. *v.* Deacon 8 S. & R. (Pa.) 47; State *v.* Ferguson, 2 Hill (S. Car.) 619, 27 Am. Dec. 412. See Foster 310, 311.

England.—Past Misdemeanor.—Danger of Continuance.—The right of an officer to arrest without a warrant after the offense has been committed, has been extended in England, even in cases of misdemeanor, until all danger of continuance of the offense has ceased. Reg. *v.* Light, 7 Cox C. C. 389, Dears. C. C. 332.

The Massachusetts Statute does not authorize an arrest by officers not present when the offense is committed, upon complaint by a car conductor, and such an arrest is therefore unlawful. Krulevitz *v.* Eastern R. Co., 143 Mass. 228.

Ordinance Authorizing City Marshal to Suppress Riots, etc.—A city marshal is not authorized to make an arrest without a warrant for a past misdemeanor, by an ordinance by which it is made his duty to suppress all riots, disorders, disturbances and breaches of the peace, and with or without a warrant to arrest all disorderly persons or disturbers of the peace, and convey them before a justice. Both the

marshal who makes an arrest for such a past offense and those who assist him are liable for doing so. Pow *v.* Beckner, 3 Ind. 475. See also *supra*, this title and division, subdivision *For Affrays and Other Offenses in Officer's Presence*.

1. Arrest within Reasonable Time.—Rex *v.* Bright, 4 C. & P. 387, 19 E. C. L. 434; Derecourt *v.* Corbishley, 5 El. & Bl. 188, 85 E. C. L. 188, 32 Eng. L. & Eq. 186; Taylor *v.* Strong, 3 Wend. (N. Y.) 384.

It has been held that an officer cannot arrest without a warrant for past breaches of the peace, even if committed in his presence, no matter how short an interval of time he may have remained away. The arrest must be immediate upon the commission of the offense. Krulevitz *v.* Eastern R. Co., 143 Mass. 228; Meyer *v.* Clark, 41 N. Y. Super. Ct. 107; Wahl *v.* Walton, 30 Minn. 506; Taylor *v.* Strong, 3 Wend. (N. Y.) 384; State *v.* Sims, 16 S. Car. 486. But see Com. *v.* Hastings, 9 Met. (Mass.) 259.

An arrest without warrant becomes illegal if there is unreasonable delay in procuring one after the arrest. Johnson *v.* Americus, 46 Ga. 80. See also *supra*, this title and division, subdiv. *For Affrays and Other Offenses in Officer's Presence*.

2. Danger of Death.—Coupey *v.* Henley, 2 Esp. 540; Shanley *v.* Wells, 71 Ill. 78.

3. No Power to Arrest on Suspicion of Misdemeanor.—At criminal law a police officer has no right to arrest a person on mere suspicion of misdemeanor. State *v.* Davidson, 44 Mo. App. 513; People *v.* Burt, 51 Mich. 199; State *v.* Grant, 79 Mo. 113, 49 Am. Rep. 218; Marsh *v.* Smith, 49 Ill. 396.

Nor will mere belief, however well founded, justify an arrest without a warrant for a mere misdemeanor. Com. *v.* McLaughlin, 12 Cush. (Mass.) 615; Com. *v.* Carey, 12 Cush. (Mass.) 246. See *contra*, State *v.* Brown, 5 Harr. (Del.) 505.

See also *supra*, this title and division, subdiv. *For Affrays and Other Offenses in Officer's Presence*.

4. No Warrant after Arrest Is Necessary to give jurisdiction over the person of one arrested without warrant, for "why issue a warrant for the apprehension of a party already in custody?" Hoggatt *v.* Bigley, 6 Humph. (Tenn.) 236.

But a written information against the accused setting out his offense is as necessary under such circumstances as in any other case. 1 Bishop's New Criminal Procedure (4th ed.), § 174; Tracy *v.* Williams, 4 Conn. 107, 10 Am. Dec. 102. See the Marshalsea Case, 10 Coke 766; Perkin *v.* Proctor, 2 Wils. 384; Morgan *v.* Hughes, 2 T. R. 225; Gru-

f. ON VERBAL ORDER OF MAGISTRATE.—An officer is justified in making an arrest without a warrant, upon the verbal order of a magistrate in whose presence an offense has been committed.¹ In other cases his order will be no protection unless it takes the form of a legal warrant.²

g. OF NIGHT WALKERS AND SUSPICIOUS CHARACTERS.—At the common law, an officer may arrest night walkers, prowlers, and suspicious characters

mon v. Raymond, 1 Conn. 40, 6 Am. Dec. 200; *Slocum v. Wheeler*, 1 Conn. 429.

Liability of Officer Detaining Prisoner without Warrant.—A police officer may arrest a person without a warrant for violating a municipal ordinance, but he must take him at once before a magistrate; a warrant must be obtained and a trial had. *State v. Freeman*, 86 N. Car. 683.

An officer who has lawfully arrested a person without a warrant is not guilty of trespass, because the district judge before whom he has made a complaint for the offense against the prisoner has failed to issue a warrant. *Douglas v. Barber*, 18 R. I. 459.

In *Burke v. Bell*, 36 Me. 317, it was held that a town by-law which authorizes a police officer to arrest a person, without a warrant, and detain him for two hours, is void and repugnant to a statute (*Maine Stat.* 1848, c. 71) which enacts that if an officer "shall detain any offender without a warrant longer than such time as was necessary to procure a legal warrant such officer shall be liable," etc.

Where a police superintendent in *New York*, instead of complying with the law which requires that a person arrested without a warrant shall be "immediately and without delay" conveyed before the nearest magistrate, directs the arrested person to be imprisoned, he is liable in damages therefor. *Green v. Kennedy*, 46 Barb. (N. Y.) 16.

Disposition of Prisoner by Private Person.—Where an arrest has been made by a citizen for an offense committed in his presence he must, to justify himself, show that without unnecessary delay he took the prisoner before a magistrate, or delivered him to a peace officer. *Judson v. Reardon*, 16 Minn. 431.

After a private person has arrested another person for a felony he may either deliver him into the hands of a constable, or he may carry him to any jail in the county. But the safest course is, as soon as convenience will allow, to bring him before a justice of the peace by whom he may be examined, bailed, or committed to prison. *Kindred v. Stitt*, 51 Ill. 401.

1. Verbal Order to Arrest.—2 Hale P. C. 86; 2 Hawk. P. C., c. 13, § 14; *Coupey v. Henley*, 2 Esp. 540. See *Odell v. Schroeder*, 58 Ill. 353. Compare *State v. James*, 78 N. Car. 455; *Touhey v. King*, 9 Lea (Tenn.) 422.

An officer may, when commanded verbally by the magistrate, arrest a person when the offense was committed in his absence, as well as in his presence. 1 Hawk. P. C., p. 518, § 16.

And if a prisoner lawfully arrested by verbal order of the magistrate escapes, the justice may order him to be retaken, and an assault upon the constable under such circumstances will be an assault on him in the discharge of his duty.

Com. v. McGahey, 11 Gray (Mass.) 194. See *Rex v. Williams*, 1 Moo. C. C. 387.

In *Odell v. Schroeder*, 58 Ill. 353, it was held that an officer who holds in custody a person committed to prison on the verbal order of a magistrate for the nonpayment of a fine, acts both without authority and against the law; but this was the case of a commitment, not an arrest. See *State v. James*, 78 N. Car. 455; *State v. Dean*, 3 Jones (N. Car.) 393; *State v. Parker*, 75 N. Car. 249; 22 Am. Rep. 669.

Where a justice who assumes to act under *New Hampshire* Gen. Stat., c. 236, § 7, directs an officer by verbal order to arrest an offender, the officer is justified in doing so, whether he saw the offense committed or not, and he will be justified so long as he acts in good faith though he does not believe that the person is guilty, and although the justice does not act in good faith nor upon reasonable belief of the person's guilt. *Forrist v. Leavitt*, 52 N. H. 481.

A magistrate may order an offender into custody for an offense such as an assault and battery committed in his view, and within his jurisdiction, and may proceed to his trial. A warrant and affidavit are not necessary in such a case. *Lancaster v. Lane*, 19 Ill. 242. See *O'Brian v. State*, 12 Ind. 369, where it was held that while he could order him into custody he could not proceed to a trial until the prisoner is regularly charged by a complaint. See *Bargis v. State*, 4 Ind. 126; *Bigelow v. Stearns*, 19 Johns. (N. Y.) 39, 10 Am. Dec. 189; *Holcomb v. Cornish*, 8 Conn. 375.

In *Touhey v. King*, 9 Lea (Tenn.) 422, it was held that a magistrate may, by verbal order, command the arrest of any one for an offense committed in his presence, but he has no power to order him committed to prison without an examination and a hearing.

In *Lott v. Sweet*, 33 Mich. 308, it was held that it is just as competent for a magistrate, as conservator of the peace, to order into custody an insane man who is committing a breach of the peace in his presence as to order the arrest of a sane person under like circumstances; though an insane person may not be guilty of crime, he may lawfully be prevented from doing harm. See *Van Deusen v. Newcomer*, 40 Mich. 142.

2. When Order of Magistrate No Protection.—2 Hale P. C. 86; 1 Hawk. P. C., p. 518; 2 Hawk. P. C., c. 13, § 14; *Rex v. Gardener*, 1 Moo. C. C. 390.

Where a magistrate, on verbal complaint of a market dispute, orally directed a constable to bring before him, and, if necessary, arrest the person against whom the complaint was made, and who had refused to attend at the magistrate's request, it was held that the arrest was illegal. *Forbes v. Lloyd*, 10 Ir. R. C. L. 552. See *Maloney v. French*, 3 Ir. R. C. L. 391.

going around at night;¹ but he has no authority to arrest a common prostitute without a warrant, unless disorderly conduct is committed in his presence.²

§. OF FUGITIVES FROM OTHER STATES.—An officer has no authority without a warrant to arrest a fugitive from another state who is charged with a crime.³

3. **By Justice in Person.**—A justice of the peace has the rights of other peace officers, and may arrest one whom he has just cause to suspect of a felony,⁴ or one committing a breach of the peace in his presence;⁵ but the

1. **Night Walkers and Suspicious Characters.**—*Lawrence v. Hedger*, 3 Taunt. 14; *Roberts v. State*, 14 Mo. 138, 55 Am. Dec. 97; *Eanes v. State*, 6 Humph. (Tenn.) 53, 44 Am. Dec. 289.

At common law, officers are authorized to arrest street walkers. *Miles v. Weston*, 60 Ill. 361.

Also night walkers or prowlers. *Com. v. Sullivan*, 5 Allen (Mass.) 511; *Com. v. Carter*, 108 Mass. 17; *Roberts v. State*, 14 Mo. 138, 55 Am. Dec. 97; *State v. Maxcy*, 1 McMull. (S. Car.) 503; *Brown v. State*, 2 Lea (Tenn.) 158.

Night Walkers Defined.—Night walkers are persons who are in the habit of being out at night for some wicked purpose. *Watson v. Carr*, 1 Lew. 6.

2. **Arrest of Prostitute.**—*Pinkerton v. Verberg*, 78 Mich. 573, 18 Am. St. Rep. 473; *In re Way*, 41 Mich. 299; *People v. Pratt*, 22 Hun (N. Y.) 300; *People v. Forbes*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 611. *Contra, Ex p. Birchfield*, 52 Ala. 378; *Shafer v. Mumma*, 17 Md. 336, 79 Am. Dec. 656. See *Drennan v. People*, 10 Mich. 169; *Ross v. Leggett*, 61 Mich. 445, 1 Am. St. Rep. 608; *Quinn v. Heisel*, 40 Mich. 576; *Newman v. Stein*, 75 Mich. 402; *People v. Burt*, 51 Mich. 199.

In *People v. Pratt*, 22 Hun (N. Y.) 300, it was held that a city ordinance empowering a policeman "to arrest all vagrants, common prostitutes, drunkards, and other disorderly persons found in the city," conferred upon them no power of arrest in addition to that given by the general law of the state.

An officer who arrests a woman without a warrant, upon a mere suspicion that she is plying the vocation of a prostitute, because he finds her walking on the street in the night, is liable for assault and illegal arrest in the absence of any act on her part showing that she is walking the streets for that purpose. Mere impudence on her part to an officer, or daring him to arrest her, will not justify him in making such arrest, and evidence of specific acts of lewdness is inadmissible to justify the officer in an action for false arrest as a prostitute. *Pinkerton v. Verberg*, 78 Mich. 573, 18 Am. St. Rep. 473.

3. **Arrest of Fugitive from Another State.**—*Scott v. Eldridge*, 154 Mass. 25; *State v. Shelton*, 79 N. Car. 605.

No person has authority to arrest without a warrant a person who has fled from justice in another state. If he does so he is guilty of assault and battery. *State v. Shelton*, 79 N. Car. 605.

It has been held that the judicial tribunals

of Louisiana may direct the arrest of a felon from Alabama without the demand or order of the governor of either state. *Morrell v. Quarles*, 35 Ala. 544.

A telegram from the authorities in another state, stating that they have a warrant for the arrest of a certain person who has fled from justice, a copy of which warrant is included in the telegram, and a statement in such message that they have started after him with the proper papers, will not justify the arrest and detention of such fugitive without a warrant against a petition for habeas corpus, at least where no judicial commitment or inquiry has been made. *Simmons v. Vandyke*, 138 Ind. 380.

A person is not justified because of his official character as sheriff in another state, and of a bench warrant issued by him as such sheriff, upon information found in his own state, in arresting a person named in such warrant in a state other than his own, and carrying him beyond its boundaries. He stands on the same footing when attempting to do so as a private person acting without a warrant. Where a private person acting without a warrant arrests a person for the purpose of forcibly abducting him from the state, and carries out his design, such seizure and abduction of themselves constitute a criminal offense of high grade, both at common law and by statute. One who has arrested another without a process, unlawfully, or on a void process, cannot detain him on a valid process until he has first restored him to liberty. *Mandeville v. Guernsey*, 51 Barb. (N. Y.) 99.

A telegram sent by the chief of police of a city without the state, which says that certain persons are swindling commission merchants, and asks that they be kept under observation, does not justify their arrest within the state without a warrant upon suspicion of felony. *Cunningham v. Baker*, 104 Ala. 160. See *In re Robinson*, 29 Neb. 135.

A person who has received a telegram from the chief of police of a city in another state, that a certain person has absconded with funds belonging to an association, is not authorized to arrest such fugitive without a warrant. *Malcolmson v. Scott*, 56 Mich. 459.

A private detective who has shadowed a fugitive from another state and found him cannot arrest such person without a warrant by getting a policeman to make the arrest. *Harris v. Louisville, etc., R. Co.*, 35 Fed. Rep. 116. See generally the title EXTRADITION.

4. **Arrest by Justice of the Peace.**—2 Hale P. C. 87; *Holcomb v. Cornish*, 8 Conn. 375; *State v. McAfee*, 107 N. Car. 812.

5. See *Rex v. Pinney*, 5 C. & P. 254, 24 E.

more usual course is to issue his verbal order or warrant to an officer, instead of making the arrest in person.¹

4. By Sheriffs, Mayors, Coroners, and Other Officers.—Sheriffs, mayors, coroners, watchmen, and the like are conservators of the peace, and their power and right to make arrests without warrant are similar to those of constables and ordinary police officers.²

C. L. 306, and notes; *Republica v. Montgomery*, 1 Yeates (Pa.) 419.

South Carolina Gen. Stat., § 836, which authorizes a justice to arrest any person who is guilty of disorderly conduct in his view, does not limit the officer's power to cases where he sees the offense, but extends also to cases where he acquires his knowledge by his other senses. *State v. Williams*, 36 S. Car. 493.

A justice of the peace may arrest a person without a warrant and without giving him any information of the nature of the charge, when the party arrested knows him to be a justice, and has committed a criminal assault in his presence. *State v. McAfee*, 107 N. Car. 812. The court, in this case, by Avery, J., said: "A justice of the peace, a constable, or a sheriff is unquestionably authorized to arrest without warrant one who commits a felony or breach of the peace in his presence. *State v. Hunter*, 106 N. Car. 796; *State v. Freeman*, 86 N. Car. 683; *Wharton Crim. Law*, § 2927."

In *Kindred v. Stitt*, 51 Ill. 406, the court, by Breese, C. J., said: "As to an arrest by an officer without a warrant, it is settled that a justice of the peace may apprehend, or cause to be apprehended, by verbal order merely, any person committing a felony or breach of the peace in his presence, 1 Hale P. C. 86; but if it is committed in his absence he must issue a warrant in due course of law to apprehend the offender."

In *People v. Smith*, 1 Cal. 13, the court, by Bennett, J., said: "Judges of first instance are invested with a criminal as well as a civil jurisdiction (art. 2, § 2, pt. 2, of law of May 23, 1837, and art. 9 of same law), and are empowered not only to try criminal causes but also to act in the preliminary proceedings of arrest and commitment. * * * It was conceded on the argument that they were conservators of the peace, but it was contended that the power of such officers does not extend to the arrest and commitment of persons charged with the commission of crimes. Before the institution of the office of justice of the peace in England, the public order was maintained by officers who bore the name of conservators of the peace (4 Stephen's Comm. 37, 38), and they were empowered to preserve the peace, to suppress riots and affrays, and to apprehend and commit felons and other inferior criminals (Id. 43). The same power is conferred upon a variety of officers in England and the United States by simply declaring them by statute to be conservators of the peace, and the constitution of this state confers the same authority in the same terms upon the justices of this court and the district judges."

1. 1 Bishop New Crim. Proced., § 77; Bishop Stat. Crimes, § 137.

A justice of the peace is not limited to the

town for which he was chosen in the exercise of those functions of conservator of the peace, which he is authorized to perform. Except for the trial of civil causes, his jurisdiction extends to the limits of the county. *Gurnsey v. Lovell*, 9 Wend. (N. Y.) 319.

2. Various Officers.—See 2 Hale P. C. 86; Bishop's New Crim. Proc., §§ 181, 225, 226, 229; *Coyles v. Hurtin*, 10 Johns. (N. Y.) 85; *Burn. Just., Justices of the Peace*; 2 Hawk. P. C., c. 8; 1 Hale P. C. 576; 1 Chit. Crim. Law 34, 36; *Ex p. Eagan*, 18 Fla. 194; *Cameron v. State*, 13 Ark. 712; *People v. Smith*, 1 Cal. 9; *In re Smith*, 4 Colo. 532; *Taintor v. Taylor*, 36 Conn. 251, 4 Am. Rep. 58; *Com. v. Cummins*, 18 B. Mon. (Ky.) 26; *State v. Wofford*, 10 Smed. & M. (Miss.) 626; *Linsday v. People*, 67 Barb. (N. Y.) 548; *Com. v. The Jailer*, 1 Grant's Cas. (Pa.) 218; *Berry v. State*, Dudley (S. Car.) 215. See *Faust v. State*, 45 Wis. 273.

Mayor or Coroner.—As to the power of arrest of a mayor of a city or a coroner, see 2 Hale P. C. 88; *Rex v. Taylor*, 7 C. & P. 266, 32 E. C. L. 505; *Ex p. Anderson*, 55 Ark. 527; *Bass v. State*, 29 Ark. 142; *Brown v. State*, 71 Ind. 470; *Cluggish v. Rogers*, 13 Ind. 538; *Gulick v. New*, 14 Ind. 93, 77 Am. Dec. 49; *Com. v. Leight*, 1 B. Mon. (Ky.) 107; *Shafer v. Mumma*, 17 Md. 331, 79 Am. Dec. 656; *People v. Budge*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 519; *Giles v. Brown*, 1 Mill Const. (S. Car.) 230; *State v. Williams*, 36 S. Car. 493; *Holmes v. State*, 44 Tex. 631. See *Butolph v. Blust*, 41 How. Pr. (N. Y. Supreme Ct.) 481.

Aldermen.—As to the power of aldermen and policemen to arrest for violation of a city ordinance, see *Danovan v. Jones*, 36 N. H. 246.

Sergeant-at-Arms.—The sergeant-at-arms is bound to arrest such persons as the legislature may direct. *Massing v. State*, 14 Wis. 502.

Where a committee of the House of Representatives of Massachusetts was invested with power by the house to investigate certain public affairs and to send for persons and papers, and a certain witness had appeared before the committee and had refused to produce certain books which they asked for, and, being thereupon brought before the committee and examined and asked to produce the books, he refused to do so, the house thereupon issued a warrant to its sergeant-at-arms to arrest him for contempt, and committed him for twenty-four days, unless he should in the meantime produce the books and answer such questions as were put to him, and it was held that this arrest and commitment were both legal. *Burnham v. Morrissey*, 14 Gray (Mass.) 226, 74 Am. Dec. 676.

Fish Wardens.—Where a statute contains a provision authorizing a fish warden to arrest

5. **By Masters.**—At the common law, a master has the right to arrest his runaway servant, and for this he may enter peaceably into any house, unless forbidden by the owner.¹

6. **By Private Persons**—*a.* **FOR FELONIES IN THEIR PRESENCE.**—A private person who sees an act of treason or felony committed in his presence, not alone may but must arrest the offender. To neglect to do so, would be in itself the misdemeanor of misprison of treason or felony.²

Arrest to Prevent Felony.—He may also do so to prevent the commission of a felony.³

without a warrant a person for violating the fish laws, such an arrest is legal if made by such warden or wardens in any town in the state. *Sheets v. Atherton*, 62 Vt. 229.

Officers of Humane Society.—Under the *New York* statute for prevention of cruelty to animals (Laws 1867, c. 375) the authorized officers of the American Society for the Prevention of Cruelty to Animals, designated by the sheriff as prescribed in the act, have power to arrest without warrant any offender violating the statute. *Davis v. American Soc., etc.*, 75 N. Y. 362. See *Stage Horse Cases*, 15 Abb. Pr. N. S. (N. Y. C. Pl.) 62.

Gamekeepers.—It was held that a person who was not a regularly appointed gamekeeper, but who was employed as a watchman to watch for poachers, had authority to apprehend poachers, and that it was not necessary that he should have any written authority. *Rex v. Price*, 7 C. & P. 178, 32 E. C. L. 486.

A gamekeeper may make an arrest. *Rex v. Payne*, 1 Moo. C. C. 378.

1. **By Masters.**—*State v. Kerr*, Add. (Pa.) 324. See *Johnson v. Tompkins*, Baldw. (U. S.) 571; *Weimer v. Sloane*, 6 McLean (U. S.) 259; *Hill v. Low*, 4 Wash. (U. S.) 327; *Driskill v. Parrish*, 3 McLean (U. S.) 631.

The rule of the common law has not been changed by the *Pennsylvania* act "for the regulation of apprentices," though such act gives a further remedy. The same authority that a master has for the arrest of a runaway servant is given by an advertisement for his apprehension, but the person who acts under it does so at his peril, for if the publishers had no authority, or if the advertisement is not genuine, he is liable. *State v. Kerr*, Add. (Pa.) 324. See the title APPRENTICES.

2. **Arrest by Private Person for Felony in His Presence.**—*England.*—2 Hawk. P. C. 74; *Samuel v. Payne*, Doug. 359; *Rex v. Jackson*, 1 East P. C. 298; *Ex p. Kraus*, 1 B. & C. 258, 8 E. C. L. 110; *Hadley v. Perks*, L. R. 1 Q. B. 456; *Allen v. London, etc., R. Co.*, L. R. 6 Q. B. 65; *Rex v. Hunt*, 1 Moo. C. C. 93.

California.—*People v. Pool*, 27 Cal. 572.

Connecticut.—*Knot v. Gay*, 1 Root (Conn.) 66.

Indiana.—*Vandever v. Mattocks*, 3 Ind. 479.

New Hampshire.—*Mayo v. Wilson*, 1 N. H. 53.

New York.—*Taylor v. Strong*, 3 Wend. (N. Y.) 384; *People v. Adler*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 249.

North Carolina.—*State v. Bryant*, 65 N. Car. 327.

South Carolina.—*City Council v. Payne*, 2 Nott & M. (S. Car.) 475.

Vermont.—*In re Powers*, 25 Vt. 261.

See *Long v. State*, 12 Ga. 293; *Ryan v. Donnelly*, 71 Ill. 100; *Kindred v. Stitt*, 51 Ill. 401; *Reuck v. McGregor*, 32 N. J. L. 70; *Phillips v. Trull*, 11 Johns. (N. Y.) 486; *Burns v. Erben*, 40 N. Y. 463; *Hawley v. Butler*, 54 Barb. (N. Y.) 490; *Brockway v. Crawford*, 3 Jones (N. Car.) 433, 67 Am. Dec. 250; *Doughty v. State*, 33 Tex. 1; *Keenan v. State*, 8 Wis. 132.

The Attempt to Commit a Treason or Felony, even though only a misdemeanor, gives a person seeing it the right to arrest the offender. *Rex v. Hunt*, 1 Moo. C. C. 93; *Handcock v. Baker*, 2 B. & P. 260. See *Case of Armes*, Poph. 121, cited in 2 B. & P. 264, note.

If a wound is given of such a character that there would be a murder if the party should die, those witnessing it are bound to arrest the offender, otherwise they are liable to fine and imprisonment. 1 Chit. Crim. Law 16.

But in *Alford v. State*, 8 Tex. App. 545, it was held that no person, except an officer, is authorized to make arrests for felonies committed in his presence and within his view, unless he is specially appointed to do so by a magistrate, or is summoned on the *posse comitatus*.

Private Person may Arrest on Fresh Pursuit.—A private person may lawfully arrest a person without a warrant upon fresh pursuit when he has knowledge of the commission of a felony. *Kennedy v. State*, 107 Ind. 144. See further, *Rohan v. Sawin*, 5 Cush. (Mass.) 285; *Com. v. Carey*, 12 Cush. (Mass.) 251; *Kindred v. Stitt*, 51 Ill. 401; *Stonehouse v. Elliott*, 6 T. R. 315; *Kercheval v. State*, 46 Ind. 120.

In *Hadley v. Perks*, L. R. 1 Q. B. 456, *Blackburn, J.*, said: "Under the common law, if a felony were actually committed a person might be arrested without a warrant by any one, if he were reasonably suspected of having committed the felony; and a constable could go farther: if he had reasonable ground for supposing that a felony had been committed, and reasonable ground for supposing that a certain person had committed the supposed felony, he might arrest him, though no felony had actually been committed; but neither a constable nor any one else could arrest a person merely on suspicion of his having illegally obtained goods. This is a misdemeanor, and a power of arrest is given with respect to it quite beyond the common law."

3. **Arrest by Private Person to Prevent Felony.**—*Handcock v. Baker*, 2 B. & P. 260; *Dill v. State*, 25 Ala. 15.

When a private person is endeavoring to

b. FOR PAST FELONIES.—An individual may, acting in good faith, arrest a particular individual for having committed a treason or felony on an occasion already past.¹

What Necessary to Justify Individual in Arresting for Past Felony.—In order to justify such an arrest, it must be proved that a felony was actually committed and that there was reasonable ground for suspecting the person arrested.²

prevent the commission of a felony, which he is justified in doing, he may use all the force necessary for that purpose, but wanton violence is not justifiable. *Ruloff v. People*, 45 N. Y. 213.

1. Arrest by Private Individual for Past Felony—*England*.—*Ledwith v. Catchpole*, Cald. 291; *Ashley's Case*, 12 Coke 90.

United States.—*U. S. v. Boyd*, 45 Fed. Rep. 851.

Connecticut.—*Wrexford v. Smith*, 2 Root (Conn.) 171.

Georgia.—*Long v. State*, 12 Ga. 293.

Indiana.—*Doering v. State*, 49 Ind. 56, 19 Am. Rep. 669.

New Jersey.—*Reuck v. McGregor*, 32 N. J. L. 70.

New York.—*Holley v. Mix*, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702; *Burns v. Erben*, 40 N. Y. 463.

North Carolina.—*State v. Roane*, 2 Dev. (N. Car.) 58; *Brockway v. Crawford*, 3 Jones (N. Car.) 433, 67 Am. Dec. 250.

Oregon.—*Lander v. Miles*, 3 Oregon 35.

Pennsylvania.—*Brooks v. Com.*, 61 Pa. St. 352, 100 Am. Dec. 645.

2. When Private Person Justified in Arresting

for Past Felony—*England*.—*Allen v. Wright*, 8 C. & P. 522, 34 E. C. L. 512; *Samuel v. Payne*, Doug. 359; *Ledwith v. Catchpole*, Cald. 291; *Rex v. Woolmer*, 1 Moo. C. C. 334; *Nicholson v. Hardwicke*, 5 C. & P. 495, 24 E. C. L. 425; *Davis v. Russell*, 5 Bing. 354, 15 E. C. L. 463, 2 M. & P. 590; *Lawrence v. Hedger*, 3 Taunt. 14; *Hobbs v. Branscomb*, 3 Campb. 420; *Chinn v. Morris*, 2 C. & P. 361, 12 E. C. L. 171; *Beckwith v. Philby*, 6 B. & C. 635, 13 E. C. L. 287, 9 D. & R. 487; *Reg. v. Tuberfield*, L. & C. 495, 10 Cox C. C. 1; *Stonehouse v. Elliott*, 6 T. R. 315; *Adams v. Moore*, 2 Selw. N. P. 910.

Canada.—*Ashley v. Dundas*, 5 U. C. Q. B. O. S. 754; *McKenzie v. Gibson*, 8 U. C. Q. B. 100.

United States.—*Johnson v. Tompkins*, Baldw. (U. S.) 578; *Wilmarth v. Mountford*, 4 Wash. (U. S.) 82.

Alabama.—*Carey v. State*, 76 Ala. 78.

Arkansas.—*Carr v. State*, 43 Ark. 99.

Connecticut.—*Wrexford v. Smith*, 2 Root (Conn.) 171.

Georgia.—*Long v. State*, 12 Ga. 293.

Illinois.—*Dodds v. Board*, 43 Ill. 95; *Kindred v. Stitt*, 51 Ill. 401; *Ryan v. Donnelly*, 71 Ill. 100.

Indiana.—*Wasson v. Canfield*, 6 Blackf. (Ind.) 406; *Teagarden v. Graham*, 31 Ind. 422; *Doerin v. State*, 49 Ind. 56, 19 Am. Rep. 669.

Iowa.—*Allen v. Leonard*, 28 Iowa 529.

Massachusetts.—*Rohan v. Sawin*, 5 Cush. (Mass.) 281; *Com. v. Presby*, 14 Gray (Mass.) 65; *Morley v. Chase*, 143 Mass. 396.

Michigan.—*People v. Burt*, 51 Mich. 199; *Drennan v. People*, 10 Mich. 169; *Somerville v. Richards*, 37 Mich. 299.

Missouri.—*State v. Underwood*, 75 Mo. 230.

Nebraska.—*Simmerman v. State*, 16 Neb. 615.

New Hampshire.—*State v. Holmes*, 48 N. H. 377.

New Jersey.—*Reuck v. McGregor*, 32 N. J. L. 70.

New York.—*Holley v. Mix*, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702; *Phillips v. Trull*, 11 Johns. (N. Y.) 486; *Burns v. Erben*, 40 N. Y. 463; *Hawley v. Butler*, 54 Barb. (N. Y.) 490; *Davis v. American Soc.*, etc., 75 N. Y. 363; *Hall v. Suydam*, 6 Barb. (N. Y.) 84.

North Carolina.—*State v. Roane*, 2 Dev. (N. Car.) 58; *Brockway v. Crawford*, 3 Jones (N. Car.) 433, 67 Am. Dec. 250; *Neal v. Joyner*, 89 N. Car. 287; *State v. Bryant*, 65 N. Car. 327.

Pennsylvania.—*Brooks v. Com.*, 61 Pa. St. 352, 100 Am. Dec. 645; *Com. v. Deacon*, 8 S. & R. (Pa.) 49; *Wakely v. Hart*, 6 Binn. (Pa.) 316; *Winebiddle v. Porterfield*, 9 Pa. St. 137.

South Carolina.—*State v. Ferguson*, 2 Hill (S. Car.) 619, 27 Am. Dec. 412.

Tennessee.—*Eanes v. State*, 6 Humph. (Tenn.) 53, 44 Am. Dec. 289; *Lewis v. State*, 3 Head (Tenn.) 146; *Hall v. Hawkins*, 5 Humph. (Tenn.) 357.

Texas.—*Doughty v. State*, 33 Tex. 1.

Wisconsin.—*Keenan v. State*, 8 Wis. 132.

A Personal Resemblance between the Person Arrested and the Real Offender is not sufficient to justify an arrest. *Sugg v. Pool*, 2 Stew. & P. (Ala.) 196; *Aaron v. Alexander*, 3 Campb. 35; *Rogers v. Wilson*, Minor (Ala.) 407, 12 Am. Dec. 61.

Reasonable Grounds of Suspicion.—A person must allege and prove that he had reasonable grounds for believing that the person he arrested was the guilty person. *Williams v. Croswell*, 2 C. & K. 422, 61 E. C. L. 422; *M'Cloughan v. Clayton*, Holt 478, 3 E. C. L. 190; *Broughton v. Jackson*, 18 Q. B. 387, 83 E. C. L. 387, 11 Eng. L. & Eq. 388; *Wasson v. Canfield*, 6 Blackf. (Ind.) 406.

A mere suspicion alone is not sufficient to justify an arrest; there must be specific circumstances connecting the party suspected with the act. *Findlay v. Pruitt*, 9 Port. (Ala.) 195.

When the arrest is made under the belief that the party accused is guilty of a felony, when in fact he is only guilty of a misdemeanor, the party arresting will be justified. *Smith v. Donnelly*, 66 Ill. 464.

In *Tarvers v. State*, 90 Tenn. 485, it was held that *Tennessee Code*, art. 5868, which provides that a private person may arrest another "when felony has been committed and he has reasonable cause to believe that the

person arrested committed it," authorizes private persons to make such arrests only within the State of Tennessee.

Reasonable Suspicion—How Far Question of Law or Fact.—It is a question of law for the court to determine whether the facts proved are sufficient to justify a reasonable person in believing that the person arrested was the offender; and it is for the jury to determine whether the facts stated in the plea and such facts as may be inferred from them are true. *Mure v. Kaye*, 4 Taunt. 34; *West v. Baxendale*, 9 C. B. 141, 67 E. C. L. 141; *Coxe v. Wirrall*, Cro. Jac. 193; *Pain v. Rochester*, Cro. Eliz. 871.

In *Panton v. Williams*, 2 Q. B. 169, 42 E. C. L. 622, the court, by Tindal, C. J., said: "We take the broad question between the parties to be this: Whether, in a case in which the question of reasonable or probable cause depends not upon a few simple facts, but upon facts which are numerous and complicated, and upon inferences to be drawn therefrom, it is the duty of the judge to inform the jury, [that] if they find the facts proved and the inferences to be warranted by such facts, the same do or do not amount to reasonable or probable cause so as thereby to leave the question of fact to the jury and the abstract question of law to the judge. And we are all of opinion that it is the duty of the judge so to do. In the more simple cases, where the question of reasonable and probable cause depends entirely on the proof of the facts and circumstances which gave rise to and attended the prosecution, no doubt has ever existed, from the time of the earliest authorities, but that such question is purely a question of law to be decided by the judge. * * * And such being the rule of law where the facts are few and the case simple, we cannot hold it to be otherwise where the facts are more numerous and complicated. It is undoubtedly attended with greater difficulty in the latter case to bring before the jury all the combinations of which numerous facts are susceptible, and to place in a distinct point of view the application of the rule of law, according as all or some only of the facts, and inferences from facts, are made out to their satisfaction. But it is equally certain that the task is not impracticable; and it rarely happens but that there are some leading facts in each case which present a broad distinction to their view without having recourse to the less important circumstances that have been brought before them." See further, *Sutton v. Johnstone*, 1 T. R. 493; *Johnstone v. Sutton*, 1 T. R. 510; *Wall v. McNamara*, *Michaelmas 1783*, cited in *Sutton v. Johnstone*, 1 T. R. 502; *Mostyn v. Fabrigas*, Cowp. 161; *Jones v. Gwynn*, 10 Mod. 148; *Reynolds v. Kennedy*, 1 Wils. 232; *Broughton v. Jackson*, 18 Q. B. 387, 83 E. C. L. 387, 11 Eng. L. & Eq. 386; *Wasson v. Canfield*, 6 Blackf. (Ind.) 406.

In some instances it has been treated as a mixed question of law and fact, as the question of probable cause in case of malicious prosecution. See *Beckwith v. Philby*, 6 B. & C. 635, 13 E. C. L. 287; *Davis v. Russell*, 5 Bing. 354, 15 E. C. L. 463; *Wedge v. Berkeley*, 6 Ad. & El. 663, 33 E. C. L. 167; *Nicholson v. Hardwicke*, 5 C. & P. 495, 24 E. C. L. 425.

Probable Cause, though No Felony in Fact Committed.—In many cases it has been held that proof of probable cause for making the arrest will not justify a private person in doing so unless a felony has actually been committed. *Burke v. Bell*, 36 Me. 317; *Com. v. McLaughlin*, 12 Cush. (Mass.) 615; *Holley v. Mix*, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702; *Hawley v. Butler*, 54 Barb. (N. Y.) 490; *Mandeville v. Guernsey*, 51 Barb. (N. Y.) 99; *Brown v. Chadsey*, 39 Barb. (N. Y.) 253; *Pratt v. Hill*, 16 Barb. (N. Y.) 303; *Burns v. Erben*, 40 N. Y. 463; *Farnam v. Feeley*, 56 N. Y. 451; *Farrell v. Warren*, 3 Wend. (N. Y.) 253; *Brooks v. Com.*, 61 Pa. St. 352, 100 Am. Dec. 645; *Harris v. Bennet*, 1 Phila. (Pa.) 175.

Reasonable Suspicion in Mitigation of Damages.—But proof of reasonable ground of suspicion is admissible in mitigation of damages, though the general bad character of the prisoner is not admissible against him in order to justify the arrest. *Chinn v. Morris*, 2 C. & P. 361, 2 E. C. L. 171; *Cowles v. Dunbar*, 2 C. & P. 565, 12 E. C. L. 265; *Rogers v. Wilson*, *Minor* (Ala.) 407, 12 Am. Dec. 61; *Sugg v. Pool*, 2 Stew. & P. (Ala.) 196; *Wrexford v. Smith*, 2 Root (Conn.) 171; *Wasson v. Canfield*, 6 Blackf. (Ind.) 406; *Drennan v. People*, 10 Mich. 169; *Phillips v. Trull*, 11 Johns. (N. Y.) 486; *Russell v. Shuster*, 8 W. & S. (Pa.) 308; *McKenzie v. Allen*, 3 Strobb. (S. Car.) 546; *Eanes v. State*, 6 Humph. (Tenn.) 53, 44 Am. Dec. 289; *Staples v. State*, 14 Tex. App. 136.

Mere Honest Belief Not Sufficient.—There must be a clear-cut belief, founded upon and arising from definite facts and strong reasons. A mere honest belief is not sufficient to justify a private person in making an arrest for a past felony. And the facts must be such as would warrant a cautious person in coming to the conclusion that the person arrested is the real offender, and these facts must be known to the person making the arrest, at the time it is made. *Holtum v. Lotun*, 6 C. & P. 726, 25 E. C. L. 619; *Lock v. Ashton*, 12 Q. B. 871, 64 E. C. L. 871; *Allen v. Wright*, 8 C. & P. 522, 34 E. C. L. 512; *Roberts v. Orchard*, 2 H. & C. 769; *Read v. Coker*, 13 C. B. 850, 76 E. C. L. 850; *Broad v. Ham*, 5 Bing. N. Cas. 722, 35 E. C. L. 286; *Thomas v. Russell*, 9 Exch. 764, 25 Eng. L. & Eq. 559; *Reg. v. Dadson*, 1 Eng. L. & Eq. 566, 2 Den. C. C. 75; *Perryman v. Lister*, L. R. 3 Exch. 197; *Johnson v. Tompkins*, *Baldw.* (U. S.) 571; *Wilmarth v. Mountford*, 4 Wash. (U. S.) 82; *Rogers v. Wilson*, *Minor* (Ala.) 407, 12 Am. Dec. 61; *Wills v. Noyes*, 12 Pick. (Mass.) 324; *Hall v. Suydam*, 6 Barb. (N. Y.) 84; *Swaim v. Stafford*, 3 Ired. (N. Car.) 289; *Winebiddle v. Porterfield*, 9 Pa. St. 137; *Hall v. Hawkins*, 5 Humph. (Tenn.) 357.

Felony must Actually have been Committed.—In *Reuck v. McGregor*, 32 N. J. L. 70, the court, by Bedle, J., said: "A private person is justified in arresting when a felony has actually been committed, and there is probable ground to fairly suspect the person guilty, or, as it is well expressed by Tindal, C. J., in the case of *Allen v. Wright*, 8 C. & P. 522, 34 E. C. L. 512, where it appears '(1) that a felony had actually been committed; (2) that

If a Person Who has been Arrested for a Felony Escapes, any one may arrest him without a warrant.¹

the circumstances were such that you yourselves, or any reasonable person acting without passion and prejudice, would have fairly suspected the plaintiff of being the person who did it." The test here given is in accord with many authorities. 2 Hale P. C. 78; Ashley v. Dundas, 5 U. C. Q. B. O. S. 749; McKenzie v. Gibson, 8 U. C. Q. B. 100; Teagarden v. Graham, 31 Ind. 422; Holley v. Mix, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702; People v. Adler, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 249; Buckway v. Crawford, 3 Jones (N. Car.) 433; Doughty v. State, 33 Tex. 1. See Hedges v. Chapman, 2 Bing. 523, 9 E. C. L. 508; Reg. v. Price, 8 C. & P. 282, 34 E. C. L. 390.

According to other authorities, it is not sufficient for a private person to prove that he had probable cause to believe the person arrested guilty of felony, but he must prove a felony actually committed by the person arrested. Com. v. Carey, 12 Cush. (Mass.) 246; Rohan v. Sawin, 5 Cush. (Mass.) 281; Morley v. Chase, 143 Mass. 396.

A private person may arrest another who has stolen the property of a private person, and is in the act of carrying it away. Hershey v. O'Neill, 36 Fed. Rep. 168.

Where the person arrested was in law incapable of committing a felony it was held that the person who arrested him was liable. Marsh v. Loader, 14 C. B. N. S. 535, 108 E. C. L. 535.

Where a woman's pocket was picked in a theatre, and she gave a person over to an officer on suspicion, but was mistaken as to his guilt, she was held liable. The judgment did not clearly determine whether she was inexcusable because no felony had been committed, or because she could not prove that she had reasonable ground for suspecting the prisoner of the act. But the case goes to show that where a private person makes an arrest of another he must make out a full and complete justification. Stonehouse v. Elliott, 6 T. R. 315.

Distinction between Officers and Private Persons.—The broad distinction between arrests made by an officer and by a private person, on suspicion of felony, is this: that a private person, in order to be justified, must prove that a felony has actually been committed, while an officer need not. Beckwith v. Philby, 6 B. & C. 635, 13 E. C. L. 287; Samuel v. Payne, Doug. 360; Chinn v. Morris, 2 C. & P. 361, 12 E. C. L. 171; Hadley v. Perks, L. R. 1 Q. B. 456.

In cases of suspicion of felony, and in cases of offenses less than felony, a private person has at common law no right to apprehend offenders. Fost. 318.

The principle of the common law in reference to arrests is thus stated by Lord Tenterden in Beckwith v. Philby, 6 B. & C. 635, 13 E. C. L. 287: "There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only

make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas a constable, having reasonable ground to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities." And to this effect are the authorities in the absence of controlling legislation. See Allen v. Wright, 8 C. & P. 522, 34 E. C. L. 512; Rohan v. Sawin, 5 Cush. (Mass.) 281; Reuck v. McGregor, 32 N. J. L. 70; Burns v. Erben, 40 N. Y. 463; Neal v. Joyner, 89 N. Car. 287; Brockway v. Crawford, 3 Jones (N. Car.) 433, 67 Am. Dec. 250.

Arrest of Person Indicted for Felony.—Whether or not a private person may arrest a person who stands indicted for felony, does not appear to be well settled. Lord Hale inclines to the opinion that the protection does not extend to a private person in such a case, because a person innocent may be indicted, and because there is another way of bringing him to answer, viz., process of *capias* to the sheriff, who is a known responsible officer. 1 Roscoe's Criminal Evidence 262; 2 Hale P. C. 84.

The reasoning of Mr. East, however, is rather in favor of the protection. It may be urged, he observes, that if the fact of the indictment found against the party be known to those who endeavor to arrest him, in order to bring him to justice, it cannot be truly said that they act upon their own private suspicion or authority, and therefore they ought to have equal protection with the ordinary ministers of the law. At any rate, it is a good cause of arrest, by private persons, if it may be made without the death of the felon. And if the fact of the prisoner's guilt be necessary for their complete justification, the bill of indictment found by the grand jury would (he conceives) for that purpose be *prima facie* evidence of the fact till the contrary should be proved. 1 East P. C. 300; 1 Roscoe's Criminal Evidence 262.

After a Warrant has been Issued a private person has no right to arrest for the crime charged in the warrant; if he interferes without being called on by the officer he acts at his peril. Kirbie v. State, 5 Tex. App. 60.

1. Rearrest after Escape of One Charged with Felony.—Com. v. Sheriff, 1 Grant's Cas. (Pa.) 187; Dows' Case, 18 Pa. St. 37; State v. Holmes, 48 N. H. 377.

After a Felon Who has Pleaded Guilty has Escaped without force or actual breaking from the prison, to which he has been sentenced, a private person may arrest him without a warrant. State v. Holmes, 48 N. H. 377. In this case the court, by Smith, J., said: "The reason of the rule allowing private persons in certain cases to make arrests seems at least as applicable to the arrest of a felon who, after sentence upon his plea of guilty, has escaped from confinement, as to the arrest of a person who, though there is reasonable cause to suspect him, has not yet been tried or sentenced. The former has been proved guilty of a felony by his own solemn admission; the latter may

c. FOR AFFRAYS AND OTHER OFFENSES IN THEIR PRESENCE.—A private person may arrest another for an affray or breach of the peace committed in his presence.¹

turn out to be innocent. The former has beyond all doubt committed two crimes, a felony and a misdemeanor; the latter may not have committed any crime at all. 'The people ought not to be deprived of any right by an escape of whatever kind from custody under criminal process,' *Clark v. Cleveland*, 6 Hill (N. Y.) 349; 'and, indeed, since the liberty gained by the prisoner is wholly owing to his own wrong, there seems to be no reason he should take any manner of advantage from it,' 2 Hawkins P. C. 200, § 12. The well-settled doctrine that a private person may, after the commission of a felony, arrest an individual whom he has reasonable cause to believe guilty, does not admit of the limitation 'provided the person thus suspected has not solemnly admitted his guilt, and afterwards escaped from legal custody.'"

Arrest to Prevent Escape.—When, because of the want of an officer or for other sufficient reason, it is necessary to do so, a private person may arrest a felon in order to prevent his escape. But in order to be justified he must notify the felon of his purpose. *State v. Bryant*, 65 N. Car. 327.

1. **Arrest by Private Individual for Affray in His Presence—England.**—4 Black. Comm. 145; *Foster* 272, 311; *Rex v. Hunt*, 1 Moo. C. C. 93; *Grant v. Moser*, 5 M. & G. 74, 44 E. C. L. 123; *Simmons v. Millingen*, 2 C. B. 524, 52 E. C. L. 524; *Baynes v. Brewster*, 2 Q. B. 375, 42 E. C. L. 720; *Webster v. Watts*, 11 Q. B. 311, 63 E. C. L. 311; *Cohen v. Huskisson*, 2 M. & W. 477; *Rex v. Wigan*, 1 W. Bl. 47; *Timothy v. Simpson*, 1 C. M. & R. 757.

United States.—U. S. v. Travers, 2 Wheel. Cr. Cas. (U. S. Circuit Ct.) 508.

Alabama.—Dill v. State, 25 Ala. 15.

New Jersey.—Reuck v. McGregor, 32 N. J. L. 70.

New York.—Holley v. Mix, 3 Wend. (N. Y.) 351, 20 Am. Dec. 702.

North Carolina.—Brockway v. Crawford, 3 Jones (N. Car.) 438, 67 Am. Dec. 250.

Pennsylvania.—Com. v. Deacon, 8 S. & R. (Pa.) 48; *Wakely v. Hart*, 6 Binn. (Pa.) 316.

Vermont.—In re Powers, 25 Vt. 261.

Wisconsin.—Keenan v. State, 8 Wis. 132.

While an affray is actually going on, any one may, in order to preserve peace, arrest any of the offenders without a warrant. *Knot v. Gay*, 1 Root (Conn.) 66.

Facts must be Specially Pleaded.—One who is sued for such an alleged false arrest must aver that there was an affray or riot. *Price v. Seeley*, 10 Cl. & F. 28; *Grant v. Moser*, 5 M. & G. 123, 44 E. C. L. 74; *Knot v. Gay*, 1 Root (Conn.) 66.

A private person cannot avail himself of this defense under a plea of the general issue, but a peace officer can, *McCloughan v. Clayton*, Holt 478, 3 E. C. L. 190; because a private person is *prima facie* a trespasser in making an arrest, and must rebut this presumption against him by a special plea upon

the record, *Wheeler v. Whiting*, 9 C. & P. 262, 38 E. C. L. 111; *Williams v. Crosswell*, 2 C. & K. 422, 61 E. C. L. 422; *Webster v. Watts*, 11 Q. B. 311, 63 E. C. L. 311.

Disposition of Person Arrested.—And as private persons may take all necessary measures to end the breach and to prevent its recurrence, they may apprehend and detain any persons taking part in the disturbance. Whether or no, when all danger of any further breach is over, no felony having been committed, they are bound to set at liberty the persons in their custody, or whether they may take them before a magistrate, or give them into the custody of a peace officer, does not appear to have been discussed. *Rex v. Price*, 7 C. & P. 178, 32 E. C. L. 486.

Right to Arrest Continues while Public Peace Endangered.—A private person has the right to arrest any person actually engaged in an affray in his presence, whether he was the first wrongdoer or not, so long as the conduct of the person arrested shows that the public peace is likely to be endangered by his acts. *Timothy v. Simpson*, 1 C. M. & R. 757; 1 Hawk. P. C., bk. 1, c. 63, § 11; *Derecourt v. Corbishley*, 32 Eng. L. & Eq. 186, 5 El. & Bl. 188, 85 E. C. L. 188.

There must Be a Clear and Distinct Breach of the Peace before a private person is justified in arresting another, or in delivering him over to an officer. *Ingle v. Bell*, 1 M. & W. 516; *Rex v. Bright*, 4 C. & P. 387, 19 E. C. L. 434; *Wheeler v. Whiting*, 9 C. & P. 262, 38 E. C. L. 111; *Cohen v. Huskisson*, 2 M. & W. 477; *Baynes v. Brewster*, 2 Q. B. 375, 42 E. C. L. 720; *Grant v. Moser*, 5 M. & G. 123, 44 E. C. L. 74; *Howell v. Jackson*, 6 C. & P. 723, 25 E. C. L. 617; *Moriarty v. Brooks*, 6 C. & P. 684, 25 E. C. L. 597.

Where a bystander took hold of a fireman and turned him around, telling him that he was pumping water on the wrong place, and the fireman handed him over to a policeman, it was held that the fireman was not justified in so doing, as there was no assault on him, the bystander not having acted hostilely. *Coward v. Baddeley*, 4 H. & N. 478. See *Wooding v. Oxley*, 9 C. & P. 1, 38 E. C. L. 13, to the same effect.

But see *Burton v. Henson*, 10 M. & W. 105, where it was held that the churchwardens were justified in removing a dismissed parish clerk from the church when they had reasonable grounds for believing that he would interrupt divine service.

When Private Person is Assaulted by One Disturbing the Peace.—A private person who is assaulted by a person who is disturbing the peace in a public street may arrest him and bring him to any peace officer, and such peace officer need not be a justice of the peace. *Forrester v. Clarke*, 3 U. C. Q. B. 151.

If Either Party be Dangerously Wounded in an Affray, and a stander-by, endeavoring to arrest the other, be not able to take him without

Where a Misdemeanor Amounts to a Breach of the Peace a private person not alone may, but is bound to, interfere to suppress it.¹

Misdemeanor Not Amounting to a Breach of the Peace.—In the case of misdemeanors which do not amount to a breach of the peace a private person may, according to some authorities, make an arrest, but is not bound to do so.²

Forcible Entry—Arrest by Individual or by His Direction.—A private person who directs a constable to arrest one for a forcible entry which amounts to a breach of the peace for which that officer has the authority to arrest, is not liable in a civil action; but a private person who, without a warrant, makes such an arrest himself, when no officer is present, may become liable.³

d. FOR PAST RIOTS AND AFFRAYS.—A private person is not justified in arresting or giving in charge of a policeman, without a warrant, a party who has been engaged in an affray, unless the affray is still continuing, or there is reasonable ground for apprehending that he intends to renew it.⁴

hurting or even wounding him, yet he is in no way liable to be punished, inasmuch as he is bound, under pain of fine and imprisonment, to arrest such an offender, and either detain him till it appear whether the party will live or die, or carry him before a justice of peace. 1 Hawk. P. C., c. 63, § 12; 3 Inst. 158.

No Arrest after Breach of Peace at an End.—It appears from *Price v. Seeley*, 10 Cl. & F. 28, that while a private person may interfere for the purpose of stopping or preventing a breach of the peace he cannot do so for the purpose of bringing the person to punishment when it is all over. See *Timothy v. Simpson*, 1 C. M. & R. 760.

1. Misdemeanor Amounting to Breach of Peace.—*Hancock v. Baker*, 2 B. & P. 260; *Rex v. Wigan*, 1 W. Bl. 47; *Case of Armes*, Poph. 121, cited in 2 B. & P. 264, note; *Respublica v. Montgomery*, 1 Yeates (Pa.) 419; *Com. v. Daley*, 4 Pa. L. J. 154; *State v. Jenkins*, 14 Rich. (S. Car.) 215, 94 Am. Dec. 132.

Person Present Presumed Guilty.—All persons who are present at riotous and tumultuous assemblies are *prima facie* presumed to be participants, and the onus is thrown upon them of proving their noninterference, unless they have been actually engaged in suppressing the riot, by arrest or otherwise, which they are bound to do in law. *Reg. v. Howell*, 9 C. & P. 437, 38 E. C. L. 179; *Reg. v. Sharpe*, 3 Cox C. C. 228; *Roberts v. O'Conner*, 33 Me. 496; *Williams v. State*, 9 Mo. 270; *State v. Cribbs*, Add. (Pa.) 277; *State v. Blair*, 13 Rich. (S. Car.) 93; *State v. Bugbee*, 22 Vt. 32. See also *State v. Hildreth*, 9 Ired. (N. Car.) 440, 51 Am. Dec. 369; *Floyd v. State*, 29 Tex. App. 349; *Sharp v. State*, 29 Tex. App. 211; *Alford v. State*, 31 Tex. Crim. Rep. 299; *Connaught v. State*, 1 Wis. 159, 60 Am. Dec. 370.

In the absence of a conspiracy, the fact that a person is present when a homicide while resisting arrest is committed does not render such person guilty, unless he does some overt act with a view to committing the homicide. *Woolweaver v. State*, 50 Ohio St. 277, 40 Am. St. Rep. 667.

In *State v. McBride*, 19 Mo. 239, it was held that it is not a presumption of law that every one present at a riotous and tumultuous assembly, and actually assisting in its suppression, is

a participant unless he proves his noninterference.

2. Misdemeanors Generally.—2 Hawk. P. C., c. 12, § 301. But see *Smith v. Donnelly*, 66 Ill. 464.

The common-law rule that arrests without warrant for misdemeanors, which do not amount to breaches of the peace, are unlawful, has been modified by statute in many cases, both in England and in some of the states which have special enactments in regard to arrests without warrant generally. See 24 and 25 Vict., c. 96, § 103; *Morris v. Wise*, 2 F. & F. 51; *Kindred v. Stitt*, 51 Ill. 401; *Stage Horse Cases*, 15 Abb. Pr. N. S. (N. Y. C. Pl.) 62; *Lewis v. State*, 3 Head. (Tenn.) 127; *Smith v. State*, 13 Tex. App. 507. See also *supra*, this title and division, subdiv. *By Peace Officers—For Affrays and Other Offenses in Officers' Presence*.

3. Forcible Entry Amounting to Breach of Peace.—*Derecourt v. Corbishley*, 5 El. & Bl. 188, 85 E. C. L. 188, 32 Eng. L. & Eq. 186. See further, *Ingle v. Bell*, 1 M. & W. 516; *Cohen v. Huskisson*, 2 M. & W. 477; *Price v. Seeley*, 10 Cl. & F. 28; *Coward v. Baddeley*, 4 H. & N. 478; *Fox v. Gaunt*, 3 B. & Ad. 798, 23 E. C. L. 187.

4. Past Crimes.—*Price v. Seeley*, 10 Cl. & F. 28.

The same rule is laid down in *Phillips v. Trull*, 11 Johns. (N. Y.) 486, where the court, by Platt, J., said: "So any person whatever, if an affray be made to the breach of the peace, may, without a warrant from a magistrate, restrain any of the offenders in order to preserve the peace, but after there is an end of the affray, they cannot be arrested without a warrant."

It seems clear that, regularly, no private person can, of his own authority, arrest another for a bare breach of the peace, after it is over. 3 Hawk. P. C. 174, bk. 2, § 20. See also 2 Inst. 52; *Burn's Justice* 92.

A private person cannot make an arrest after a breach of the peace is over, and it has been held that he cannot do so to prevent such a misdemeanor. *Wheeler v. Whiting*, 9 C. & P. 262, 38 E. C. L. 111.

In justifying an arrest without a warrant for an affray, or a breach of the peace which was still continuing at the time of the arrest,

c. **ASSISTING OFFICER.**—An officer lawfully making an arrest may demand the aid of a private person, and he is bound to render it.¹ In such case, however, in order for the private person to be justified, the officer must be actually or constructively present and commanding.²

7. By Surety in Bail Bond.—In contemplation of law, when a prisoner is admitted to bail he is taken into custody by his surety, who may arrest him whenever he thinks proper, without a warrant, and deliver him up again to the magistrate who admitted him to bail; and this he may do at any time before a forfeiture of the bail bond.³

the plea should contain a direct averment that there was such an affray or breach of the peace, actually continuing at the time, or reasonable grounds for fearing its renewal. *Price v. Seeley*, 10 Cl. & F. 28. See also *Fox v. Gaunt*, 3 B. & Ad. 798, 23 E. C. L. 187; *Butler v. Turley*, 2 C. & P. 585, 12 E. C. L. 277; *Wahl v. Walton*, 30 Minn. 506; *Phillips v. Trull*, 11 Johns. (N. Y.) 486.

Where a private person of his own account undertakes to make an arrest of a party guilty only of a misdemeanor, except when such misdemeanor is actually committed, or there is danger of its occurrence or renewal, and at the summons of a proper officer, he is thereupon a trespasser, and the person whom he is attempting to arrest may use all the force that is necessary to prevent him. A private person has no right, without a warrant, to make an arrest for a riot, rout, or affray, or other breach of the peace, unless the offense is committed in his presence, nor can a justice of the peace confer such authority by mere verbal command or order. *State v. Campbell*, 107 N. Car. 948.

1. Private Person Assisting Officer at His Demand.—2 Hawk. P. C., c. 13, § 7.

England.—*Burdett v. Colman*, 14 East 163.

Alabama.—*Rogers v. State*, 62 Ala. 170; *Watson v. State*, 83 Ala. 60; *Martin v. State*, 89 Ala. 115, 18 Am. St. Rep. 91.

Arkansas.—*Mitchell v. State*, 12 Ark. 50, 54 Am. Dec. 253.

Georgia.—*Phillips v. State*, 66 Ga. 755.

Indiana.—*Dietrichs v. Schaw*, 43 Ind. 175.

Kentucky.—*Reed v. Rice*, 2 J. J. Marsh. (Ky.) 44, 19 Am. Dec. 122.

Michigan.—*Firestone v. Rice*, 71 Mich. 377, 15 Am. St. Rep. 266.

New Hampshire.—*Forrist v. Leavitt*, 52 N. H. 481.

New York.—*Coyles v. Hurtin*, 10 Johns. (N. Y.) 85.

North Carolina.—*State v. Shaw*, 3 Ired. (N. Car.) 20.

Vermont.—*McMahan v. Green*, 34 Vt. 69, 80 Am. Dec. 665.

Where the party making the arrest is not a known public officer, but only assumes to act in the particular case by special appointment, persons aiding the supposed officer are bound to know whether he is authorized to make the arrest or not, and if in such case the party making the arrest is a trespasser for want of authority, those aiding him are also trespassers. *Dietrichs v. Schaw*, 43 Ind. 175.

Grounds of Belief of One Aiding Officer.—It has been held that a private person who assists an officer in making an arrest must him-

self have reasonable grounds for believing that the person being arrested is guilty of a felony. *Salisbury v. Com.*, 79 Ky. 425.

Homicide by One Aiding Officer—When Justified.—A private person who assists an officer is not justified in killing the person being arrested where no felony has actually been committed. *East P. C.* 297; *Fost. Cr. L.* 309.

Volunteer.—Where an officer is making an arrest under a warrant a volunteer interferes at his peril. *Kirbie v. State*, 5 Tex. App. 60. See generally *supra*, this title, *Right to Summon Bystanders*.

2. Presence of Officer Necessary.—*Rex v. Patience*, 7 C. & P. 775, 32 E. C. L. 730; *Com. v. Field*, 13 Mass. 321; *People v. Moore*, 2 Dougl. (Mich.) 1; *Coyles v. Hurtin*, 10 Johns. (N. Y.) 85.

The officer may have special assistants to aid him if he goes away for further help. *Coyles v. Hurtin*, 10 Johns. (N. Y.) 85; 1 Chitty Crim. Law 16.

Where a private person takes part in an unlawful imprisonment of another by an officer, he becomes a principal in the act and is liable therefor; but if he merely communicates facts or suspicious circumstances to the officer, allowing him then to act on his own judgment and responsibility, he is no longer liable. *Brown v. Chadsey*, 39 Barb. (N. Y.) 253. See *supra*, this title, *Right to Summon Bystanders*.

3. Surety on Bail Bond.—Anonymous, 6 Mod. 231; *State v. Cunningham*, 10 La. Ann. 393; *State v. Lazarre*, 12 La. Ann. 166; *Com. v. Brickett*, 8 Pick. (Mass.) 140; *Nicolls v. Ingersoll*, 7 Johns. (N. Y.) 145; *State v. Le Cerf*, 1 Bailey (S. Car.) 410; *Com. v. Bronson*, 14 B. Mon. (Ky.) 291; *Ex p. Milburn*, 9 Pet. (U. S.) 704; *State v. Mahon*, 3 Harr. (Del.) 568.

In *Com. v. Brickett*, 8 Pick. (Mass.) 140, the court, by Putnam, J., said: "In the comprehensive words used by the court in Anonymous, 6 Mod. 231, case 339, the bail have the principal always upon the string, and may pull it when they please to render him in their own discharge. The bail may seize the principal himself or depute an agent to take him. *Nicolls v. Ingersoll*, 7 Johns. (N. Y.) 145."

Action against Surety—Imprisonment.—The arrest and imprisonment of the principal is in law a satisfaction of the judgment so long as the imprisonment continues, and during that time no action can be maintained against the surety. *Koenig v. Steckel*, 58 N. Y. 475; *Sunderland v. Loder*, 5 Wend. (N. Y.) 58.

Surrender after Forfeiture.—It has been held that the surety in a recognizance, after forfeiture by the default of the principal and surety

By Deputy of Surety.—Another person may be deputized by the surety to arrest the principal, which he may do in any manner that the surety might have done; he may take the principal at any time or place, even in another state, without requisition, and doors may be broken in order to effect the arrest.¹

8. By Military Officer.—*a.* OF DESERTERS.—An officer of the army may lawfully arrest a deserter, without a warrant, and hold him for trial by court-martial.²

entered of record, has no right to surrender the principal in order to exonerate himself from liability, or to arrest and detain the principal for that purpose. *Com. v. Johnson*, 3 *Cush. (Mass.)* 454.

Commanding Assistance of Officers.—At common law the bail may command the assistance of the sheriff and his officers in making an arrest of the principal. *State v. Cunningham*, 10 *La. Ann.* 393.

Surrender to Subofficer—Deputy Sheriff—Justice of the Peace.—In *State v. Le Cerf*, 1 *Bailey (S. Car.)* 410, the court, by Richardson, J., said: "The only question presented by this case is whether the surety of a party bound in a recognizance to answer for a misdemeanor has a right to surrender his principal to a deputy sheriff, and, thereby, to discharge himself from all liability as surety. No precedent for such a right has been offered to the court, and we know of none. Admitting that such a surrender to the high sheriff would be sufficient, which is by no means admitted, yet, assuredly, a surrender to a mere ministerial subofficer is unauthorized. The surrender of the principal in such a case must be to some officer who may commit the principal to jail or admit him to bail, but the deputy sheriff can do neither. * * * A surrender to a justice of the peace may be legal. He has a discretionary power to detain the prisoner in order to inquire into the charge, but his subofficer, the constable, has no such power. It is unlike the case of bail in civil actions. There the sheriff holds the process in his own hands and merely receives the defendant, whom he had before committed to the friendly custody of his bail. We perceive no sufficient analogy to justify placing the surety in a recognizance on the footing of bail in civil actions."

1. Surrender by Surety's Agent.—*Parker v. Bidwell*, 3 *Conn.* 84; *State v. Mahon*, 3 *Harr. (Del.)* 568; *Ex p. Lafonta*, 2 *Rob. (La.)* 495; *Com. v. Brickett*, 8 *Pick. (Mass.)* 138; *Nicolls v. Ingersoll*, 7 *Johns. (N. Y.)* 145; *Republica v. Gaoler*, 2 *Yeates (Pa.)* 263.

But see, where it is said that a bail cannot delegate his authority, nor can he arrest his principal in a foreign state, *Wharton's Criminal Law*, § 29, p. 6.

For a Full Discussion of This Topic, see the title BAIL.

2. Confining Deserter in County Jail.—*Hutchings v. Van Bokkelen*, 34 *Me.* 126. In this case it was held to be no infraction of the deserter's rights that the county jail was used as the place of his confinement, nor was such confinement unjustifiable, unless it could be proved that a court-martial could have been convened for trial within that period, and

that proof that the person making the arrest was *de facto* an officer was enough.

Desertion No Felony—War Department Orders Strictly Construed.—In *Trask v. Payne*, 43 *Barb. (N. Y.)* 569, it was held that desertion is not a felony at common law; that an order of the War Department touching the arrest and detention of deserters and stating specifically the persons who are to make such arrests must be strictly construed, and with the precise limitations it prescribes. Where authority is given in such an order to sheriffs to make arrests, it will not authorize deputy sheriffs, as such, to arrest deserters; and a deserter is not liable as a felon to arrest by any citizen without process. The court, by Bacon, J., said: "The fifth article of the amendments to the Constitution of the United States * * * practically withdraws the entire catalogue of military offenses from the cognizance of the civil magistrate, and turns over the whole subject to be dealt with by the military tribunals; and except in military law desertion is legally unknown to the tribunals of this country. It does not, in the contemplation of the civil law, reach the grade of a misdemeanor." See *Merriman v. Bryant*, 14 *Conn.* 200; *Wilson v. Mackenzie*, 7 *Hill (N. Y.)* 95, 42 *Am. Dec.* 51.

Arresting Deserter without Warrant—By Officer.—As to an officer arresting a deserter without a warrant, and evidence in mitigation of damages, see *Beckwith v. Bean*, 98 *U. S.* 266; *McCall v. McDowell*, 1 *Abb. (U. S.)* 212; *Carpenter v. Parker*, 23 *Iowa* 450.

Same—By Police Officer—Private Person.—In *Kurtz v. Moffitt*, 115 *U. S.* 487, it was held that a police officer, as such, or a private citizen, has no authority to arrest and detain a deserter from the United States army without a warrant, and this is the common law inasmuch as desertion is not a felony. 1 *Hale P. C.* 587; 2 *Hale P. C.* 76-81; 4 *Black. Comm.* *292; *Wright v. Court*, 6 *D. & R.* 623.

Order of Arrest Lost.—In *Teagarden v. Graham*, 31 *Ind.* 422, it was held sufficient to justify an arrest of a supposed deserter, to prove that after such arrest had actually been made the order authorizing it was lost.

By Provost Marshals without Warrants.—It was held in *Hawley v. Butler*, 54 *Barb. (N. Y.)* 490, that provost marshals and their deputies are authorized to make arrests without a warrant when there is reasonable ground for believing that a certain person is a deserter. A provost marshal's acts performed by authority of law are done by "due process of law" within the meaning of the 15th article of the amendments to the Constitution of the United States.

b. OF CITIZENS.—The arrest and imprisonment of a citizen by the legitimate orders of a military commander have the same force and effect as if he were confined upon a proper warrant from a civil tribunal.¹ But it appears that this holds good only when the civil government is provisional, and as regards citizens who are subject to military law in time of war.²

9. Hue and Cry.—Hue and cry is the old common-law process of pursuing with horn and with voice all felons, and such as have dangerously wounded others. The hue and cry may be raised by constables, private persons, or both. The constable and his assistants have the same powers, protection, and indemnification as if acting under the warrant of a magistrate. Private persons who join are justified, even though it should turn out that no felony has been committed. But if a person wantonly and maliciously, and without cause, raises the hue and cry, he is liable to punishment as a disturber of the peace.³

Questions of this character are determined in *England* by the annual Mutiny Act. See *Grant v. Gould*, 2 H. Bl. 69.

1. *Belding v. State*, 25 Ark. 315, 99 Am. Dec. 214.

Martial Law—Arrest of Persons Engaged in Rebellion.—Where in any state martial law is declared, an officer may lawfully arrest any one who he has reasonable grounds for believing was engaged in a rebellion, or he may order a house to be forcibly entered in order to make such an arrest. But this power is limited to the use only of such force as is necessary, and if oppression is used, the party by whose order it is done becomes liable. *Luther v. Borden*, 7 How. (U. S.) 1.

Court-martial—Jurisdiction—Liability of Officers.—Where a person is arrested who is not subject to the jurisdiction of a court-martial, and detained for trial for an offense not within their jurisdiction, both the commanding officer and the persons making the arrest are liable therefor. A citizen of the United States who is not in military service is not subject to a court-martial. *Smith v. Shaw*, 12 Johns. (N. Y.) 257.

2. Courts will Take Judicial Notice of the status of a state, and recognize that the civil government is provisional, when such is the case, and that military commanders are clothed with the authority to arrest and imprison citizens who violate the laws. *Belding v. State*, 25 Ark. 315, 99 Am. Dec. 214.

On Suspicion of Aiding the Enemy—Evidence.—A military officer stationed on the line of the territory is justified in seizing a person who is transporting property towards the enemy's province under circumstances creating a reasonable suspicion that he is about to carry the same to the enemy. *Clow v. Wright, Brayt. (Vt.)* 118.

Abusive Language.—A sergeant in garrison may arrest a person standing outside the garrison, and on the streets of the city, who is using low and abusive language towards him. *Oglesby v. State*, 39 Tex. 53.

Officer's Liability for Subordinate.—A military officer is liable for undue harshness practiced by his subordinates in making an arrest. *McCall v. McDowell*, 1 Abb. (U. S.) 212.

Jurisdiction of Provost Marshal.—Where a deputy provost marshal has been directed by

his superior to arrest all persons engaged in stealing any government property in any county in the state and send them to headquarters, he is not thereby authorized, upon his own motion, and without proper legal process under the laws of *Indiana*, to arrest and imprison any citizen upon suspicion that he has committed some crime, and any person so arrested may be discharged by any judge of competent jurisdiction upon a habeas corpus. *Skeen v. Monkeimer*, 21 Ind. 1.

The President of the United States, whether in his civil capacity, or as commander in chief of the army and navy, has no power during a rebellion or insurrection to arrest or imprison, or authorize another to arrest or imprison, any person not subject to military law, without any order, writ, precept, or process of some court of competent jurisdiction, and claim to such power is so destitute of color that it cannot constitute a case arising under the Constitution of the United States so as to give original jurisdiction to federal courts. *Jones v. Seward*, 40 Barb. (N. Y.) 563. See *Jones v. Seward*, 41 Barb. (N. Y.) 269, 17 Abb. Pr. (N. Y.) 377, 26 How. Pr. (N. Y.) 433. *Contra*, *Benjamin v. Murray*, 28 How. Pr. (N. Y. Supreme Ct.) 193.

Military Prisoner—Nonmilitary Crime.—Where a person is arrested by military force for violating sections 20 and 21 of the *Indiana Intercourse Act* of June 30, 1854 (4 U. S. Stat. 732), he is not a military prisoner subject to the articles of war, but a private citizen charged with a nonmilitary crime, and within five days from his arrest or discharge he must be removed for trial by the civil authorities, and his detention after that time is unlawful under any circumstances. Where a prisoner is under arrest under these circumstances he may be detained in the prison, but he can be required to do no labor other than taking care of his person. *Waters v. Campbell*, 5 Sawy. (U. S.) 17. See *In re Carr*, 3 Sawy. (U. S.) 316.

3. Hue and Cry.—*Harris Cr. L. (Force's ed.)* 251. If a felony be committed, and the felon fly from justice, or a dangerous wound be given, it is the duty of every man to use his best endeavors to prevent such an escape; and in such cases, if fresh pursuit be made, and, *a fortiori*, if hue and cry be levied, all those

10. For Insanity.—At common law, a person's insanity justifies his arrest, without legal process, in a case of reasonable necessity.¹

11. In Civil Cases.—An arrest without a warrant, whether by an officer or a private person, can only be made for infractions of the criminal law. In no case can an officer make an arrest in a civil case without a warrant, though he may make a rearrest in such cases without a special warrant because the original warrant is still in force.²

VI. ILLEGAL ARREST—1. In General.—It may be stated as a general principle that a ministerial officer is protected in the execution of process, whether it issues from a court of general or limited jurisdiction, although such court, as a fact, has no authority in the particular case, provided it appears upon the face of the process that the court has jurisdiction of the subject-matter, and that nothing appears to apprise the officer that the court has no authority to order the arrest of the person named therein.³

who join in aid of those who began the pursuit will be under the same protection of the law; and the same rule holds if a felon, after arrest, break away as he is being carried to jail, and his pursuers cannot retake him without killing him. 1 Hale 489, 490; 1 Hawk. P. C., c. 28, § 11; Fost. 309; 1 East P. C., c. 5, § 67, p. 298.

Where, upon a robbery committed by several, the party robbed raised hue and cry, and the country pursued the robbers, and one of the pursuers was killed by one of the robbers, it was held that this was murder, because the country, upon hue and cry levied, are authorized by law to pursue and apprehend the malefactors, and that, although there were no warrant of a justice of the peace to raise hue and cry, nor any constable in the pursuit, yet the hue and cry was a good warrant in law for the pursuers to apprehend the felons, and that therefore the killing of any of the pursuers was murder. Rex v. Jackson, 1 Hale 464; 1 East P. C. 298. See the title HUE AND CRY.

1. Keleher v. Putnam, 60 N. H. 30, 49 Am. Rep. 304.

Nuisance Not Ground for Arrest.—But the mere fact that a person is a nuisance does not authorize his arrest and confinement, without a warrant, if he is not dangerous to himself or others. Look v. Dean, 108 Mass. 116, 11 Am. Rep. 323.

See also the title INSANITY.

2. Bigelow on Torts (4th ed.), p. 157.

See also Mathews v. Biddulph, 4 Scott N. R. 54, 1 Dowl. N. S. 216; and *supra*, this title, Arrest without Warrant—In General.

3. Warrant Fair on Its Face—Liability of Officers—England.—Buller's Nisi Prius 83; Shergold v. Holloway, 2 Stra. 1002; Tarlton v. Fisher, Doug. 671; Moravia v. Sloper, Willes 32; Parsons v. Loyd, 3 Wils. 345.

Connecticut.—Watson v. Watson, 9 Conn. 148, 23 Am. Dec. 324.

Illinois.—Brother v. Cannon, 2 Ill. 200; Robinson v. Harlan, 2 Ill. 237.

Massachusetts.—Sturbridge v. Winslow, 21 Pick. (Mass.) 83; Clarke v. May, 2 Gray (Mass.) 413; Donahoe v. Shed, 8 Met. (Mass.) 326; Kennedy v. Duncklee, 1 Gray (Mass.) 71; Fisher v. McGirr, 1 Gray (Mass.) 45, 61 Am. Dec. 381.

New Hampshire.—State v. Weed, 21 N. H. 262, 53 Am. Dec. 188.

New Jersey.—Mangold v. Thorpe, 33 N. J. L. 134.

New York.—Rogers v. Mulliner, 6 Wend. (N. Y.) 597, 22 Am. Dec. 546; Horton v. Hendershot, 1 Hill (N. Y.) 118; Abbott v. Yost, 2 Den. (N. Y.) 86; Deyo v. Van Valkenburgh, 5 Hill (N. Y.) 242; Warner v. Shed, 10 Johns. (N. Y.) 138; Chegaray v. Jenkins, 5 N. Y. 381; Savacool v. Boughton, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181.

North Carolina.—State v. Curtis, 1 Hayw. (N. Car.) 471; State v. Sigman, 106 N. Car. 728.

Ohio.—Harmon v. Gould, Wright (Ohio) 709.

Pennsylvania.—Fox v. Wood, 1 Rawle (Pa.) 143; Jones v. Hughes, 5 S. & R. (Pa.) 299, 9 Am. Dec. 364; Paul v. Vankirk, 6 Binn. (Pa.) 123; Allison v. Rheam, 3 S. & R. (Pa.) 139, 8 Am. Dec. 644; Stephens v. Wilkins, 6 Pa. St. 260.

South Carolina.—Foster v. Gault, 2 McMull. (S. Car.) 335.

Vermont.—Pierson v. Gale, 8 Vt. 509, 30 Am. Dec. 487.

In State v. Weed, 21 N. H. 262, 53 Am. Dec. 188, the court, by Eastman, J., said: "Where the process or warrant is regular and legal in its frame, bearing upon its face all the legal requisites to make it perfect in form, and, so far as can be discovered from its inspection, in substance also, and it appears to have been issued by a court or magistrate having jurisdiction of the subject-matter and of the person of the respondent, the officer is to be protected in the service, notwithstanding any error or irregularity in the previous issuing of the same, or any imposition practiced upon the court in obtaining it; and the party resisting the officer is liable."

In Savacool v. Boughton, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181, the court, by Marcy, J., said: "The following propositions * * * are well sustained by reason and authority. That where an inferior court has not jurisdiction of the subject-matter, or, having it, has not jurisdiction of the person of the defendants, all its proceedings are absolutely void. * * * If a mere ministerial officer executes any process upon the face of which it appears that the court which issued it had not jurisdiction of the subject-matter, or of the person against whom it is directed, such process will afford

2. Liability for Illegal Arrest—*a.* OF PERSON PROCURING WARRANT.—A Private Person who unlawfully arrests, or who procures the arrest of another under a warrant unlawfully issued, renders himself liable therefor;¹ and

him no protection for acts done under it. If the subject-matter of a suit is within the jurisdiction of a court, but there is a want of jurisdiction as to the person or place, the officer who executes process issued in such suit is no trespasser unless the want of jurisdiction appears by such process."

See *infra*, this division, *Of Officer Executing*.

1. Illegal Arrest—Liability of Private Individual—*England*.—*Jones v. Nicholls*, 3 Moo. & P. 139; *Austin v. Debnam*, 3 B. & C. 139, 10 E. C. L. 37; *Wentworth v. Bullen*, 9 B. & C. 840, 17 E. C. L. 503; *Smith v. Cattel*, 2 Wils. 376; *Barker v. Braham*, 3 Wils. 376; *Parsons v. Loyd*, 3 Wils. 341; *Green v. Elgie*, 5 Q. B. 114, 48 E. C. L. 114; *Bryant v. Clutton*, 1 M. & W. 408; *West v. Smallwood*, 3 M. & W. 418; *Carratt v. Morley*, 1 Q. B. 18, 41 E. C. L. 417; *Codrington v. Lloyd*, 8 Ad. & El. 449, 35 E. C. L. 433; *Goslin v. Wilcock*, 2 Wils. 302.

United States.—*Johnson v. Tompkins*, Baldw. (U. S.) 601.

Alabama.—*Clifton v. Grayson*, 2 Stew. (Ala.) 412; *Findlay v. Pruitt*, 9 Port. (Ala.) 195.

Arkansas.—*Floyd v. State*, 12 Ark. 43, 54 Am. Dec. 250.

Connecticut.—*Stoddard v. Bird*, Kirby (Conn.) 65.

Illinois.—*Roth v. Smith*, 41 Ill. 314; *Wolf v. Boettcher*, 64 Ill. 316; *Develing v. Sheldon*, 83 Ill. 390; *Johnson v. Von Kettler*, 66 Ill. 63.

Indiana.—*Patterson v. Prior*, 18 Ind. 440, 81 Am. Dec. 367; *Patterson v. Crawford*, 12 Ind. 241; *Veneman v. Jones*, 118 Ind. 41, 10 Am. St. Rep. 100.

Iowa.—*Allen v. Leonard*, 28 Iowa 529.

Kansas.—*Jackson v. Linnington*, 47 Kan. 396, 27 Am. St. Rep. 300; *Hauss v. Kohlar*, 25 Kan. 640, 20 Am. Law Reg. N. S. 625.

Kentucky.—*Webber v. Kenny*, 1 A. K. Marsh. (Ky.) 345.

Louisiana.—*Letzler v. Huntington*, 24 La. Ann. 330.

Massachusetts.—*Hackett v. King*, 6 Allen (Mass.) 58; *Briggs v. Wardwell*, 10 Mass. 356; *Emery v. Hapgood*, 7 Gray (Mass.) 55, 66 Am. Dec. 459.

Missouri.—*Fellows v. Goodman*, 49 Mo. 62.

Nebraska.—*Painter v. Ives*, 4 Neb. 122.

New Hampshire.—*Gibbs v. Randlett*, 58 N. H. 407.

New York.—*Wilson v. Robinson*, 6 How. Pr. (N. Y. Supreme Ct.) 110; *Chapman v. Dyett*, 11 Wend. (N. Y.) 31, 25 Am. Dec. 598; *Vredenburgh v. Hendricks*, 17 Barb. (N. Y.) 179; *Kerr v. Mount*, 28 N. Y. 659; *Hallock v. Dornay*, 7 Hun (N. Y.) 52; *Brown v. Chadsey*, 39 Barb. (N. Y.) 253; *Devoe v. Davis*, 12 N. Y. Wkly. Dig. 544; *Curry v. Pringle*, 11 Johns. (N. Y.) 444; *Deyo v. Van Valkenburgh*, 5 Hill (N. Y.) 242; *Guilleaume v. Rowe*, 63 How. Pr. (N. Y. Supreme Ct.) 175; *Judson v. Cook*, 11 Barb. (N. Y.) 642;

Davis v. Newkirk, 5 Den. (N. Y.) 92; *Besson v. Southard*, 10 N. Y. 236.

North Carolina.—*Tucker v. Davis*, 77 N. Car. 330.

Ohio.—*Diehl v. Friester*, 37 Ohio St. 473.

Pennsylvania.—*Allison v. Rheam*, 3 S. & R. (Pa.) 139, 8 Am. Dec. 644; *Wengert v. Beashore*, 1 P. & W. (Pa.) 232; *Herman v. Brookerhoff*, 8 Watts (Pa.) 240.

Vermont.—*Pierson v. Gale*, 8 Vt. 509, 30 Am. Dec. 487.

Wisconsin.—*Bonesteel v. Bonesteel*, 28 Wis. 245, 30 Wis. 511; *Fenelon v. Butts*, 53 Wis. 344; *Baldwin v. Hamilton*, 3 Wis. 747.

Knowledge of Complainant.—A party to an action in a justice's court, unless he directs and sanctions the proceedings, is not liable for the issuing of a process out of such court, or for any arrest that may be made thereunder. But if he attends at the trial and proceeds with the action after gaining knowledge of the arrest, he makes himself liable therefor. Where a defendant who has a justification joins with another who has not, he thereby loses his defense, but the plaintiff must show a cause of action against him on the general issue before he is called on to justify. *Gold v. Bissell*, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480. See *Percival v. Jones*, 2 Johns. Cas. (N. Y.) 51; *Taylor v. Trask*, 7 Cow. (N. Y.) 249.

In New Hampshire, to use the criminal process of the state in order to extort money or to compel the payment of debts, is illegal. *Shaw v. Spooner*, 9 N. H. 199, 32 Am. Dec. 348; *Plumer v. Smith*, 5 N. H. 553, 22 Am. Dec. 478; *Hinds v. Chamberlin*, 6 N. H. 230.

Trespass.—Void process must be set aside or vacated before trespass can be maintained for acts done thereunder against the person who caused it to issue. *Day v. Sharp*, 4 Whart. (Pa.) 339, 34 Am. Dec. 509.

Execution pending Appeal.—Where a decree was obtained in a civil bill court against a defendant who lodged an appeal, the clerk gave the decree to the plaintiff without any note therein relative to the appeal, the practice being to indorse on the decree: "appeal lodged and not to be executed." The defendant gave the plaintiff notice of the appeal, and cautioned him against proceeding on the decree, but he nevertheless took the person of the defendant in execution, and was held liable for making an illegal arrest. *Hughes v. Hearne*, 1 Cr. & Dix C. C. (Ir.) 312. See *Brown v. O'Keefe*, 3 Law Rec. N. S. (Ir.) 30; *Coppinger v. Bradley*, 5 Ir. Law Rep. 257.

Special Bailiff Named by Complainant.—Where the plaintiff in a civil bill decree procured the sheriff to grant to special bailiffs named by the plaintiff a warrant to execute a decree, the plaintiff was held liable for the acts of such bailiffs. *Hurford v. Kinsella*, 5 Ir. Com. Law Rep. 95. See *Brennan v. Gray*, Ir. Cri. Rep. 90.

Calling Attention of Officer to Supposed Offense.—Where a person calls the attention of an

although a void process, if regular on its face, will protect the officer in its execution, it will afford no protection to a private person who wantonly procures it to be issued.¹

Assent—Arrest by Mistake.—In case an arrest is made without the assent of the complainant,² or where a proviso is inserted in the writ by mistake for the arrest of the defendant in a case in which the arrest is not lawful, and the arrest is made without the knowledge of the complainant, he is not liable.³

Erroneous Writ.—Where the writ is simply erroneous, and is not quashed or reversed, it furnishes a complete justification to the person procuring it for an arrest made under it.⁴

officer to what he supposes is a breach of the peace, and the officer thereupon, on his own responsibility, arrests the offender, the person so calling his attention is not rendered liable for such arrest on the part of the officer. *Veneman v. Jones*, 118 Ind. 41, 10 Am. St. Rep. 100.

Strangers and Third Person or Volunteers are liable for interfering, instigating, and causing the enforcement of unlawful process, though it may be regular and valid on its face. Public duty does not require such persons to assume the responsibility of executing legal process. *Emery v. Hapgood*, 7 Gray (Mass.) 55, 66 Am. Dec. 459.

1. *Hudson v. Cook*, Skinner 131; *Barker v. Braham*, 3 Wils. 368; *Turner v. Felgate*, 1 Lev. 95; *Felgate v. Tournier*, 1 Keb. 822; *McGuinty v. Herrick*, 5 Wend. (N. Y.) 240; *Kissock v. Grant*, 34 Barb. (N. Y.) 149; *Chapman v. Dyett*, 11 Wend. (N. Y.) 31, 25 Am. Dec. 598; *Smith v. Snyder*, 15 Wend. (N. Y.) 324; *Peck v. Yorks*, 32 How. Pr. (N. Y. Supreme Ct.) 410; *Ackroyd v. Ackroyd*, 3 Daly (N. Y.) 42; *Hall v. Munger*, 5 Lans. (N. Y.) 105.

A Writ Regular on Its Face, and issued by a magistrate having jurisdiction, will justify the officer who makes an arrest under it; but although regular, it will not justify the person who instigated the prosecution if he did so maliciously and without probable cause. *Lavender v. Hudgens*, 32 Ark. 763.

Abuse of Process.—The person who procures a process, if he commands or advises its abuse, will be equally liable with the officer for such abuse, although all the proceedings are otherwise regular. *Snyder v. Brosse*, 51 Ill. 357, 99 Am. Dec. 551.

Voidable Process a Justification.—A process which is merely voidable is a justification, both of the officer and the party who procures it, until it is set aside. *Dominick v. Eacker*, 3 Barb. (N. Y.) 19; *Roth v. Schloss*, 6 Barb. (N. Y.) 313; *Chapman v. Dyett*, 11 Wend. (N. Y.) 31, 25 Am. Dec. 598.

In *Landt v. Hiltz*, 19 Barb. (N. Y.) 283, it was held that if the justice who issues the warrant has acquired jurisdiction neither the officer nor the party is liable.

Irregular Process Set Aside.—But where a process has been set aside for irregularity or because it is void, it no longer protects the party who procured it, whether the officer be protected or not. See *McGuinty v. Herrick*, 5 Wend. (N. Y.) 240; and other cases cited in this note.

2. Persons Acting Together—Consent.—When two or more persons are acting together in making a lawful arrest of a person charged with a crime, neither is liable for the unlawful act which is done without his consent by the other, though in furtherance of the common purpose. *Wert v. Potts*, 76 Iowa 612, 14 Am. St. Rep. 252.

Liability of Partner.—There must be a positive and actual consent to an arrest and imprisonment, to render a person liable for an arrest caused by his partner in business. *Gilbert v. Emmons*, 42 Ill. 143, 89 Am. Dec. 412.

Improper Use of Affidavit by Officer.—Where a person makes an affidavit for the purpose of procuring the arrest of another, and the officer makes an improper use of such affidavit and illegally arrests and imprisons a party thereunder, the person making the affidavit will not be liable for such arrest where it is made without his knowledge and contrary to his intention. *Roth v. Smith*, 41 Ill. 314.

Acts beyond Officer's Authority.—A party at whose instance a warrant is procured is not liable for acts done by an officer beyond the authority of such process, unless they were done by his direction. *Adams v. Freeman*, 9 Johns. (N. Y.) 117.

Liability of Member of a Committee.—A person who is a member of a committee which has counseled and advised an arrest to be made which is illegal cannot be held liable for the acts of such committee, unless it is shown that he acted with them; the mere fact that he was a member of the committee does not openly make him guilty of their unlawful acts. *Develling v. Sheldon*, 83 Ill. 390.

3. Complainant Not Liable for Mistake.—*Taylor v. Trask*, 7 Cow. (N. Y.) 249; *Cohen v. Morgan*, 6 D. & R. 8, 16 E. C. L. 250; *West v. Smallwood*, 3 M. & W. 418; *Brown v. Chapman*, 6 C. B. 365, 60 E. C. L. 365; *Stewart v. Hawley*, 21 Wend. (N. Y.) 552.

Officer Not Agent of Complainant—Declarations.—An officer who makes an arrest is not the agent of the person who procures the warrant for such arrest, but the agent or minister of the law, consequently his declarations are not binding upon the person who made the complaint. *Reisan v. Mott*, 42 Minn. 49.

In *Adams v. Freeman*, 9 Johns. (N. Y.) 117, it was held that a private person is not liable for acts done by an officer beyond the authority of his process, unless the acts have been done at his instance and by his direction.

4. Erroneous Process Not Actionable—Coram non Judice.—In the *Marshalsea Case*, 10 Coke

b. OF JUSTICE ISSUING WARRANT—Inferior Magistrates.—In case a justice of the peace or other inferior magistrate acts without his jurisdiction in issuing

76, it was held that where a court has jurisdiction of the cause, but proceeds *inverso ordine*, or erroneously, the party who sues, or the officer who executes the process or precept of the court, is not liable. But where the whole proceeding is *coram non judice*, an action will lie against them without any regard to the precept or process.

Process against Married Woman.—When an execution is regularly issued against a married woman upon a judgment recovered against her in a court of competent jurisdiction, as a single woman, and she is arrested thereon, the judgment creditor who refuses to release her from arrest upon being notified that she is a married woman is rendered thereby liable, where the statute provides that no married woman shall be arrested on a writ or execution. *Winchester v. Everett*, 80 Me. 535, 6 Am. St. Rep. 228.

Three Distinct Principles.—In *Winchester v. Everett*, 80 Me. 535, 6 Am. St. Rep. 228, the court, by Virgin, J., said that three distinct principles are announced in the English and American cases:

"1. A writ of execution void for want of jurisdiction or otherwise can be no jurisdiction to a party thereto for any action under it. As where the debtor was arrested on a writ or execution wherein the debt was less than that authorizing an arrest, *Green v. Morse*, 5 Me. 292; *Smith v. Cattel*, 2 Wils. 376; or where an administratrix was arrested on an execution without suggestion of *devastavit*, *Barker v. Braham*, 3 Wils. 368; or where a term intervened between the teste and the return of a writ on which the defendant was arrested, *Parsons v. Loyd*, 3 Wils. 341; so in case of arrest on execution issued after the judgment was paid, *Bates v. Pilling*, 6 B. & C. 38, 13 E. C. L. 104; or discharged under the insolvency statute, *Deyo v. Van Valkenburgh*, 5 Hill (N. Y.) 242; although in the latter case it seems the officer would not be liable even if the defendant showed his discharge before the arrest, *Wilmarth v. Burt*, 7 Met. (Mass.) 257.

"2. Where a process is not void, but only voidable for some irregularity in issuing it, the party is justified for acts done in accordance with it, provided it is never actually superseded; but when it is set aside for the irregularity, the party at whose instance it was issued becomes a trespasser for acts done under it while in force, as if no process had ever issued. Thus in trespass for false imprisonment of a certified bankrupt, *Buller, J.*, said: 'The original plaintiff would not be liable to an action of trespass till the writ is superseded, for till then it is a justification; after a supersedeas, trespass will lie against the party, but still not against the sheriff. I take this to have been settled over and over again.' *Tarlton v. Fisher*, Doug. 677; *Prentice v. Harrison*, 4 Q. B. 852, 45 E. C. L. 852. Somewhere an execution is issued against an absent defendant without filing bond pursuant to statute, it is good till superseded, *Gardiner Mfg. Co.*

v. Heald, 5 Me. 381, 17 Am. Dec. 248; so where the debtor was arrested on an execution issued more than a year after the date of the judgment without a *sci. fa.* to revive it, *Codrington v. Lloyd*, 8 Ad. & El. 449, 35 E. C. L. 433; *Blanchenay v. Burt*, 4 Q. B. 707, 45 E. C. L. 707; *Kerr v. Mount*, 28 N. Y. 659, and cases there cited.

"3. When the process is neither irregular nor void, but is simply erroneous, then the party is forever protected for whatever he had done under it before it is reversed. This rule has been said to be founded in public policy, that parties may be induced freely to resort to the courts for the enforcement of their rights and the remedy of their grievances, without the risk of undue punishment for their own ignorance of the law or for the errors of courts. *Marks v. Townsend*, 97 N. Y. 593. 'It is incomprehensible,' said Lord Kenyon, in *Belk v. Broadbent*, 3 T. R. 185, 'to say that a person shall be considered a trespasser who acts under a process of court.' 'There is a great difference,' remarked Lord Chief Justice De Grey, 'between erroneous process and irregular (that is to say void) process. The first stands valid and good until it be reversed; the latter is an absolute nullity from the beginning. The party may justify under the first until it be reversed, but he cannot under the latter, because it was his own fault that it was irregular and void at first.' *Parsons v. Loyd*, 3 Wils. 345. So in *Philips v. Biron*, 1 Stra. 509, it was said that a plaintiff is not justified by a judgment (process?) set aside for irregularity as he is where reversed on error, 'for in case of error it is no fault of the party, but of the court, and therefore binds till reversed.' 1 Stra. 509. So where a process of attachment sued out by a party is afterwards set aside on appeal for error, the party is not liable for trespass under it; but when set aside for irregularity or bad faith in obtaining, it may be. *Williams v. Smith*, 14 C. B. N. S. 596, 108 E. C. L. 596. * * * So where a plaintiff, notwithstanding an insolvent discharge exempting the defendant from execution, obtained a general judgment and procured an execution on which the defendant was arrested, the judgment was held to be simply erroneous, and protected the plaintiff from an action for false imprisonment. *Brown v. Crowl*, 5 Wend. (N. Y.) 298. See also *Day v. Bach*, 87 N. Y. 56; *Marks v. Townsend*, 97 N. Y. 590, and the cases therein cited, for illustrations of this rule. * * * We may add that the King's Bench declined to discharge a married woman from arrest on execution, where, as in this case, being sued as a *feme sole*, she suffered judgment to go by default, and was subsequently arrested on the execution. On application for her discharge, Lord Chief Justice Tenterden said: 'She must be left to her writ of error.' *Moses v. Richardson*, 8 B. & C. 421, 15 E. C. L. 254. This case was followed by *Poole v. Canning*, L. R. 2 C. P. 241."

Justification under Erroneous Writ.—For cases

a warrant, to the injury of another person, the magistrate is personally liable for such acts.¹ But where such magistrate acts from error of judgment or

in which the party procuring the warrant was held not liable, see generally:

England.—Carratt v. Morley, 1 Q. B. 18, 41 E. C. L. 417; Barber v. Rollinson, 1 Crompt. & M. 330; West v. Smallwood, 3 M. & W. 418; Philips v. Biron, 1 Stra. 509; Hopkins v. Crowe, 7 C. & P. 373, 32 E. C. L. 546; Lock v. Ashton, 12 Q. B. 871, 64 E. C. L. 871; Green v. Elgie, 5 Q. B. 99, 48 E. C. L. 99; Austin v. Dowling, L. R. 5 C. P. 534; Sowell v. Champion, 6 Ad. & El. 407, 33 E. C. L. 92; Williams v. Smith, 14 C. B. N. S. 596, 108 E. C. L. 596; Belk v. Broadbent, 3 T. R. 183; Scott v. Shepherd, 1 Smith Lead. Cas. 466.

Illinois.—Develing v. Sheldon, 83 Ill. 390; Roth v. Smith, 41 Ill. 314.

Kansas.—Gillett v. Thiebold, 9 Kan. 427; Wagstaff v. Schippel, 27 Kan. 450.

Massachusetts.—Coupal v. Ward, 106 Mass. 289; Jewett v. Locke, 6 Gray (Mass.) 233; Shaw v. Reed, 16 Mass. 450; Cassier v. Fales, 139 Mass. 462.

Michigan.—Murphy v. Walters, 34 Mich. 180.

New Hampshire.—Blanchard v. Goss, 2 N. H. 491; Woods v. Davis, 34 N. H. 328; Kimball v. Molony, 3 N. H. 376.

New York.—Peckham v. Tomlinson, 6 Barb. (N. Y.) 253; Lewis v. Penfield, 39 How. Pr. (N. Y. Supreme Ct.) 490; Curry v. Pringle, 11 Johns. (N. Y.) 444; Brown v. Demont, 9 Cow. (N. Y.) 263; Marks v. Townsend, 97 N. Y. 590; Landt v. Hilts, 19 Barb. (N. Y.) 283; Brown v. Crowl, 5 Wend. (N. Y.) 298; Adams v. Freeman, 9 Johns. (N. Y.) 117; Taylor v. Trask, 7 Cow. (N. Y.) 249; Stanton v. Schell, 3 Sandf. (N. Y.) 323; Von Latham v. Rowan, 17 Abb. Pr. (N. Y. Supreme Ct.) 237; Von Latham v. Libby, 38 Barb. (N. Y.) 339; Gordon v. Upham, 4 E. D. Smith (N. Y.) 9; Hall v. Munger, 5 Lans. (N. Y.) 101; Lyon v. Yates, 52 Barb. (N. Y.) 238.

Wisconsin.—Fenelon v. Butts, 49 Wis. 342.

False Representations in Procuring Warrant.—It was held in Coupal v. Ward, 106 Mass. 289, that a person who has procured the arrest and imprisonment of another on a lawful warrant is not liable, although he procured the warrant by false representations.

1. Liability of Inferior Magistrates—England.—Perkin v. Proctor, 2 Wils. 384; Marshalsea Case, 10 Coke 68b; Terry v. Huntingdon, Hard. 480; Entick v. Carrington, 2 Wils. 275; Hill v. Bateman, 1 Stra. 710; Morgan v. Hughes, 2 T. R. 225; Rex v. Constable, 1 Q. B. 894, note a, 41 E. C. L. 828, note a; Rex v. Birnie, 5 C. & P. 206, 24 E. C. L. 281; Prickett v. Gratrex, 8 Q. B. 1020, 55 E. C. L. 1020; Broughton v. Mulshoe, 20 Vin. Abr. 482; Wedge v. Berkeley, 6 Ad. & El. 663, 33 E. C. L. 167; Tate v. Chambers, 3 N. & M. 523, 28 E. C. L. 412; Edwards v. Ferris, 7 C. & P. 542, 32 E. C. L. 622; Caudle v. Seymour, 1 Q. B. 889, 41 E. C. L. 825; Rogers v. Jones, 3 B. & C. 409, 10 E. C. L. 134; Sthreshley v. Fisher, Hard. (Ky.) 257.

Alabama.—Heard v. Harris, 68 Ala. 43.

Connecticut.—Dyer v. Smith, 12 Conn. 384; Grumon v. Raymond, 1 Conn. 40, 6 Am. Dec. 200; Burlingham v. Wylee, 2 Root (Conn.) 152.

Georgia.—Campbell v. State, 48 Ga. 353.

Illinois.—Flack v. Harrington, 1 Ill. 213, 12 Am. Dec. 170.

Indiana.—Pouk v. Slocum, 3 Blackf. (Ind.) 421; Cooper v. Adams, 2 Blackf. (Ind.) 294.

Kansas.—Gillett v. Thiebold, 9 Kan. 427. *Massachusetts*.—Fisher v. Deans, 107 Mass. 118; Doherty v. Munson, 127 Mass. 495.

Michigan.—Sheldon v. Hill, 33 Mich. 171; La Roe v. Roeser, 8 Mich. 537.

New York.—Yates v. Lansing, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290, and note; Gold v. Bissell, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480; Wait v. Green, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 185; Reynolds v. Orvis, 7 Cow. (N. Y.) 269; Blythe v. Tompkins, 2 Abb. Pr. (N. Y. Supreme Ct.) 468; Rogers v. Mulliner, 6 Wend. (N. Y.) 597, 22 Am. Dec. 546; Campbell v. Ewalt, 7 How. Pr. (N. Y. Supreme Ct.) 399; Stanton v. Schell, 3 Sandf. (N. Y.) 323; Scott v. Ely, 4 Wend. (N. Y.) 555; Wallsworth v. McCullough, 10 Johns. (N. Y.) 93; Pratt v. Hill, 16 Barb. (N. Y.) 303; Adkins v. Brewer, 3 Cow. (N. Y.) 206, 15 Am. Dec. 264; Vosburgh v. Welch, 11 Johns. (N. Y.) 175; Wilson v. Robinson, 6 How. Pr. (N. Y. Supreme Ct.) 110; Comfort v. Fulton, 13 Abb. Pr. (N. Y. Supreme Ct.) 276; Van Steenbergh v. Kortz, 10 Johns. (N. Y.) 169.

South Carolina.—Garvin v. Blocker, 2 Brev. (S. Car.) 157; Miller v. Grice, 2 Rich. (S. Car.) 27, 44 Am. Dec. 271; Lining v. Bentham, 2 Bay (S. Car.) 1.

For Offense in Another State.—Where an action was brought against a magistrate for issuing a warrant for the arrest of a person guilty of assault and battery in another state, and the person was arrested and imprisoned under it, it was held that it was only necessary to show that the justice knew when he issued the warrant that the offense was committed out of the jurisdiction. Want of malice or corrupt motive or error of judgment as to his jurisdiction over the matter will not justify the justice, although they are admissible in mitigation of damages. Miller v. Grice, 2 Rich. (S. Car.) 27, 44 Am. Dec. 271.

Preliminary Requisites—General Warrant.—In Grumon v. Raymond, 1 Conn. 40, 6 Am. Dec. 200, it was held that if the preliminary requisites to the issue of a warrant, such as the oath, etc., are omitted, or if the warrant be general, the proceeding is *coram non iudice*, and both the justice who issued it and the officer executing it are liable in trespass to the party injured. See the title WARRANTS.

Where Justice Is Interested.—In Dyer v. Smith, 12 Conn. 384, where the justice of the peace, who was the owner of a promissory note, payable to a stated person or bearer, began a suit on it in the name of A, as bearer, against the maker, returnable before himself, rendered judgment against him by default, is-

a *bona fide* mistake of law, within his jurisdiction, unless he acts corruptly, he is not liable therefor.¹

sued execution upon it, and caused the maker to be arrested and committed to jail, it was held that as the judge knew at the time of the proceeding that he was the owner, and acted in order to collect his own debt, he was liable to the maker in trespass for the arrest and imprisonment.

Contrary to Rule—Warrant against Freeholder.—It was held, contrary to the general rule, in *Rogers v. Mulliner*, 6 Wend. (N. Y.) 597, 22 Am. Dec. 546, that a justice was not liable for issuing a warrant against a freeholder without the oath required in such cases, although the process was void, there being nothing to show that he acted *mala fide* or officiously.

Privileged Persons.—In *Percival v. Jones*, 2 Johns. Cas. (N. Y.) 49, it was held that an action lies against a justice of the peace, who voluntarily and without request or authority of the plaintiff, in an action before him, issues an execution against the body of a defendant who is privileged from imprisonment, who claims his privilege and is taken on the execution. See *Adkins v. Brewer*, 3 Cow. (N. Y.) 206, 15 Am. Dec. 264; *Taylor v. Trask*, 7 Cow. (N. Y.) 250.

An Inferior Magistrate must have jurisdiction both of the subject-matter and person of the defendant, in order to justify proceedings against such defendant, and when he exceeds his jurisdiction all concerned in such proceedings are liable in trespass. *Little v. Moore*, 4 N. J. L. 82, 7 Am. Dec. 574.

A justice of the peace acts ministerially in issuing and delivering a criminal warrant to an officer to be executed, and if it is not lawful on its face he is liable. *Blythe v. Tompkins*, 2 Abb. Pr. (N. Y. Supreme Ct.) 468. See *Van Rensselaer v. Witbeck*, 7 N. Y. 521; *Wilson v. New York*, 1 Den. (N. Y.) 599; *Houghton v. Swarthout*, 1 Den. (N. Y.) 589.

Offense must have been Committed—Accusation.—Before a justice of the peace is authorized to issue a warrant for the arrest of a person, he must be satisfied, upon an examination of the complainant upon oath, that a criminal offense has been committed, and the accusation must be recited in the warrant. *Wilson v. Robinson*, 6 How. Pr. (N. Y. Supreme Ct.) 110.

For Further Discussion of This Topic, see the title WARRANTS.

1. Error of Judgment—England.—*West v. Smallwood*, 3 M. & W. 418; *Hamond v. Howell*, 1 Mod. 184; *Taafe v. Downes*, 3 Moo. P. C. C. 36, note.

Alabama.—*Irion v. Lewis*, 56 Ala. 190; *Hamilton v. Williams*, 26 Ala. 527; *Busteed v. Parsons*, 54 Ala. 393, 25 Am. Rep. 688; *Heard v. Harris*, 68 Ala. 43.

California.—*Downer v. Lent*, 6 Cal. 94, 65 Am. Dec. 489.

Connecticut.—*Phelps v. Sill*, 1 Day (Conn.) 328; *Parmalee v. Baldwin*, 1 Conn. 317.

Illinois.—*Outlaw v. Davis*, 27 Ill. 467.

Kansas.—*Gillett v. Thiebold*, 9 Kan. 427; *Bauer v. Clay*, 8 Kan. 580; *Prell v. McDon-*

ald, 7 Kan. 426, 12 Am. Rep. 423; *Clark v. Spicer*, 6 Kan. 440.

Kentucky.—*Gregory v. Brown*, 4 Bibb (Ky.) 28, 7 Am. Dec. 731.

Maine.—*Downing v. Herrick*, 47 Me. 462.

Massachusetts.—*Pratt v. Gardner*, 2 Cush. (Mass.) 68, 48 Am. Dec. 652; *Kelley v. Dresser*, 11 Allen (Mass.) 31; *Bean v. Crosby*, 1 Allen (Mass.) 220.

New Hampshire.—*Evans v. Foster*, 1 N. H. 377.

New Jersey.—*Little v. Moore*, 4 N. J. L. 82, 7 Am. Dec. 574.

New York.—*Kissock v. Grant*, 34 Barb. (N. Y.) 144; *Skinning v. Kelley*, 18 N. Y. 355; *Johnson v. Moss*, 20 Wend. (N. Y.) 145; *Van Alstyne v. Erwine*, 11 N. Y. 331; *Matter of Faulkner*, 4 Hill (N. Y.) 598; *Miller v. Brinkerhoff*, 4 Den. (N. Y.) 120, 47 Am. Dec. 242; *Warner v. Shed*, 10 Johns. (N. Y.) 138; *Curry v. Pringle*, 11 Johns. (N. Y.) 444; *Weaver v. Devendorf*, 3 Den. (N. Y.) 117; *Yates v. Lansing*, 5 Johns. (N. Y.) 282; *Wilson v. New York*, 1 Den. (N. Y.) 599; *Cunningham v. Bucklin*, 8 Cow. (N. Y.) 178, 18 Am. Dec. 432; *Barhyte v. Shepherd*, 35 N. Y. 242.

Pennsylvania.—*Billings v. Russell*, 23 Pa. St. 189, 62 Am. Dec. 330; *Jones v. Hughes*, 5 S. & R. (Pa.) 299, 9 Am. Dec. 364; *Kennedy v. Barnett*, 64 Pa. St. 141.

Rhode Island.—*Alexander v. Card*, 3 R. I. 145.

South Carolina.—*Reid v. Hood*, 2 Nott & M. (S. Car.) 168, 10 Am. Dec. 582; *Lining v. Bentham*, 2 Bay (S. Car.) 1.

Wisconsin.—*Steele v. Dunham*, 26 Wis. 396.

Unworthy Motives.—Where a justice of the peace, from motives of personal ill-will, instigated a constable to execute a state's warrant for felony nine months after the warrant was issued, and the constable, at the instigation of the justice, and moved also by motives of personal ill-will, arrested the party against whom the warrant was issued, although the person who had originally procured the warrant had made no recent application to have it executed, it was held that both the constable and the justice were liable, although there was no cruelty exercised. *Garvin v. Blocker*, 2 Brev. (S. Car.) 157.

Malice Not Presumed.—The law does not presume malice against a judicial officer either because he renders an illegal judgment, or because he does an illegal act in the discharge of his official functions. *Campbell v. State*, 48 Ga. 353.

Two Warrants, One Illegal.—Where a person was convicted before a trial justice of two distinct offenses, and committed to the house of correction under two warrants, one of which was illegal, and the other legal, and was held in custody under both during the whole term of his imprisonment, it was held that he was lawfully imprisoned, and that the justice, if liable at all for issuing the warrant, was liable in nominal damages only. *Doherty v. Munson*, 127 Mass. 495.

Knowledge of Jurisdiction.—Trespass will

Superior Judges.—If the judge of a court of superior or general jurisdiction exceeds his jurisdiction, or otherwise causes to issue a wrongful warrant of arrest, he cannot, nevertheless, be held liable, unless his acts have been prompted by corrupt or malicious motives.¹

c. OF CLERK OF COURT.—A clerk who is acting as of course and ministerially is not liable for the issuing of an execution contrary to law, unless the facts which render it unlawful are within his knowledge,² but such an officer, having knowledge of the facts, will not be protected from the effects of an unlawful arrest merely because it was ordered by his superior officer.³

d. OF OFFICER EXECUTING.—(1) *In General*—Warrant Void on Its Face.—If a warrant is illegal and void on its face an officer is not justified in executing it;⁴ but if the warrant is valid upon its face, he is not bound to

not lie against a justice for acting judicially without jurisdiction, unless he knew or had the means of knowing of the defect of jurisdiction. *Gwynne v. Poole*, 2 Lutw. 1378; *Calder v. Halket*, 3 Moo. P. C. 28; *Pike v. Carter*, 3 Bing. 78, 11 E. C. L. 37; *Lowther v. Radnor*, 8 East 113.

1. Superior Judges.—Book of Assise, 27 Edw. 3, pl. 15; 9 Hen. VI. 60, pl. 9; 9 Edw. IV. 3, pl. 10.

England.—*Floyd v. Barker*, 12 Coke 23; *Hire v. Sedgwick*, 2 Roll. 109; *Crepps v. Durden*, Cowp. 640; *Perkin v. Proctor*, 2 Wils. 384; *Marshalsea Case*, 10 Coke 76; *Gwynne v. Poole*, Lutw. 937, 1160; *Groenwelt v. Burwell*, 1 Raym. 454; *Ackerley v. Parkinson*, 3 M. & S. 411; *Calder v. Halket*, 3 Moo. P. C. 28; *Hamond v. Howell*, 2 Mod. 218; *Miller v. Seare*, 2 W. Bl. 1145; *Mostyn v. Fabrigas*, Cowp. 172; *Morgan v. Hughes*, 2 T. R. 225; *Smith v. Bouchier*, 2 Stra. 993.

United States.—*Randall v. Brigham*, 7 Wall. (U. S.) 535; *Bradley v. Fisher*, 13 Wall. (U. S.) 351.

Connecticut.—*Tracy v. Williams*, 4 Conn. 107, 10 Am. Dec. 102; *Phelps v. Sill*, 1 Day (Conn.) 315; *Grunum v. Raymond*, 1 Conn. 40, 6 Am. Dec. 200; *Slocum v. Wheeler*, 1 Conn. 429.

Illinois.—*Flack v. Harrington*, 1 Ill. 213, 12 Am. Dec. 170.

New Jersey.—*Little v. Moore*, 4 N. J. L. 82, 7 Am. Dec. 574.

Kentucky.—*Gregory v. Brown*, 4 Bibb (Ky.) 28, 7 Am. Dec. 731.

New York.—*Yates v. Lansing*, 9 Johns. (N. Y.) 395, 6 Am. Dec. 290; *Wallsworth v. McCullough*, 10 Johns. (N. Y.) 93; *Lange v. Benedict*, 18 Alb. L. J. 11, 73 N. Y. 27, 29 Am. Rep. 80.

Pennsylvania.—*Jones v. Hughes*, 5 S. & R. (Pa.) 299, 9 Am. Dec. 364.

South Carolina.—*Reid v. Hood*, 2 Nott & M. (S. Car.) 168, 10 Am. Dec. 582; *Brodie v. Rutledge*, 2 Bay (S. Car.) 69.

See also *Fray v. Blackburn*, 3 B. & S. 576, 113 E. C. L. 576; *Borden v. State*, 11 Ark. 519, 54 Am. Dec. 217; *Elmore v. Overton*, 104 Ind. 548, 54 Am. Rep. 343; *Wasson v. Mitchell*, 18 Iowa 153; *Ross v. Griffin*, 53 Mich. 5; *Stone v. Graves*, 8 Mo. 148, 40 Am. Dec. 131; *Grove v. Van Duyn*, 44 N. J. L. 654, 43 Am. Rep. 412; *Cunningham v. Bucklin*, 8 Cow. (N. Y.) 178, 18 Am. Dec. 432; *Wilson v. New York*, 1

Den. (N. Y.) 599; *Piper v. Pearson*, 2 Gray (Mass.) 120, 61 Am. Dec. 438; *Prestidge v. Woodman* 2 D. & R. 43.

The judges of the high court of justice in *England* are practically exempt from all accountability, except to the king by whom they are appointed. *Hamond v. Howell*, 2 Mod. 218; *Grenville v. College of Physicians*, 12 Mod. 388, 1 Salk. 396; *Taafe v. Downes*, 3 Moo. P. C. 36, note; *Year Books* 43 Edw. III., 9, 9 Edw. IV., 3.

A judicial officer will not be held responsible personally in damages for acts done in discharge of the functions with which he is intrusted, unless it is proved that he has acted arbitrarily in violation of the law. *Boutte v. Emmer*, 43 La. Ann. 980.

2. Clerk of Court.—*Barnes v. Viall*, 12 Rep. 5. See *Briggs v. Wardwell*, 10 Mass. 356; *Fisher v. Deans*, 107 Mass. 118; *Andrews v. Marris*, 1 Q. B. 3, 41 E. C. L. 409; *Carratt v. Morley*, 1 Q. B. 18, 41 E. C. L. 417; *Lewis v. Palmer*, 6 Wend. (N. Y.) 367.

3. Swart v. Kimball, 43 Mich. 443.

4. Warrant Void on Its Face.—*England.*—*Rex v. Hood*, 1 Moo. C. C. 281.

United States.—*Ex p. Burford*, 3 Cranch (U. S.) 448.

Alabama.—*Noles v. State*, 24 Ala. 672; *Duckworth v. Johnston*, 7 Ala. 578.

Arkansas.—*State v. Crow*, 6 Ark. 642; *Durr v. Howard*, 6 Ark. 461.

Connecticut.—*Grunum v. Raymond*, 1 Conn. 40, 6 Am. Dec. 200; *Hall v. Howd*, 10 Conn. 514, 27 Am. Dec. 696; *Burlingham v. Wylee*, 2 Root (Conn.) 152; *Lampson v. Landon*, 5 Day (Conn.) 506; *Tracy v. Williams*, 4 Conn. 107, 10 Am. Dec. 102; *State v. Leach*, 7 Conn. 456, 18 Am. Dec. 118.

Florida.—*Camp v. Moseley*, 2 Fla. 171.

Georgia.—*Howard v. Reid*, 51 Ga. 328.

Illinois.—*Moore v. Watts*, 1 Ill. 42; *Rafferty v. People*, 69 Ill. 111, 18 Am. Rep. 601, 72 Ill. 37.

Indiana.—*State v. Wenzel*, 77 Ind. 428.

Maine.—*Gurney v. Tufts*, 37 Me. 130, 58 Am. Dec. 777.

Maryland.—*Lewin v. Uzuber*, 65 Md. 341.

Massachusetts.—*Sandford v. Nichols*, 13 Mass. 286, 7 Am. Dec. 151; *Donahoe v. Shed*, 8 Met. (Mass.) 326.

Michigan.—*Sweet v. Negus*, 30 Mich. 406.

Missouri.—*Halsted v. Brice*, 13 Mo. 171; *State v. Stern*, 4 Mo. App. 385.

New York.—*Reynolds v. Corp.*, 3 Cai. (N.

Y.) 267; *People v. Koeber*, 7 Hill (N. Y.) 39; *Sleight v. Ogle*, 4 E. D. Smith (N. Y.) 445; *Savacool v. Boughton*, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181.

North Carolina.—*State v. McDonald*, 3 Dev. (N. Car.) 471; *Welch v. Scott*, 5 Ired. (N. Car.) 72; *State v. Curtis*, 1 Hayw. (N. Car.) 471.

Pennsylvania.—*Conner v. Com.*, 3 Binn. (Pa.) 38; *Stephens v. Wilkins*, 6 Pa. St. 260.

South Carolina.—*State v. Wimbush*, 9 S. Car. 309.

Wisconsin.—*Sprague v. Birchard*, 1 Wis. 457, 60 Am. Dec. 393; *Watkins v. Page*, 2 Wis. 92; *Weinberg v. Conover*, 4 Wis. 803.

Jurisdiction of the Person.—Where the want of jurisdiction of the person appeared upon the face of the process the officer was held liable. *Pearce v. Atwood*, 13 Mass. 344. See *Buller's N. P.* 83; *Marshalsea Case*, 10 Coke 68b; *Camp v. Moseley*, 2 Fla. 171; *Hill v. Bateman*, 1 Stra. 711; *Entick v. Carrington*, 2 Wils. 275, 19 How. St. Tr. 1029; *Perkin v. Proctor*, 2 Wils. 384; *Allen v. Gray*, 11 Conn. 95; *Shergold v. Holloway*, 2 Stra. 1002; *Wise v. Withers*, 3 Cranch (U. S.) 331.

Complaint on Oath or Affirmation.—An officer is not justified in making an arrest when a warrant is not supported by a complaint founded on oath or affirmation, or where it is issued upon an insufficient oath, and that fact appears on the face of the warrant. *Caudle v. Seymour*, 1 Q. B. 889, 41 E. C. L. 825; *Smith v. Bouchier*, 2 Stra. 993; *Grumon v. Raymond*, 1 Conn. 40, 6 Am. Dec. 200; *State v. J. H.*, 1 Tyler (Vt.) 444; *Conner v. Com.*, 3 Binn. (Pa.) 38; *Ex p. Burford*, 3 Cranch (U. S.) 448; *Halsted v. Brice*, 13 Mo. 171.

Vague Description.—A warrant is upon its face illegal which states vaguely the name of the person against whom it is directed, or gives a vague description of his person. *Com. v. Crotty*, 10 Allen (Mass.) 403, 87 Am. Dec. 669.

Misnomer.—An officer is not justified in making an arrest under a warrant which designates a person by a name supposed to be his, but which is not, in fact, his name. *West v. Cabell*, 153 U. S. 78.

In New York, previous to the Acts of 1830, process, whether in civil or criminal cases, issued against a person by a wrong or fictitious name, would not justify an arrest, although the person arrested was, as a fact, the person intended to be taken. *Gurnsey v. Lovell*, 9 Wend. (N. Y.) 319.

Party Well Known by Both Names.—The arrest would be justifiable in such a case only if it were shown that the party was as well known by the one name as the other. *Shadgett v. Clipson*, 8 East 328; *Cole v. Hindson*, 6 T. R. 234; *Caffall v. Huntley*, 4 Eng. Crim. Law 331; *Scandover v. Warne*, 2 Campb. 270; *Wilks v. Lorck*, 2 Taunt. 400; *Mead v. Haws*, 7 Cow. (N. Y.) 332; *Griswold v. Sedgwick*, 6 Cow. (N. Y.) 456, 1 Wend. (N. Y.) 126; *Scott v. Ely*, 4 Wend. (N. Y.) 555; *Johnston v. Riley*, 13 Ga. 98. See *Stevenson v. Danvers*, 2 B. & P. 109; *Delanoy v. Cannon*, 10 East 328; *Dring v. Dickenson*, 11 East 225; *Dixie v. Scholl*, 8 East 225.

Offense must be Specified.—A warrant which does not specify the offense with which the person is charged is illegal. *Money v. Leach*, 1 W. Bl. 555; *Ex p. Nisbett*, 8 Jur. 1071.

Without Seal.—Where a seal is required a warrant without a seal is void on its face. *State v. Curtis*, 1 Hayw. (N. Car.) 471.

Irregularity—Insertion of Sheriff's Name.—As to when process is void for irregularity, the sheriff's name having been inserted in the writ after it was issued, see *Housin v. Barrow*, 6 T. R. 122.

As to when an Arrest by a Constable for Alleged Indecent Behavior was held illegal, see *Nixon v. Rogers*, 1r. Rep. 3 C. L. 614.

Service Outside Precinct.—An attempt by an officer to serve a process outside of his precinct is illegal, and makes him liable. 1 East Crown Law 309; *Grumon v. Raymond*, 1 Conn. 40, 6 Am. Dec. 200; *Tracy v. Williams*, 4 Conn. 107, 10 Am. Dec. 102; *State v. Leach*, 7 Conn. 456, 18 Am. Dec. 118; *Nichols v. Thomas*, 4 Mass. 232.

Description of Offense—Larceny.—Where a warrant issued for larceny did not state the value of the thing stolen, a fact which was material to determining what the punishment of the crime should be, it was held absolutely void, and, not being amendable, it did not justify the officer who made the arrest. *Frazier v. Turner*, 76 Wis. 562.

Signing by Justice—Indorsement.—Where a justice issued a warrant, writing his name in the body thereof and indorsing it on the back, but failed to sign it at the foot, the warrant was held void, and the arrest thereunder illegal. *Davis v. Sanders*, 40 S. Car. 507.

Omitting Debt in Execution—Married Woman.—An execution which specifies a debt less than the amount which authorizes an execution, or which describes a woman as a married woman, is void on its face. See *Green v. Morse*, 5 Me. 292; *Smith v. Cattel*, 2 Wils. 376; *Brooks v. Hodgkinson*, 4 H. & N. 712.

If No Crime is Charged, or if the act charged amounted to no crime for which arrest may be lawfully made, the arrest is illegal. *Shergold v. Holloway*, 2 Stra. 1002; *Duckworth v. Johnston*, 7 Ala. 578; *State v. Leach*, 7 Conn. 453, 18 Am. Dec. 118; *Moore v. Watts*, 1 Ill. 42; *Coffin v. Varila* (Tex. Civ. App. 1894), 27 S. W. Rep. 956.

Unconstitutional Statute.—The arrest is also illegal if the statute under which the warrant issued was unconstitutional, *Fisher v. McGirr*, 1 Gray (Mass.) 1, 61 Am. Dec. 381; *Greene v. Briggs*, 1 Curt. (U. S.) 311; or if the magistrate was forbidden by law from issuing such a process, *Stephens v. Wilkins*, 6 Pa. St. 260.

Want of Jurisdiction.—The defects upon the face of a warrant which render an officer liable are such as apprise him of a want of jurisdiction in the court over either the subject-matter or the person of the defendant. *Dominick v. Eacker*, 3 Barb. (N. Y.) 17.

Arrest for Offense in Officer's Presence—Warrant for Another Offense.—When an officer arrests a person without a warrant, for an offense committed in his presence, the law requires him to make a complaint for the offense, but does not require him, in order to

examine its validity as determined by extrinsic facts.¹

Lack of Jurisdiction.—If an officer knows of his own knowledge that the magistrate had not jurisdiction he is not bound to serve the warrant, and he is a trespasser if he does so;² and he is a trespasser also if he knows that the warrant has been superseded.³

Warrant Prima Facie Regular.—But the production of a warrant lawful and regular on its face, is a *prima facie* justification of an arrest under it.⁴ And

justify such arrest, to procure a complaint and warrant for the offense so committed. If he makes the complaint, the fact that the magistrate does not issue a complaint and warrant thereon cannot make the officer a trespasser. *Douglass v. Barber*, 18 R. I. 459.

Law of the Time of the Arrest Determines.—The law in force at the time an arrest is made determines the legality of an order of arrest, not that which existed at the time the order was issued. *Hecht v. Levy*, 20 Hun (N. Y.) 53.

Formal Defects and Clerical Errors.—Mere formal defects or clerical errors do not render a warrant illegal and void, so as to make the officer executing it liable, although they are apparent upon the face of the process. *Com. v. Martin*, 98 Mass. 4; *Donahoe v. Shed*, 8 Met. (Mass.) 326; *Pratt v. Bogardus*, 49 Barb. (N. Y.) 89; *Stoddard v. Tarbell*, 20 Vt. 321; *Patterson v. Kise*, 2 Blackf. (Ind.) 127.

For Further Discussion of the requisites of a warrant, see the title WARRANTS.

1. *Smith v. Shaw*, 12 Johns. (N. Y.) 257; *Savacool v. Boughton*, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181; *Churchill v. Churchill*, 12 Vt. 661; *Barnes v. Barber*, 6 Ill. 401, and *cited in Parker v. Smith*, 6 Ill. 411; *Miller v. Grice*, 1 Rich. (S. Car.) 147; *Smith v. Bouchier*, 2 Stra. 993; *Harrison v. Bulcock*, 1 H. Bl. 68. But in *Suydam v. Keys*, 13 Johns. (N. Y.) 444, the court, by Platt, J., said: "The rule is wisely settled that in such cases the subordinate officer is bound to see that he acts within the scope of the legal powers of those who command him."

2. **Knowledge of Want of Jurisdiction Renders Arrest Illegal.**—*McDonald v. Wilkie*, 13 Ill. 22, 54 Am. Dec. 423; *Barnes v. Barber*, 6 Ill. 401; *Guyer v. Andrews*, 11 Ill. 494; *Hill v. Figley*, 25 Ill. 156; *Leachman v. Dougherty*, 81 Ill. 324; *Sumner v. Beeler*, 50 Ind. 341, 19 Am. Rep. 718; *Grace v. Mitchell*, 31 Wis. 533, 16 Am. Rep. 613; *Sprague v. Birchard*, 1 Wis. 457, 60 Am. Dec. 393.

An officer may stop in the execution of process, regular on its face, whenever he becomes satisfied that there is a want of jurisdiction in the court or officer issuing the same. *Earl v. Camp*, 16 Wend. (N. Y.) 562. See *Housh v. People*, 75 Ill. 487.

But see the following cases, where it was held that an officer is not bound to look beyond the face of his process for facts that will apprise him that it is irregular or voidable, as he is bound to serve it, if it is regular on its face. *Magney v. Burt*, 5 Q. B. 381, 48 E. C. L. 381; *Laroche v. Wasbrough*, 2 T. R. 737; *Tarlton v. Fisher*, Doug. 671; *Whitmore v. Clinton*, 1 M. & Rob. 531; *Gott v.*

Mitchell, 7 Blackf. (Ind.) 270; *Wilmarth v. Burt*, 7 Met. (Mass.) 257; *Twitchell v. Shaw*, 10 Cush. (Mass.) 46, 57 Am. Dec. 80; *O'Shaughnessy v. Baxter*, 121 Mass. 515; *Underwood v. Robinson*, 106 Mass. 296; *People v. Warren*, 5 Hill (N. Y.) 440; *Thomas v. Clapp*, 20 Barb. (N. Y.) 165; *Webber v. Gay*, 24 Wend. (N. Y.) 485; *Watson v. Watson*, 9 Conn. 140, 23 Am. Dec. 324; *Wall v. Trumbull*, 16 Mich. 234; *Taylor v. Alexander*, 6 Ohio 147.

Writ of Protection—Return.—An officer who arrests a debtor on execution and afterwards discharges him upon his exhibiting a writ of protection, and returns the execution unsatisfied without stating the arrest in his return, cannot, if sued by the debtor for the arrest, justify upon the execution. *Munroe v. Merrill*, 6 Gray (Mass.) 236.

3. **Warrant Superseded.**—In *Morrison v. Wright*, 7 Port. (Ala.) 67, it was held that process in the hands of the sheriff becomes inoperative by a supersedeas, and all subsequent proceedings under such process are void. Therefore, if the sheriff, after notice of such supersedeas, does any act by virtue of such superseded process, he is a trespasser, but he is not if he does not receive such notice.

4. **Warrant Regular on Its Face.**—*Henry v. Lowell*, 16 Barb. (N. Y.) 268; *Kerlin v. Heacock*, 3 Binn. (Pa.) 215.

In *Henry v. Lowell*, 16 Barb. (N. Y.) 268, it was held that it was not necessary to give other evidence than that furnished by the process of the court, valid on its face, to justify the officer and those aiding him in making an arrest.

"If the warrant be legal in the frame of it, and issue in the ordinary course of justice, from a court or person having jurisdiction in the case, it is sufficient. No error or irregularity in the previous proceedings will affect it, or excuse the party killing the officer in the execution of it from the guilt of murder." 1 East P. C. 309, § 78. See *Roscoe's Crim. Evidence* (3d ed.) 750, 751; 1 *Chitty Crim. Pleading* 40; *Cotes v. Michell*, 3 Levinz 23; *Moravia v. Sloper*, Willes 34; *Barker v. Braham*, 3 Wils. 376.

The Rule Adopted in the United States is that so long as the warrant is regular on its face, the officer is not bound to look beyond it, or to inquire into the validity of the proceedings. It is enough if the warrant does not disclose a want of jurisdiction and if it is regular on its face. *Erskine v. Hohnbach*, 14 Wall. (U. S.) 613; *Warner v. Shed*, 10 Johns. (N. Y.) 138; *Noble v. Holmes*, 5 Hill (N. Y.) 194; *Parker v. Walrod*, 16 Wend. (N. Y.) 514, 30 Am. Dec. 124; *Cornell v. Barnes*,

generally, if the warrant shows upon its face that the magistrate issuing it had jurisdiction of the subject-matter, and nothing appears to apprise the officer that the court had not also jurisdiction of the person of the defendant, the officer will be protected.¹

(2) *Liability for Arrest of Privileged Person.*—No action lies against an officer for the arrest under civil process of a person privileged from

7 Hill (N. Y.) 35; *Nichols v. Thomas*, 4 Mass. 232; *Donahoe v. Shed*, 8 Met. (Mass.) 326; *State v. McNally*, 34 Me. 210, 56 Am. Dec. 650; *Gray v. Kimball*, 42 Me. 299; *Welch v. Scott*, 5 Ired. (N. Car.) 72; *State v. Mann*, 5 Ired. (N. Car.) 45; *Humes v. Taber*, 1 R. I. 464; *Haskins v. Ralston*, 69 Mich. 63, 13 Am. St. Rep. 376.

Justification under Void Process.—As an officer may justify under a voidable process, so also he may justify under one which is absolutely void, provided the defect is not apparent on its face. *Kennedy v. Dunclee*, 1 Gray (Mass.) 71; *Parsons v. Loyd*, 3 Wils. 345.

Ministerial Officers need Not Look beyond Process.—In *Earl v. Camp*, 16 Wend. (N. Y.) 562, the court, by Cowen, J., said: "The law imposes various duties upon them [ministerial officers] on delivering to them the process of the superior or inferior courts, or the warrants of officers, to the discharge of which they are absolutely bound provided there is jurisdiction; and though there be a total want of such jurisdiction, if it be not apparent on the face of the process, the law will not put them to inquire and judge of the case. In general they ought not to look beyond the process, and in no case need they do so."

A Distinction has Sometimes been Made between the persons against whom an action may be brought for the execution of process, without the jurisdiction of the court issuing it, the plaintiff being considered a trespasser, but the officer of the court not. *Rex v. Danser*, 6 T. R. 242.

1. *Arkansas.*—See *Trammell v. Russellville*, 34 Ark. 105, 36 Am. Rep. 1.

Connecticut.—*Wooster v. Parsons*, Kirby (Conn.) 110; *Allen v. Gleason*, 4 Day (Conn.) 376.

Georgia.—*Boyd v. State*, 17 Ga. 194.

Illinois.—*Barnes v. Barber*, 6 Ill. 401; *McDonald v. Wilkie*, 13 Ill. 22, 54 Am. Dec. 423; *Ressler v. Peats*, 86 Ill. 275; *Slomer v. People*, 25 Ill. 70, 76 Am. Dec. 786; *Johnson v. Von Kettler*, 66 Ill. 63.

Indiana.—*Boaz v. Tate*, 43 Ind. 60; *Davis v. Bush*, 4 Blackf. (Ind.) 330.

Maine.—*Nowell v. Tripp*, 61 Me. 426, 14 Am. Rep. 572; *Chase v. Fish*, 16 Me. 132.

Massachusetts.—*Donahoe v. Shed*, 8 Met. (Mass.) 326; *Wilmarth v. Burt*, 7 Met. (Mass.) 257; *Sandford v. Nichols*, 13 Mass. 288, 7 Am. Dec. 151; *Hoit v. Hook*, 14 Mass. 213.

Michigan.—*Wheaton v. Beecher*, 49 Mich. 348.

New York.—*Sleight v. Ogle*, 4 E. D. Smith (N. Y.) 445; *Landt v. Hiltz*, 19 Barb. (N. Y.) 283; *Lewis v. Penfield*, 39 How. Pr. (N. Y. Supreme Ct.) 490; *Gold v. Bissell*, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480; *Savacool v.*

Boughton, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181; *Bradley v. Ward*, 58 N. Y. 401.

Pennsylvania.—*Allison v. Rheam*, 3 S. & R. (Pa.) 139, 8 Am. Dec. 644.

Tennessee.—*Herzog v. Graham*, 9 Lea (Tenn.) 152.

Utah.—*Clinton v. Nelson*, 2 Utah 284.

Magistrate a De Facto Officer.—An officer is not liable where the magistrate is only a *de facto* justice, though the justice himself might be liable. *Wilcox v. Smith*, 5 Wend. (N. Y.) 231, 21 Am. Dec. 213; *Rodman v. Harcourt*, 4 B. Mon. (Ky.) 230; *Com. v. Kirby*, 2 Cush. (Mass.) 577.

Joint Liability—Arrest and Detention.—Officers who make an unlawful arrest are liable jointly with those who cause or take part in any subsequent detention under it; but if the arrest is lawful they will not be liable for such subsequent wrongful detention. *Bath v. Metcalf*, 145 Mass. 274, 1 Am. St. Rep. 455.

Good Faith Presumed.—An officer who makes an arrest is presumed to act in good faith. *State v. Pugh*, 101 N. Car. 737, 9 Am. St. Rep. 44.

Entire Conduct of Officer Considered.—In order to determine whether an arrest made under a warrant regular on its face is lawful or unlawful, the entire subsequent conduct of the officer may be taken into consideration, and if he does not comply with his process he will be held liable. Thus, in *People v. Fick*, 89 Cal. 144, the court, by DeHaven, J., said: "If an officer desires the protection which the law always gives to one who acts under its authority, he must keep within the limits of its commands. If he arrests under a warrant, he must follow its direction in dealing with his prisoner. The rule is that 'one who arrests the person of another by legal process, or other equivalent authority conferred upon him by law, can only justify himself by a strict compliance with the requirements of such process or authority. If he fails to execute or return the process as thereby required, or to do what the law required him to do in making the arrest, his whole justification fails.' *Phillips v. Fadden*, 125 Mass. 198. In *Brock v. Stimson*, 108 Mass. 521, 11 Am. Rep. 390, referring to the principle which holds an officer to be a trespasser *ab initio* for an abuse in the execution of process, it is said: 'The same rule holds good in the case of an officer who, after arresting a person on criminal process, omits to perform the duty required by the law, of taking him before a court.' The case here is unlike that of *Ex p. Sternes*, 82 Cal. 245. In that case it appeared that the officer acted under a lawful warrant and did precisely what he was thereby commanded to do; and it was held that he had committed no crime in so doing."

arrest.¹ The officer arresting is not bound to take notice of the privilege of the defendant,² and he is not a trespasser in making the arrest.³ And the fact that the defendant is at the time privileged is no ground for abating the writ.⁴

e. OF ATTORNEY.—An attorney is liable in an action for false imprisonment for an arrest upon a void process which has been sued out by him.⁵

Liability of Tax Collectors.—As to the liability of collectors of taxes for arrests made under warrants by assessors, see *Nowell v. Tripp*, 61 Me. 426, 14 Am. Rep. 572; *Judkins v. Reed*, 48 Me. 386; *Caldwell v. Hawkins*, 40 Me. 526; *Ford v. Clough*, 8 Me. 342, 23 Am. Dec. 513; and the title **TAXATION**.

1. Arrest of Privileged Persons.—*Smith v. Jones*, 76 Me. 138, 49 Am. Rep. 598; *Tarlton v. Fisher*, Doug. 671; *Cameron v. Lightfoot*, 2 W. Bl. 1190; *Cameron v. Bowles*, 2 W. Bl. 1195; *Crossley v. Shaw*, 2 W. Bl. 1085; *Yearsley v. Heane*, 14 M. & W. 322; *Ewart v. Jones*, 14 M. & W. 774; *Stokes v. White*, 1 C. M. & R. 223; *Rideal v. Fort*, 11 Exch. 847; *Magnay v. Burt*, 5 Q. B. 381, 48 E. C. L. 81; *Marsh v. Worley*, 1 Dowl. & L. 84; *Lloyd v. Wood*, 5 Ad. & El. 228, 31 E. C. L. 322; *Carle v. Delesdernier*, 13 Me. 363, 29 Am. Dec. 508; *Chase v. Fish*, 16 Me. 132; *Wilmarth v. Burt*, 7 Met. (Mass.) 257; *Aldrich v. Aldrich*, 8 Met. (Mass.) 102; *Thompson's Case*, 122 Mass. 428, 23 Am. Rep. 370; *Person v. Grier*, 66 N. Y. 124, 23 Am. Rep. 35.

In *Carle v. Delesdernier*, 13 Me. 363, 29 Am. Dec. 508, the court, by Weston, C. J., said: "Although there must have been numerous arrests, upon precepts, of privileged persons, who have been discharged upon motion or upon habeas corpus, not one case has been cited or referred to where trespass has been brought against the officer and been adjudged to lie. This of itself is evidence not to be disregarded that the law has been understood to be against it."

Where the person arrested is by law privileged from arrest, an officer is not liable because that fact does not appear upon the process. *Tarlton v. Fisher*, Doug. 671.

2. Officer Not Bound to Take Notice of Privilege.—*Ray v. Hogeboom*, 11 Johns. (N. Y.) 433; *Secor v. Bell*, 18 Johns. (N. Y.) 52; *Sperry v. Willard*, 1 Wend. (N. Y.) 32; *Chase v. Fish*, 16 Me. 132.

Claim of Privilege to be Disregarded.—It is the duty of an officer to serve his precept notwithstanding any claim of privilege that may be made by the person arrested. *Sperry v. Willard*, 1 Wend. (N. Y.) 32.

Officer may Take Notice of Privilege—Escape—Defense.—Although an officer is not bound to take any notice of the privilege of a person against whom he has a warrant, yet if he does so, and either neglects to arrest him, or allows him to go at large after he has been arrested, the privilege of the arrested person is a full defense to an action against the officer for an escape. *Ray v. Hogeboom*, 11 Johns. (N. Y.) 433; *Secor v. Bell*, 18 Johns. (N. Y.) 52.

3. *Chase v. Fish*, 16 Me. 132; *Sperry v. Willard*, 1 Wend. (N. Y.) 32.

Privilege Does Not Make Officer Trespasser.—Officers are bound to execute writs although

the persons against whom they are directed are privileged from arrest, and an officer who acts in accordance with his precept is not a trespasser, though the person arrested is privileged. *Carle v. Delesdernier*, 13 Me. 363, 29 Am. Dec. 508; *Sperry v. Willard*, 1 Wend. (N. Y.) 32; *Secor v. Bell*, 18 Johns. (N. Y.) 52; *Ray v. Hogeboom*, 11 Johns. (N. Y.) 433; *Tarlton v. Fisher*, Doug. 671.

4. *Hart v. Kennedy*, 15 Abb. Pr. (N. Y. Supreme Ct.) 290; *Booraem v. Wheeler*, 12 Vt. 311; *Hubbard v. Sanborn*, 2 N. H. 468.

A Previous Arrest on Same Process, illegal because the defendant was at the time privileged, does not invalidate a second arrest after the period of exemption has expired. *Petrie v. Fitzgerald*, 1 Daly (N. Y.) 401; *Van Wezel v. Van Wesel*, 1 Edw. Ch. (N. Y.) 113; *Humphrey v. Cumming*, 5 Wend. (N. Y.) 90; *Barrack v. Newton*, 1 Q. B. 525, 41 E. C. L. 655; *Andrewes v. Walton*, 1 M. & Gord. 380.

Stipulation Not to Sue—Duress.—A party released from arrest upon stipulating not to sue for false imprisonment is precluded from maintaining any action upon the bond given by the plaintiff on obtaining the order for arrest. *Schuyler v. Englert*, 62 How. Pr. (N. Y. Marine Ct.) 479.

Direction to Officer Suspended by Temporary Privilege.—A direction to the officer to make the arrest immediately does not mean that he shall make it while the defendant is temporarily privileged. It must be understood that the officer was not to make the arrest until the defendant became subject to arrest. *Sewell v. Lane*, 1 Ind. 293.

An order of arrest should not be vacated on the ground that the defendant is exempt from arrest by virtue of his office. The plaintiff has a right to retain the warrant, so that he may make the arrest when the exemption has ceased. *Hart v. Kennedy*, 15 Abb. Pr. (N. Y. Supreme Ct.) 290, 24 How. Pr. (N. Y.) 425. See *Peck v. Hozier*, 14 Johns. (N. Y.) 346; *Humphrey v. Cumming*, 5 Wend. (N. Y.) 90; *Sperry v. Willard*, 1 Wend. (N. Y.) 32.

5. Liability of Attorney.—*Barker v. Braham*, 3 Wils. 368. See *Gibson v. Mudford*, 1 Rolle 408; *Stockley v. Hornidge*, 8 C. & P. 11, 34 E. C. L. 272; *Sleight v. Leavenworth*, 5 Duer (N. Y.) 122; *Fischer v. Langbein*, 65 How. Pr. (N. Y. Supreme Ct.) 382, 62 How. Pr. (N. Y.) 238; *Landt v. Hiltz*, 19 Barb. (N. Y.) 283; *Fischer v. Raab*, 81 N. Y. 235.

An attorney is also liable if he gets an insolvent debtor arrested on a *ca. sa.* issued on a judgment which was obtained against such insolvent debtor for tort previous to his discharge, the discharge having the effect of extinguishing such judgment. *Deyo v. Van Valkenburgh*, 5 Hill (N. Y.) 242.

In *Green v. Elgie*, 5 Q. B. 99, 48 E. C. L. 99, it was held that an attorney who delib-

f. OF SHERIFF.—The court will presume in favor of a sheriff in making an arrest on mesne or final process if there is a doubt as to the legality of such arrest.¹ But if a sheriff arrests a person under an illegal writ or process, or under a warrant issued by a court having no jurisdiction of the subject-matter, and the defect appears upon its face, he is liable for such arrest.² Or if he arrests a person after a direction to him by the plaintiff not to execute a *ca. sa.*, or if he detains the defendant after receiving notice from the plaintiff that he has released the debt, he becomes liable for such arrest or detention.³ So he is liable for illegal arrests made by his deputies.⁴

erately directs the execution of a warrant is liable in trespass if it proves bad.

And in *Codrington v. Lloyd*, 8 Ad. & El. 449, 35 E. C. L. 433, the court, by Patteson, J., said: "The process when set aside is as if it had never existed, and if the party therefore cannot justify under it, neither can the attorney. If indeed the attorney had done no act beyond what his duty required, that might be made a defense, * * * but that would be under the general issue."

But where the court has jurisdiction, both of the subject-matter of the suit and of the person of the defendant, and the papers presented by the attorney are regular on their face, and the court grants the application for the arrest after consideration, and after hearing and acting judicially upon the papers, but the order of arrest is subsequently vacated for error, the attorney is not liable. *Fisher v. Langbein*, 62 How. Pr. (N. Y. Supreme Ct.) 238, 65 How. Pr. (N. Y.) 382. See *Williams v. Smith*, 14 C. B. N. S. 596, 108 E. C. L. 596; *Cooper v. Harding*, 7 Q. B. 928, 53 E. C. L. 928; *Sedley v. Sutherland*, 3 Esp. 202; *Simpson v. Hornbeck*, 3 Lans. (N. Y.) 54; *Landt v. Hiltz*, 19 Barb. (N. Y.) 283; *Stanton v. Schell*, 3 Sandf. (N. Y.) 328.

See the titles *ADVICE OF COUNSEL*; *FALSE IMPRISONMENT*; *MALICIOUS PROSECUTION*.

1. *Connell v. Mahon*, Bl. D. & O. (Ir.) 211. See *Whitworth v. Clifton*, 1 M. & Rob. 531.

2. *Liability of Sheriff—Connecticut.*—*Stoyel v. Lawrence*, 3 Day (Conn.) 1; *Grunon v. Raymond*, 1 Conn. 40, 6 Am. Dec. 200.

Illinois.—*Moore v. Watts*, 1 Ill. 42; *Gorton v. Frizzell*, 28 Ill. 291.

Maine.—*Harwood v. Siphers*, 70 Me. 464.

Massachusetts.—*Pearce v. Atwood*, 13 Mass. 324; *Munroe v. Merrill*, 6 Gray (Mass.) 236.

Michigan.—*Sheldon v. Hill*, 33 Mich. 171.

New York.—*Barhydt v. Valk*, 12 Wend. (N. Y.) 145, 27 Am. Dec. 124; *Abbott v. Booth*, 51 Barb. (N. Y.) 546; *Blythe v. Tompkins*, 2 Abb. Pr. (N. Y. Supreme Ct.) 468; *Arteaga v. Conner*, 88 N. Y. 403.

Vermont.—*Clayton v. Scott*, 45 Vt. 386.

Where the sheriff makes an arrest under a *capias ad respondendum* he need not state in his answer justifying such arrest that an affidavit was filed before the writ was issued, but the answer must show that a return has been made if the return day is past. *Caldwell v. Kenworthy*, 31 Ind. 238.

Mere Informalities or Irregularities in the Writ will not subject the sheriff to an action. *Cooper v. Adams*, 2 Blackf. (Ind.) 294; *Poor*

v. Taggart, 37 N. P. T. 544; *Bean v. Crosby*, 1 Allen (Mass.) 220.

3. *Barker v. St. Quintin*, 12 M. & W. 441.

In *Withers v. Henley*, Cro. Jac. 379, 3 Bulst. 96, Lord Coke says: "One being in execution, the plaintiff comes and says to the sheriff, 'Set him at large out of prison;' if he will detain him afterwards in prison but by the space of an hour, an action for false imprisonment will well lie against him for this."

4. *Arrests by Deputy Sheriffs.*—*White v. Johnson*, 1 Wash. (Va.) 159; *Tuttle v. Love*, 7 Johns. (N. Y.) 472; *Paddock v. Cameron*, 8 Cow. (N. Y.) 212; *Murrell v. Smith*, 3 Dana (Ky.) 462; *Owens v. Gatewood*, 4 Bibb (Ky.) 494; *White v. Philbrick*, 5 Me. 149; *Murray v. Lovejoy*, 2 Cliff. (U. S.) 197, 3 Wall. (U. S.) 1.

But although a sheriff is liable for a trespass committed by his deputy alone, the courts in *Massachusetts* have held that he cannot be sued for such trespass jointly with the deputy, nor will an action lie against him after a judgment has been recovered against the deputy individually and execution has been levied under it. *Campbell v. Phelps*, 1 Pick. (Mass.) 62, 11 Am. Dec. 139. See *Parsons v. Winchell*, 5 Cush. (Mass.) 592, 52 Am. Dec. 745; *Elliott v. Hayden*, 104 Mass. 180; *Pervear v. Kimball*, 8 Allen (Mass.) 199, in which cases the relation of sheriff and deputy was taken to be in effect that of master and servant, and that therefore they were not jointly liable. In *Pervear v. Kimball*, 8 Allen (Mass.) 199, it was held that no action lies against a sheriff upon a judgment recovered against his deputy.

However, in *Morgan v. Chester*, 4 Conn. 387, it was held that the sheriff is jointly liable with the deputy, and that a judgment recovered against the deputy without satisfaction does not bar an action against the sheriff himself.

The same rule was adopted in *Waterbury v. Westervelt*, 9 N. Y. 598, in which the relation of principal and agent was that accepted as the proper analogy to be applied, and *Campbell v. Phelps*, 1 Pick. (Mass.) 62, 11 Am. Dec. 139, was specifically *dissented* from, and the case of *Moulton v. Norton*, 5 Barb. (N. Y.) 296, which followed it, was *overruled*. In *Christian v. Hoover*, 6 Yerg. (Tenn.) 505, the rule in *Connecticut* and *New York* was followed, and a judgment against the deputy without satisfaction was held to be no bar to an action against the sheriff.

In *Cabell v. Arnold*, 86 Tex. 102, it was held that the United States marshal was not liable for an arrest made by his deputies without a

g. OF RAILROAD COMPANY.—A railroad company is liable for a wrongful arrest made by a person in its employ.¹

3. Conspiracy to Arrest.—All persons concerned in an arrest on a criminal process, including the prosecutor, may be indicted for illegal arrest, where they conspire to procure such process and arrest for improper purposes.²

4. Arrests under Altered and Blank Warrants.—The addition by a magistrate, before whom a warrant is made returnable, of the name of a person against whom it shall run, after having been issued by another magistrate, is such an alteration as may invalidate the warrant.³ Blank warrants are void, and those making arrests under them are liable for false imprisonment.⁴

5. Killing while Attempting Illegal Arrest.—If a person while attempting to make an illegal arrest kills another, the homicide cannot be of less grade than manslaughter, though committed upon reasonable apprehension of danger, because a person cannot avail himself of a necessity which he has wilfully brought upon himself.⁵

warrant, when a proper warrant for such arrest was in his own hands, and no greater force was used in making the arrest than if the *capias* had been in the hands of the deputy.

1. *Duggan v. Baltimore, etc., R. Co.*, 159 Pa. St. 248; *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 29 Am. St. Rep. 827, and note. But see *Mulligan v. New York, etc., R. Co.*, 129 N. Y. 506, 26 Am. St. Rep. 539, and note; *Chicago, etc., R. Co. v. Flexman*, 103 Ill. 546, 42 Am. Rep. 33, and note; *Lynch v. Metropolitan El. R. Co.*, 90 N. Y. 77, 43 Am. Rep. 141; *Lafitte v. New Orleans, etc., R. Co.*, 43 La. Ann. 34; *Galveston, etc., R. Co. v. Donahoe*, 56 Tex. 162. See *Mali v. Lord*, 39 N. Y. 381, 100 Am. Dec. 448.

In *Allen v. London, etc., R. Co.*, L. R. 6 Q. B. 65, where a clerk in the service of a railway company, whose duty was limited to issuing tickets to passengers and receiving the money and keeping it in a till under his charge, gave into custody a person whom he suspected of having robbed the till, after the attempt to do so had ceased, it was held that as the arrest could not be necessary for the protection of the company's property he had no implied authority from the company to give such person into custody, and that the company was therefore not liable for his acts. See *Paulton v. London, etc., R. Co.*, L. R. 2 Q. B. 534; *Edwards v. London, etc., R. Co.*, L. R. 5 C. P. 445.

2. Conspiracy to Arrest.—*Slomer v. People*, 25 Ill. 70, 76 Am. Dec. 786; *Com. v. Collins*, 12 Rep. N. S. 284; *Sydenham v. Keilaway*, Cro. Jac. 8; *Stewart v. Cooley*, 23 Minn. 347, 23 Am. Rep. 690; *Newall v. Jenkins*, 26 Pa. St. 159.

In an action against a prosecutor, a magistrate, and a constable for conspiring together to arrest a person through malice and without probable cause, proof that each one acted illegally against the plaintiff will not suffice; it must be shown that they conspired together in order to make the arrest. *Newall v. Jenkins*, 26 Pa. St. 159.

3. Altered Warrants.—*Haskins v. Young*, 2 Dev. & B. (N. Car.) 527, 31 Am. Dec. 426; *Housin v. Barrow*, 6 T. R. 122; *Burslem v. Fern*, 2 Wils. 47. See Stat. 5 Geo. I., c. 21, § 53.

4. Blank Warrants.—"A blank warrant is highly reprehensible. It withdraws from the ministers of justice that protection which the law, when properly executed, was meant to afford them, and thereby holds out a temptation for future resistance." 1 East Crown Law 311, *citing R. Stokely 1772*; *Foster's MSS.* See *Rex v. Winwick*, 8 T. R. 454; *Money v. Leach*, 1 W. Bl. 555; *Rex v. Hood*, 1 Moo. C. C. 281; *Hoye v. Bush*, 1 M. & G. 775, 39 E. C. L. 649; *Year Book 14 Hen. VIII.* 16; *Alford v. State*, 8 Tex. App. 545.

Where a magistrate signed a number of warrants in blank, and gave them to a police officer to be filled up with the names of the persons to be arrested as occasion required, and the police officer filled one of them in this way without any charge under oath being made against the prisoner, the warrant was held void as not issuing in the regular course of law from a justice. *Rafferty v. People*, 69 Ill. 111, 18 Am. Rep. 601.

But in *Bailey v. Wiggins*, 5 Harr. (Del.) 462, 60 Am. Dec. 650, it was held that a warrant duly issued on complaint against a person whose name was unknown, and with a blank for the name, was not illegal, and would justify the arrest of the proper person.

"If an officer be killed in attempting to execute a writ or warrant invalid on the face of it, or if issued with a blank in it, and the blank be afterwards filled up, or if issued with an insufficient description of the defendant or against a wrong person, or out of the district in which alone it could be lawfully executed, or if a private person interfere in a case where he has no authority by law to do so, or if the defendant has no knowledge of the officer's business, or of the intention with which a private person interferes, and the officer or private person be resisted and killed, the killing will be manslaughter only." 1 Hale P. C. 465. See also *Housin v. Barrow*, 6 T. R. 122; *Rex v. Hood*, 1 Moo. C. C. 281, 1 East P. C. 100, 111. See *Johnston v. Riley*, 13 Ga. 97.

For a Full Discussion of the requisites of a warrant of arrest, see the title WARRANTS.

5 Killing while Attempting Illegal Arrest.—*Alabama.*—*Wills v. State*, 73 Ala. 362. *California.*—*People v. Hunt*, 59 Cal. 430. *Illinois.*—*Adams v. People*, 47 Ill. 376.

VII. RESISTING ARREST—1. In General.—It has been seen that one who is lawfully making an arrest may, in case of necessity, use force sufficient to effect his purpose,¹ and if he be resisted or assaulted, he is not bound to fly to the wall, but may press forward and may kill the offender if it is necessary to save his own life, or guard his person from great bodily harm.²

Resisting Arrest for Misdemeanor.—According to the weight of authority, the same rule applies in resisting an arrest for a misdemeanor as in resisting arrest for a felony.³

Indiana.—*Barnett v. State*, 100 Ind. 171; *Story v. State*, 99 Ind. 413.

Iowa.—*State v. Neeley*, 20 Iowa 108.

Maine.—*State v. Smith*, 32 Me. 369, 54 Am. Dec. 578; *Smith v. State*, 33 Me. 48, 54 Am. Dec. 607.

Missouri.—*State v. Starr*, 38 Mo. 270.

Texas.—*Reed v. State*, 11 Tex. App. 509, 40 Am. Rep. 795; *Carter v. State*, 30 Tex. App. 551, 28 Am. St. Rep. 944.

1. See *supra*, this title, *Process—Execution of Process—Execution by Force*. See also the title ASSAULT AND BATTERY.

The general subject of obstructing or resisting officers in the discharge of their duty is discussed under the title OBSTRUCTING JUSTICE.

Prisoner Arrested Lawfully should Submit.—

Where a prisoner has been arrested lawfully, it is his duty to go along with the officer, although the officer does not, when making the arrest, let the prisoner know the charge that is made against him. *Com. v. Weathers*, 7 Kulp (Pa.) 1. See *Tiner v. State*, 44 Tex. 128.

Liability of Officer for Oppressive Proceedings.—

However, as a protection to the public, officers are punishable for corruption or for oppressive proceedings, either by indictment, attachment, or action at the suit of the party injured. *Bacon's Abr.*, tit. Offices and Officers; *Anonymous*, 6 Mod. 96, case 136. See the title ASSAULT AND BATTERY.

2. *Mackalley's Case*, 9 Coke 68*b*; *State v. McNally*, 87 Mo. 644. See also *infra*, this section, and the titles ASSAULT AND BATTERY; HOMICIDE; SELF-DEFENSE.

Arrest must Be Peaceable if Possible, by Force if Necessary.—The law does not clothe a peace officer with the right to judge arbitrarily of the necessity of killing a prisoner to secure him, or of killing a person in order to prevent a rescue; it is the function of the jury to judge of the necessity of such killing. *State v. Bland*, 97 N. Car. 478.

In *State v. Mahon*, 3 Harr. (Del.) 568, the court, by Booth, C. J., said: "A person having authority to arrest another must do it peaceably, and with as little violence as the case will admit of; * * * if resisted, he may use force sufficient to effect his purpose."

The Amount of Force that the law allows an officer to use in making an arrest, is as much as is necessary to effect his object; and the jury must judge the necessity, and not the officer, where he is accused of having exceeded the just limit. Where he uses more force than the occasion requires he is liable for the excess. *Levy v. Edwards*, 1 C. & P. 40, 11 E. C. L. 306; *Imason v. Cope*, 5 C. & P. 193, 24 E. C. L. 274; *Harrison v. Hodgson*,

10 B. & C. 445, 21 E. C. L. 109; *Burdett v. Colman*, 14 East 163; *Ramsey v. State*, 92 Ga. 53; *Kreger v. Osborn*, 7 Blackf. (Ind.) 74; *Wright v. Keith*, 24 Me. 158; *Hannen v. Edes*, 15 Mass. 347; *Golden v. State*, 1 S. Car. 292; *State v. Quin*, 3 Brev. (S. Car.) 515; *State v. Wood*, 1 Bay (S. Car.) 351; *State v. Lazarus*, 1 Mill Const. (S. Car.) 34; *Giroux v. State*, 40 Tex. 97; *Mesmer v. Com.*, 26 Gratt. (Va.) 976.

Killing is not to be resorted to until all other efforts to make the arrest have failed. *Gardner v. Thibodeau*, 14 La. Ann. 742; *Reg. v. Murphy*, 1 Cr. & Dix C. C. (Ir.) 20; *Rex v. Scully*, 1 C. & P. 319, 11 E. C. L. 407; *Holloway's Case*, W. Jones 198.

Escaped Convict.—If a convict who has escaped, and one of his associates, make a hostile demonstration with deadly weapons against an arresting posse, in order to prevent their arrest, they may be shot. If after such demonstration either kills any of the arresting posse, it is murder in both, irrespective of the question as to which of them fired the fatal shot, or whether they or the posse fired first. *Tolbert v. State*, 71 Miss. 179, 42 Am. St. Rep. 454. See *State v. Garrett*, *Winst.* (N. Car.) 144, 84 Am. Dec. 359, and note; *Hawkins v. Com.*, 14 B. Mon. (Ky.) 318, 61 Am. Dec. 147; *Handley v. State*, 96 Ala. 48, 38 Am. St. Rep. 81, and note.

3. 1 East P. C. 302; 1 Hale P. C. 481; *State v. McNally*, 87 Mo. 644; *State v. Garrett*, *Winst.* (N. Car.) 144, 84 Am. Dec. 359. But see *Thomas v. Kinkead*, 55 Ark. 502; *Couradely v. People*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 234; *Reneau v. State*, 2 Lea (Tenn.) 720, 31 Am. Rep. 626.

Distinction between Resisting and Fleeing from Arrest for Misdemeanor.—In *Tiner v. State*, 44 Tex. 128, it was held that a party guilty of a misdemeanor and fired on by a policeman while avoiding arrest may repel such attack in self-defense by returning the fire, and if in so doing he kills the policeman, such killing will not necessarily be unlawful. In this case the court, by Gould, J., said: "It is true that it is the duty of every citizen to submit to lawful arrest. There is, however, a broad distinction between resistance and avoidance; between forcible opposition to arrest and merely fleeing from it. See *State v. Anderson*, 1 Hill (S. Car.) 346. There is no rule of law that he who flees from attempted arrest in cases of misdemeanor thereby forfeits his right to defend his life. It is certainly possible for the officer of the law to commit a felony by shooting at a man, or by other excessive violence, even when attempting his arrest. *Caldwell v. State*, 41 Tex. 86. And it would follow that the party

Killing Officer while Resisting Lawful Arrest.—If an officer be killed by one resisting a lawful arrest, the killing will be murder.¹

Resisting Person Assisting Officer.—Every person who assists an officer in making a lawful arrest is given the same protection that the officer himself has; and this whether he was commanded by the officer to arrest or not.²

Resisting Private Persons.—The same protection is accorded to private persons arresting in cases of felonies and breaches of the peace.³

thus feloniously assaulted might defend his life. *State v. Oliver*, 2 Houst. (Del.) 605."

"It is not lawful to kill the party accused [of misdemeanor or breach of the peace] if he fly from the arrest, though he cannot otherwise be overtaken, and though there be a warrant to apprehend him; and generally speaking, it will be murder; but under circumstances it may amount only to manslaughter if it appear that death was not intended. But as in case of felony, so here, if the officer meet with resistance and kill the offender in the struggle, he will be justified; and if he be killed it will be murder. * * * In some instances, however, of flight, in cases of flagrant misdemeanor, such as the one before mentioned of a dangerous wound given, * * * the same extremity may be resorted to if the party cannot be otherwise overtaken; but this is founded upon a presumption that the offense may turn out to be felony." 1 East P. C. 302.

Fleeing from Arrest for Felony.—"If a felony be committed, and the felon fly from justice, * * * it is the duty of every man to use his best endeavors for preventing an escape; and if in the pursuit the felon be killed, where he cannot be otherwise overtaken, the homicide is justifiable. * * * The same rule holds if a felon, after arrest, break away as he is carrying to jail, and his pursuers cannot retake without killing him." 1 East P. C. 298.

1. Homicide in Resisting Lawful Arrest—*England*.—Rex v. Ford, R. & R. C. C. 329; Rex v. Woolmer, 1 Moo. C. C. 334; Rex v. Ball, 1 Moo. C. C. 330; Rex v. Edmeads, 3 C. & P. 390, 14 E. C. L. 364; Reg. v. Porter, 12 Cox C. C. 444, 5 Moak's Rep. 497.

Alabama.—Dill v. State, 25 Ala. 15.

California.—People v. Pool, 27 Cal. 572.

Delaware.—State v. Oliver, 2 Houst. (Del.) 585.

Georgia.—Joinson v. State, 30 Ga. 426; Boyd v. State, 17 Ga. 194; Croom v. State, 85 Ga. 718, 21 Am. St. Rep. 179.

Illinois.—Rafferty v. People, 72 Ill. 37.

Kentucky.—Creighton v. Com., 83 Ky. 142, 4 Am. St. Rep. 143.

Minnesota.—State v. Spaulding, 34 Minn. 36.

Pennsylvania.—Brooks v. Com., 61 Pa. St. 352, 100 Am. Dec. 645.

South Carolina.—State v. Anderson, 1 Hill (S. Car.) 343.

Tennessee.—Tackett v. State, 3 Yerg. (Tenn.) 392, 24 Am. Dec. 582.

Texas.—Angel v. State, 36 Tex. 642, 14 Am. Rep. 380.

For a full discussion of this subject, see the title HOMICIDE.

Murder or Manslaughter.—In *Roberts v. State*, 14 Mo. 138, 55 Am. Dec. 97, the court, by Napton, J., said: "It is well established

that where persons have authority to arrest, and are resisted in the proper exercise of such authority and killed, such homicide is murder in all who have taken part in such resistance. *Foster* 270; 1 Hale P. C. 465. On the other hand, where the arrest is illegal, the offense is reduced to manslaughter. *Com. v. Drew*, 4 Mass. 396. Three things, it is said, must be attended to in matters of this kind: the legality of the deceased's authority, the legality of the manner in which he executed it, and the defendant's knowledge of that authority."

When a person knows or has reasonable grounds of belief that an officer intended and was endeavoring to arrest him for a felony with which he was charged, and he kills him, it is murder; but if a person, upon a sudden visit at night by an armed man, kills him without knowledge of his official character or intentions, or reasonable ground of belief as to the same, and without malice, it is manslaughter. *Croom v. State*, 85 Ga. 718, 21 Am. St. Rep. 179. See *Fleetwood v. Com.*, 80 Ky. 1; *Roberts v. State*, 14 Mo. 138, 55 Am. Dec. 97.

Resisting Officer de Facto.—Under § 6, art. 14, *Missouri* Constitution, requiring all officers under the authority of the state to take an oath of office, a deputy constable regularly appointed who has not taken the oath of office is not an officer *de jure*, but is an officer *de facto*, and others have no right to resist him in the performance of the duties of a constable; and when such an officer is on trial under indictment for murder for killing one who had resisted him while attempting to make an arrest, he should be treated as an officer, and the instruction to the jury should proceed on the theory that he is one. *State v. Dierberger*, 96 Mo. 666, 9 Am. St. Rep. 380.

Although resistance be made to an officer of justice, yet if the officer kills the person resisting, after he has ceased to resist, and the necessity for extreme measures has ceased, the crime of the officer will be at least manslaughter. 1 Russ. on Crimes (9th Am. ed.) 858.

2. 3 Russell on Crimes (inter. ed.) 72; 1 Hale P. C. 462, 463. See *Rex v. Phelps*, C. & M. 180; Reg. v. Porter, 12 Cox C. C. 444, 5 Moak's Rep. 497. See also the titles ASSAULT AND BATTERY; HOMICIDE; OBSTRUCTING JUSTICE; SELF-DEFENSE.

3. Private Persons.—Where private persons use their endeavors to bring felons to justice, some cautions ought to be observed. In the first place, it should be ascertained that a felony has actually been committed, or that an actual attempt to commit a felony is being made by the party arrested; for if that be not

Resisting through Ignorance.—If a person resists an officer through ignorance of the latter's official character, such ignorance will be a defense for making the resistance.¹

Officer Making Arrest Killed by Third Person.—If an officer be killed in making an arrest, not by the one arrested who submits himself without resistance, but by others who attempt to rescue him, the person arrested is innocent and the others are guilty of murder; unless the former countenanced the violence of the latter, in which case he would be equally guilty.²

Standing in Way of Officer.—An officer may arrest one who stands in his way for the purpose of preventing him from making an arrest, and when one encourages a person arrested, or being arrested, to resist the officer, he may be taken into custody.³

the case, no suspicion, however well grounded, will bring the person so interposing within the protection which the law extends to persons acting with proper authority. If it is clear that a felony has been committed, the next consideration will be whether it was committed by the person intended to be pursued or arrested; for, supposing a felony to have been actually committed, but not by the person arrested or pursued upon suspicion, this suspicion, though probably well founded, will not bring the person endeavoring to arrest or imprison within the protection of the law so far as to excuse him from the guilt of manslaughter if he should kill; or, on the other hand, to make the killing of him amount to murder. It seems that, in either case, it would only be manslaughter; the one not having used due diligence to be apprised of the truth of the fact, the other not having submitted and rendered himself to justice. 1 Russ. on Crimes (9th Am. ed.) 799.

See also *supra*, this title, *Arrest without Warrant—By Private Persons*; and the title *ASSAULT AND BATTERY*.

1. Ignorance of Official Character.—*Yates v. People*, 32 N. Y. 509; *State v. Kirby*, 2 Ired. (N. Car.) 201; *State v. Bryant*, 65 N. Car. 327; *State v. Belk*, 76 N. Car. 10; *Logue v. Com.*, 38 Pa. St. 265, 80 Am. Dec. 481; *Johnson v. State*, 26 Tex. 117.

It appeared that on the morning of the day mentioned in the indictment, the prisoner stole some wheat from an outhouse belonging to one S.; that the wheat was soon after found concealed in an adjoining field, and that S., W., and others watched near the spot, expecting that the thief would come to carry it away, and that they should be able to discover and apprehend him. In the course of the day the prisoner and another man walked into the field and lifted up the sacks containing the wheat. They were immediately pursued, and W. seized the prisoner without desiring him to surrender, or stating for what reason he was apprehended. A scuffle ensued, during which, before W. had spoken, the prisoner drew a knife and cut him across the throat. Lawrence, J., held that as W. did not communicate to the prisoner the purpose for which he seized him the case did not come within the statute, for if death had ensued, it would only have been manslaughter. But he said that if a proper notification had been made before the cutting the case would have assumed a different com-

plexion. *Rex v. Ricketts*, 3 Campb. 68; *Reg. v. Forbes*, 10 Cox C. C. 362.

2. 1 Russ. on Crimes (inter. ed.) 73.

Interposing to Prevent Arrest.—If a man be arrested, and he and his company endeavor a rescue, and while they are fighting one who knows nothing of the arrest, coming by, act in aid of the party arrested, and one of the bailiffs be killed, the person so acting in aid is guilty of murder; for a man must take the consequences of joining in an unlawful act, such as fighting, and his ignorance will not excuse him, where the fact is made murder by the law without any actual precedent malice, as in the case of killing an officer in the due execution of his office (*Stanley's Case*, J. Kel. 86). But it should be observed that in another report of the same case it is said to have been resolved that if a person not knowing the cause of the struggle, had interposed between the bailiff and the party arrested, with intent to prevent mischief, it would not have been murder in such person, though the bailiff's assistants were killed by one of the rescuers (*R. v. Stanlie*, 1 Sid. 160 MSS.); and it should seem that in a case of this kind the material inquiry would be whether the stranger interfered with the intention of preserving the peace and preventing mischief, for if he interposed for the express purpose of aiding one party against the other he must abide the consequences at his peril. 1 East P. C., c. 5, § 83, p. 318.

See also *Reg. v. Wallis*, 1 Salk. 334; *Jackson's Case*, 1 Hale 464; *Brooks v. Com.*, 61 Pa. St. 352, 100 Am. Dec. 645; *Galvin v. State*, 6 Coldw. (Tenn.) 283.

All the Parties Resisting an Arrest Are Responsible for the Consequent Acts growing out of the general design, but not for particular acts growing out of the particular malice of individuals. *Whart. Cr. Law*, § 397; *Martin v. State*, 89 Ala. 120, 18 Am. St. Rep. 91; *Jordan v. State*, 79 Ala. 9; *Amos v. State*, 83 Ala. 1, 3 Am. St. Rep. 682; *Williams v. State*, 81 Ala. 1, 60 Am. Rep. 133; *Montgomery v. Sutton*, 58 Iowa 697.

3. Standing in Officer's Way—Encouraging Resistance to Arrest.—1 Russell on Crimes (inter. ed.) 880; Anonymous, 1 East P. C. 305; *Levy v. Edwards*, 1 C. & P. 40, 1 E. C. L. 306; *White v. Edmunds*, Peake N. P. 89; *Roddy v. Finnegan*, 43 Md. 490; *Coyles v. Hurtin*, 10 Johns. (N. Y.) 85. See also the title *OBSTRUCTING JUSTICE*.

2. Resisting Unlawful Arrest.—An unlawful arrest, or an attempt to make an unlawful arrest, stands upon the same footing as any other nonfelonious assault, or as a common assault and battery.¹ The person who is so unlawfully arrested, or against whom such an unlawful attempt is directed, is not bound to yield, and may resist force with force, but he is not authorized to go beyond the line of force proportioned to the character of the assault, or he in turn becomes a wrongdoer.²

Homicide in Resisting Arrest.—In accordance with these principles, homicide in resisting an unlawful arrest will be murder or manslaughter,³ unless the

1. *Creighton v. Com.*, 84 Ky. 103, 4 Am. St. Rep. 193. See the title ASSAULT AND BATTERY.

2. *Noles v. State*, 26 Ala. 31, 62 Am. Dec. 711; *State v. Oliver*, 2 Houst. (Del.) 606; *Com. v. Wright*, 158 Mass. 149, 35 Am. St. Rep. 475; *Ross v. State*, 10 Tex. App. 455, 38 Am. Rep. 643. See also the title ASSAULT AND BATTERY.

Right of Lawful Resistance.—A person resisting an officer who attempts to arrest him under an illegal process may, if he uses undue violence in repelling him, be guilty of an assault. *Com. v. Cooley*, 6 Gray (Mass.) 350. See *U. S. v. Liddle*, 2 Wash. (U. S.) 205; *U. S. v. Ortega*, 4 Wash. (U. S.) 531; *U. S. v. Benner*, Baldw. (U. S.) 234; *People v. Gulick*, Hill & D. Supp. (N. Y.) 229.

And a person is not justified in resisting an officer to the extent of making an assault on him, with intent to kill him, because he was endeavoring unlawfully to arrest the person so resisting. *State v. Perrigo*, 67 Vt. 406.

If a person does not know that an officer has a warrant and is seeking to arrest him he is justified in resisting any attempt at arrest. 1 *Hale P. C.* 461; *Wharton's Crim. Law* 318; *State v. Caldwell*, 2 Tyler (Vt.) 212; *State v. Carpenter*, 54 Vt. 551; *State v. Downer*, 8 Vt. 424, 30 Am. Dec. 482; *State v. Burt*, 25 Vt. 373.

All other means of peaceably avoiding an unlawful arrest must be exhausted before a person is justified in offering forcible resistance to an illegal arrest. *People v. Carlton*, 115 N. Y. 618; *Rafferty v. People*, 72 Ill. 37; *State v. Belk*, 76 N. Car. 10.

Under the *Kentucky Crim. Code*, § 39, such persons as assist an officer in making an arrest, who have not been duly summoned, may be lawfully resisted by the person being arrested, and so may an officer who does not inform a person of the charge made against him. *Hamlin v. Com.* (Ky. 1889), 12 S. W. Rep. 146, 11 Ky. L. Rep. 348.

Where a warrant has been issued without complying with the constitutional requirements of an oath or affirmation it is void, and an officer attempting to make an arrest under it may be lawfully resisted. *State v. Wimbush*, 9 S. Car. 309.

So resistance is lawful if made to an arrest without a warrant. *State v. Lovell*, 23 Iowa 304.

3. *Connecticut.*—*State v. Scheele*, 57 Conn. 307, 14 Am. St. Rep. 106.

Georgia.—*Croom v. State*, 85 Ga. 718, 21 Am. St. Rep. 179; *Johnson v. State*, 30 Ga. 426.

Illinois.—*Rafferty v. People*, 69 Ill. 111, 18

Am. Rep. 601; *Palmer v. People*, 138 Ill. 356, 32 Am. St. Rep. 146.

Massachusetts.—*Com. v. Carey*, 12 Cush. (Mass.) 246.

Missouri.—*State v. Fuller*, 96 Mo. 165; *Roberts v. State*, 14 Mo. 138, 55 Am. Dec. 97.

Pennsylvania.—*Brooks v. Com.*, 61 Pa. St. 352, 100 Am. Dec. 645.

Texas.—*Miller v. State*, 31 Tex. Crim. App. 609, 37 Am. St. Rep. 836; *Mewly v. State*, 26 Tex. App. 274, 8 Am. St. Rep. 477; *Jones v. State*, 26 Tex. App. 1, 8 Am. Dec. 454; *Dyson v. State*, 14 Tex. App. 454.

Virginia.—*Briggs v. Com.*, 82 Va. 554.

Murder or Manslaughter.—Where a person in resisting an unlawful arrest unnecessarily kills the assailant the homicide is justifiable, but if committed solely for the purpose of defense it is manslaughter and not murder. But where the slayer had a premeditated intent to kill the assailant, which intent was the result of previous hatred and malice, and was based in some degree upon a desire for revenge for past injuries, and not wholly upon the necessity of protection from present danger, the killing is murder. *State v. Scheele*, 57 Conn. 307, 14 Am. St. Rep. 106. See *Brooks v. Com.*, 61 Pa. St. 352, 100 Am. Dec. 645.

In *Miller v. State*, 31 Tex. Crim. Rep. 609, 37 Am. St. Rep. 836, the court, by Davidson, J., said: "Where a party is illegally detained he may, in a proper manner, regain his liberty, and a killing under such circumstances may be reduced to manslaughter or self-defense. But if the killing be for any other cause, as ill-will or malice, it will be murder; or if more force than necessary be used, or a deadly weapon be resorted to unnecessarily in the first instance by the arrested party, this would constitute him the aggressor. Tex. Code Crim. Pro., arts. 83, 84; *Stockton v. State*, 25 Tex. 776. If his intention was to kill, or do serious bodily harm, the killing would be upon express malice. He is not required to submit to illegal arrest, but may demand the warrant or proper authority, and in its absence repel force by force, provided the force does not exceed prevention and defense. Such force, however, cannot be disproportionate to the injury. The right to repel force by force continues until the person attempting the illegal arrest presses forward with such violence that the person defending is obliged to choose between three things: to retreat, to surrender, or the death of his adversary. If the force used be disproportionate to the injury about to be inflicted, self-defense is eliminated; and if it be attributed to any other cause than resistance to the illegal ar-

unlawful act is persisted in until it ultimately results in an actual necessity on the part of the person resisting the arrest to kill his assailant in order to prevent the commission of a felony or the infliction of great bodily harm, or in the reasonable belief by him of the existence of such necessity.¹

Where Process Regular on Face and Issued by Court Having Jurisdiction.—If one resists an officer in the execution of a process issued by a court having jurisdiction of the subject-matter, and if the process is regular on its face, such resistance is indictable.²

VIII. WAIVER OF ILLEGAL ARREST.—A person who has been unlawfully arrested may waive his right to claim that such arrest is illegal, either because of defects in the process and service thereof,³ or by reason of his being

rest, such arrest cannot be looked to as a mitigating circumstance. * * * It has been held that an unlawful arrest is esteemed, in law, a great provocation. If it be conceded that such provocation constitutes 'adequate cause,' under our statute, then, in order to reduce the killing to manslaughter, 'sudden passion' must have existed in the mind of the slayer at the time of the homicide, otherwise the killing would be murder. *Massie v. State*, 30 Tex. App. 64; *Ex p. Jones*, 31 Tex. Crim. Rep. 422; *Ex p. Sherwood*, 29 Tex. App. 334; *Miller v. State*, Tex. Crim. App., Jan. 21, 1893. Such provocation, in the absence of 'sudden passion,' may become evidence of a most cogent character and force, showing malice. (Same authorities.) Again, if there exists a provocation unknown to the accused at the time of the homicide, this would not suffice to reduce the killing below murder. There must be a concurrence of 'adequate cause' and 'sudden passion,' as defined by our statute, to reduce a felonious homicide to the degree of manslaughter."

For a Full Treatment of the subject of homicide in resisting arrest, see the titles **HOMICIDE**; **SELF-DEFENSE**.

1. *Ross v. State*, 10 Tex. App. 455, 38 Am. Rep. 643. See *Noles v. State*, 26 Ala. 31, 62 Am. Dec. 711; *Simmerman v. State*, 16 Neb. 615, 14 Neb. 568.

The Mere Attempt to Arrest Unlawfully will not, however, where the attempt creates no reasonable belief that the person seeking to arrest will commit a felony or do great bodily harm, excuse a homicide. *Noles v. State*, 26 Ala. 31, 62 Am. Dec. 711.

In *Creighton v. Com.*, 84 Ky. 103, 4 Am. St. Rep. 193, the court, by Pryor, J., said: "In the case of *Com. v. Drew*, 4 Mass. 391, the same doctrine has been announced, and the substance of all the decisions upon the subject based on the elementary authorities is that an unlawful arrest, or an attempt to make an unlawful arrest, is to be placed on the same footing as any other nonfelonious assault, or as a common assault and battery. For an illegal arrest, the party has his remedy by habeas corpus and by an action for false imprisonment. * * * An unlawful arrest is a trespass, and not a felony. *State v. Oliver*, 2 Houst. (Del.) 606; *State v. Craton*, 6 Ired. (N. Car.) 164. * * * In resisting the arrest, and this the accused had the right to do, he could not take the life of Wilson unless his own life was in danger, or to save his person from great bodily injury."

2. See the title **OBSTRUCTING JUSTICE**.

Where a person advised another against whom the sheriff had a warrant, and whom he was about to arrest under it, to draw a line upon the ground and forbid the officer to cross it, and further told him that if the sheriff passed the line and he killed him the law would be on his side, it was held that these facts were sufficient to support an indictment against such adviser for resisting an officer in the performance of his official duty. *State v. Caldwell*, 2 Tyler (Vt.) 212. See *State v. Lovett*, 3 Vt. 110; *State v. McOmber*, 6 Vt. 215; *State v. Buchanan*, 17 Vt. 573; *State v. Downer*, 8 Vt. 424, 30 Am. Dec. 482; *State v. Miller*, 12 Vt. 437; *Merritt v. Miller*, 13 Vt. 476.

The offense of a conspiracy to resist an officer does not merge in the offense of impeding him. *State v. Noyes*, 25 Vt. 415.

And see the general principle in *Savacool v. Boughton*, 5 Wend. (N. Y.) 170, 21 Am. Dec. 181; *Parker v. Walrod*, 16 Wend. (N. Y.) 514, 30 Am. Dec. 124; *Earl v. Camp*, 16 Wend. (N. Y.) 562; *Coon v. Congden*, 12 Wend. (N. Y.) 496; *Lewis v. Palmer*, 6 Wend. (N. Y.) 367; *Dominick v. Eacker*, 3 Barb. (N. Y.) 19; *Sandford v. Nichols*, 13 Mass. 286, 7 Am. Rep. 151.

Where the warrant had been obtained improperly and by perjury, it varied not the offense of him who killed the officer in attempting to execute it. 1 East Pleas of the Crown 310.

3. **Waiver of Defects in Warrant or Service.**—*Howe Mach. Co. v. Lincoln*, 24 Kan. 123; *Junction City v. Keffe*, 40 Kan. 275; *Williams v. Shillaber*, 153 Mass. 541; *Saunders v. Gallaher*, 2 Humph. (Tenn.) 445; *Ilsley v. Harris*, 10 Wis. 95; *Maxwell v. Deens*, 46 Mich. 35; *Coles v. Hannigan*, 8 Daly (N. Y.) 43; *Madge v. Puig*, 71 N. Y. 608.

Where a person goes to his lawyer's office or to a magistrate's house after his arrest in order to give bail, he does not waive his rights thereby to claim the arrest to be unlawful, nor does he do so by giving bail, or by filing an answer without objection to the service of the writ. *Buzzell v. Emerton*, 161 Mass. 176.

Submission to an Unlawful Arrest is no waiver of the right to resist, especially when the arrest is coerced. *Roberson v. State*, 53 Ark. 516; *Alford v. State*, 8 Tex. App. 545.

Jurisdictional Matter.—In order to justify the issuing of a writ as a *capias* in an action founded on contract under *Rhode Island R.*

exempt from such arrest on account of privilege. In the latter case the privilege will be deemed to be waived unless it is set up within a reasonable time after the arrest is made.¹

IX. SECOND ARREST—1. In General.—It is a rule of the common law that a person cannot be a second time taken in execution for the same cause.²

L., § 1487, the affidavit must be filed at the time the writ issues, and where this is not done the justice has no jurisdiction to issue the *capias*, and the writ is void; nor does the defendant lose his right to object by failing to do so at the first opportunity. *Pike v. McMullin*, 66 Vt. 121.

1. In *Petrie v. Fitzgerald*, 1 Daly (N. Y.) 401, the court, by Brady, J., said: "Exemption from arrest is a personal privilege which can be waived, and the waiver is complete when the party or witness fails to claim it at once, and does some act in the cause in reference to his appearance or defense." See also *Smith v. Jones*, 76 Me. 138, 49 Am. Rep. 598; *Brown v. Getchell*, 11 Mass. 14; *Cole v. McClellan*, 4 Hill (N. Y.) 59; *Hardenbrook's Case*, 8 Abb. Pr. (N. Y. Supreme Ct.) 416; *Farmer v. Robbins*, 47 How. Pr. (N. Y. Supreme Ct.) 415; *Stewart v. Howard*, 15 Barb. (N. Y.) 26; *Pixley v. Winchell*, 7 Cow. (N. Y.) 366, 17 Am. Dec. 525; *Dix v. Palmer*, 5 How. Pr. (N. Y. Supreme Ct.) 233; *Leal v. Wigram*, 12 Johns. (N. Y.) 88; *Green v. Bonaffon*, 2 Miles (Pa.) 219; *Geyer v. Irwin*, 4 Dall. (Pa.) 107.

A Member of the State Legislature may waive his privilege from arrest. *Chase v. Fish*, 16 Me. 132.

Giving Ball Bond waives defects in issuance of process for arrest. *Saunders v. Gallaher*, 2 Humph. (Tenn.) 445; *Tipton v. Harris*, Peck (Tenn.) 414; *Stewart v. Howard*, 15 Barb. (N. Y.) 26; *Green v. Bonaffon*, 2 Miles (Pa.) 219. Compare *Baker Mfg. Co. v. Knotts*, 30 Kan. 356 (statutory); and *Washburn v. Phelps*, 24 Vt. 506.

Courts do Not Notice *ex Officio* the privilege granted legislators exempting them from arrest and service of civil process. Advantage must be taken of their privilege at the proper time, and in the proper way, or it will be deemed waived. *Prentiss v. Com.*, 5 Rand. (Va.) 697, 16 Am. Dec. 782.

English Rule.—It has been held in England that the privilege of attending suitors and witnesses is the privilege of the court and not of the individual, and that as a consequence such person so attending court cannot lose, by his own laches, his right to be released or to get redress for an illegal arrest. See *Cameron v. Lightfoot*, 2 W. Bl. 1193; *Magnay v. Burt*, 5 Q. B. 393, 48 E. C. L. 393; *Webb v. Taylor*, 1 D. & L. 676.

2. **Second Arrest—Common Law.**—U. S. v. *Watkins*, 4 Cranch (C. C.) 271, 7 Pet. (U. S.) 670; *McGilvery v. Morehead*, 2 Cal. 607; *Harden v. Campbell*, 4 Gill (Md.) 29; *Doane v. Baker*, 6 Allen (Mass.) 260; *Sherburn v. Beatlie*, 16 N. H. 437; *Enoch v. Ernst*, 21 How. Pr. (N. Y. Supreme Ct.) 96; *Doyle v. Russell*, 30 Barb. (N. Y.) 300; *State v. Brittain*, 3 Ired. (N. Car.) 17.

In *State v. Brittain*, 3 Ired. (N. Car.) 17, the

court, by Daniel, J., said: "At the common law, if a sheriff who arrests on mesne process (not on *ca. sa.*) lets the defendant go at large without taking bail, he may retake him at any time before the return of the writ, and he is not liable to an action for an escape. *Atkinson v. Matteson*, 2 T. R. 172; *Fuller v. Prest*, 7 T. R. 105. In this state (by the statute) if the sheriff does not take bail when he arrests on mesne process, he himself is special bail, and he may then as bail arrest at any time thereafter. But if the sheriff has once taken bail on an arrest on mesne process in a civil action, we find nothing in the law books which authorizes him to arrest the defendant a second time on the same process, on the ground that the bail may have become insufficient."

In *U. S. v. Watkins*, 4 Cranch (C. C.) 276, the court, by Cranch, C. J., said: "The general principle is that no man shall be arrested again for the same cause. This principle has been so long and so well established as to have become a maxim in law. *Nemo debet bis vexari pro eadem causa*. This rule, according to the English practice, is extended to mesne process as well as to execution. Thus after holding the defendant to bail, the plaintiff shall not discontinue his action because he does not like the bail, and again hold the defendant to bail for the same cause."

Different Cause of Action in Same Transaction.—Where a person has been arrested in an action on contract, his subsequent exoneration from imprisonment for debt under 2 *New York Rev. Stat.* 30, § 10, prevents the plaintiff from procuring a second arrest in an action of tort which arose from the same transaction as the alleged cause of action in contract. *Wright v. Ritterman*, 1 Abb. Pr. N. S. (N. Y. Super. Ct.) 428; *People v. Kelly*, 1 Abb. Pr. N. S. (N. Y.) 435.

United States and State Courts.—Where a person has been arrested and held to bail in a United States court, he cannot be arrested in a state court in an action for the same cause. *Hernandez v. Carnobeli*, 10 How. Pr. (N. Y. Super. Ct.) 433, 4 Duer (N. Y.) 642. See *Gordon v. Lindo*, 1 Cranch (C. C.) 588.

Reversal of Order Setting Aside Execution.—Where an order setting aside an execution against the person has been reversed, the defendants cannot be recommitted under the old process, but may be arrested on a new process. *Carrigan v. Washburn* (City Ct.), 28 N. Y. St. Rep. 156, 18 Civ. Pro. Rep. (N. Y.) 79.

Prisoner Passing through Another County.—A person arrested in one county, passing through another county in the proper route to the place where the warrant under which he was arrested orders him to be conveyed, is not liable to arrest in the county through which he passes, and if arrested, all persons

The Circumstances of Each Case, however, will determine whether the court should allow a second arrest upon a second cause of action substantially the same as that upon which the first arrest was made.¹ The second arrest is generally held to be vexatious in such case, and is not often allowed.²

A Discharge for Defective Process will not, in the discretion of the court, furnish an absolute bar to a second arrest in the same cause.³

concerned therein who have knowledge of the first arrest are answerable as for an unlawful arrest. *Love v. Humphrey*, 9 Wend. (N. Y.) 204.

Arrest on Void Process.—Although a person may not be arrested more than once by process out of different courts in the same state, for the same cause of action, the rule does not apply when the first process is absolutely void by reason of want of authority in the court or officer who issued it. *Schadle v. Chase*, 16 How. Pr. (N. Y. Supreme Ct.) 413.

Common-law Rule as to Ca. Sa.—The common-law rule being that an arrest under a *ca. sa.* is a satisfaction, if the defendant escapes the plaintiff has no remedy but to sue the sheriff. *Berry v. Hoke*, 1 Rich. (S. Car.) 76.

But it has been held that an arrest under a *ca. sa.* is not of itself a satisfaction of the judgment, and that it does not discharge an injunction bond which has been entered into on the filing of a bill to enjoin judgment. *Conner v. Winn*, 1 Brev. (S. Car.) 185.

Although the judgment on which a *ca. sa.* issued is discharged by the release of the judgment debtor, yet where he has been arrested on a *ca. sa.* and released by his creditors upon a promise to pay, the promise is binding upon him, and it may be enforced by an action. *Snevely v. Reed*, 9 Watts (Pa.) 396. See further *Bowman v. Bowe*, 40 Hun (N. Y.) 489; *In re Bowen*, 20 Wis. 300, 91 Am. Dec. 404; *Hedges v. Payne*, 85 Hun (N. Y.) 377; *In re Rodda*, 23 Wash. L. Rep. 229.

1. Discretion of the Court.—*Young v. Weeks*, 7 Daly (N. Y.) 115; *Ewart v. Schwartz*, 48 N. Y. Super. Ct. 390. And see succeeding note.

2. A Second Process will not be granted unless the court is satisfied that a second arrest will not be vexatious. *McGilveray v. Morehead*, 2 Cal. 607; *State v. Brittain*, 3 Ired. (N. Car.) 17; *U. S. v. Watkins*, 4 Cranch (C. C.) 271; *Doane v. Baker*, 6 Allen (Mass.) 260; *Archer v. Champneys*, 3 Moore 307; *People v. Tweed*, 5 Hun (N. Y.) 382.

Where a defendant was released once on his agreement to waive the arrest, and a second time because of urgent requests by him and promises to pay which he did not keep, it was held that a third arrest was not vexatious. *Citizens' Nat. Bank v. Vorhis*, 39 Hun (N. Y.) 24.

An arrest may be made a second time for the same cause of action, the plaintiff having discontinued and paid the costs of the action before commenced. *The Atlas Ins. Co. v. Purdon*, 1 Law Rec. (Ir.) O. S. 336.

A defendant who was arrested before the return day of the writ, and rescued himself, was held liable to rearrest by the sheriff upon fresh pursuit after the return day of the writ. *Smith v. Henry*, Hay. & Jon. (Ir.) 579.

On an application for the discharge of a defendant from custody it was held that the plaintiff might retake the defendant who had been discharged from custody by the coroner without the plaintiff's authority. *O'Brien v. Fannin*, Bl. D. & O. (Ir.) 100.

Where a second arrest is not vexatious a defendant may be held to bail in a second action brought for the same cause as a previous discontinued action. Whether it is vexatious or not is a question of fact depending on the circumstances of the case, and the ruling of the court is not reviewable on appeal. *People v. Tweed*, 63 N. Y. 202.

For instances in which second arrests were permitted, see *Aldrich v. Weeks*, 62 Vt. 89; *Com. v. Hastings*, 9 Met. (Mass.) 259; *Bronson v. Noyes*, 7 Wend. (N. Y.) 188; *Cochrane v. State*, 6 Md. 400; *U. S. v. Sowles*, 16 Fed. Rep. 536.

3. Where First Process Defective.—*Butterworth v. White*, 2 Miles (Pa.) 141; *Schadle v. Chase*, 16 How. Pr. (N. Y. Supreme Ct.) 413; *Meucci v. Raudnitz*, 20 Hun (N. Y.) 343.

In *Meucci v. Raudnitz*, 20 Hun (N. Y.) 343, it was held that a second arrest may be granted at the discretion of the court after the first has been vacated in the same action because the affidavit failed to establish a cause of action.

A Prior Illegal Arrest, from which a prisoner has been discharged, will not prevent a subsequent legal one for the same cause. *Petrie v. Fitzgerald*, 1 Daly (N. Y.) 401; *Van Wezel v. Van Wezel*, 1 Edw. Ch. (N. Y.) 113; *Shults v. Andrews*, 54 How. Pr. (N. Y. Supreme Ct.) 380; *Humphrey v. Cumming*, 5 Wend. (N. Y.) 90; *Lagrange's Case*, 14 Abb. Pr. N. S. (N. Y. Supreme Ct.) 333, note; *Hart v. Kennedy*, 15 Abb. Pr. (N. Y. Supreme Ct.) 290; *Andrews v. Walton*, 1 M. & Gord. 380; *Towers v. Newton*, 1 Q. B. 319, 41 E. C. L. 558; *Barrack v. Newton*, 1 Q. B. 525, 41 E. C. L. 655; *Cartwright v. Keely*, 1 Taunt. 192, 2 E. C. L. 192.

Where a Subsequent Detainer has been lodged against a person illegally arrested, without collusion with the other creditors, it is good, and the sheriff is bound to detain the prisoner in custody. *Page v. Williams*, 1 Ir. Com. Law Rep. 499, 3 Ir. Jur. O. S. 323, 4 Ir. Jur. O. S. 248. See *O'Fallon v. Naghten*, 2 Ir. Jur. O. S. 40.

Discharge on Illegal Commitment.—On finding a commitment illegal, if it appears that the party is guilty of an offense, the court will not discharge him without allowing time for his arrest by the proper authorities. *Ex p. Crandall*, 2 Cal. 144.

As to Second Arrests and Arrests on Alias Writs in Canada, see *McCagne v. Meighan*, 2 U. C. Q. B. O. S. 550; *Sheldon v. Hamilton*, 3 U. C. Q. B. O. S. 65; *Burn v. Straight*, 5

Discharge on Habeas Corpus.—A party set at large by writ of habeas corpus because the judgment of imprisonment was void for want of jurisdiction in the court, may be again arrested for the same cause upon legal process of a court having jurisdiction either to try or to bind over.¹

2. In Cases of Escape.—The rule seems to be that where a party who has been lawfully arrested escapes, he may be retaken without a fresh warrant;² even though, it has been held, the officer consented to the escape.³ The whole subject of escapes, in both criminal and civil proceedings, will be found exhaustively treated elsewhere in this work.⁴

Discharge upon Condition.—And where one, liberated upon condition, violates the condition, he may be retaken without new process.⁵

Insufficient Bail.—But the mere fact that a prisoner has been released upon insufficient bail is not an escape; hence he cannot be retaken without new process.⁶ Where bail has been procured through fraud, however, he may be rearrested as for an escape.⁷

U. C. Q. B. O. S. 523; *Bradbury v. Loney*, 6 U. C. Q. B. O. S. 291; *Garfield v. Simons*, 2 U. C. Q. B. 411; *Barry v. Eccles*, 3 U. C. Q. B. 112; *Ellis v. James*, 1 Ont. Pr. 153; *Gillespie v. Deming*, 1 Ont. Pr. 387; *McIntosh v. Jarvis*, 8 U. C. Q. B. 535; *McGregor v. Scarlett*, 7 Ont. Pr. 20.

1. Discharge on Habeas Corpus.—*Barbee v. Weatherspoon*, 88 N. Car. 19. To the same effect are *Ex p. Milburn*, 9 Pet. (U. S.) 704; *Ex p. Jilz*, 64 Mo. 205; *Yates v. People*, 6 Johns. (N. Y.) 338, *reversing* 4 Johns. (N. Y.) 317. In the case last cited it was held that if a judge in vacation discharges a prisoner brought before him on habeas corpus, such discharge, whether erroneous or not, is final and conclusive, and the party cannot be again imprisoned for the same cause, unless by order of the court in which he is recognized to appear, or other court having jurisdiction of the cause.

Subsequent Complaint and Warrant.—When a party has been discharged upon habeas corpus for defect of proof, as provided in *Minnesota* Gen. Stat. 1878, c. 80, § 46, a complaint and warrant for his rearrest need not be any different from what they would be if there had been no prior arrest and discharge. *State v. Holm*, 37 Minn. 405.

For a Full Discussion of this subject, see the title HABEAS CORPUS. And for the procedure, see the same title in the ENCYC. OF PLEADING AND PRACTICE.

2. 1 *Bishop's New Cr. Pro.*, § 163; *Clark v. Cleveland*, 6 Hill (N. Y.) 344; *Cooper v. Adams*, 2 Blackf. (Ind.) 294; *State v. Holmes*, 48 N. H. 377. Compare *Doyle v. Russell*, 30 Barb. (N. Y.) 303.

3. *Com. v. Sheriff*, 1 Grant's Cas. (Pa.) 187.

4. For a Full Discussion of this topic, see the title ESCAPE.

5. Discharge upon Condition — Rearrest. — 1 *Bishop's New Crim. Law*, § 915; 1 *Bishop's New Crim. Pro.*, § 1382; *Rex v. Miller*, 1 Leach C. C. 74; *Madan's Case*, 1 Leach C. C. 223; *Aickles's Case*, 1 Leach C. C. 390; *Cantellow v. Trueman*, 2 D. P. C. 2; *Puckford v. Maxwell*, 6 T. R. 52; *Penford v. Maxwell*, 1 Chit. Rep. 275, note, 18 E. C. L. 79, note; *People v. James*, 2 Cai. (N. Y.) 57; *People v. Potter*, 1 Park. Cr. Rep. (N. Y. Supreme

Ct.) 47; *State v. McClure*, Phil. (N. Car.) 491; *State v. Chancellor*, 1 Strobh. (S. Car.) 347, 47 Am. Dec. 557; *State v. Barnes*, 32 S. Car. 14, 17 Am. St. Rep. 832; *State v. Smith*, 1 Bailey (S. Car.) 285, 19 Am. Dec. 679; *State v. Addington*, 2 Bailey (S. Car.) 516, 23 Am. Dec. 150; *State v. Fuller*, 1 McCord (S. Car.) 178. Compare *People v. Moore*, 62 Mich. 497.

6. Insufficient Bail. — *Wilson v. Hamer*, 8 Bing. 54, 21 E. C. L. 219; *Housin v. Barrow*, 6 T. R. 218; *Ingram v. State*, 27 Ala. 17; *Redman v. State*, 28 Ind. 205; *Doyle v. Russell*, 30 Barb. (N. Y.) 300; *McQueen v. Heck*, 1 Coldw. (Tenn.) 212.

A Verdict of Guilty does not, of itself, terminate the right of an accused person on bail, to his liberty, nor does it place him in the sheriff's custody, or give the sheriff any right to arrest or imprison him. *Redman v. State*, 28 Ind. 205.

Sureties Discharged by Second Arrest.—Where a person was arrested upon a charge of assault with intent to murder, and gave bond to appear for trial, and upon the finding of an indictment the judge issued a bench warrant, on which he was arrested and remained in the custody of the sheriff till the trial, during which he escaped, it was held that the sureties were discharged by the second arrest under the bench warrant. *Smith v. Kitchens*, 51 Ga. 158, 21 Am. Rep. 232. See *contra*, *Chappell v. State*, 30 Tex. 613.

Discharge from an Arrest without Warrant.—Where a person has been arrested without a warrant, and has consented to his own discharge, which has been unlawfully granted by the officer, he may be again arrested for the same cause without warrant; but where he has been arrested under lawful process, and has given bail to appear in court, the warrant is *functus officio*, and he cannot be rearrested on it. *Bishop's New Crim. Pro.*, §§ 178, 204; *State v. Queen*, 66 N. Car. 615; *Doyle v. Russell*, 30 Barb. (N. Y.) 300; *State v. Downes*, 8 Ind. 42.

7. Bail Procured through Fraud.—*Bradley v. Gompertz*, 1 M. & R. 567, 17 E. C. L. 277; *Sutcliffe v. Eldred*, 2 D. P. C. 184; *Ward v. Levi*, 1 B. & C. 268, 8 E. C. L. 115, 2 D. & R. 421; *Wilson v. Hamer*, 8 Bing. 54, 21 E. C. L. 219; *Puckford v. Maxwell*, 6 T. R. 52. See

3. Disposal of Rearrested Prisoner.—A convict who has escaped and been rearrested may be recommitted to the former custody in order to serve out the remainder of his term of sentence.¹ In case a prisoner escapes before sentence, he should, upon rearrest, be brought before the court in which he was convicted or some other court of superior jurisdiction having the power to enforce execution.²

X. REWARDS FOR ARREST.—An offer of a reward for making an arrest is binding on the person making it.³

A Person Who Claims a Reward for arresting or causing the arrest of a person charged with a criminal offense, must prove that the prisoner was apprehended through force or persuasion moving from himself.⁴

Public Policy forbids a public officer to take a reward for making an arrest, and the same rule applies to persons acting as a *posse comitatus*.⁵

Bronson v. Noyes, 7 Wend. (N. Y.) 188; *Com. v. Hastings*, 9 Met. (Mass.) 259; *Bulson v. People*, 31 Ill. 409.

Conditional Bail.—Where a bail bond is taken under an agreement that it is to be inoperative unless other or additional bail be procured by the defendant, and the defendant is permitted to be at large, if such additional bail is not furnished the officer may rearrest the defendant before the return of the process. *Bronson v. Noyes*, 7 Wend. (N. Y.) 188.

1. Disposition of Person Rearrested.—*Rex v. Okey*, 1 Lev. 61; *Rex v. Ratcliffe*, 18 How. St. Tr. 429; *Rex v. Harris*, 1 Ld. Raym. 482; *Ex p. Clifford*, 29 Ind. 106; *In re Edwards*, 43 N. J. L. 555, 39 Am. Rep. 610; *Cleek v. Com.*, 21 Gratt. (Va.) 777; *Dolan's Case*, 101 Mass. 219; *State v. Cockerham*, 2 Ired. (N. Car.) 204; *Hollon v. Hopkins*, 21 Kan. 638; *State v. Chancellor*, 1 Strobb. (S. Car.) 347, 47 Am. Dec. 557.

Where a convicted person escaped the day before that set for his execution, and was rearrested, and held in custody until the next term of the court, and then brought by the sheriff before the court, and the fact of his escape made known, the court awarded execution against him upon the former judgment, and this was held to be not error. *Bland v. State*, 2 Ind. 608.

In *Haggerty v. People*, 53 N. Y. 476, the court, by Rapallo, J., said: "The mode of proceeding, in cases where for any reason sentence of death is not executed at the time appointed, is now regulated in this state by statute, * * * and the old common-law proceeding does not exist even in capital cases excepting so far as it conforms to the statute. In cases where, before the expiration of a term of imprisonment, the prisoner escapes, no new award of execution is necessary or proper. The prisoner can be retaken at any time and confined, under the authority of the original judgment, until his term of imprisonment has been accomplished. If the wrong person should be taken, or if the prisoner's term has, in fact, expired, he can obtain relief by habeas corpus. The course of proceeding adopted in the present case may have been a judicious way of satisfying the officers of the identity of the party; but we think it was extra-judicial, and would not conclude the prisoner on habeas corpus, neither is it reviewable on writ of error."

2. Escape before Sentence — Rearrest.—*Rex v. Rogers*, 3 Burr. 1810; *Sir Walter Raleigh's Case*, Cro. Jac. 495; *Bland v. State*, 2 Ind. 608; *State v. Wainwright*, 16 Ind. 357; *People v. Potter*, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 47; *People v. James*, 2 Cai. (N. Y.) 57; *State v. McClure*, Phil. (N. Car.) 492; *Luckey v. State*, 14 Tex. 400.

3. Rewards — England.—*Lancaster v. Walsh*, 4 M. & W. 16; *Williams v. Carwardine*, 4 B. & Ad. 621, 24 E. C. L. 126.

Alabama.—Central, etc., R. Co. v. Cheatham, 85 Ala. 292, 7 Am. St. Rep. 48.

California.—*Ryer v. Stockwell*, 14 Cal. 134, 73 Am. Dec. 634; *McLeod v. Meade*, 77 Cal. 87.

Indiana.—*Hayden v. Songer*, 56 Ind. 46, 26 Am. Rep. 1.

Louisiana.—*Murray v. Kennedy*, 15 La. Ann. 385, 77 Am. Dec. 189.

Massachusetts.—*Symmes v. Frazier*, 6 Mass. 344, 4 Am. Dec. 142; *Loring v. Boston*, 7 Met. (Mass.) 411; *Wentworth v. Day*, 3 Met. (Mass.) 352, 37 Am. Dec. 145.

New Hampshire.—*Janvlin v. Exeter*, 48 N. H. 83, 2 Am. Rep. 185.

Texas.—*Morris v. Kasling*, 79 Tex. 141.

Vermont.—*Davis v. Munson*, 43 Vt. 676, 5 Am. Rep. 315.

For a Full Discussion of this subject, see the title REWARDS.

4. Currie v. Swindall, 11 Ired. (N. Car.) 361.

As to when a person may claim and recover a reward for giving "information leading to an arrest," see *Tarner v. Walker*, L. R. 1 Q. B. 641, L. R. 2 Q. B. 301.

As to when the information given was not the primary cause of the arrest, see *Bent v. Wakefield, etc., Union Bank*, 4 C. P. Div. 1.

See the title REWARDS.

5. Public Officers.—*St. Louis, etc., R. Co. v. Grafton*, 51 Ark. 504, 14 Am. St. Rep. 66; *Preston v. Bacon*, 4 Conn. 479; *Warner v. Grace*, 14 Minn. 487; *Smith v. Whildin*, 10 Pa. St. 40, 49 Am. Dec. 572; *Smith v. Smith*, 1 Bailey (S. Car.) 71; *Ring v. Devlin*, 68 Wis. 384; *Austin v. Milwaukee County*, 24 Wis. 279.

But Where an Officer Is under No Obligation to perform the service because of his official position, he may then earn a reward offered for the arrest of a criminal. *Kasling v. Morris*, 71 Tex. 584, 10 Am. St. Rep. 797.

ARREST OF JUDGMENT.—See vol. 2 ENCYC. OF PLEADING AND PRACTICE, p. 793.

ARRIVAL.—The act of coming to or reaching a place.¹

1. "The strict and etymological meaning of the word *arrival* is to come to the shore, *ad ripam*, and in the French language, through which the word comes to us from the Latin, this meaning is preserved. In our language, the etymological meaning has not been so closely adhered to, but the radical signification of the word is to come to some place by water. The word implies a *transitus* and a *terminus*, a voyage made and a point at which it terminates." *U. S. v. Shackford*, 1 Ware (U. S.) 171.

"On *arrival*" and "to *arrive*" mean the same thing. Parke, B., in *Johnson v. Macdonald*, 9 M. & W. 601.

Sales to Arrive.—See the title SALES.

Ships.—See also the title SHIPS AND SHIP-PING.

To be an *arrival*, the vessel must have dropped its anchor or moored. *Gray v. Gardner*, 17 Mass. 190.

Same—Accidental Arrival.—A statute provided that a register should, within ten days after the *arrival* of a ship, be delivered to the collector of the district. It was held that though *arrival*, in its most general sense, imported a mere entry within the local limits of the district, as here used it must be taken to mean an *arrival* there not by accident or from necessity, but intentionally, as one of the termini of the voyage. *U. S. v. Shackford*, 5 Mason (U. S.) 445.

Same—Voluntary Arrival.—In *Parsons v. Hunter*, 2 Sumn. (U. S.) 419, it is said that it seems that any voluntary *arrival* in a foreign port in the course of the voyage, although for advices only, and not the port of final destination, would be within a statute requiring that the ship register should be deposited with the consul of such port.

But in *Harrison v. Vose*, 9 How. (U. S.) 372, it was held that the *arrival* spoken of meant an *arrival* for purposes of business requiring an entry and clearance and stay at the port, and not merely touching for advices, or to ascertain the state of the market, or being driven in by adverse wind. See also *Toler v. White*, 1 Ware (U. S.) 277.

Same—Whether the Mere Passing through American Waters Is an Arrival in the United States.—A statute provided for the forfeiture of any vessel *arriving* within any district of the United States and departing without reporting to the collector of the district. It was held that the mere passing through a river of the United States, which forms the boundary between the United States and the territory of a foreign state, for the purpose of proceeding to such foreign territory, was not an *arrival*. *The Apollon*, 9 Wheat. (U. S.) 362.

Same—Vessel Driven Ashore.—A vessel which has been driven ashore by stress of weather has not *arrived* within the limits of the collection district, within the meaning of the U. S. Rev. Stat., § 2867, which provides for a forfeiture for the unloading of a vessel

without the authority of the custom officer. *Cargo ex Lady Essex*, 39 Fed. Rep. 765.

Same—Arrive Distinguished from Enter.—A *United States* statute excluded British vessels from the ports of the United States, and provided that "every such vessel that shall enter or attempt to enter the same" should be forfeited to the United States. It was held that the words *arrive* and "enter" were not synonymous, and that a libel alleging that a boat *arrived* by sea was not in strict conformity with the words of the statute. The court said: "The words *arrive* and 'enter' are not always synonymous, and there certainly may be an *arrival* without an actual entry or an attempt to enter. Perhaps an *arrival* within a port cannot be without an entry into the port. But still, it seems to me that courts of law are not to inflict forfeitures without the substantial phrases of the statute being used. And I am by no means sure that the court would be warranted in giving judgment where the words departed so widely from those of the statute." *U. S. v. An Open Boat*, 5 Mason (U. S.) 120.

Nonintercourse Act.—It is held that under the nonintercourse act the moment a vessel came voluntarily within the Chesapeake bay, there was an *arrival* within the United States. *Thompson v. U. S.*, 1 Brock. (U. S.) 407.

In a Bill of Lading—Demurrage.—*Arrival* in a bill of lading, as indicating the time from which lay days were to be reckoned, was held to mean coming to the place, whether indicated by custom of the port, or by direction of the consignee, or by definition in the bill of lading, at which the master may report his vessel as ready to deliver her cargo, and may call upon the consignee to provide a place for delivery. *Kenyon v. Tucker*, 17 R. I. 533. And in that case it was held that where a schooner came to anchor, and her master reported her as ready to go to the wharf at the pier, she had *arrived* within the meaning of the bill of lading, though it was contended by the defendant that the schooner did not *arrive* until actually at the wharf. See also *Reed v. Weld*, 6 Fed. Rep. 304; *Choate v. Meredith*, 1 Holmes (U. S.) 500. Compare *Gronstadt v. Withoff*, 15 Fed. Rep. 269. And see the titles BILLS OF LADING; DEMURRAGE; LAY DAYS.

Wrecking Rule—Salvage. (See also the title SALVAGE.)—Under Wrecking Rule 4 in salvage cases prescribed by the District Court of Florida, requiring that licensed wrecking vessels shall be admitted to assist at the wreck in the order in which they *arrive*, a vessel is deemed to have *arrived* when she is in reasonable hailing distance, ready to receive and obey orders; and a subsequent change in position, by standing off and on, although she may be farther from the wreck than another vessel just *arriving*, will not forfeit her right. *Acosta v. Halcyon*, 1 Fed. Cas. 57, No. 31.

ARROGATION. (See also the title **ADOPTION OF CHILDREN**, vol. 1, p. 726.)—"Arrogation," at civil law, was the adoption of a person who was *sui juris*.¹

Marine Insurance. (See also the title **MARINE INSURANCE**.)—Where a policy insured a vessel for a voyage to a certain port and for twenty-four hours after anchoring in safety, the risk is not terminated by an *arrival* and lying at anchorage outside the harbor for more than twenty-four hours. *Simpson v. Pacific Mut. Ins. Co.*, 1 Holmes (U. S.) 136. The court said: "When the vessel is insured to a particular port of discharge, *arrival* within the limits of the harbor does not terminate the risk, if the place is not one where vessels are discharged and voyages completed. The policy covers the vessel through the port navigation as well as on the open sea, until she reaches the destined place."

"In *Meigs v. The Mutual Marine Ins. Co.*, 2 Cush. (Mass.) 453, the court said: 'Reaching the harbor, therefore, cannot be *arriving*, within the meaning of the policy, and if it do not mean that, it must mean that particular place or point in the harbor which is the ultimate destination of the ship. Until that point is reached, the voyage is not ended, and the ship has not *arrived*, though she may be obstructed and delayed in her progress through the harbor, and, for want of water, or by adverse winds or other causes, be obliged to come to anchor, and remain at anchor twenty-four hours, and to take out some portion of her cargo. While she is properly pursuing her course to the place of her ultimate destination, and of completed and final unloading, and until she reaches that place, and has been moored there in safety twenty-four hours, she is insured and protected by the policy.'

"In *Brown v. Tierney*, 1 Taunt. 516, a vessel bound for Pillaw had arrived at Pillaw Roads, where ships bound for Pillaw which

draw much water usually bring to, and unload some part of their cargo to lighten them sufficiently for passing the bar. Although the ship had *arrived* at the place where she was to begin unloading, and had reached her port of discharge, yet inasmuch as it was not proved to be ever the practice wholly to discharge a ship in Pillaw Roads, but only to lighten her sufficiently to enable her to enter the harbor, it was decided that the ship was to be considered 'as much at open sea as ever she had been.'

"In *Samuel v. The Royal Exchange Assurance Co.*, 8 B & C. 119, a vessel insured from Sierra Leone to London, and upon which the insurance was to endure until she had been moored in good safety twenty-four hours, *arrived* on the 18th of February, and the captain, having orders to take her into the King's dock at Deptford, moored her near the dock gates. On account of ice in the river, the ship could not enter the dock until the 27th, and then, in warping her towards the dock, a rope broke, she grounded, and was totally lost. Lord Tenterden held that the place where the vessel was moored, not being the place of her ultimate destination, the policy did not expire when she had been there in safety twenty-four hours.

"In the case of *Brereton v. Chapman*, 7 Bing. 559, it was held that the lay-days allowed by a charter party for a ship's discharge are to be reckoned from the time of her *arrival* at the usual place of discharge, though she should, for the purposes of navigation, discharge some of her cargo at the entrance of the port before arriving at the usual place of discharge."

1. *Reinders v. Koppelman*, 68 Mo. 497, 30 Am. Rep. 802.

ARSON.

By A. P. HALLETT.

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For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ACCESSORY*, vol. 1, p. 257; *ACCOMPLICES*, vol. 1, p. 389; *ATTEMPTS TO COMMIT CRIME*; *CIRCUMSTANTIAL EVIDENCE*; *CRIMINAL LAW*; *SOLICITATIONS*.

I. DEFINITION.—Arson, which is a felony at common law, is defined to be the wilful and malicious burning the house of another.¹

1. **Definition.**—1 Hale P. C. 566; 2 East P. C. 1015; 3 Coke Inst. 66; 4 Blackstone 218.
Alabama.—Davis v. State, 52 Ala. 357.

Arkansas.—Mary v. State, 24 Ark. 44, 81 Am. Dec. 60.

California.—People v. Fisher, 51 Cal. 319.

II. ELEMENTS OF THE OFFENSE—1. The Intent—*a*. WILFUL AND MALICIOUS.
 —To constitute arson, the burning must be wilful and malicious;¹ otherwise it is not felony, but only a trespass; therefore, no negligence or mischance amounts to it.²

Malice Presumed.—Though malice is a necessary ingredient of the offense, its presence need not be specially proven; it will be presumed by the law from the wilfulness of the act.³

Connecticut.—State *v.* McGowan, 20 Conn. 245, 52 Am. Dec. 336.

Georgia.—McLane *v.* State, 4 Ga. 335; Giddins *v.* Mirk, 4 Ga. 365; Stallings *v.* State, 47 Ga. 572.

Kentucky.—Young *v.* Com., 12 Bush (Ky.) 243.

New York.—Shepherd *v.* People, 19 N. Y. 537; Dedieu *v.* People, 22 N. Y. 178.

North Carolina.—State *v.* Laughlin, 8 Jones (N. Car.) 455; State *v.* McCarter, 98 N. Car. 637.

Ohio.—Allen *v.* State, 10 Ohio St. 287.

Vermont.—State *v.* Roe, 12 Vt. 93; State *v.* Hannett, 54 Vt. 83.

1. Wilful and Malicious Intent Essential.—3 Coke Inst. 67; 4 Blackstone Com. 222; 1 Hale P. C. 569; 2 East P. C. 1033.

England.—Reg. *v.* Natrass, 15 Cox C. C. 73; Reg. *v.* Harris, 15 Cox C. C. 75.

Alabama.—Winslow *v.* State, 76 Ala. 42; Heard *v.* State, 81 Ala. 57.

Georgia.—Jenkins *v.* State, 53 Ga. 33, 21 Am. Rep. 255.

Illinois.—McDonald *v.* People, 47 Ill. 533.

Iowa.—State *v.* Carroll, 85 Iowa 1.

Kentucky.—Aikman *v.* Com. (Ky. 1892), 18 S. W. Rep. 937.

Maryland.—Kellenbeck *v.* State, 10 Md. 431, 69 Am. Dec. 166.

Mississippi.—Jesse *v.* State, 28 Miss. 100; Maxwell *v.* State, 68 Miss. 339.

New Hampshire.—State *v.* Gove, 34 N. H. 510.

New York.—People *v.* Fanshawe, 65 Hun (N. Y.) 77.

North Carolina.—State *v.* Mitchell, 5 Ired. (N. Car.) 350; State *v.* Thorne, 81 N. Car. 555; State *v.* Phifer, 90 N. Car. 721.

Texas.—Thomas *v.* State, 41 Tex. 27; Davis *v.* State, 15 Tex. App. 594.

Where the Prisoner Was a Person of Weak Intellect, and the jury found that, though the prisoner set fire to the building as charged, they did not believe that he was conscious that the effect of what he did would be to injure any person, Martin, B., ordered a verdict of not guilty to be entered. Reg. *v.* Davies, 1 F. & F. 69.

2. Accidental Burnings.—1 Hale 567; 2 East P. C. 1019; 3 Inst. 67; 4 Blackstone 222.

Where a sailor on board a ship entered the hold for the purpose of stealing the rum, and, the rum coming in contact with the lighted match in his hand, the ship was set on fire and destroyed, it was held by the Court of Crown Cases Reserved in Ireland that a conviction for arson could not be upheld. Reg. *v.* Faulkner, 13 Cox C. C. 550.

In *England* if a person not properly quali-

fied happens, by shooting at game, to set fire to the thatch of a house, or if a man by shooting at the poultry of another does the same, it is not arson. 2 East P. C. 1019.

3. Malice Presumed.—Brown *v.* State, 52 Ala. 345; State *v.* Byrne, 45 Conn. 273; Brooks *v.* State, 51 Ga. 612; State *v.* Rohfrisch, 12 La. Ann. 382; State *v.* Watson, 63 Me. 128; Com. *v.* McCarthy, 119 Mass. 354; People *v.* Haynes, 55 Barb. (N. Y.) 450; Tullis *v.* State, 41 Tex. 598.

Illustrations.—It is a malicious act in contemplation of law when a man wilfully does that which is illegal, and its necessary consequence must injure his neighbor. Tindal, C. J., in Rex *v.* Pinney, 5 Car. & P. 266, note, 24 E. C. L. 312.

The state is not bound to prove malice or any facts or circumstances besides the unlawful burning; malice will be presumed from the deliberateness of the act. The burden is upon the defendant to negative or destroy this presumption. State *v.* Jaynes, 78 N. Car. 504.

Where a person sets fire to a dwelling house in which human beings are lodged, in the nighttime, it is not necessary to allege or prove any particular intent or motive. The act alone evidences such moral depravity and such a reckless disregard of human life as to constitute the offense, irrespective of the motive from which the act proceeded. People *v.* Fanshawe, 137 N. Y. 68.

When it is clearly made out that the firing of a house was wilfully done, it is of no consequence what was the motive for, or intention of, the act. People *v.* Jones, 2 Edm. Sel. Cas. (N. Y. Oyer & T. Ct.) 86.

It is not necessary, to constitute the crime, that the intent should be to produce death, and it is immaterial whether the prisoner had knowledge that the building was occupied by human beings lodging therein, either habitually or at the time. It is sufficient if the building was in fact occupied and was wilfully burned by the prisoner. People *v.* Orcutt, 1 Park. Cr. Rep. (Oneida Oyer & T. Ct.) 252.

Prima facie, the setting fire to any house is unlawful and malicious, and consequently a felony. When it turns out that the house was the property of the person setting fire to it, something more must be proved to make the act unlawful and malicious, and proof that the act might be an injury to, or a fraud upon, any person, and that the accused acted with that intent, would establish the unlawfulness and maliciousness of the act. Reg. *v.* Bryans, 12 U. C. C. P. 166. Cited and approved in Reg. *v.* Greenwood, 23 U. C. Q. B. 250.

b. MUST BE AN INTENT TO BURN A HOUSE.—The fire must also be set with a design to burn a house. If the intent is merely mischievous,¹ or only to burn personal property,² such burning will not constitute the offense.

Intent to Burn Not Specific.—But the intent to burn is to be generally and not specifically proven. If the intent is to burn a house, and some house is burned, the crime is complete, even though the house burned is not the house intended.³ For every one is presumed by law to intend the natural and probable consequences of his acts, and he cannot shield himself from punishment by showing that the consequences differed from his unlawful design.⁴

Intent to Burn Presumed.—When fire is set to a house, the presumption of law is that the design is to consume it, and the burden is upon the defendant to rebut this presumption.⁵

Burning Hole in Jail to Escape.—Whether a prisoner confined in a jail would be guilty of arson in setting fire to it, would seem to depend on the intent with which the act was done. If with a design to burn the jail, either from malice or with the hope of escaping during the ensuing confusion, and the prisoner was indifferent whether the jail was actually consumed or not, it would doubtless be arson.⁶ But if his intent was merely to burn a hole therein, or to

1. Must Be an Intent to Burn the Building.—Where two lads threw a lighted paper into a post-office letter-box, forming part of a house, whereby several letters were burned, Williams, J., said that no doubt if they intended the fire to do its worst they would be guilty, but if they only set fire to the letters, and it was contrary to their intention to burn the house, they would not be guilty, and would not be guilty even if the house had been burned. *Reg. v. Batstone*, 10 Cox C. C. 20.

In *Reg. v. Brown*, 3 F. & F. 821, it was held that the provision of statute 24 and 25 Vict., c. 97, § 9, making it a felony to "destroy, throw down, or damage" the whole or any part of any dwelling house or other building, any person being therein, wilfully and maliciously, by the explosion of gunpowder or other explosive substance, was intended to apply to malicious injuries to houses by throwing explosive substances against or into them, with intent to destroy them or injure the inmates, and not to cases of wanton mischief or assault.

2. Intent to Burn Personal Property.—Under statute 24 and 25 Vict., c. 97, § 7, it has been held that if a person sets fire to goods or things in, under, or against a building, with the intent to burn the building, it will amount to felony; but if he intends only to destroy the goods and not to injure the building, it will not be felony. *Reg. v. Child*, 12 Cox C. C. 64; *Reg. v. Harris*, 15 Cox C. C. 75; *Reg. v. Nattrass*, 15 Cox C. C. 73.

But if the Person Knew that the Natural Consequence of His Act would be the burning of the house, and was indifferent to such consequence, he would be guilty. *Reg. v. Lyons*, 8 Cox C. C. 84.

3. General Intent to Burn Sufficient.—If A has a malicious intent to burn the house of B, and, in setting fire to it, burns the house of C also; or if the house of B escapes by some accident, and the fire takes in the house of C and burns it; this shall be said in law to be the malicious and wilful burning of the house

of C, though A did not intend to burn that house. 1 Hale 569; 1 Hawk. P. C., c. 39, § 19.

And accordingly it has been said that if one man commands another to burn the house of J. S., and he does so, and the fire thereof burns another house, the commander is accessory to the burning such other house. *Reg. v. Saunders*, Plowd. 475, 2 East P. C. 1031; *Woodford v. People*, 62 N. Y. 117, 20 Am. Rep. 464.

And such malicious and wilful burning of the house of another may be by the means of setting fire to the party's own house, and this though it should appear that the primary intention of the party was only to burn his own house. If, in fact, other houses were burned, being adjoining, and in such a situation as that the fire must in all probability reach them, the intent being unlawful and malicious, and the consequences immediately and necessarily following from the original act done, the offense will be felony. 2 East P. C. 1031; *Rex v. Spalding*, 1 Leach 218; *Schofield's Case*, Cald. 397; *Probert's Case*, 2 East P. C. 1031; *State v. Toole*, 29 Conn. 342, 76 Am. Dec. 602; *McDonald v. People*, 47 Ill. 533; *State v. Elder*, 21 La. Ann. 157; *Bloss v. Tobey*, 2 Pick. (Mass.) 320; *Com. v. Makely*, 131 Mass. 421; *People v. Orcutt*, 1 Park. Cr. Rep. (Oneida Oyer & T. Ct.) 252; *Shepherd v. People*, 19 N. Y. 537; *Ball's Case*, 2 City Hall Rec. (N. Y.) 85; *State v. Hurd*, 51 N. H. 176; *Allen v. State*, 10 Ohio St. 289; *Gage v. Shelton*, 3 Rich. (S. Car.) 242; *Roberts v. State*, 7 Coldw. (Tenn.) 359; *Early v. Com*, 86 Va. 921; *Lacy v. State*, 15 Wis. 13.

4. A person is presumed by law to intend the natural and probable consequence of his act. *People v. Orcutt*, 1 Park. Cr. Rep. (Oneida Oyer & T. Ct.) 252.

5. State v. Mitchell, 5 Ired. (N. Car.) 350.

6. People v. Long, 2 Edm. Sel. Cas. (N. Y. Oyer & T. Ct.) 129. And see *Smith v. State*, 23 Tex. App. 357.

burn off a lock, whereby to effect his escape, and he took precautions to restrain the fire from doing further damage, it has been held that the legal presumption of intent to burn the jail would be sufficiently rebutted by proof of such precautions, and the prisoner would not be guilty of arson.¹

c. TO INJURE OR DEFRAUD.—By statutes in *England* and in some of the *United States* the intent to injure or defraud is made an ingredient of the offense;² and the particular intent must be alleged in the indictment and

1. **Burning Hole in Jail to Escape.**—In *People v. Cotteral*, 18 Johns. (N. Y.) 115, where prisoners had burned a hole in a jail to effect their escape, the court said: "It does not appear to have been the intention of the prisoners to burn the jail. Their original and primary intention was to effect their escape, and the burning was merely for that purpose. It lay on the prisoners to show that it was no part of their intention to burn the jail, and we think they have done so. The statute makes it felony for a person to aid or assist a felon to escape from prison, but neither by the statute nor the common law is the attempt of a felon to escape a felony. We think it would be carrying the doctrine too far to say that setting fire to a prison by a prisoner, merely for the purpose of effecting his own escape, amounted to the crime of arson."

In *State v. Mitchell*, 5 Ired. (N. Car.) 350, the court says: "In cases under the statute, as well as in arson at common law, the setting fire to the building constitutes the offense, no matter how little may be burned, provided there was an intention to destroy the building; and such an intention is to be inferred, unless the contrary is clearly established, since fire set to combustible materials will naturally consume them. Therefore, *prima facie*, this prisoner was guilty. But all inference of his guilt is repelled by its being found, or rather assumed by the presiding judge, that he did not intend to burn down the jail, but intended to escape by burning a small hole through the door and nothing more. It may be extremely difficult for a prisoner, especially a solitary prisoner, to establish, as he must do affirmatively, that he did not intend to consume the jail when he set fire to it, but only to burn a slight opening in it. But that difficulty does not lie on this prisoner, according to the case as now appearing, because it is yielded by the state that he had no such intention. His innocence does not arise from an intention of the prisoner having been to escape, but from the intention to escape by means of burning down the jail being expressly negatived; and, therefore, the presumption before spoken of must yield to the fact found. We speak of the fact as found, because the judge told the jury to convict the prisoner, although they might find the fact to be that he did not intend to burn down the house, or no matter what was his intent."

In *State v. Nevel*, 2 W. L. M. (Ohio) 494, it was held that defendants, burning a hole in a jail in order to escape, might be indicted for arson, if they intended to burn the jail; and if they set fire to it in such a way as in reasonable probability would burn

it up, the jury was justified in finding the intent.

To constitute arson, there must be a design to burn the building. It is, therefore, a necessary inquiry, For what purpose was the combustible matter set fire to? If to escape from confinement, it does not follow that the purpose was to burn the building, though it might so result. But if the means resorted to necessarily and naturally set fire to and burn the building, and the prisoner is indifferent to this consequence of his act, he is guilty of arson. *People v. Long*, 2 Edm. Sel. Cas. (N. Y. Oyer & T. Ct.) 129.

Under the *Georgia* statute there must be an intent "to consume or generally injure the house," to constitute a burning; consequently, where the evidence showed that the intent of the prisoners was merely to burn a hole whereby to escape, and not to consume or generally injure the jail, it was held that they could not be convicted of arson. *Jenkins v. State*, 53 Ga. 33, 21 Am. Rep. 255; *Washington v. State*, 87 Ga. 12.

Contrary View.—A contrary view has been taken by Mr. Bishop in his *New Criminal Law*, vol. 2, § 15, and the same has been *cited and approved* in the following cases: *Luke v. State*, 49 Ala. 30, 20 Am. Rep. 269; *Lockett v. State*, 63 Ala. 5; *Smith v. State*, 23 Tex. App. 357, *overruling* *Delany v. State*, 41 Tex. 601; *Willis v. State*, 32 Tex. Crim. Rep. 534.

2. **Intent to Injure or Defraud.**—Upon this point it was said by Tindal, C. J., in his charge to the grand jury at Bristol: "Where the statute directs that, to complete the offense, it must have been done with intent to injure or defraud any person, there is no occasion that any malice or ill-will should subsist against the person whose property is so destroyed. It is a malicious act in contemplation of law when a man wilfully does that which is illegal, and which in its necessary consequence must injure his neighbor; and it is unnecessary to observe that the setting fire of another's house, whether the owner be a stranger to the prisoner or a person against whom he had a former grudge, must be equally injurious to him. Nor will it be necessary to prove that the house which forms the subject of the indictment in any particular case, was that which was actually set on fire by the prisoner. It will be sufficient to constitute the offense if he is shown to have feloniously set on fire another house, from which the flames communicated to the rest. No man can shelter himself from punishment on the ground that the mischief which he committed was wider in its consequences than he originally intended." *Rex v. Pinney*, 5 C. & P. 266, note, 24 E. C. L. 312.

proven as alleged.¹ In the absence of statute, no particular intent to injure or defraud need be alleged or proven.²

Insurance—How Proven.—When the intent alleged is to injure or defraud an insurance company, the corporate existence of such company must be proven; but proof of a *de facto* organization is sufficient.³ The policy is the best evidence of the insurance, but if it cannot be produced, its contents may be proven by parol.⁴

1. Intent must be Alleged and Proved.—It was held that on an indictment under the repealed statute 7 Will. IV. and 1 Vict., c. 89, § 2, for the capital offense of setting fire to a dwelling house, some person being therein, the indictment not charging any intent to injure or defraud any person, the prisoner could not be convicted of the transportable offense of setting fire to the house, under the third section of the statute, as an allegation of intent to injure or defraud some person was essential to an indictment under that section. Reg. v. Paice, 1 C. & K. 73, 47 E. C. L. 73.

To sustain an indictment under c. 228 North Carolina Acts 1874-75, the allegation of an intent to injure or defraud is necessary. State v. England, 78 N. Car. 552.

Intent to Injure Presumed.—Where a man was indicted for setting fire to a mill (43 Geo. III., c. 58, § 1, repealed), with intent to injure the occupier thereof, and it appeared from the prosecutor's evidence that the prisoner was an inoffensive man, and never had any quarrel with the occupier, and that there was no known motive for committing the act, the judges held the conviction right, for a party who does an act wilfully, necessarily intends that which must be the consequence of his act. Rex v. Farrington, R. & R. C. C. 207; Rex v. Philp, 1 Moo. C. C. 264, and see State v. Byrne, 45 Conn. 273.

Intent to Injure Rebutted.—In State v. Phifer, 90 N. Car. 721, the court says: "As a general proposition, it is true there is a presumption of law that every man intends the natural consequences of his acts, but this presumption has no other or greater effect than to establish a *prima facie* case against the defendant and throw upon him the burden of proof. In the absence of opposing proof, the jury are bound by it. But when there is opposing proof, it is a question for the jury to decide whether the presumption is rebutted." The presumption that the warehouse was burned with intent to injure the owner will be rebutted by a confession of the defendant's, introduced by the state, that he burnt the house to conceal the larceny of some cotton therefrom.

Intent to Defraud must be Strictly Proven.—Where a clerk was jointly indicted with his employer for burning a store, with the intent to charge or injure the insurance company, it was held necessary for his conviction that it be shown that he had knowledge of the insurance. Martin v. State, 28 Ala. 71.

2. It is only when the statute makes the particular intent an ingredient of the offense of burning, that it must be charged and proved as charged. State v. McCarter, 98 N. Car. 637.

3. Intent to Defraud Insurance Company—California.—People v. Hughes, 29 Cal. 258; People v. Schwartz, 32 Cal. 160.

Connecticut.—State v. Byrne, 45 Conn. 273. **District of Columbia.**—U. S. v. McBride, 7 Mackey (D. C.) 371.

Illinois.—McDonald v. People, 47 Ill. 533. **Indiana.**—Johnson v. State, 65 Ind. 204.

Massachusetts.—Com. v. Goldstein, 114 Mass. 272.

Missouri.—State v. Tucker, 84 Mo. 23.

New York.—Carncross v. People, 1 N. Y. Crim. Rep. 518; Freund v. People, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 198.

Ohio.—Evans v. State, 24 Ohio St. 458.

Insurance Corporation—Proof of De Facto Existence Sufficient.—In U. S. v. Amedy, 11 Wheat. (U. S.) 392, the court said: "The case here is of a public prosecution for a crime, where the corporation is no party and is merely collaterally introduced as being intended to be prejudiced by the commission of the crime. Under such circumstances, we think nothing more was necessary for the government to prove than that the company was *de facto* organized and acting as an insurance company and corporation. The very procurement of a policy by the prisoner, to be executed by the company, was of itself *prima facie* evidence for such a purpose. * * *

The same answer may be given to another objection, and that is that the policy ought to have been proved to be executed by the authority of the company in such manner as to be binding on them. The actual execution of the policy by the known officers of the company *de facto*, is sufficient." U. S. v. McBride, 7 Mackey (D. C.) 371.

Michigan.—In Meister v. People, 31 Mich. 99, it was held that as the statute punishes only the burning of property actually insured, nothing but proof of a valid insurance would suffice; that where the validity of a policy depended on the authority of an agent to sign it, it was essential to show such authority.

But the failure of an insurance company, otherwise duly incorporated, to file a copy of its charter with the secretary of state as provided by statute, does not affect the validity of a contract between such company and a policy holder, and cannot be set up as a ground for exception to a verdict rendered against the defendant for burning property insured under such policy. Johns v. People, 25 Mich. 500; People v. Jones, 24 Mich. 215.

4. When Existence of Insurance Provable by Parol.—Where, in a trial for arson, it was material for the state to show the existence of a policy of insurance on the burned premises as evidence of the motive for the offense, and it was shown that the policy had been

2. The Burning—*a*. MUST BE AN ACTUAL BURNING.—To constitute arson at common law, there must be an actual burning of the house or some part of it.¹

Merely Putting Fire into or towards a House, however maliciously, if either by accident or timely prevention the fire does not take, and no part of the building is burned, does not amount to arson at common law.²

Thus Setting Fire to Personal Property in a Building will not constitute the crime if no part of the house itself is burned.³

"Setting Fire to"—Statutes.—Though the words "setting fire to," used in the statutes, would seem to have enlarged the offense at common law, so that an actual burning was no longer necessary to constitute the crime, these words have been generally construed as equivalent to the word "burn," as used at common law, and are to be given no larger signification,⁴ except where the intention of the legislature to distinguish them is manifest.⁵

surrendered to the agent of the insurance company, and could not be produced, because he was out of the jurisdiction of the court, it was held admissible to prove the contents of such policy by parol evidence. *State v. Watson*, 63 Me. 128.

When notice has been served upon the defendant to produce an insurance policy, and he has failed, a copy of the written portions of the policy kept in the agent's book may be placed in evidence, and the agent may testify that the policy was a standard policy and that the copy in the book is a transcript of the written portions thereof. *Com. v. Smith*, 151 Mass. 491.

On an indictment for arson on the prosecution of an insurance company, their books are not evidence of the insurance without notice to produce the policy. *Rex v. Doran*, 1 Esp. 127.

And the nature of the proceedings does not give notice to the prisoner to produce the policy so as to dispense with actual notice to produce it. *Reg. v. Kitson*, 6 Cox C. C. 159.

Nevada.—In *State v. Cohn*, 9 Nev. 179, the court said: "C, partner and brother of appellant, was allowed to testify to the amount and place of insurance upon their property, without production of the policies; this is said not to be the best evidence. Certainly not the best evidence of insurance, but that was not the ultimate fact sought. True, as suggested in argument, the policies might have been invalid and in fact no insurance; but that is immaterial. The fact to be proven was the belief of appellant that he was insured; and though that belief might have been entirely misplaced, still, as the basis for a motive to fire his property, it continued real and true to him."

1. Actual Burning Necessary.—2 East P. C. 1020; 2 Russ. on Cr., § 48; *Rex v. Judd*, 2 T. R. 255; *Graham v. State*, 40 Ala. 659; *Mary v. State*, 24 Ark. 44, 81 Am. Dec. 60; *Woolsey v. State*, 30 Tex. App. 346.

2. The setting fire to the house of another maliciously to burn it, is not at common law a felony if, either by accident or timely prevention, the fire does not take. 1 Hale P. C. 568.

At common law, neither an intention nor an actual attempt to burn a house will amount to a felony if no part is burned. *Cochrane v. State*, 6 Md. 400.

In *People v. Cottrell*, 18 Johns. (N. Y.) 115, it is said that a wilful setting fire to an inhabited dwelling house, though the fire should afterwards go out of itself or be extinguished, would constitute the crime of arson.

3. Burning Personal Property in Building—Not Arson.—Cotton stored in a warehouse was set on fire, but the fire was extinguished before any part of the building was burned. It was held that this was not arson. To constitute the crime, there must be an actual burning of a building within the common-law meaning of the word "burn." *Graham v. State*, 40 Ala. 659.

A was indicted for setting fire to an out-house, commonly called a paper mill. It appeared that she had set fire to a large quantity of paper drying in a loft annexed to the mill, but no part of the mill itself was consumed. The judges held that this was not a setting fire to the mill within the statute. *Taylor's Case*, 2 East P. C. 1020; 1 Leach C. C. 49.

Where the indictment charged that the defendant set fire to a dwelling house, and the proof was that he set fire to some personal property of his own therein, with the intent to burn the house, but that the fire was extinguished before any part of the house was burned, it was held that he could not be convicted on the indictment as drawn. *Dedieu v. People*, 22 N. Y. 178.

4. "Set Fire to," and "Burn," Equivalent—Statutes.—In the 9 Geo. I., c. 22, the words "set fire" are used, and Mr. East observes that he is not aware of any decision which has put a larger construction on those words than prevails by the rule of the common law. 2 East P. C. 1020. And he afterwards remarks, that the actual burning at common law, and the "setting fire" under the statute, in effect, mean the same thing. 2 East P. C. 1038. The words "set fire" are used in all the subsequent statutes, so that this passage and the following decisions are still applicable. *Taylor's Case*, 1 Leach C. C. 49; *Spalding's Case*, 1 Leach C. C. 218; *Breeme's Case*, 1 Leach C. C. 220; 1 Hawk. P. C. 166; *Graham v. State*, 40 Ala. 659; *State v. Taylor*, 45 Me. 322. But see *Howell v. Com.*, 5 Gratt. (Va.) 664.

5. "Set Fire to," and "Burn," Distinguished by Some Statute—Georgia.—Under the Georgia statute the offense of "setting fire to" is

b. WHAT CONSTITUTES A BURNING—Material Injury Not Necessary.—Though there must be an actual burning to constitute the offense, it is not necessary that the building should be wholly consumed or even materially injured. If any part, however small, is consumed, it is sufficient.¹

Burning Defined.—To constitute a burning, it is not necessary that there should be a flame.²

Charring Constitutes a Burning.—It will be consummated when any portion of the wood of the building is charred, or the character of its composition changed by the action of heat.³

A Mere Scorching or Discoloration, however, will not suffice.⁴

c. MEANS BY WHICH FIRE IS APPLIED.—The means used to accomplish the burning are immaterial. If they are adapted to the purpose intended, and accomplish it by reason of such adaptation, it is sufficient.⁵

complete when any attempt is made to burn by putting fire to a house, though no material injury results; the crime of "burning" is complete when the house is consumed or generally injured. *Jenkins v. State*, 53 Ga. 33, 21 Am. Rep. 255.

Vermont.—The statute in this state has made a distinction between "setting fire to" with intent to burn, and "burning," and so the terms are no longer legal synonyms. *State v. Dennin*, 32 Vt. 158; *State v. Babcock*, 51 Vt. 570.

1. Building need Not be Consumed or Materially Injured—England.—*Dalton* 506; 1 Hale P. C. 569; 1 Hawk., c. 39; 2 East P. C. 1020; 3 Inst. 66.

Alabama.—*Graham v. State*, 40 Ala. 659.

Arkansas.—*Mary v. State*, 24 Ark. 44, 81 Am. Dec. 60.

California.—*People v. Haggerty*, 46 Cal. 354; *People v. Simpson*, 50 Cal. 304.

Georgia.—*Hester v. State*, 17 Ga. 130; *Phillips v. State*, 29 Ga. 105.

Maine.—*State v. Taylor*, 45 Me. 322.

Massachusetts.—*Mead v. Boston*, 3 Cush. (Mass.) 404; *Com. v. Van Schaack*, 16 Mass. 105; *Com. v. Tucker*, 110 Mass. 403.

Missouri.—*Polsten v. State*, 14 Mo. 463.

New York.—*People v. Butler*, 16 Johns. (N. Y.) 203; *Levy v. People*, 80 N. Y. 327.

North Carolina.—*State v. Sandy*, 3 Ired. (N. Car.) 570; *State v. Mitchell*, 5 Ired. (N. Car.) 350.

Texas.—*Woolsey v. State*, 30 Tex. App. 346; *Blanchette v. State* (Tex. Crim. App. 1893), 24 S. W. Rep. 507; *Smith v. State*, 23 Tex. App. 357.

Vermont.—*State v. Dennin*, 32 Vt. 158; *State v. Babcock*, 51 Vt. 570.

Compare *State v. De Bruhl*, 10 Rich. (S. Car.) 23.

2. Flame Not Necessary.—*Rex v. Stallion*, 1 Moo. C. C. 398; *Reg. v. Russell*, C. & M. 541, 41 E. C. L. 295; *Graham v. State*, 40 Ala. 659.

3. Charring Constitutes Burning.—*Reg. v. Russell*, C. & M. 541, 41 E. C. L. 295; *People v. Haggerty*, 46 Cal. 354; *People v. Simpson*, 50 Cal. 304; *Com. v. Van Schaack*, 16 Mass. 105; *Com. v. Tucker*, 110 Mass. 403; *People v. Butler*, 16 Johns. (N. Y.) 203; *People v. Cotteral*, 18 Johns. (N. Y.) 115; *State v. Sandy*, 3 Ired. (N. Car.) 570; *State v. Mitchell*, 5 Ired. (N. Car.) 350.

Where the prisoner was indicted under the 7 Will. IV. and 1 Vict., c. 89, § 3, and it was proved that the floor near the hearth was scorched, it being in fact charred in a trifling way, and that it had been at a red heat, though not in a blaze, *Parke, B.*, held that the offense was complete. *Reg. v. Parker*, 9 C. & P. 45, 38 E. C. L. 29.

The Crime of Arson Was Complete at Common Law by the burning of any part of a house, and a house is burned when it is charred; that is, when any of the wood therein is reduced to coal. *State v. Hall*, 93 N. Car. 571.

4. Scorching Not a Burning.—*State v. Hall*, 93 N. Car. 571; *Smith v. State*, 23 Tex. App. 357; *Blanchette v. State* (Tex. Crim. App. 1893), 24 S. W. Rep. 507; *Woolsey v. State*, 30 Tex. App. 346.

So on a charge of arson it appeared that a small fagot was set on fire on the boarded floor of a room, and the fagot was nearly consumed; the boards of the floor were "scorched black, but not burned," and no part of the wood of the floor was consumed. *Cresswell, J.*, said: "The case of *Reg. v. Parker*, 9 C. & P. 45, 38 E. C. L. 29, is the nearest to the present, but I think it is distinguishable. * * * I have conferred with my brother *Patteson*, and he concurs with me in thinking, that as the wood of the floor was scorched, but no part of it consumed, the present indictment cannot be supported." *Reg. v. Russell*, C. & M. 541, 41 E. C. L. 295.

5. Burning Ginhouse by Putting Matches in the Cotton.—In *Overstreet v. State*, 46 Ala. 35, the evidence tended to show a burning of the ginhouse by the ignition, in passing through the gin, of matches which had been thrown by the defendants into the cotton to be ginned. The court said: "Every man is presumed to intend the natural, necessary, and even probable consequences of an act which he intentionally performs. There must also be some adaptation in the thing done to accomplish the thing intended. If the defendants put the matches in the ginhouse amidst the unginned cotton, with the intention and expectation of their being ignited by the necessary or probable handling of the cotton, or in such handling, and they were ignited, in consequence of which the ginhouse was burned, they would be guilty of burning it."

Object to Which Fire is Applied.—It is likewise immaterial to what object the fire is primarily applied. The intent and the ultimate object burned determine the offense and are its controlling elements.¹

3. The Property Burned—*a.* AT COMMON LAW—(1) *Generally.*—Arson, at common law, is an offense against the security of the habitation, rather than against the rights of property.² Dwelling houses are, therefore, the proper subjects of the offense.

Barns and Stacks.—But the crime was early extended by statute to the burning of barns containing hay and corn,³ and to burning stacks of

1. Communicating Fires.—If a person sets fire to a building, and thereby an adjoining building is set fire to or burnt, he can be indicted and convicted of setting fire to the latter. *Hennessey v. People*, 21 How. Pr. (N. Y. Supreme Ct.) 239; *Grimes v. State*, 63 Ala. 166; *State v. Hill*, 55 Me. 365; *State v. Watson*, 63 Me. 128; *People v. Fairchild*, 48 Mich. 31.

Primary Intent to Burn One's Own House.—Hence it appears that, though the primary intention of the party were only to burn his own house, yet if in fact others were burnt, being adjoining and in such a situation as that the fire must in all probability reach them, the intent being unlawful and malicious, and the consequence immediately and necessarily flowing from the original act done, it is felony. In *Isaac's Case*, where the prisoner set fire to his own house to defraud an insurance company, and the fire was communicated to and burned several other houses adjoining, he was held guilty, if at all, of felony and not of a misdemeanor. 2 East P. C. 1031.

The fire need not be applied directly to the building burned. Upon the principle that a person is responsible for the natural and probable consequences of a criminal act, the burning of one's own dwelling house, though only a high misdemeanor of itself, will amount to a felony if the dwelling house of another is burned as a natural consequence thereof. *State v. Laughlin*, 8 Jones (N. Car.) 354.

If a Person Sets Fire to a Schoolhouse with the intent also to burn a dwelling house, which is situated so near that the natural and probable consequence will be that the latter will also be burned, and it is, he is indictable for burning the dwelling house. *Combs v. Com.*, 93 Ky. 313.

If a Person Sets Fire to a Stack, the fire from which is likely to, and does in fact, communicate to a barn, which is thereby burned, the person is indictable for burning the barn. *Rex v. Cooper*, 5 C. & P. 535, 24 E. C. L. 444; *State v. Roberts*, 15 Oregon 187.

So where the Prisoners Set Fire to a Summer-house which was in a wood, and some of the trees overhung it, and their branches were burned by the fire, which consumed the summerhouse and also burned some of the trees, it was held that the prisoners might be convicted under the 7 and 8 Geo. IV., c. 30, § 17, of setting fire to the wood. *Reg. v. Price*, 9 C. & P. 729, 38 E. C. L. 309.

2. Common Law—Arson Offense against Se-

curity of Habitation—England.—*Pedley's Case*, 1 Leach C. C. 242, 2 East P. C. 1026; *Rex v. Wallis*, 1 Moo. C. C. 344.

Alabama.—*Graham v. State*, 40 Ala. 659; *Davis v. State*, 52 Ala. 357; *Adams v. State*, 62 Ala. 177; *Childress v. State*, 86 Ala. 77.

California.—*People v. Wooley*, 44 Cal. 494; *People v. Fisher*, 51 Cal. 319.

Connecticut.—*State v. Lyon*, 12 Conn. 487; *State v. Toole*, 29 Conn. 342, 76 Am. Dec. 602; *State v. Keena*, 63 Conn. 329.

Indiana.—*Ritchey v. State*, 7 Blackf. (Ind.) 168; *Wolf v. State*, 53 Ind. 30.

Iowa.—*State v. Tenny*, 9 Iowa 436.

Kentucky.—*Young v. Com.*, 12 Bush (Ky.) 243; *Com. v. Elliston* (Ky. 1892), 20 S. W. Rep. 214.

Maine.—*State v. Haynes*, 66 Me. 307, 22 Am. Rep. 569.

Massachusetts.—*Com. v. Hamilton*, 15 Gray (Mass.) 480; *Com. v. Wade*, 17 Pick. (Mass.) 395.

Michigan.—*Snyder v. People*, 26 Mich. 106, 12 Am. Rep. 302; *People v. Fairchild*, 48 Mich. 31.

Missouri.—*State v. Aguila*, 14 Mo. 130; *State v. Hayes*, 78 Mo. 307.

Nebraska.—*Burger v. State*, 34 Neb. 397.

New Jersey.—*State v. Fish*, 27 N. J. L. 323.

New York.—*People v. Gates*, 15 Wend. (N. Y.) 159; *Woodford v. People*, 62 N. Y. 117, 20 Am. Rep. 464; *Levy v. People*, 80 N. Y. 327.

North Carolina.—*State v. Sandy*, 3 Ired. (N. Car.) 570; *State v. Outlaw*, 72 N. Car. 598; *State v. Williams*, 90 N. Car. 724, 47 Am. Rep. 541.

Texas.—*Tuller v. State*, 8 Tex. App. 501; *Wiley v. State* (Tex. Crim. App. 1895), 31 S. W. Rep. 393.

Vermont.—*State v. Roe*, 12 Vt. 93.

Virginia.—*Ersine v. Com.*, 8 Gratt. (Va.) 624.

Washington.—*McClaine v. Territory*, 1 Wash. 345.

Wisconsin.—*Carter v. State*, 20 Wis. 647.

3. Burning of Barns—England.—1 Hale P. C. 566; 1 Moody C. C. 239; 2 East P. C. 1020; *Rex v. Cooper*, 5 C. & P. 535, 24 E. C. L. 444; *Elsmore v. St. Briavells*, 8 B. & C. 461, 15 E. C. L. 266.

Canada.—*Reg. v. Soucie*, 17 New Bruns. 611.

Alabama.—*Overstreet v. State*, 46 Ala. 30.

Iowa.—*State v. Smith*, 28 Iowa 565.

North Carolina.—*State v. Porter*, 90 N. Car. 719; *State v. Laughlin*, 8 Jones (N. Car.) 354.

grain;¹ and such burnings are now accounted arson at common law.

(2) *Dwelling House*.—A Dwelling House Is Any Structure Occupied Wholly or in Part by any person or persons as a place of abode, together with all outhouses used in connection therewith, and situated within the curtilage.²

(a) *What Constitutes a Dwelling House—Character of Building Immaterial*.—To constitute a building a dwelling house, it is not necessary that it should have been originally designed or intended as such. If it is the usual sleeping place of a human being, it is his dwelling house, and within the protection of the law.³

Apartments—Interior Communication.—Where the several parts of the same building are occupied by different persons or for different purposes, but there is interior communication between them, the several parts form but one building, and a setting fire to one part is a setting fire to the whole.⁴

Pennsylvania.—*Sampson v. Com.*, 5 W. & S. (Pa.) 385; *Chapman v. Com.*, 5 Whart. (Pa.) 427, 34 Am. Dec. 565.

South Carolina.—*State v. Sutcliffe*, 4 Strobb. (S. Car.) 372.

But see *Creed v. People*, 81 Ill. 565.

1. *Burning Stacks of Grain*.—2 East P. C. 1020; 4 Bl. Com. 220; *Rex v. Newell*, 1 Moo. C. C. 458; *State v. Sutcliffe*, 4 Strobb. (S. Car.) 372. Compare *Creed v. People*, 81 Ill. 565; *Black v. State*, 2 Md. 376.

2. *Dwelling Houses*.—A dwelling house is the apartment, building, or cluster of buildings in which a man with his family resides. He need not so construct his habitation that all the shelter he requires will be under one roof; therefore, the word "dwelling house" embraces in law the entire congregation of buildings, main and auxiliary, used for abode. *Bishop Stat. Cr.*, § 278.

The term "dwelling house" includes all houses within the curtilage of the mansion. *State v. Sutcliffe*, 4 Strobb. (S. Car.) 372.

"House" imports a dwelling house. *Com. v. Posey*, 4 Call (Va.) 109, 2 Am. Dec. 560.

In the common and ordinary acceptance of the term "house," it includes everything appurtenant and accessory to a main building. *Workman v. Insurance Co.*, 2 La. 507, 22 Am. Dec. 141. See 1 Hale P. C. 566; *State v. Stewart*, 6 Conn. 47; *State v. Shaw*, 31 Me. 523; *Gibson v. State*, 54 Md. 447; *People v. Taylor*, 2 Mich. 250; *State v. Fish*, 27 N. J. L. 323; *State v. Laughlin*, 8 Jones (N. Car.) 354; *State v. Jim*, 8 Jones (N. Car.) 459; *State v. Cherry*, 63 N. Car. 493; *State v. Porter*, 90 N. Car. 719; *Gage v. Shelton*, 3 Rich. (S. Car.) 242.

Under the *Washington* statute, any tent, cabin, or other structure, no matter of what material constructed, which is used and occupied as a place of abode by any person or persons, is a dwelling house. *McClaine v. Territory*, 1 Wash. 345.

3. *A Storehouse in Which a Person Sleeps Regularly*, for the protection thereof, is a dwelling house. *State v. Outlaw*, 72 N. Car. 598; *State v. Williams*, 90 N. Car. 724, 47 Am. Rep. 541.

A Building Originally Intended for a Storehouse was occasionally used by the owner as a dwelling house when he was working at a gold mine near which it was situated. There was a bedstead and bedcord in the house when it was

burned. The question whether the building was a dwelling house was left to the jury, and this was held proper on appeal. *McLane v. State*, 4 Ga. 335.

A Barn or Stable Usually Occupied at Night by a person lodging therein, and so occupied when set fire to, is a dwelling house. *State v. Jones*, 106 Mo. 302.

Whole Building Not Occupied as Dwelling.—In *People v. Orcutt*, 1 Park. Cr. Rep. (Oneida Oyer & T. Ct.) 252, the court said that a dwelling house is any building usually occupied by a person lodging therein at night. It is not necessary that the whole building should be thus occupied; if a part is occupied as a sleeping room, it is sufficient, although other parts might be used for other and entirely different purposes.

Where a defendant sets fire to a building, the lower floor of which was occupied by himself as a store or shop, and the upper floor as a dwelling by other persons, he is indictable for burning a dwelling house. *State v. Kroscher*, 24 Wis. 64.

Jails.—Upon the construction of the statute of 9 Geo. I., c. 22, it has been held that a common jail is a house within the meaning of that act. The entrance to the prison was through the dwelling house of the jailer, and the prisoners were sometimes allowed to lie in it. All the judges held that the dwelling house was to be considered as part of the prison, and the whole prison was the house of the corporation to which it belonged. *Donnevan's Case*, 2 East P. C. 1020, 2 W. Bl. 683, 1 Leach C. C. 69. Compare *Reg. v. Connor*, 2 Cox C. C. 65.

A prison is a dwelling house kept by law for the abode of persons confined under legal process. *State v. Collins*, 2 Idaho 1182; *People v. Van Blaricum*, 2 Johns. (N. Y.) 105; *People v. Cottler*, 18 Johns. (N. Y.) 115; *Com. v. Posey*, 4 Call (Va.) 109, 2 Am. Dec. 560.

Hotel.—Where the defendant burned an inhabited hotel, it was held that he should have been indicted for burning a dwelling house and not a building. The offense of burning a dwelling house, and that of burning any other sort of building, are distinct and separate offenses. *State v. Atkinson*, 88 Wis. 1.

4. *Apartments*.—Where a building is leased to different persons in distinct apartments, each apartment is the dwelling house of the

No Interior Communication.—But where the parts are occupied severally, and there is no interior communication, the parts are to be considered separate buildings.¹

Must be Occupied.—To constitute a house a dwelling house, there must be an occupation of it by some person or persons. Though it may have been designed as a dwelling house, and capable of being so occupied, until it is actually dwelt in, it does not become a dwelling house in contemplation of law.²

Disused Dwelling.—A dwelling house also loses its character as such when it ceases to be dwelt in.³

lessee. *Stedman v. Crane*, 11 Met. (Mass.) 295; *Mason v. People*, 26 N. Y. 200.

The indictment charged the prisoner as accessory to the crime of arson in the first degree; it charged that the fire was set by the principals in the nighttime, and burned the dwelling house of K, in which he then was. It appeared that the building was a five-story tenement house, having a common entrance in front and in the rear. The front entrance opened into a hallway used in common, and the apartments in the several floors opened into a common hall. The prisoner, with his wife, occupied three rooms; K, with his family, occupied three adjoining rooms; there was no direct communication between the rooms of K and those occupied by the prisoner. The fire was set in the prisoner's rooms, and burned portions of them. It was held that the indictment was well drawn; that it mattered not that but a part of the house was burned, it was a setting fire to the whole, and to the part occupied by another tenant as well as that tenanted by the prisoner, even though no portion of the rooms occupied by such other tenant was burned. *Levy v. People*, 80 N. Y. 327. See *Dale v. State*, 27 Ala. 31; *Com. v. Bulman*, 118 Mass. 456, 19 Am. Rep. 469; *State v. Garity*, 46 N. H. 61; *Shepherd v. People*, 19 N. Y. 537; *Ullman v. State*, 1 Tex. App. 220, 28 Am. Rep. 405.

1. When Apartments Are to be Considered Separate Buildings.—*State v. Toole*, 29 Conn. 342, 76 Am. Dec. 602; *State v. Sandy*, 3 Ired. (N. Car.) 570.

In *People v. Fairchild*, 48 Mich. 31, where the lower floor of a building was used as a store by one person, and the upper floor as a dwelling by others, the two floors having no interior communication, the dwelling being reached by an outside flight of stairs, it was held that the store and the dwelling were to be considered separate buildings, and that by setting fire to the store the defendant would not be indictable for setting fire to a dwelling house, under section 1 of the statute, but for burning a dwelling house by setting fire to some other building, under section 2 of the statute.

2. Unfinished House.—An unfinished house cannot be a dwelling house until completed and dwelt in.

England.—*Reg. v. Allison*, 1 Cox C. C. 24; *Reg. v. Kimbrey*, 6 Cox C. C. 464; *Elsmore v. St. Briavells*, 8 B. & C. 461, 15 E. C. L. 266; *Reg. v. Edgell*, 11 Cox C. C. 132.

Connecticut.—*State v. McGowan*, 20 Conn. 245, 52 Am. Dec. 336.

Georgia.—*McLane v. State*, 4 Ga. 342; *Stallings v. State*, 47 Ga. 572.

Indiana.—*State v. Wolfenberger*, 20 Ind. 242.

Maine.—*State v. Warren*, 33 Me. 30.

Massachusetts.—*Com. v. Squire*, 1 Met. (Mass.) 258; *Mead v. Boston*, 3 Cush. (Mass.) 404; *Com. v. Barney*, 10 Cush. (Mass.) 478.

Mississippi.—*Dick v. State*, 53 Miss. 384.

New York.—*McGary v. People*, 45 N. Y. 153; *Woodford v. People*, 62 N. Y. 117, 20 Am. Rep. 464.

North Carolina.—*State v. Clark*, 7 Jones (N. Car.) 167.

Virginia.—*Hooker v. Com.*, 13 Gratt. (Va.) 763.

Wisconsin.—*Lacy v. State*, 15 Wis. 13.

In *State v. McGowan*, 20 Conn. 245, 52 Am. Dec. 336, the court said: "The building is described to be one built and designed for a dwelling house constructed in the usual manner. It was designed to be painted, but was not yet finished in that respect, and not quite all the glass were set in one of the outer doors. The building had never been occupied, and it was not parcel nor an appurtenant of any other. We think this was not a dwelling house in such a sense as that to burn it constituted the crime of arson. In shape and purpose it was a dwelling house, but not in fact, because it had never been dwelt in; it had never been used, and was not contemplated as then ready for the habitation of man."

A shed or cabin, though built of stone, roofed, and with low fireplace and window, does not, in a case of arson, constitute a house within the 7 Will. IV. and 1 Vict., c. 89, § 3, where the building was erected, not for habitation, but for workmen to take their meals, and had not been slept in with permission of the owner. *Reg. v. England*, 1 C. & K. 533, 47 E. C. L. 533.

In *People v. Handley*, 93 Mich. 46, it was held that an allegation in the indictment charging the defendant with burning "a certain vacant brick dwelling house, the property of A," would not be proved by evidence that the house was built for and was suitable for a dwelling house, was vacant, and was the property of A. The term "vacant dwelling house" implies a dwelling that is temporarily vacant, and not one that has never been occupied.

3. Disused Dwelling House.—In *Henderson v. State* (Ala. 1895), 16 So. Rep. 931, a small one-room structure, which had been built and at one time used for a dwelling, but which was now dilapidated, dismantled, and wholly unfit for habitation, and had not been occupied as a dwelling for eight or ten years

Temporary Absence.—But a mere temporary absence of the occupants does not thus affect the character of the house.¹ If there is an intention to return, it will remain their dwelling.²

Statutory Occupation.—Under the statutes of some of the states, to constitute the burning arson in the first degree, the actual presence of a human being in the house at the time it is fired is necessary;³ and such

past, but had been used for the storage of cotton, was held not to be a dwelling house, the burning of which would raise the offense to the first degree.

Vacant Dwelling House.—A house, though it was built for a dwelling house and had been used as such, and although it was about to be so used again, yet, having been unoccupied for ten months previously, and being unoccupied when it was burned, was held not to be a dwelling house. *Hooker v. Com.*, 13 Gratt. (Va.) 763.

A house built for, and at one time used as, a dwelling house, but untenanted at the time of the burning, is not within the provisions of the section of the code making it a felony to burn a dwelling house. *State v. Clark*, 7 Jones (N. Car.) 167.

1. Temporary Absence.—A dwelling house once inhabited as such, and from which the occupant is but temporarily absent, is a dwelling house in contemplation of the law. *Paine v. State*, 89 Ala. 26; *State v. McGowan*, 20 Conn. 245, 52 Am. Rep. 336. *State v. Warren*, 33 Me. 30; *Stupetski v. Transatlantic F. Ins. Co.*, 43 Mich. 373, 38 Am. Rep. 195.

The court, in *Johnson v. State*, 48 Ga. 116, said: "Where a man, or a man and his family, or a woman, or a woman and her family, are living in a dwelling house, and have their household effects or valuable articles in such dwelling house, and are temporarily absent at church, or on a visit to a neighbor, or on business, and the dwelling house is burnt during such temporary absence, it is the burning of an occupied dwelling house within the meaning of the statute, although no one was in the dwelling house at the time it was burnt. The object of the statute is to protect the home of the occupants of a dwelling house, and their property therein, from the torch of the incendiary, and it is none the less their home, their dwelling house, because temporarily absent therefrom."

2. Must Be an Intention to Return.—For a house to continue a dwelling house after the occupant has left it, there must be an intention to return. *State v. Meerhouse*, 34 Mo. 344, 86 Am. Dec. 109; *Com. v. Barney*, 10 Cush. (Mass.) 478; *Com. v. Hayden*, 150 Mass. 332.

3. Actual Presence in House at Time of Burning — Statutes — England.—*Reg. v. Paice*, 1 C. & K. 73, 47 E. C. L. 73; *Reg. v. Warren*, 1 Cox C. C. 68; *Reg. v. Fletcher*, 2 C. & K. 215, 61 E. C. L. 215.

Alabama.—*Childress v. State*, 86 Ala. 77.

Georgia.—*Stallings v. State*, 47 Ga. 572.

Kansas.—*State v. Nolan*, 48 Kan. 723.

Massachusetts.—*Com. v. Buzzell*, 16 Pick. (Mass.) 153.

Minnesota.—*State v. Grimes*, 49 Minn. 443.

Mississippi.—*Lewis v. State*, 49 Miss. 354; *Dick v. State*, 53 Miss. 384.

Missouri.—*State v. Aguila*, 14 Mo. 130.

New York.—*People v. Butler*, 16 Johns. (N. Y.) 203; *Shepherd v. People*, 19 N. Y. 537; *Woodford v. People*, 62 N. Y. 117, 20 Am. Rep. 464.

Wisconsin.—*Lacy v. State*, 15 Wis. 13.

What Constitutes an Actual Presence.—The statute 1 Vict., c. 89, § 3, made the setting fire to any dwelling house, any person being therein, a capital felony. In *Reg. v. Fletcher*, 2 C. & K. 215, 61 E. C. L. 215, the prisoner was indicted under this section. The evidence showed that the fire had been applied to an outhouse adjoining and under the same roof as, but not communicating with, the dwelling house, and that the fire spread to the latter and burnt it. At the time the fire was set to the outhouse there was a person in the dwelling house, but before the fire reached this she had left it. It was held that the prisoner could not be convicted under this section. To the same effect is *Reg. v. Warren*, 1 Cox C. C. 68.

The *Massachusetts* statute makes the crime of arson capital only when the dwelling house burned is actually occupied by some person lawfully present. In *Com. v. Buzzell*, 16 Pick. (Mass.) 153, it was held that where a mob entered a convent, and by threats compelled the inmates to leave it before it was fired, the defendant could not be convicted of a capital offense. Neither would the presence of a stranger, who had entered at the same time for the purpose of protecting the persons and property of the inmates, be such a lawful presence as to raise the offense to the grade of a capital crime; nor would the presence of the nuns in a summerhouse within the curtilage of the convent, where they had sought shelter, suffice to do so.

If during a general conflagration started by the prisoner, when the dwelling house charged in the indictment took fire, there was a human being therein, it is immaterial whether he was asleep or awake, or whether escape was practicable or not before the building actually took fire. *Woodford v. People*, 3 Hun (N. Y.) 310, 62 N. Y. 117, 20 Am. Rep. 464.

On an indictment under section 9 of statute 24 and 25 Vict., c. 97, for maliciously damaging a building by the explosion of dynamite, whereby the lives of certain persons were endangered, it was held not to be necessary for the persons endangered to have been inside the building, but that the case of persons outside whose lives were imperilled by anything proceeding from the damaged building would also be included. *Reg. v. McGrath*, 14 Cox C. C. 598.

presence must be specially proven to secure conviction.¹

(b) **Outhouses.**—An outhouse is any building used in connection with the mansion, and adjoining it, or situated within the curtilage thereof.²

Character—How Determined.—Its character as such depends upon its uses and location, rather than upon its construction. It may be a mere hovel, but if it is used in connection with the mansion, for the better enjoyment thereof, and is situated within the curtilage, it constitutes part of the dwelling house.³

1. Proof of Actual Occupation Necessary.—In *Stallings v. State*, 47 Ga. 572, a verdict was reversed and a new trial granted for lack of positive proof that the house was occupied. There was evidence by inference from the facts disclosed, but the court held that positive proof was necessary. So also in *Reg. v. Paice*, 1 C. & K. 73, 47 E. C. L. 73, where there was a failure to prove that there were any persons in the house at the time of setting fire to it, conviction could not be had.

Where the occupant of a building has been shown to have been alive a few hours before the fire, it is not incumbent upon the state to prove that he was alive at the time of the burning of the building, the presumption being in favor of the continuance of life during that period. *Childress v. State*, 86 Ala. 77.

Under the *Washington* statute, to render the offense a capital felony, it is necessary to prove that the death of some person ensues therefrom, and that the defendant knew that such person was occupying or present on the premises at the time such premises were set fire to. *McClaine v. Territory*, 1 Wash. 345.

But it is otherwise in *New York* and *Missouri*. In *People v. Jones*, 2 Edm. Sel. Cas. (N. Y. Oyer & T. Ct.) 86, it was held that it is not necessary to prove that the defendant knew the building fired was inhabited. *People v. Orcutt*, 1 Park. Cr. Rep. (Oneida Oyer & T. Ct.) 252. See *State v. Aguila*, 14 Mo. 130.

2. Outhouse—What Constitutes—Alabama.—*Fisher v. State*, 43 Ala. 17.

Massachusetts.—*Com. v. Estabrook*, 10 Pick. (Mass.) 293.

Michigan.—*People v. Taylor*, 2 Mich. 250; *Pitcher v. People*, 16 Mich. 142.

New York.—*People v. Parker*, 4 Johns. (N. Y.) 424; *Quinn v. People*, 71 N. Y. 561, 27 Am. Rep. 87.

North Carolina.—*State v. Mordecai*, 68 N. Car. 207; *State v. Outlaw*, 72 N. Car. 598; *State v. Potts*, 75 N. Car. 129; *State v. Roper*, 88 N. Car. 656.

Ohio.—*Ratekin v. State*, 26 Ohio St. 420.

South Carolina.—*State v. Ginns*, 1 Nott & M. (S. Car.) 583.

Tennessee.—*Armour v. State*, 3 Humph. (Tenn.) 379.

Virginia.—*Com. v. Posey*, 4 Call (Va.) 109, 2 Am. Dec. 560; *Page v. Com.*, 26 Gratt. (Va.) 943.

See *State v. Shaw*, 31 Me. 523.

An Outhouse Is a Building Appurtenant to Some Main Building or Mansion House, and whether it is parcel of it or not, depends upon its particular location or its connection with such mansion house. *State v. Bailey*, 10 Conn. 144, overruling *State v. O'Brien*, 2 Root (Conn.) 516.

Outhouses must Be Parcels of the Dwelling House, though not adjoining thereto nor under the same roof. 2 East P. C. 1020.

An Outhouse Has a Technical Meaning; it is one that belongs to a dwelling house, and is, in some respects, parcel of the same, and situated within the curtilage. *State v. Roper*, 88 N. Car. 656.

Whether the Outhouse Burned Be in a City, Town, or Village, or Not, does not affect the legal character of the offense. It affects the punishment only. *Smith v. State*, 64 Ga. 605.

3. Illustrations as to What Constitutes an Outhouse—Stable.—In *Gage v. Shelton*, 3 Rich. (S. Car.) 242, a stable sixty yards from the dwelling, and used in connection therewith, was held to be an outhouse.

Upon the Meaning of the Word "Outhouse" in the repealed statute 9 Geo. I., c. 22, the following case was decided: It appeared that the prisoner (who was indicted for setting fire to an outhouse) had set fire to and burned part of a building of the prosecutor, situated in the yard at the back of his dwelling house. The building was four or five feet distant from the house, but not joined to it. The yard was inclosed on all sides, in one part by the dwelling house, in another by a wall, and in a third by a railing which separated it from a field, and in the remaining part by a hedge. The prosecutor kept a public house and was also a flaxdresser. The buildings in question consisted of a stable, and chamber over it used as a shop for the keeping and dressing of flax. It was objected that this was a part of the dwelling house, and not an outhouse; but the prisoner having been convicted, the judges were of opinion that the verdict was right. It was observed that though, for some purpose, this might be part of the dwelling house, yet in fact it was an outhouse. *North's Case*, 2 East P. C. 1021.

The Following Case was Decided upon the Words of the Same Statute: The prisoner was indicted in some counts for setting fire to an outhouse, in others to a house. The premises burned consisted of a schoolroom, which was situated very near to the house in which the prosecutor lived, being separated from it only by a narrow passage about a yard wide. The roof of the house, which was of tile, reached over part of the roof of the school, which was thatched with straw; and the school, with the garden and other premises, together with a court which surrounded the whole, was rented of the parish by the prosecutor at a yearly rent. There was a fence around the premises, and nobody but the prosecutor or his family had a right to come within it. It was objected for the prisoner

(c) **The Curtilage.**—The curtilage is the space of ground adjoining the dwelling house, necessary and convenient, and habitually used for family purposes and the carrying on of domestic employments.¹

Fences.—The curtilage need not be separated from other lands by a fence;² nor does the intersection of the curtilage by divisional fences affect the rela-

that the building was neither a house nor an outhouse within the repealed statute 9 Geo. I., c. 22, but the judges were of opinion that it was correctly described either as an outhouse or part of a dwelling house within the meaning of the statute. *Rex v. Winter*, R. & R. C. C. 295.

A Building Thirty-six Feet Distant from a Man's House, used for preserving the nets employed in the owner's ordinary occupation of a fisherman, is in law a part of his dwelling, though not included with the house by a fence. *Pond v. People*, 8 Mich. 150.

Pigsty.—In *Reg. v. Janes*, 1 C. & K. 303, 47 E. C. L. 303, it was held that a pigsty, boarded up at the sides, with doors and a thatched roof, situated in a yard bounded by fences and by other buildings, was held to be an outhouse.

An Open Shed in a Farmyard, composed of upright posts supporting pieces of wood laid across them, and covered with straw as a roof, was held to be an outhouse. *Rex v. Stallion*, 1 Moo. C. C. 398.

An Old Building Located at a Crossroad and Occupied as a Storehouse, and not inclosed with, nor a parcel of, any dwelling house, is not an outhouse. *State v. Roper*, 88 N. Car. 656.

"Adjoining" Construed.—In *State v. Downs*, 59 N. H. 320, it was held that the word "adjoining" was a synonym of "adjacent to" and "contiguous," and that where an outhouse was alleged as adjoining a dwelling house, evidence that there was a space of four inches between them would not sustain the allegation.

Under chapter 188 of the *Virginia Code*, "no outhouse not adjoining a dwelling house, nor under the same roof (although within the curtilage thereof), shall be deemed parcel of such dwelling house within the meaning of this chapter, unless some person usually lodge therein at night." In *Page v. Com.*, 26 Gratt. (Va.) 943, the court said: "Now, it is evident that to constitute the offense for which the prisoner has been sentenced, the house mentioned in the third count of the indictment either must be in itself a dwelling house, or must be parcel of a dwelling house, by being adjacent thereto, or under the same roof therewith, or within the curtilage thereof and occupied therewith; and, though within the curtilage thereof, yet if it be not adjoining a dwelling house, nor under the same roof, it is not to be deemed parcel thereof, 'unless some person usually lodge therein at night.'"

In *Peverelly v. People*, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 59, the words of the statute, "Every person who shall wilfully set fire to or burn in the nighttime any shop, warehouse, or other building, not being the subject of arson in the first degree, but

adjoining to or within the curtilage of any inhabited dwelling house, so that such house shall be endangered by such firing, shall, upon conviction, be adjudged guilty of arson in the second degree," were construed to mean that the building fired must be immediately adjoining and in actual contact with the dwelling endangered, or within the curtilage thereof; and the words, "so that such house shall be endangered by such firing," are to be treated as mere surplusage.

See further the title *ADJOINING*, vol. 1, p. 635.

"Belonging to" Construed.—A barn constituting part of the necessary buildings of a farm, and although not connected with the dwelling house thereon, yet so situated that its destruction by fire would endanger the dwelling house, is a barn "belonging to" the dwelling house within the meaning of section 137 of the *Pennsylvania Penal Code*, and the setting fire thereto consequently constitutes the offense of felonious arson. *Hill v. Com.*, 98 Pa. St. 192.

Alabama.—In Alabama, to set fire to any barn, stable, shop, or office of another person, within the curtilage of a dwelling house, is arson in the second and not in the first degree. *Cheatham v. State*, 59 Ala. 40.

1. The Curtilage Defined.—*State v. Shaw*, 31 Me. 523.

A courtyard adjoining a messuage. *Sweet's Law Dict.*

A piece of ground lying near and belonging to a dwelling house, as a courtyard or the like. *Brown's Law Dict.*

The inclosed space immediately surrounding a dwelling house, contained within the same inclosure. *Bouvier's Law Dict.*

The curtilage is the courtyard in the front or rear of a house, or at its side, or any piece of ground lying near, inclosed and used with the house and necessary for its convenient occupation. *People v. Gedney*, 10 Hun (N. Y.) 151.

In its most comprehensive and proper legal signification, it includes all that space of ground and buildings thereon which is usually inclosed within the general fence immediately surrounding a principal messuage, outbuildings, and yard, closely adjoining to a dwelling house, but it may be large enough for cattle to be levant and couchant therein. *People v. Taylor*, 2 Mich. 250.

2. Need Not be Inclosed.—A fence is not necessary to include buildings within the curtilage, if within a space no larger than that usually occupied for the purposes of the dwelling and customary outhouses. *Pond v. People*, 8 Mich. 150; *State v. Shaw*, 31 Me. 523.

When Buildings Are within Curtilage.—In *Pitcher v. People*, 16 Mich. 142, where a barn was situated about eight rods from the house

tion to the mansion of buildings thus separated from it;¹ but it is otherwise if a public highway lies between them.²

b. BY STATUTE—(1) *Statutory Changes in the Law*.—Statutory arson is, in many respects, a different offense from arson at common law. Many of the niceties and distinctions which hitherto existed as to what were, and what were not, subjects of the crime, have been taken away by statutes which have so extended its bounds as to make the punishment of malicious burning equally extensive with the mischief. Statutory arson is not merely an offense against the security of the habitation, but against the rights of property as well.³

Degrees.—In many, if not in all, of the states, the crime has been divided into degrees, punishable as a felony or a misdemeanor according to the subject of the offense and the time and circumstances of its commission.⁴

and opened into the same yard, it was held to be within the curtilage. The court said: "There can be no doubt that the barn in question would have been regarded as within the curtilage and embraced by the term 'dwelling house' as a part of the congregated buildings occupied and used by the family for domestic purposes."

1. *Divisional Fences*.—In *Reg. v. Gilbert*, 1 C. & K. 84, 47 E. C. L. 84, the barn was situated in an inclosure which was surrounded by a general fence, but the yard in which the barn stood was separated from the yard immediately about the house by a stone wall. It was held that the barn was within the curtilage.

In *People v. Taylor*, 2 Mich. 250, the court, following the doctrine of the English cases, said: "In this case the barn stood eighty feet from the dwelling house, and nearly in range with it, east and west; it stood in a yard or lane with which there was a communication from the house by a pair of bars. The space of ground occupied by both buildings, and the buildings, were such as are usually included in one inclosure in England. It is quite manifest from the statute that it was the intention of the legislature to protect dwelling houses from the hazards of fire which might be set to a barn, office, stable, or shop standing near to the house, as well as to protect these other buildings; we think it is our duty to apply the words of the statute in such enlarged sense as will insure that protection to dwelling houses as well as barns, etc., which it appears to us was the manifest intention of the legislature to provide." It was held that the barn was within the curtilage.

In *People v. Aplin*, 86 Mich. 393, the following charge to the jury was held to be correct: "If you find that the barn was an outhouse, adjacent to and used as a part of the homestead of D, and there was access by gate or bars from the house to the barn, and that the same was used for the better enjoyment thereof by him, as farmers commonly use such buildings in connection with their homesteads, then such barn would be within the curtilage, and under the law would be regarded as part of the dwelling house."

Matter of Fact for Jury.—The curtilage usually includes the yard, garden, or field which is near to, and used in connection with, the building; and in some cases it may be

affirmed, as a matter of law, on the undisputed facts, that a particular building is or is not within the curtilage; but where the building burned, a barn, is situated seventy-five yards from the dwelling house, in a grove which is separated from the front yard by a cross fence, through which there is a connecting gate, the entire premises being inclosed by a fence and containing between two and three acres, it cannot be affirmed, as a matter of law, that it was not within the curtilage, and the question is properly submitted to the jury. *Cook v. State*, 83 Ala. 62, 3 Am. St. Rep. 688.

When Not within the Curtilage.—A building had been built for an oven to bake bricks, but afterwards was roofed and a door put to it; in this place the prosecutor kept a cow. Adjoining to it, but not under the same roof, was a lean-to, in which another person kept a horse. The nearest dwelling was one hundred yards off, and belonged to another person. It was held that the building was neither a stable nor an outhouse, nor within the curtilage of the mansion. *Rex v. Haughton*, 5 C. & P. 555, 24 E. C. L. 453.

An open building in a field at a distance from, and out of sight of, the owner's house, was held not to be within the curtilage. *Rex v. Ellison*, 1 Moo. C. C. 336. See also *Rex v. Parrot*, 6 C. & P. 402, 25 E. C. L. 458.

2. *Public Highway between*.—A mill house situated seventy-five yards from its owner's dwelling house, but separated by a public highway therefrom, is not an outhouse within the curtilage of such dwelling house. *State v. Sampson*, 12 S. Car. 567, 32 Am. Rep. 513.

In *Curkendall v. People*, 36 Mich. 309, a barn situated some fifteen rods from the dwelling house, with a public highway between them, and a yard between the barn and the highway, was held not to be within the curtilage.

A barn eighteen rods from the mansion house, entirely disconnected and separated by a highway, is not parcel of such house. *State v. Stewart*, 6 Conn. 47.

3. *Statutory Arson*.—*People v. Fisher*, 51 Cal. 319; *M'Neal v. Woods*, 3 Blackf. (Ind.) 485; *Ritchey v. State*, 7 Blackf. (Ind.) 168; *Garrett v. State*, 109 Ind. 527; *State v. Biles*, 6 Wash. 186; *McClaine v. Territory*, 1 Wash. 345.

4. *Degrees*.—The statutes not only enlarge the subjects of arson, but it is a felony or a

(2) *What Constitutes a House.*—The word “house,” as used in the statutes, does not necessarily imply a dwelling place, as at common law, but may mean any erection of value falling within the general description of a house.¹

Incomplete Structures.—A building need not be entirely completed to constitute it a house. The question whether the construction has reached such a stage as to so constitute it, is one of fact, to be submitted to the jury under proper instructions from the court.²

(3) *Subjects of Statutory Arson.*—Statutory arson embraces a great variety of subjects, differently described and classified in the statutes of the several states of the Union. Among the subjects embraced are: barns,³

misdeemeanor, visited with punishment differing in severity according to the circumstances attending the act and the character of the subject. In *Alabama* it is divided into three degrees; the first having reference especially to the protection of human life, the second to the character of the thing to which fire is set or which is burned, the third essentially to the protection of the property merely. The first and second are felonies; the third is a misdemeanor. *Davis v. State*, 52 Ala. 357; *Heard v. State*, 81 Ala. 57. See also *Lacy v. State*, 15 Wis. 13.

1. House Defined as Used in Statutes.—Under the *Tennessee* statutes, the meaning of the word “house” is held not to be restricted to a dwelling place, but to include any erection of value which may fall within the general description of a house. *Hall v. State*, 3 Lea (Tenn.) 552.

A house, as that term is defined by the *Texas* statute, is any building or structure inclosed within walls, and covered, whatever may be the materials used for building. *Mulligan v. State*, 25 Tex. App. 199, 8 Am. St. Rep. 435.

Any house, edifice, structure, vessel, or other erection, capable of affording shelter for human beings, is a building within the meaning of the chapter of the *California* Code defining arson. *People v. Fisher*, 51 Cal. 319.

The words “house” and “building” are synonymous. *State v. Moore*, 61 Mo. 276.

2. Unfinished Structures.—In *Reg. v. Manning*, 12 Cox C. C. 106, the prisoners were convicted, under 24 and 25 Vict., c. 97, § 6, of setting fire to a certain building. The erection was intended for a dwelling house, all its walls, external and internal, were built and finished, the roof was on and finished, a considerable part of the flooring was laid, and the internal walls were ready for plastering. The house was in a forward state towards completion, but was not completed. It was held that, to constitute a building, the erection need not be absolutely complete, and that it was a question of fact for the jury whether it was substantially a “building” within the meaning of the act.

An unfinished building intended as a cart shed, which is boarded up on all its sides and has a door with a lock to it, and the frame of a roof with loose gorse thrown upon it because it is not yet thatched, is a building within the statute 7 and 8 Geo. IV., c. 29, § 44. *Rex v. Worrall*, 7 C. & P. 516, 32 E. C. L. 608.

The term “building,” as used in the *Massachusetts* statute, does not necessarily import

a structure so far advanced as to be in every respect finished and perfect for the purposes for which it is designed eventually to be used. Whether the structure has arrived at such a stage towards completion as to constitute it a building, is a question of fact to be submitted to the jury, under proper instructions of the court. *Com. v. Squire*, 1 Met. (Mass.) 258.

In *McGary v. People*, 45 N. Y. 153, the indictment was drawn under the statute making it a felony to set fire to or burn “any building erected for the manufacture of cotton or woolen goods or both;” the evidence showed that the frame of the whole building was not up at the time of the fire, and that the part which had been raised was not entirely inclosed; the floors were not laid, the stairs were not up, and no part of it was ready for occupation, or substantially ready for the reception of the machinery, or for use and occupation for any purpose. It was held that a building so incomplete can scarcely be called a building erected for any purpose.

An unfinished structure intended to be used as a house, is not a house within the meaning of 24 and 25 Vict., c. 97, § 2. *Reg. v. Edgell*, 11 Cox C. C. 132.

What Is Not a House.—In *Reg. v. Labadie*, 32 U. C. Q. B. 429, it was held that the remains of a wooden dwelling house, undergoing repairs after a previous fire, which had left only a few rafters of the roof and injured the sides and floors so as to render it untenable, was not a building within the statute so as to be the subject of arson.

Where a tenant in possession of premises, which he was about to vacate, tore down a building because of a disagreement with the landlord concerning it, and burned the material of which it had been constructed, it was held that this was not a burning of a house and would not amount to arson. *Mulligan v. State*, 25 Tex. App. 199, 8 Am. St. Rep. 435.

In *Reg. v. England*, 1 C. & K. 533, 47 E. C. L. 533, the indictment charged the burning of a “house.” The building burned was a small structure, having walls seven feet high of stones without mortar, and a roof of broom, turf, and straw. There was one door, but no windows. It was held that this was not a “house” within the meaning of the statute.

3. Subjects of Statutory Arson—Barns.—By statute it is arson to burn a detached barn, whether it contains grain or not. *Evans v. Com.* (Ky. 1890), 12 S. W. Rep. 769; *De Shazer v. Com.* (Ky. 1890), 14 S. W. Rep.

cotton houses,¹ stables, and other farm buildings, although not parcels of a dwelling house;² corncribs,³ stacks,⁴ woods,⁵ and fences;⁶ court-

542; *Gibson v. State*, 54 Md. 447; *State v. Roberts*, 15 Oregon 187; *State v. Thornton*, 56 Vt. 35; *Wolf v. Com.*, 30 Gratt. (Va.) 833.

Under the Penal Code of *Pennsylvania* the wilful burning of a barn is a misdemeanor, unless such barn belongs to a dwelling house, in which case it is a felony. *Staeger v. Com.*, 103 Pa. St. 469; *Sampson v. Com.*, 5 W. & S. (Pa.) 385.

What Constitutes a Barn.—In the *United States* any covered building for receiving grain, hay, or other productions of the farm, is termed a barn, and it is not infrequent that farmers use such buildings also for stabling their horses or cattle, so that a barn is both a corn house and a stable. *State v. Smith*, 28 Iowa 565.

A house seventeen feet long and twelve feet wide, setting on blocks in a stable yard, having two rooms in it, one quite small used for storing "nubbins" and refuse corn to be fed to the stock, and the other used for storing peas, oats, and other produce of the farm, is not a barn within the meaning of the statute, the burning of which is made a felony. *State v. Laughlin*, 8 Jones (N. Car.) 455. See also *State v. Jim*, 8 Jones (N. Car.) 459.

But a building twenty-six feet by fifteen feet, built of hewn logs, divided by a partition of the same, upon one side of which were horses, and upon the other corn, oats, and wheat, threshed and unthreshed, also hay, fodder, etc., having sheds adjoining under which were wagons and farming utensils, was held to be a barn. *State v. Cherry*, 63 N. Car. 493.

1. **Cotton House.**—Under the *Alabama* statute it is arson in the second degree to set fire to a cotton house, whether it contains cotton or not. And in *Washington v. State*, 68 Ala. 85, the word "or" in the clause "cotton house, or cotton pen containing cotton," was declared to be a typographical error and should be stricken out.

2. **Stable.**—*Dugle v. State*, 100 Ind. 259.

3. **Corncrib.**—*Brown v. State*, 52 Ala. 345; *Adams v. State*, 62 Ala. 177; *Cook v. State*, 83 Ala. 62, 3 Am. St. Rep. 688; *Leonard v. State*, 96 Ala. 108; *Hester v. State*, 17 Ga. 130; *State v. Millican*, 15 La. Ann. 557. See also *Mulligan v. State*, 25 Tex. App. 199, 8 Am. St. Rep. 435.

4. **Stacks.**—It is arson to burn any stack of grain, hay, or straw of another of the value of five dollars. *McClaine v. Territory*, 1 Wash. 345.

Under a statute of *South Carolina* the offense of setting fire to a stack of straw is not arson, but a felony of a lower grade. *State v. Pope*, 9 S. Car. 273. See also *Com. v. Macomber*, 3 Mass. 254.

What Constitutes a Stack.—In *Reg. v. Munson*, 2 Cox C. C. 186, a count in the indictment charged an attempt to set fire to a stack of haulm. It was proved that some haulm had been carted from a field and stacked in a building originally intended for a stable, but afterwards divided into three parts by a wall

which reached only to the eaves; one part was used as a stable, and the part fired contained the haulm and a lot of tiles. It was held that the count was sufficient inasmuch as it is not necessary to the character of a stack that it should be erected out of doors.

In *Reg. v. Spencer*, 7 Cox C. C. 189, it was held that flaxseed is a grain, and that to burn a stack of it is a felony within 7 Will. IV. and 1 Vict., c. 89, § 10.

What Is Not a Stack.—The prisoner set fire to a quantity of straw placed in a lorry and left for the night in the yard of an inn on the way to market. It was held that upon these facts a conviction on an indictment charging him with setting fire to a stack of straw could not be sustained. *Reg. v. Satchwell*, 12 Cox C. C. 449, L. R. 2 C. C. 21.

A stack of which the lower part consisted of colesseed straw, and the upper part of wheat stubble, was held, in *Rex v. Tottenham*, 7 C. & P. 237, 32 E. C. L. 500, not to be a stack of straw; and the setting fire to it was not, therefore, a capital offense within 7 and 8 Geo. IV., c. 29, § 17.

In *Reg. v. Baldock*, 2 Cox C. C. 55, sedge and rushes were held not to be straw within the meaning of the statute 7 Will. IV. and 1 Vict., c. 89, which was confined to the straw of wheat, oats, barley, and rye.

In *Rex v. Reader*, 4 C. & P. 245, 19 E. C. L. 367, the prisoners had set fire to a stack of stubble, sometimes called haulm, and were indicted for setting fire to a stack of straw. It was held that this was not straw.

A pile of wheat, threshed, cleaned, and housed in a building, is not a stack of wheat within the sixth section of chapter 4 of the Code of *Virginia*. *Erschine v. Com.*, 8 Gratt. (Va.) 624.

Setting fire to a parcel of unthreshed wheat was held, in *Rex v. Judd*, 1 Leach C. C. 484, not to be a felony within 9 Geo. I., c. 22.

An indictment for setting fire to a cock of hay cannot be sustained under a statute making it an offense to set fire to a stack of hay. *Reg. v. M'Keever*, 5 Ir. R. C. L. 86.

An indictment for burning a stack of wheat is not sustained by proof of the burning of shocks of wheat. *Denbow v. State*, 18 Ohio 11.

In *Rex v. Aris*, 6 C. & P. 348, 25 E. C. L. 433, it was held that setting fire to a score of fagots which were piled one upon another in a loft, which was made by means of a temporary floor put over an archway roofed in between two houses and under which carts could go, was not setting fire to a stack of wood within 7 and 8 Geo. IV., c. 30, § 17.

5. **Woods.**—*Hall v. Cranford*, 5 Jones (N. Car.) 3; *Earhart v. Com.*, 9 Leigh (Va.) 671. Section 16, c. 97, 24 and 25 Vict., made it felony to set fire to any wood, coppice, or plantation of trees, and under this section conviction was had in *Reg. v. Price*, 9 C. & P. 729, 38 E. C. L. 309.

6. **Fences.**—*State v. Lewis*, 10 Rich. (S. Car.) 20.

houses,¹ jails,² market houses, colleges, schoolhouses,³ churches,⁴ and other public buildings; mills and manufacturing buildings;⁵ shops and mercantile buildings;⁶ storehouses,⁷ warehouses,⁸ public bridges, wharves, piers, locks, dams, flumes, mines; railroad stations and cars; ships, boats, and other water craft.⁹

(4) *The Value*.—At common law, the value of the house burned was immaterial. But statutory arson being an offense against property, in some states the value of the thing burned becomes a material element of the offense, as determining whether it is a felony or a misdemeanor. In those states where fines are imposed by statute in addition to imprisonment, the value of the property determines the amount of the fine.¹⁰

1. *Courthouse*.—Lavelle v. State, 136 Ind. 233; Gregg v. State, 3 W. Va. 705.

2. *Jail*.—People v. Van Blaricum, 2 Johns. (N. Y.) 105; Com. v. Posey, 4 Call (Va.) 109, 2 Am. Dec. 560; Stevens v. Com., 4 Leigh (Va.) 683.

Penitentiary.—State v. Johnson, 93 Mo. 73.

3. *Schoolhouse*.—Under the *Maryland* Act of 1809, c. 138, a party may be indicted for wilfully burning a schoolhouse, such property being embraced by the terms "any other outhouse not parcel of a dwelling house." Jones v. Hungerford, 4 Gill & J. (Md.) 402.

In Wallace v. Young, 5 T. B. Mon. (Ky.) 155, it was held that the words "any other house or houses whatsoever," used in the *Kentucky* statute defining arson, include schoolhouses.

A building removed by a city, and afterwards fitted up as a schoolhouse and engine-house, is a building "erected for public use," within *Massachusetts* Gen. Stat., c. 161, § 2. Com. v. Horrigan, 2 Allen (Mass.) 159.

4. *Church*.—McDonald v. Com., 86 Ky. 10; State v. Kingsbury, 58 Me. 238; State v. Roe, 12 Vt. 93.

In Watt v. State, 61 Ga. 66, the defendant was indicted for the offense of arson, and charged with having wilfully and maliciously burned "a certain house dedicated to the worship of God, the property of a congregation of persons known as 'Locust Hill Colored Missionary Baptist Church.'" It was held that conviction might properly be had under section 4379 of the Code, and that a church would properly come under the denomination "or any other house" mentioned therein.

5. *Sawmill*.—State v. Upchurch, 9 Ired. (N. Car.) 454.

In State v. Livermore, 44 N. H. 386, where the defendant was charged with burning a sawmill, it was held that a sawmill was not necessarily a building within the provisions of the Revised Statutes; that it might or might not be under cover; and as the indictment did not allege any building to have been burned, the indictment was quashed.

Gristmill.—Hudson v. State, 61 Ala. 333; People v. Haynes, 55 Barb. (N. Y.) 450.

Ginhouses.—McAdory v. State, 62 Ala. 154; State v. Moore, 24 S. Car. 150; State v. Gregory, 33 La. Ann. 737.

6. *Shop*.—A house used for the purposes of selling or manufacturing goods, etc., is a shop within the meaning of that term as it is employed in the statute. State v. Morgan, 98 N. Car. 641.

To render a person guilty of arson under the *Indiana* statute, in burning a building or room, such building or room must have been occupied at the time as a shop, or an office for professional business. State v. O'Connell, 26 Ind. 266.

Building for Carrying on a Trade.—A building used by a carpenter, who was putting up a house near it, as a place of deposit for his tools, and for window frames which he had made, but in which no work was carried on by him, was held not to be "a building used in carrying on the trade of a carpenter." Reg. v. Smith, 14 U. C. Q. B. 546.

7. *Storehouse*.—People v. Shainwold, 51 Cal. 468. A storehouse is a house within the *Tennessee* statute. The term "house" is not restricted to dwelling places, but may be any erection of value. Hall v. State, 3 Lea (Tenn.) 552.

A building the lower floor of which was used as a storehouse and the upper floor as a dwelling house, the two stories having no interior communication and the fire being set on the lower floor, was held to be properly described in an indictment as "a two-story wooden storehouse building." State v. Biles, 6 Wash. 187.

A building in which goods are kept for sale by a retail merchant is a "storehouse" within the Revised Statutes of *North Carolina*. State v. Sandy, 3 Ired. (N. Car.) 570.

8. *Warehouse*.—A house used exclusively for storing goods is a warehouse, although the building had been constructed and formerly used for another purpose, and although the goods were owned by the tenant. Allen v. State, 10 Ohio St. 287.

Barrel House.—A barrel house attached to a cooperage was held to be included under the general term "house" used in the *Tennessee* statute. Pike v. State, 8 Lea (Tenn.) 577.

Sugar House.—State v. Ambler, 56 Vt. 672.

9. The term "vessel," as used in *Massachusetts* Stat. 1804, c. 131, does not mean a small unfinished boat still in the hands of a builder and unfit for use. Setting fire to an unfinished boat in a shop, with intent to burn the building, is a misdemeanor at common law; but unless some permanent part of the building is burned, it does not come under the statute. Com. v. Francis, Thach. Cr. Cas. (Mass.) 240.

10. *Value of House Burned*.—Clark v. People, 2 Ill. 117; Ritchey v. State, 7 Blackf. (Ind.) 168; Lavelle v. State, 136 Ind. 233; Burger v.

4. Ownership and Possession—*a*. MUST BE THE HOUSE OF ANOTHER—At Common Law, to constitute arson, the house burned must be the house of another. The burning of a man's own house, even though committed with the intent to injure or defraud a mortgagor or an insurer, is no felony at common law.¹ Neither is it arson for either husband or wife to burn the house of the other, since in legal contemplation they are one person.² However, if a man burns his house in a town, or so near to other houses as to create danger to them, it is a great misdemeanor.³

By Statute, in *England* and in some of the *United States*, it is now arson if the owner of a house burns it with intent to injure or defraud an insurance company.⁴

State, 34 Neb. 397; *Avant v. State*, 71 Miss. 78; *Wolf v. Com.*, 30 Gratt. (Va.) 833.

Value Affecting Punishment.—In *Ritchey v. State*, 7 Blackf. (Ind.) 168, the court said: "The objection urged against the indictment is that it does not state the value of the property destroyed. In *England* there is no need of making such an averment in the indictment, and it is usually omitted in the forms. But in *England* the extent of the punishment for arson does not at all depend upon the value of the property consumed or injured. In this state it is otherwise. In addition to imprisonment in the penitentiary, the guilty person is liable to a fine not exceeding double the value of the property destroyed."

By the *Alabama* statute the value of the building burned determines the degree of the offense, whether second or third. *James v. State*, 104 Ala. 20; *Henderson v. State* (Ala. 1895), 16 So. Rep. 931; *Hudson v. State*, 61 Ala. 333. And see *Brown v. State*, 52 Ala. 345.

1. Must be House of Another Person—Common Law—*England*.—1 Hale P. C. 568; 2 East P. C. 1027.

Canada.—Reg. v. Bryans, 12 U. C. C. P. 163.

Alabama.—*Sullivan v. State*, 5 Stew. & P. (Ala.) 175.

Connecticut.—*State v. Lyon*, 12 Conn. 487.

Illinois.—*McDonald v. People*, 47 Ill. 533.

Maine.—*State v. Haynes*, 66 Me. 307, 22 Am. Rep. 569.

Massachusetts.—*Bloss v. Tobey*, 2 Pick. (Mass.) 320; *Com. v. Tucker*, 110 Mass. 403.

Missouri.—*State v. Wacker*, 16 Mo. App. 417.

New Hampshire.—*State v. Hurd*, 51 N. H. 176.

South Carolina.—*Gage v. Shelton*, 3 Rich. (S. Car.) 242.

Tennessee.—*Roberts v. State*, 7 Coldw. (Tenn.) 359.

Vermont.—*State v. Hannett*, 54 Vt. 83.

Virginia.—*Erskine v. Com.*, 8 Gratt. (Va.) 624.

2. Husband or Wife Burning the House of the Other.—A wife was not indictable under 7 and 8 Geo. IV., c. 30, for setting fire to her husband's house with intent to injure him, as it is essential that there should be an intent to injure or defraud some third person and not one identified with herself. *Rex v. March*, 1 Moo. C. C. 182.

In *Snyder v. People*, 26 Mich. 106, 12 Am. Rep. 302, the court held that the statutes for

the protection of the rights of married women have not affected the marital unity of husband and wife; and that a husband living with his wife, and having a rightful possession, jointly with her, of a dwelling house which she owns and they both occupy, is not guilty of arson in burning it. Whether, if the family relation was in fact broken up, and husband and wife were living separate, the same rule would apply, *quære*?

In *Indiana*, in *Garrett v. State*, 109 Ind. 527, the court said: "It will be readily seen, from an examination of section 1927, that arson as defined in our statute is a different offense, in many respects, from arson at the common law. Arson as defined in our statute is an offense against the property as well as the possession, and the question of occupancy or nonoccupancy, habitation or nonhabitation, of or in the property, as we have seen, becomes and is an immaterial question, in view of the statutory definition of the offense. It is the law of this state, we think, that if a man unlawfully, feloniously, wilfully, and maliciously sets fire to and burns the dwelling house of his wife, wherein she permits him to live with her as her husband, he is guilty of the crime of arson as such crime is defined in our statute."

The wife also may be indicted for burning the husband's barn. *Emig v. Daum*, 1 Ind. App. 146.

3. 2 East P. C. 1030, and the case of *Rex v. Probert* there cited; *Luke v. State*, 49 Ala. 30, 20 Am. Rep. 269; *Hennessey v. People*, 21 How. Pr. (N. Y. Supreme Ct.) 239; *State v. Dennin*, 32 Vt. 158.

4. Owner Burning House with Intent to Defraud Insurance Company—*England*.—Reg. v. Wallace, C. & M. 200, 41 E. C. L. 113.

Alabama.—*Heard v. State*, 81 Ala. 55.

District of Columbia.—*U. S. v. McBride*, 7 Mackey (D. C.) 371.

Illinois.—*Staadon v. People*, 82 Ill. 432, 25 Am. Rep. 333.

Louisiana.—*State v. Cazea*, 8 La. Ann. 114; *State v. Rohfrischt*, 12 La. Ann. 382; *State v. Elder*, 21 La. Ann. 157.

Massachusetts.—*Com. v. Goldstein*, 114 Mass. 272.

Michigan.—*Hamilton v. People*, 29 Mich. 173; *Meister v. People*, 31 Mich. 99.

New Hampshire.—*State v. Hurd*, 51 N. H. 176.

New York.—*Shepherd v. People*, 19 N. Y. 537, overruling *People v. Henderson*, 1 Park.

b. OCCUPANT CONSIDERED AS OWNER.—Arson, at common law, being an offense against the house as a habitation and not as property, the house of another is the house of the occupant and not of the owner of the fee.¹

Cr. Rep. (N. Y. Supreme Ct.) 560, and a dictum in *People v. Gates*, 15 Wend. (N. Y.) 159.

Ohio.—*Evans v. State*, 24 Ohio St. 458; *Searles v. State*, 6 Ohio Cir. Ct. Rep. 331.

Tennessee.—*Roberts v. State*, 7 Coldw. (Tenn.) 359.

Texas.—*Tuller v. State*, 8 Tex. App. 501.

Vermont.—*State v. Babcock*, 51 Vt. 570.

Wisconsin.—*Frank v. Dunning*, 38 Wis. 270.

1. Occupant Considered as Owner—England.

—*Rex v. Pedley*, 1 Leach C. C. 242, 2 East P. C. 1026; *Rex v. Wallis*, 1 Moo. C. C. 344.

Alabama.—*Graham v. State*, 40 Ala. 659; *Davis v. State*, 52 Ala. 357; *Adams v. State*, 62 Ala. 177; *Childress v. State*, 86 Ala. 77.

California.—*People v. Wooley*, 44 Cal. 494; *People v. Fisher*, 51 Cal. 319.

Connecticut.—*State v. Lyon*, 12 Conn. 487; *State v. Toole*, 29 Conn. 342, 76 Am. Dec. 602; *State v. Keena*, 63 Conn. 329.

Delaware.—*State v. Burrows*, 1 Houst. Crim. Cas. (Del.) 74.

Indiana.—*Ritchey v. State*, 7 Blackf. (Ind.) 168; *Wolf v. State*, 53 Ind. 30.

Iowa.—*State v. Tenny*, 9 Iowa 436.

Kentucky.—*Young v. Com.*, 12 Bush (Ky.) 243; *Com. v. Elliston* (Ky. 1892), 20 S. W. Rep. 214.

Maine.—*State v. Haynes*, 66 Me. 307, 22 Am. Rep. 569.

Massachusetts.—*Com. v. Hamilton*, 15 Gray (Mass.) 480; *Com. v. Wade*, 17 Pick. (Mass.) 395.

Michigan.—*Snyder v. People*, 26 Mich. 106, 12 Am. Rep. 302; *People v. Fairchild*, 48 Mich. 31.

Missouri.—*State v. Aguila*, 14 Mo. 130; *State v. Hayes*, 78 Mo. 307.

Nebraska.—*Burger v. State*, 34 Neb. 397.

New Jersey.—*State v. Fish*, 27 N. J. L. 323.

New York.—*People v. Gates*, 15 Wend. (N. Y.) 159; *Woodford v. People*, 62 N. Y. 117, 20 Am. Rep. 464; *Levy v. People*, 80 N. Y. 327.

North Carolina.—*State v. Sandy*, 3 Ired. (N. Car.) 570; *State v. Outlaw*, 72 N. Car. 598; *State v. Williams*, 90 N. Car. 724, 47 Am. Rep. 541; *State v. Gailor*, 71 N. Car. 88, 17 Am. Rep. 3.

Texas.—*Tuller v. State*, 8 Tex. App. 501; *Wiley v. State* (Tex. Crim. App. 1895), 31 S. W. Rep. 393.

Vermont.—*State v. Roe*, 12 Vt. 93.

Virginia.—*Ersine v. Com.*, 8 Gratt. (Va.) 624.

Washington.—*McClaine v. Territory*, 1 Wash. 345.

Wisconsin.—*Carter v. State*, 20 Wis. 647.

If one is indicted for burning the dwelling house of another, it is sufficient if the house was, in fact, the actual dwelling of such person. The court will not inquire into the tenure or interest which such person has in the house burned. It is enough that it was his actual

dwelling at the time. *People v. Van Blaricum*, 2 Johns. (N. Y.) 105.

The burning of a dwelling house being an offense against the habitation, the ownership should be laid in the occupier; and where the indictment laid the ownership of a dwelling in one Jennie Pharr, proof that she occupied the same by right of a contract for service with the actual owner, was held sufficient to sustain the averment. *Davis v. State*, 52 Ala. 357.

Where the evidence showed that the crib, charged to have been burned, was the property of joint tenants, but only in the actual occupancy of one of them, it was held proper to have laid the ownership in the indictment in the tenant who had the actual possession. *Adams v. State*, 62 Ala. 177.

Tenant at Will.—Where a father had orally given a house to his son, and the son had resided there for two years in full possession of the premises, the burning of the house would be an offense against the son and not against the father. *Wiley v. State* (Tex. Crim. App. 1895), 31 S. W. Rep. 393.

Tenant by Sufferance.—Where a laborer in husbandry was permitted to occupy a house as part of his wages, and after being discharged from his master's service, and told to quit the house in a month, remained in it after that period, it was held by the judges, upon an indictment for setting fire to the house, that it was rightfully described as being in the possession of the laborer. *Rex v. Wallis*, 1 Moo. C. C. 344.

Ownership must be Proven.—The ownership of the building burned must be proven, and a failure to do so with sufficient certainty will entitle the defendant to have a verdict against him set aside as without and contrary to evidence. *State v. Lyon*, 12 Conn. 487. But proof of actual occupation is sufficient proof of ownership. *People v. Scott*, 32 Cal. 200; *State v. Toole*, 29 Conn. 344, 76 Am. Dec. 602; *State v. Burrows*, 1 Houst. Cr. Cas. (Del.) 74; *State v. Taylor*, 45 Me. 322; *People v. Van Blaricum*, 2 Johns. (N. Y.) 105; *State v. Gailor*, 71 N. Car. 88, 17 Am. Rep. 3; *State v. Jaynes*, 78 N. Car. 504; *State v. Thompson*, 97 N. Car. 496; *Woolsey v. State*, 30 Tex. App. 346.

Where the Ownership of Property was Laid in the Parish, this was held sufficient without proof of the existence of such parish or of its incorporation. It is a political corporation, and the court will take judicial notice of the fact. *State v. Fulford*, 33 La. Ann. 679.

Where the indictment laid the ownership of the house burned in a certain person, and the proof was that it was the property of that person and his son jointly, it was held that, under the statute, this was not a material variance; that proof of interest in any part, or any part interest in the whole, would sustain the averment. *Com. v. Harney*, 10 Met. (Mass.) 422.

Owner of Fee Burning House in Possession of Tenant.—Thus, a landlord or reversioner, or a widow entitled to dower in a house, may commit arson by burning the house while in the possession of a lawful tenant.¹

Actual Occupant Burning House.—Upon the same principle, a lessee,² or mortgagor in possession,³ could not, at common law, commit arson by burning the house thus occupied by him; but this is now changed by statute in many of the states, so that it is arson in these states to burn any house, any other person having a beneficial interest therein.⁴

Occupant must Have an Interest in the House.—Though the least estate in the house occupied, such as a tenancy at will or by sufferance, will constitute the house, in law, the house of the occupant, a mere residence therein, without interest, will not suffice to do so. Where the occupant has no estate in the house, he may commit arson by burning it.⁵

5. The Time.—At common law the time when the burning occurs is not a material element of the offense, the crime being of equal enormity whether committed by night or by day; but under the statutes of some states the time when the burning occurs determines the degree of the offense.⁶ In

Nor would proof that it was the property of a firm of which defendant was a member, be a variance. *Com. v. Goldstein*, 114 Mass. 272.

1. If the Owner Burns His House while Occupied by a Tenant, it is arson. *Sullivan v. State*, 5 Stew. & P. (Ala.) 175; *Snyder v. People*, 26 Mich. 106, 12 Am. Rep. 303; *Ers- kine v. Com.*, 8 Gratt. (Va.) 624. See *State v. Lyon*, 12 Conn. 487; *State v. Toole*, 29 Conn. 342, 76 Am. Dec. 602; *Ritchey v. State*, 7 Blackf. (Ind.) 168; *Com. v. Dailey*, 110 Mass. 503; *People v. Van Blaricum*, 2 Johns. (N. Y.) 105; *Tuller v. State*, 8 Tex. App. 501.

If a Landlord or Reversioner Sets Fire to His Own House, of which another is in possession, under a lease from himself, or from those whose estate he hath, it shall be accounted arson; for during the lease the house is the property of the tenant. *Fost. 115*; 4 Black. Com. 221.

Widow Entitled to Dower.—In *Harris's Case*, 2 East P. C. 1023, a girl of fourteen years of age, but of sufficient understanding, was indicted, together with her mother as accessory before the fact, for burning a house in the possession of another. The mother held a dower estate in the house, but it had never been assigned her, and in lieu thereof she was receiving a rent from the occupant. It was held that the mother's estate in the property was immaterial, and that for the purposes of this suit the house was another's. Both were convicted.

2. Lessee of House Burning It.—A lessee is not guilty of felony in burning the premises occupied by him as such. *Rex v. Breeme*, 1 Leach C. C. 220, 2 East P. C. 1026; *Scofield's Case*, 2 East P. C. 1028; *Rex v. Holmes*, 2 East P. C. 1023; *Sullivan v. State*, 5 Stew. & P. (Ala.) 175; *State v. Lyon*, 12 Conn. 487; *M'Neal v. Woods*, 3 Blackf. (Ind.) 485; *Snyder v. People*, 26 Mich. 106, 12 Am. Rep. 303; *State v. Fish*, 27 N. J. L. 323; *People v. Smith*, 3 How. Pr. (N. Y. Supreme Ct.) 226; *State v. Sandy*, 3 Ired. (N. Car.) 570; *State v. Hannett*, 54 Vt. 83.

3. Mortgagor in Possession.—It was decided

that a person in possession of a copyhold dwelling house could not be guilty of arson by burning it, although he had a long time before surrendered it into the hands of the lord of the manor, to the use of another person, his heirs and assigns, for securing the payment of money borrowed; for it was considered that, while the tenant continued in possession, it was his own house. *Rex v. Spalding*, 1 Leach C. C. 218.

4. Statutes.—*People v. Simpson*, 50 Cal. 304; *State v. Moore*, 61 Mo. 276; *Allen v. State*, 10 Ohio St. 287.

5. Occupant must Have an Interest Therein.—It should be observed, however, that a mere residence in a house, without any interest therein, will not prevent it from being considered as the house of another; as where the prisoner was a poor man, maintained by a parish, and had, sometime before the commission of the crime, been put by the parish officers to live in the house which he was charged with burning, and was resident therein with his family at the time of the fact being committed, having the sole possession and occupation of it, but without payment of any rent; all the judges held that it could not be considered as his house, and that he was properly convicted of the arson. *Gowen's Case*, 2 East P. C. 1027.

A Mere Cropper, taking land on shares with a right to secure his crops in the barn on the premises, has no estate in the barn, nor such possession as to defeat an indictment against him for arson in burning such barn. *People v. Smith*, 3 How. Pr. (N. Y. Supreme Ct.) 226.

If a Clerk, Servant, or Employee Occupies a House for the Protection Thereof, but has no interest therein as lessee, or tenant at will, or tenant by sufferance, he cannot be said to be in possession, but his possession is the possession of his employer. *State v. Outlaw*, 72 N. Car. 598; *State v. Williams*, 90 N. Car. 724, 47 Am. Rep. 541. See also *Harvey v. State*, 67 Ga. 639.

6. The Time.—At common law, the felonious, wilful, and malicious burning of a dwelling

many states, to constitute arson in the first degree, the burning must occur in the nighttime.¹

III. PRINCIPAL AND ACCESSORY.—The general principles of law regulating the relations and criminal liability of principals and accessories apply to the case of persons engaging together in the commission of the crime of arson.²

IV. ATTEMPTS TO COMMIT ARSON.—An attempt to commit arson or other felony being in general the subject of special statutory provisions, the essentials of the offense differ in England and in the several states of the Union according to the provisions of the statutes creating it. Under some statutes, a mere soliciting of another to commit arson is a sufficient attempt to constitute the offense;³ under others, there must be some overt act proximate to the result sought to constitute it.⁴

house was of equal malignity and enormity whether committed by day or by night; by the *Virginia* statute it is a felony whether by day or by night, but more enormous in legal contemplation and more penal if done by night than by day. *Curran's Case*, 7 Gratt. (Va.) 619.

1. *State v. Gregory*, 33 La. Ann. 737; *State v. Haynes*, 66 Me. 307, 22 Am. Rep. 569; *Dick v. State*, 53 Miss. 384; *Lewis v. State*, 49 Miss. 354; *Shepherd v. People*, 19 N. Y. 537; *State v. Nolan*, 48 Kan. 723.

In *Brightwell v. State*, 41 Ga. 482, it was held that section 4318 of the Code of that state, which provides that "arson in the daytime shall be punished for a less period than arson in the nighttime," is merely addressed to the discretion of the court in fixing the sentence, and does not require that the indictment shall specify when the crime was committed so that failure to do so renders it demurrable.

2. **Principal and Accessory.**—See the title **ACCESSORY**, vol. I, p. 257.

It is not necessary, in order to render a person guilty of arson, that the torch be actually applied by him. If he is present, encouraging, instigating, and abetting others, or if he merely stands near to watch and give the alarm in case of apprehended detection, he is guilty as a principal. *State v. Squaires*, 2 Nev. 226; *People v. Trim*, 39 Cal. 75.

If one counsels or encourages another to set fire to a malthouse, and the other attempts to do so, both may be jointly indicted as principals for the misdemeanor of attempting to set the malthouse on fire, although the first be not present when the attempt is made. *Reg. v. Clayton*, 1 C. & K. 128, 47 E. C. L. 128.

Burning House at Owner's Solicitation.—In *State v. Haynes*, 66 Me. 307, 22 Am. Rep. 569, it was held that a servant could not be convicted of arson at common law or under the statute for burning his master's house at his request, for the purpose of defrauding an insurance company; that under the statute the master could not be convicted of burning his own house, and that the agent could not be convicted of a greater offense than the principal. And see *Com. v. Makely*, 131 Mass. 421.

3. **Mere Soliciting Sufficient to Constitute an Attempt.**—Merely soliciting another to commit arson, without any other act being done, is sufficient to warrant a conviction for an

attempt to commit the felony, even though the one soliciting did not mean to be present at the commission of the offense, and the other never intended to commit it. *People v. Bush*, 4 Hill (N. Y.) 133. See *Mackesey v. People*, 6 Park. Cr. Rep. (N. Y. Supreme Ct.) 114; *State v. Hayes*, 78 Mo. 307.

Evidence that the prisoner prepared camphene and other combustibles, and solicited another to use them in burning a barn, is sufficient proof to warrant his conviction of an attempt to commit arson. *McDermott v. People*, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 102.

4. **Under Some Statutes Overt Act Necessary.**—An "attempt to cause any building to be burnt," within the *Michigan* statute, requires some physical act, sufficiently proximate to the result to be caused, to stand either as the first or some subsequent step in the actual endeavor to really bring about or accomplish the crime. It must amount to something more than a preparation for an attempt to cause. Mere solicitation and furnishing oil and matches will not amount to an attempt, when no actual effort was made to set fire to the premises. *McDade v. People*, 29 Mich. 50. But if the solicitation is followed by an actual attempt, the crime is complete. *People v. Thompson*, 37 Mich. 118.

What Is a Sufficient Overt Act.—It is a sufficient overt act to render a person liable to be found guilty of attempting to set fire to a stack, if he goes to the stack with the intention of setting fire to it, and lights a lucifer match for that purpose, but abandons the attempt because he finds that he is being watched. *Reg. v. Taylor*, 1 F. & F. 511. In this case, Pollock, C. B., told the jury that if they thought the prisoner intended to set fire to the stack, and that he would have done so if he had not been interrupted, this was, in his opinion, a sufficient attempt to set fire to the stack within the meaning of the statute. "It is clear," said the learned judge, "that every act committed by a person with the view of committing the felonies therein mentioned is not within the statute; as, for instance, buying a box of lucifer matches with intent to set fire to a house. The act must be one immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances as that he has the power of carrying his intention into execution. If two persons were to agree to commit

V. EVIDENCE—1. The Corpus Delicti—Must be Proven.—On an indictment for arson, as in other criminal prosecutions, no conviction can be had without proof of the *corpus delicti*.¹ Thus it is not competent to convict a defendant on his bare confession, without proof other than his own statement that the crime was actually committed.²

What Constitutes the Corpus Delicti.—The *corpus delicti* of arson is not the fact that a house was burned, but that it was burned by the wilful act of some person criminally responsible for his acts, and not by natural or accidental causes.³

Corpus Delicti—How Proven.—Any circumstances tending to rebut the presumption that the burning was accidental may be given in evidence as proof of the *corpus delicti*.⁴

a felony, and one of them were, in execution of his share in the transaction, to purchase an instrument for the purpose, that would be a sufficient overt act in an indictment for conspiracy, but not in an indictment of this nature." See *Brown v. State*, 79 Ala. 51.

Under the *Iowa* statute, placing a lighted candle among a lot of hay and grain in a barn, in such a position that the natural and probable result of the act would be to burn the barn, was held to be a setting fire with intent to burn within the meaning of section 3885. *State v. Johnson*, 19 Iowa 230.

The defendant, having made preparations for burning a building, left his supposed accomplice at the building, saying he would go and get some matches, but did not return, and an hour or so afterward was arrested. It was held that his failure to return was not proof that he had abandoned his purpose. When the evil intent is supplemented by the requisite act toward its commission, the offense is complete. *State v. Hayes*, 78 Mo. 307.

1. Corpus Delicti must be Proven.—*Sam v. State*, 33 Miss. 347; *State v. Roe*, 12 Vt. 93; *Brown v. Com.*, 87 Va. 215, 89 Va. 379.

It is always necessary in every case to prove that a crime has been committed. In the case of arson, there can be no conviction without satisfactory proof that the building was feloniously, wilfully, and maliciously burned by some one, and was not accidentally burned. *State v. Carroll*, 85 Iowa 1.

When a house is burned, and nothing appears but that fact, the law implies that the fire was the result of accident or some providential cause, rather than of a criminal design. *Phillips v. State*, 29 Ga. 105; *Stallings v. State*, 47 Ga. 572.

2. Confessions Alone Insufficient to Convict.—*Allen v. State*, 91 Ga. 189; *State v. Carroll*, 85 Iowa 1; *People v. Burton*, 77 Hun (N. Y.) 498; *Wolf v. Com.*, 30 Gratt. (Va.) 833; *Early v. Com.*, 86 Va. 921.

In *Stallings v. State*, 47 Ga. 572, in a charge approved on appeal by the Supreme Court, the trial court instructed the jury as follows: "When a dwelling house is burned, the law presumes that it was accidentally burned, and before you can convict any one upon his confession, no matter how clear, full, and satisfactory the confession, nor how freely and voluntarily made, you must be satisfied beyond a reasonable doubt that the house was not accidentally burned, but was burned by

some one intentionally. If you are not satisfied on this subject beyond a reasonable doubt, you will have to acquit the defendant, no matter if he has freely and voluntarily confessed it."

Under section 3739 of the *Georgia Code*, "a confession alone, uncorroborated by other evidence, will not justify a conviction;" and in *Murray v. State*, 43 Ga. 256, where a prisoner was convicted on his confession, and the only corroborating evidence was the fact that the ginhouse was burned about the time he stated he set fire to it, the verdict, on appeal, was set aside for want of proof of the *corpus delicti*.

In a criminal case a conviction cannot be had on the extra-judicial confessions of the defendant, without proof *aliunde* of the *corpus delicti*; but direct and positive proof of the fact is not indispensable. *Winslow v. State*, 76 Ala. 42.

Conviction cannot be had upon a bare confession, but, if corroborated by attendant circumstances, it may be sufficient. The force to be given to the corroboration must be left to the jury. *Smith v. State*, 64 Ga. 605.

3. Winslow v. State, 76 Ala. 42; *Sam v. State*, 33 Miss. 347; *State v. Jones*, 106 Mo. 302.

4. Evidence of Felonious Burning.—Among the chief *indicia* which go to substantiate at once the *corpus delicti* and the guilt of a prisoner indicted for arson are the circumstances that the fire broke out suddenly in an uninhabited house or in different parts of the same building, and that the accused had a cause of ill-will against the sufferer or had been heard to threaten him. *Sawyers v. Com.*, 88 Va. 356.

Evidence showing that the fire occurred about midnight, at a part of the house in which no fire had been used during the day or night, and, when first discovered, was burning on the outside of the house, and that a fresh track was discovered the next morning in a lane leading from a public road to the house, which track corresponded with the defendant's, is *prima facie* sufficient proof of the *corpus delicti* to render the defendant's confessions admissible as evidence. *Winslow v. State*, 76 Ala. 42.

In *People v. Sevine* (Cal. 1889), 22 Pac. Rep. 969, evidence that, after the fire had been extinguished, a quantity of rags saturated with coal oil had been found in the saloon, and the remains of a candle, showing the

Testimony of Accomplice.—It is competent for the prosecution to prove the *corpus delicti* by the testimony of an accomplice, and, in the absence of statute, for the jury to convict upon such evidence;¹ but it is usual for the court to advise the jury not to convict unless there is other evidence in corroboration; and by statute, in many jurisdictions, corroborative evidence is required.²

means by which the fire had been communicated to the rags, was held proof of the *corpus delicti*.

As evidence of the *corpus delicti*, the testimony of a witness that he "thought the house was set on fire by some one," was held to be improperly admitted. *State v. Nolan*, 48 Kan. 723.

Evidence of experiments made subsequently to the fire, is admissible in order to show the way in which the building was set fire to. *Reg. v. Hesselstine*, 12 Cox C. C. 404.

Evidence of Other Fires.—Evidence of the burning, at almost the same time, of another building belonging to the owner of the one for the burning of which the prisoner is indicted, is admissible as tending to show that the fires were of incendiary origin and were part of one scheme concocted by the defendant and his associate. *Wright v. People*, 1 N. Y. Crim. Rep. 462.

In *State v. McMahon*, 17 Nev. 365, evidence of ten other fires, happening within two months, was admitted as tending to show that the fire charged in the indictment was not accidental, but of incendiary origin.

On an indictment for wilfully setting fire to a rick by firing a gun close to it, evidence was allowed to be given, by Maule, J., with a view of showing that the fire was not accidental, that on a previous occasion the prisoner was seen near the rick with a gun in his hand, and that the rick was then also on fire. *Reg. v. Dossett*, 2 C. & K. 306, 61 E. C. L. 306. See generally *Brock v. State*, 26 Ala. 104; *State v. Rohfrischt*, 12 La. Ann. 382.

Previous Attempts.—In *Reg. v. Bailey*, 2 Cox C. C. 311, where the prisoner was charged with wilfully setting fire to her master's house, evidence of the previous and abortive attempts of some one to set fire to different portions of the same premises was held admissible, though there was no evidence to connect the prisoner with either attempt.

Evidence that the defendant, five or six months before the burning charged in the indictment, requested a person (the witness) to burn the house, is admissible. *Martin v. State*, 28 Ala. 71.

Evidence that the prisoner had attempted to set fire to the house on a day previous to the burning alleged in the indictment, may be admitted for the purpose of showing that the burning was felonious. *People v. Shainwold*, 51 Cal. 468.

In *Com. v. McCarthy*, 119 Mass. 354, evidence that the defendant, on two previous occasions, had set fire to a shed ten feet distant from the building and connected therewith by a flight of stairs, was held competent as evidence that the burning of the building was not accidental but felonious.

It is competent for the commonwealth to

show, as evidence that the burning was wilful and intentional, and not the result of accident or negligence, that three days prior to the burning the defendant attempted to set fire to the same building. *Com. v. Bradford*, 126 Mass. 42.

Circumstances in Defendant's Favor—When Allowed.—When the state relies on circumstantial evidence to convict, the defendant should be allowed the benefit of any circumstances in his favor. And so in *Hamilton v. People*, 29 Mich. 173, where the defendant was charged with burning his barn with intent to defraud insurers, it was held error to have excluded the testimony for the defense that persons had been in the habit of playing cards in the barn, with lights, as fire might have taken in that way, and all circumstances bearing on the probabilities were material.

And in *State v. Delaney* (Iowa 1894), 61 N. W. Rep. 189, where the defendant was charged with setting fire to his premises, and the evidence against him was mostly circumstantial, he testified that there was a gasoline stove in the room where the fire caught, and wished to introduce evidence that on one occasion the stove had leaked and caught fire from that cause. This evidence was excluded, but upon appeal it was held that, as the evidence of the defendant's guilt was circumstantial, he should have been permitted to have had the benefit of any circumstances in his favor tending to show that the fire was accidental.

But in *Com. v. Gauvin*, 143 Mass. 134, where the evidence tended to show that the fire was of incendiary origin, the defendant offered to prove that there were two other fires in the same neighborhood shortly before the fire alleged in the indictment, and contended that the three fires were set by the same person, and by some person other than the defendant, it was held that the evidence offered was properly excluded.

1. Testimony of Accomplices.—*State v. Kingsbury*, 58 Me. 238; *Hoyt v. People*, 140 Ill. 588. See the title ACCOMPLICES, vol. 1, p. 399.

2. Corroboration of Accomplice.—See the title ACCOMPLICES, vol. 1, p. 400, *et seq.*

In *Johnson v. State*, 65 Ind. 204, a witness testified that one W. and himself had been employed to burn a grocery store, the intent being to defraud an insurance company; that the owner had told W. he could have what goods he could carry away, and that W. did carry away some goods, and afterwards they burned the building. Three witnesses were permitted to testify that some months afterwards they had bought groceries at different times from W.'s wife. This evidence was held admissible as tending in some slight degree to corroborate the testimony of the accomplice.

2. Evidence of Motive.—When arson has been committed, and circumstances point to the accused as the perpetrator, any facts tending to show a motive for the crime are admissible in evidence.¹

Threats.—Thus threats made by the accused against the property of the defendant may be shown to prove the existence of malice, and to connect the accused with the crime.²

1. Evidence of Malicious Motive.—In *People v. Murphy*, 135 N. Y. 450, the indictment was for setting fire to a barn. The defendant had been employed by the owner as coachman and gardener, and had been discharged. A poisonous preparation had been kept in the barn, and had been used by the defendant to destroy insects. The prosecution was permitted to prove that the night of the fire, and before it occurred, certain animals in the barn were poisoned with this preparation, and that the carriages and cutters belonging to the owner of the barn were cut and damaged, while those belonging to another person in the same barn were not injured. It was held that this evidence was competent as tending to prove that the fire was not accidental, and that it was instigated by malice, and committed by some person having an intimate knowledge of the surroundings.

In *State v. Ward*, 61 Vt. 153, evidence that the defendant had had intimate relations with the foster daughter of the prosecutor, and that these relations had been broken off by the influence of the prosecutor and his wife, whereupon the defendant had been greatly incensed, was held to be properly admitted for the purpose of showing a motive for the crime.

If there was a controversy between the defendant and the occupants of the house burned, as to the ownership of the property, and it was shown that the defendant knew the occupants had a certificate of entry for the land, which certificate was in the house at the time of the alleged burning, proof of these facts would be admissible to show a motive for the burning. *Winslow v. State*, 76 Ala. 42.

Where, on a prosecution for arson, it appeared that the defendant had beaten his stepdaughter and driven her from his house, and that the house burned was that in which the stepdaughter had taken refuge, it was held that evidence of the defendant's treatment of her was admissible in order to show a motive for burning the house. *Oliver v. State*, 33 Tex. Crim. Rep. 541. See *Johnson v. State*, 89 Ga. 107.

Evidence of Reward.—In *State v. Green*, 92 N. Car. 779, the evidence was circumstantial, and it was the theory of the state that the motive of the defendant was the hope of reward, and that he had been promised remuneration in money by some one for setting fire to a gin, for the burning of which he was indicted. Evidence tending to show, by the defendant's own declarations, that he had no money before the burning, but that he expected to have money shortly after the burning, and that he did have money very soon thereafter, was held admissible.

Committing Arson to Conceal Other Crimes.—In *State v. Travis*, 39 La. Ann. 356, where

the defendants were charged with the burning of a courthouse, it was held proper to show that there were documents in the building burned that involved and necessitated the prosecution of the defendants for crime, since the circumstance was a powerful motive for the perpetration of the act charged against them, and that proof of such motive would, in itself, be a circumstance tending to establish their guilt. See also *State v. Phifer*, 90 N. Car. 721.

On a trial for arson, evidence of a previous larceny and forgery committed by the defendant will not be admissible unless it is shown that the arson was committed to conceal the other crimes, or that they were all parts of a common design to injure the prosecutor. *State v. Miller*, 47 Wis. 530.

2. Evidence of Threats.—*Alabama.*—Overstreet v. State, 46 Ala. 35; *Hinds v. State*, 55 Ala. 145; *Hudson v. State*, 61 Ala. 333; *McAdory v. State*, 62 Ala. 154; *Winslow v. State*, 76 Ala. 42.

California.—*People v. Lattimore*, 86 Cal. 403.

Georgia.—*Brooks v. State*, 51 Ga. 612; *Johnson v. State*, 89 Ga. 107.

Illinois.—*Carlton v. People*, 150 Ill. 181.

Louisiana.—*State v. Fulford*, 33 La. Ann. 679.

Maine.—*State v. Fenlason*, 78 Me. 495; *State v. Day*, 79 Me. 120.

Massachusetts.—*Com. v. Goodwin*, 14 Gray (Mass.) 55; *Com. v. Quinn*, 150 Mass. 401.

Michigan.—*People v. Eaton*, 59 Mich. 559.

Missouri.—*State v. Crawford*, 99 Mo. 74.

Nevada.—*State v. McMahon*, 17 Nev. 365.

North Carolina.—*State v. Thompson*, 97 N. Car. 496; *State v. Rhodes*, 111 N. Car. 647.

Tennessee.—*Hensley v. State*, 9 Humph. (Tenn.) 243.

Texas.—*Davis v. State*, 15 Tex. App. 594.

Vermont.—*State v. Hannett*, 54 Vt. 83; *State v. Emery*, 59 Vt. 84.

Virginia.—*Bond v. Com.*, 83 Va. 581; *Sawyers v. Com.*, 88 Va. 356.

West Virginia.—*Gregg v. State*, 3 W. Va. 705.

General Threats Inadmissible.—Threats, to be admissible, must have been made with reference to the burning of the property for which the defendant is on trial. General threats of personal violence, made by the defendant against the prosecutor and others who had testified against him in a certain suit, are not admissible. *State v. Smalley*, 50 Vt. 736.

Threats Not Incompetent by Lapse of Time.—The length of time which elapsed between the utterance of the threats and the burning of the building charged in the indictment, while affecting the value of the evidence and its sufficiency to connect the accused with the

Excessive Insurance.—Where the defendant is charged with burning his own house to defraud an insurance company, the value of the house and contents and of the amount of insurance thereon, may be shown in evidence as tending to establish the existence of a probable motive.¹

3. Evidence of Defendant's Presence.—The presence of the accused at the scene of the crime, at or about the time of its commission, may be shown in

crime, does not affect its admissibility. *Hinds v. State*, 55 Ala. 145; *Hudson v. State*, 61 Ala. 333; *State v. Fulford*, 33 La. Ann. 679; *Com. v. Goodwin*, 14 Gray (Mass.) 55; *Com. v. Quinn*, 150 Mass. 401; *People v. Eaton*, 59 Mich. 559. See *State v. Fenlason*, 78 Me. 498.

Evidence Explaining Threats Admissible.—In *Gregg v. State*, 3 W. Va. 705, the defendant was indicted for burning a courthouse containing the records of the county. On the trial, evidence was introduced by the state to prove that a decree entered in the records which were burned, was had for the sale of the real estate of the accused, and that he said, when speaking about this decree, that he had "three ways of heading the K. lawyers;" and also that he said that he had not received justice in K. in the suit about which the decree was had; and to another witness, prior thereto, that the courthouse ought to be burned, and he would do it if the suit went against him. The defendant then offered to introduce, as rebutting testimony, a certificate of protection in bankruptcy granted to him, which the court, on objection being made, refused to permit to be read in evidence. It was held that the court erred in the refusal, as the certificate should have gone to the jury, to explain, as far as it might in their minds, the previous declaration of the prisoner.

When Evidence of Threats of Others Admissible.—Upon the trial of an indictment for arson, the defendant was convicted on proof of threats against the owner of the house, similarity of tracks, and the defendant's presence in the neighborhood at the time of the burning. The defendant offered to prove that another person had threatened to burn the house and was in the neighborhood when it was burned. The exclusion of this evidence was held erroneous. As the evidence was entirely circumstantial, the defendant should have been given the benefit of any circumstances in her favor. *Hensley v. State*, 9 Humph. (Tenn.) 243.

1. Excessive Insurance—Evidence of Motive.—*People v. Sevine* (Cal. 1889), 22 Pac. Rep. 969; *Com. v. Hudson*, 97 Mass. 565; *Com. v. McCarthy*, 119 Mass. 354; *Shepherd v. People*, 19 N. Y. 537; *Hennessey v. People*, 21 How. Pr. (N. Y. Supreme Ct.) 239; *State v. Cohn*, 9 Nev. 179.

Under an indictment for arson, where the crime is alleged to have been committed for the purpose of defrauding an insurance company which had issued a policy of insurance upon the building burned, it is competent for the state to give in evidence a claim made by the defendant for the property destroyed, and to prove that he put a value upon it in excess

of its real worth, not for the purpose of impeaching the character of the accused, but as tending to show a motive to commit the crime. *Stitz v. State*, 104 Ind. 359.

Where the defendant is charged with attempting to burn his goods with intent to defraud an insurance company, if the written application, signed by the defendant, states upon its face the value of the goods, it may be offered in evidence; and the verbal statements of value, made at the time by the defendant to the insurance agent, are inadmissible. *People v. Jones*, 24 Mich. 215.

Pecuniary Circumstances of Accused.—The premises set on fire being the property of the defendant, it was held that certain drafts, drawn by the defendant partly before, and in part after, the fire, and evidencing an indebtedness that existed mostly at the time of the fire, were properly admitted on behalf of the state for the purpose of showing the defendant's financial condition at the time of the fire. *State v. Hull*, 83 Iowa 112.

In *Reg. v. Grant*, 4 F. & F. 322, on an indictment for arson, one count laying an intent to defraud, and it being opened for the prosecution that the motive might have been to realize the money insured by the prisoner upon her goods, evidence was received that she was in easy circumstances, with a view to show that she was, at all events, under no pecuniary temptation to commit such an act.

Overvaluation Not Conclusive Evidence of Motive.—The overvaluation of house or goods, by one accused of burning them to defraud the insurer, is not necessarily evidence of wicked motive or criminal intent. Such overvaluation may result from honest mistake of value, and the accused is entitled to an instruction to this effect. *Stitz v. State*, 104 Ind. 359.

Evidence of Burning of Other Insured Property Belonging to Defendant.—Upon a trial for arson with intent to defraud an insurance company, evidence that the prisoner had made claims on two other insurance companies in respect of fires which had occurred previously, and in succession, was admitted for the purpose of showing that the fire which formed the subject of the trial was the result of design and not of accident. *Reg. v. Gray*, 4 F. & F. 1102.

But evidence showing that, upwards of five years previous, several buildings in which the prisoner had some interest, and which were insured, were burned, is irrelevant when there is no logical relation between the former fires and the present one, except that they may have all resulted from the criminal disposition of the prisoner. *State v. Raymond*, 53 N. J. L. 260.

evidence.¹ Such presence may be for an innocent purpose, and is not conclusive evidence of guilt, but, if not explained, it is a strong circumstance against the accused, to be weighed by the jury.²

Tracks and Footprints, when properly identified, furnish strong evidence of the defendant's presence.³

Possession of Goods.—Evidence of the possession, by the accused, of goods proven to have been in the burnt house immediately before the burning, is admissible.⁴ The finding of such goods is not proof of arson, but it is a circumstance, connected with other evidence, which the jury may consider in making up their verdict.⁵

1. Evidence of Defendant's Presence.—*State v. Burgor* (Iowa 1895), 62 N. W. Rep. 696; *State v. Tennehom* (Iowa 1894), 61 N. W. Rep. 193.

Evidence that the defendant was seen looking about the scene of the alleged crime, taking notice of localities and objects, may be admitted in evidence. *State v. Crawford*, 99 Mo. 74.

In *Reg. v. Taylor*, 5 Cox C. C. 136, on an indictment for arson in setting fire to a rick, the property of A, evidence was allowed of the prisoner's presence and demeanor at fires of other ricks, the property respectively of B and C, occurring the same night, although those fires were the subject of other indictments against the prisoner, such evidence being important to explain his movements and general conduct before and after the fire of A's rick; but evidence is not admissible of threats, of statements, or of particular acts, pointing alone to other indictments, and not tending to implicate or explain the conduct of the prisoner in reference to the fire in question.

2. Shannon v. State, 57 Ga. 482; *State v. Johnson*, 19 Iowa 230.

3. Tracks and Footprints.—Tracks made in the soil, although they correspond in dimensions with the shoes worn by the person charged, have but little significance, unless there is some distinguishing peculiarity in such tracks and shoes. *People v. Newton*, 3 N. Y. Crim. Rep. 406.

A Similarity of Footprints Alone will not justify a conviction where the state has failed to show any motive for the deed, and the presence of the footprints is not inconsistent with the innocence of the defendant. *State v. Johnson*, 19 Iowa 230.

Peculiarity of Footprints.—In *Hester v. State*, 17 Ga. 130, on an indictment for arson, there was testimony that tracks were discovered leading through plowed ground to and from the building burned. A witness testified that he believed these were the defendant's tracks, because he had been a good deal with him and had noticed his tracks, and had never seen anybody else that made tracks exactly like them; that the defendant's toes turned out in walking more than any person's he ever saw, and that the tracks followed turned out like the defendant's and were about the same size. This evidence was held to have been properly admitted. See also *Shannon v. State*, 57 Ga. 482; *Com. v. Phillips* (Ky. 1890), 14 S. W. Rep. 378.

4. Possession of Goods—Evidence of Presence.

—In *Rickman's Case*, 2 East P. C. 1035, the proof adduced, by the first witness, of the prisoners' having been present in the house and implicated in the fact, was that a bed and blankets were afterwards found in their possession, which had been taken out of the house at the time it was fired, and concealed by them from that time. Buller, J., doubted at first whether such evidence of another felony could be admitted in support of this charge; but as it seemed to be all one act, although the prisoners came twice to the house fired, which was adjoining to their own, he admitted this amongst other evidence.

On a trial for the burning of a farmhouse, it was held that evidence that certain goods claimed by the state to have been taken from the burned house on the day of the fire were found locked up in trunks in the defendant's possession, was properly admitted. *State v. Vatter*, 71 Iowa 557.

Where the creating of an opportunity to commit larceny from one building seems to have been the motive for setting fire to another on the same premises, evidence of the larceny is admissible against the prisoner on his trial for the arson. Where two crimes are connected in time, place, and purpose, there is some probability that the perpetrator of one perpetrated both. *Jones v. State*, 63 Ga. 395.

5. Possession of Goods Merely a Suspicious Circumstance.—The finding of goods stolen from the burnt house, in the possession of the prisoner, would not be proof of arson; still it is a circumstance, connected with other evidence, which the jury may consider in making up their verdict. *Johnson v. State*, 48 Ga. 116.

So in *Fletcher v. State*, 90 Ga. 389, the following charge was held erroneous: "If it appeared to you that the house was feloniously burned; if it further appeared to you that the house was burned in the early morning, and that on the following night, in the immediate vicinity of such a house, the prisoner was found in possession of goods that were shown to have been in the house on the night immediately preceding the burning of the house; and if he failed to explain in what manner he became possessed of those goods, then you would be authorized, if that evidence was satisfactory to your mind, to find the defendant guilty of arson, the sufficiency and satisfactoriness of the testimony being a question entirely for you."

VI. PUNISHMENT.—Arson, at common law, is a felony punishable with death,¹ but under the statutes of most of the states it has been dealt with more mildly, being punishable by various terms of imprisonment, determined by the degree of the offense.²

ART.—See note 3.

In *State v. Gillis*, 4 Dev. (N. Car.) 606, where, upon the trial of an indictment for arson, the evidence was that, after the burning alleged, the prisoner had in his possession banknotes of similar issue and like denomination to some that were stolen from the house when the arson was committed, and that he gave contradictory accounts of the means by which he obtained them, it was held that an instruction to the jury that these contradictions were evidence that he did not come honestly by the banknotes, was not erroneous.

In *Whitfield v. State*, 25 Fla. 289, the prisoner was charged with burning the dwelling house of one K. The testimony showed that the house was burned on the night of August 3d, and that on the same night the defendant left Chuluota for Forest City in an empty one-horse wagon belonging to one W.; that the distance between the two places is about twenty-two miles, and that K.'s house was about midway between them; that next morning the defendant was found, between five and six o'clock, at his home in Forest City with W.'s horse and wagon, the wagon loaded with furniture. The furniture was identified as belonging to K., and as having been in his house a short time prior to the burning. There were wagon tracks to the corner of the fence near the inclosure, when the house was burned, and the tracks appeared to have come from towards Chuluota, and to have gone towards Forest City. There were footprints, shoe tracks, from where the wagon was stopped near K.'s house, to and from the house, the tracks being of different sizes, but seeming to have been made by the same person; and the evidence showed that at this time the defendant wore odd shoes, that is, one shoe of one size and the other of a different size. The defendant appeared to be the first person that knew of the burning, and spoke of it to several persons at different times and places. To one witness he said that there was a good rifle at K.'s house, and if he had known it he would have had it. When put upon the stand, he failed to explain how he knew there was a rifle there, and why, if he had known it, he would have had it. He explained his possession of the furniture by saying he had bought it from W., but his statement of the time when he purchased it from W. was subsequent to the time when it had been seen in his possession. Upon this evidence he was found guilty, and, upon appeal, the evidence was declared sufficient to warrant the finding.

1. **Punishment—Common Law.**—1 Hale P. C. 566, 570; 3 Inst. 66; 2 East P. C. 1015.

2. **Punishment—Statutes.**—In *Alabama*, on a conviction for arson in the first degree, the jury are required to determine the punishment, subject only to the restriction of the

minimum sentence. In the other degrees, the punishment is fixed by the court. *Davis v. State*, 52 Ala. 357.

In *California*, upon a conviction of arson, it is the duty of the jury to find the degree of the crime of which the prisoner is guilty. *People v. Coch*, 53 Cal. 627. And see generally, *Aikman v. Com.* (Ky. 1892), 18 S. W. Rep. 937; *State v. Nolan*, 48 Kan. 723; *Leonard v. State*, 96 Ala. 108.

3. **Polite, Liberal, Useful, or Mechanical Art.**—A polite or liberal *art* is that in which the mind or imagination is chiefly concerned, as poetry, music, and painting. A useful or mechanical *art* is that in which the hands and body are more concerned than the brain. *New Orleans v. Robira*, 42 La. Ann. 1100. And in that case it was held that photography was a liberal *art*, and a photographer does not fall within a statute exempting those engaged in mechanical pursuits.

Art Institute—Indefiniteness of Bequest.—In *Almy v. Jones*, 17 R. I. 266, a testator had bequeathed a sum of money for an *art* institute in the city of P. It was contended that the bequest was void for indefiniteness. The court held that the objection was untenable, and said: "It is contended that the bequest in the first clause is void for indefiniteness, it being uncertain what is meant by an '*art* institute,' owing to the indeterminateness of the word *art*, and still more uncertain what is meant by an institute for the promotion of *art* 'worthy of the city' of Providence. It is true the word *art* is sometimes used very broadly; as, for instance, when it is used in contradistinction to 'nature,' or in the phrase 'the *arts* of war and peace.' But it is also used, especially when used without any qualifying adjective or phrase, to signify *art* in its higher manifestations, or *art par excellence*, as it is represented in works of *art* by those who are distinctively denominated artists. In this sense the word is used to designate the group of *arts* known as the fine *arts*, as distinguished from the useful, or mechanical and industrial *arts*. We think the word has this more distinctive meaning in the first clause of the will. The language of the codicil confirms this interpretation. The testator there, describing the twenty-five thousand dollars bequeathed in the first clause as 'a fund given for the encouragement of *art*,' declares that he wishes the income 'to become at once available,' evidently meaning that he wishes it to become available for the purpose for which the fund was given, namely, 'the encouragement of *art*,' and to that end directs its distribution in annual prizes for the best works 'of the fine *arts*' produced during the year by Rhode Island artists. We think there can be no doubt that what is meant by an '*art* institute' is an institution or establish-

ARTESIAN WELLS. (See also the title UNDERGROUND WATERS.)—An artesian well is a perpendicular perforation or boring into the ground, deep enough to reach a subterranean body of water, of which the sources are higher than the place where the perforation is made, and so force up to the surface a constant stream of water.¹

ment resembling such as exist in Europe for the promotion of the fine *arts*, of the *arts* whose aim is beauty rather than utility, though not necessarily to the exclusion of utility when the two can be combined."

Terms of Art.—As to the construction of terms of *art* in contracts, statutes, etc., see the titles CONTRACTS; STATUTES; WILLS; WORKING CONTRACTS.

Patent Law. (See the title PATENT LAW for a full exposition.)—*Art*, as used in patent law, signifies the employment of means to a desired end, or the adaptation of powers in the natural world to the uses of life. *Piper v. Brown*, 1 Holmes (U. S.) 21.

Same—Synonymous with Process or Method.—Process or method, when used to represent the means of producing a beneficial result, is in law synonymous with *art*, provided the means are not effected by mechanism or mechanical combinations. *Piper v. Brown*, 1 Holmes (U. S.) 22.

Same—Useful Art.—"A process *eo nomine* is not made the subject of a patent in our act of Congress. It is included under the general term 'useful *art*.' An *art* may require one or more processes or machines in order to produce a certain result or manufacture." *Corning v. Burden*, 15 How. (U. S.) 267.

Same—Examples.—In *Jacobs v. Baker*, 7 Wall. (U. S.) 295, it is said: "Now, without attempting to define the term '*art*' with logical accuracy, we take as examples of it, some things which, in their concrete form, exhibit what we all concede to come within a correct definition, such as the *art* of printing, that of telegraphy, or that of photography. The *art* of tanning leather might also come within the category, because it requires various processes and manipulations."

Same—Description.—In the patent acts the word *art* means a useful *art*, or a manufacture which is beneficial, and which, by the same law, is required to be described with exactness in its mode of operation. *Smith v. Downing*, 1 Fisher Pat. Cas. 64, 70.

To Use an Art.—In a custom of a city forbidding persons to use an *art*, trade, etc., these words signify to use as a master or principal. *Clark v. Denton*, 1 B. & Ad. 92, 20 E. C. L. 352.

Copyright.—The description of an *art* in a book, though entitled to the benefit of copyright, lays no foundation for an exclusive claim to the *art* itself. The object of the one is explanation; the object of the other is use. The former may be secured by copyright. The latter can only be secured, if it can be secured at all, by letters-patent. *Baker v. Selden*, 101 U. S. 105.

Art Union—Lotteries. (See also the title LOTTERIES.)—An annual distribution by lot, among the members of an *art* union, of works of *art* purchased by their subscription, is a lottery, and renders the parties liable to

the penalty therefor. *Almshouse v. American Art Union*, 7 N. Y. 228, 13 Barb. (N. Y.) 577. But it does not subject the property to forfeiture under the statute. *People v. American Art Union*, 7 N. Y. 240, reversing 13 Barb. (N. Y.) 577, and overruling *Bennett v. American Art Union*, 5 Sandf. (N. Y.) 614.

1. *Andrews v. Cross*, 8 Fed. Rep. 275.

Distinguished from Ordinary Well.—"Two forms of well have long been known: one, the ordinary domestic well; the other, the *artesian well*. In the ordinary well, the wellpit is sunk to a water-bearing stratum of the earth, from which the water will, by reason of the natural forces operating upon it, as it lies in the earth, ooze or flow from the earth into the bottom of the pit, as a reservoir, in sufficient quantities for the ordinary purposes of domestic use. In the *artesian well*, the wellpit is sunk in the earth until a water-bearing stratum is reached where the water lies under the pressure of such a head, that, when struck by the wellpit, it will come into the pit so rapidly that a stream of water is produced, flowing, by the force of its own current, from the earth, into and through the wellpit, to the surface. These two forms are not different in their method of operation. Both rely upon the natural forces, as they are found operating upon the water in the water-bearing stratum reached by the wellpit, to force the water from the earth into the pit. In both these forms the pit has uniformly been made by loosening the earth or rock and removing it upwards and out upon the surface, either by means of the spade, or the drill or auger, and the sand bucket." *Andrews v. Carman*, 13 Blatchf. (U. S.) 309.

Same—Failure to Perform Contract.—In *Foster v. Joliet*, 27 Fed. Rep. 899, it was held that where one contracted to supply water from *artesian wells*, supplying water from other sources equally good or better was not a compliance with the contract; and the court distinguished an *artesian well* from the well furnished by the plaintiff as follows: "The chief difficulty I have encountered in the case is the fact that the contract required that *artesian wells* should be sunk to procure the water supply. Since the complainant, Foster, has had possession of the works, a well about thirty feet deep has been sunk, which would seem, from the proof, to furnish an ample supply of water; but it is not an '*artesian well*,' as that term is usually understood and defined. In *Ure's Dictionary of Arts, Manufactures, and Mines* an '*artesian well*' is defined to be 'a well or bore-hole, in which water is obtained by means of a perforation bored vertically down through impermeable strata, into underlying strata of a more or less permeable character, such stratum to be charged with water. * * * Properly speaking, an *artesian well* is one in which the water

ARTICLE.—The ordinary definition of the word “article” is an extremely comprehensive one. In the primary meaning, as given in the dictionaries,

from the lower stratum rises above the surface of the superincumbent impermeable strata, but, by extension, the phrase has been applied of late years to any wells in which waters of the lower stratum are enabled to rise sufficiently near to the surface to allow of their being economically used.’ That is to say, an *artesian well* need not be a flowing well, but the water must come from beneath the impermeable stratum, so as to be uncontaminated by surface matter. Thus, the city of London contains a large number of so-called ‘*artesian wells*,’ sunk through the ‘London clay,’ as it is termed, and through the rock underlying this clay, into the chalk formation, where the water is found; but these wells do not overflow, the water being obtained from them by pumps. The well sunk by complainant, while it passes through a comparatively thin layer of clay, cannot, I think, be called an ‘*artesian well*;’ the stratum of clay overlying the water-bearing stratum of gravel not being thick enough, nor shown to be extensive enough, to make it certain that objectionable surface seepage will not at times contaminate the water.”

Bounties for Sinking Artesian Wells—Nevada Statute.—The Nevada Act of March 5, 1887, § 1, provided for the payment of bounties by the state for the sinking of *artesian wells* of a given capacity. The Act of March 7, 1889, amended the former act by fixing different bounties, to be graduated according to the depth of wells, and providing that “no two wells shall receive a bounty if located in the same county,” and further providing that “where two or more wells within the prescribed limit apply for a bounty, the well which first furnished the amount of water required by this act shall be entitled to the bounty.” The amendment was made by enacting that the former act “is hereby amended so as to read as follows,” setting forth section 1 of the Act of 1887, as amended, without any words of repeal. It was held that the effect of reenacting the section of the former act, with amendments incorporated therein, was not to repeal and reenact it, but that it continued uninterruptedly in force, and that the amendatory act was to be construed in connection with it, so that where a well was sunk and a bounty granted for it under the original act, another bounty would not be granted under the amendatory act for a well sunk within the prescribed limit. *State v. Horton*, 21 Nev. 300.

Same—Purpose of the Legislature.—The purpose of the legislature in providing for the payment of bounties by the state for sinking *artesian wells* was to encourage experiments in places where it was uncertain whether water could be obtained, and it did not contemplate the payment of bounties for wells sunk in places where it had been practically demonstrated by bounties paid by the state that *artesian* water could be obtained. *State v. Horton*, 21 Nev. 300.

Dakota Statute—Review of Establishment by

Certiorari.—Sections 2090–2140, inclusive, Comp. Laws Dakota, provided for the location, establishment, and construction of *artesian wells*, and the probate judge was made *ex-officio artesian well* commissioner for his county. Section 2097 provided that before the commissioner took any action towards locating or establishing any such well, an application should be filed with him, signed as therein set forth. Section 2116 provided that the proceedings in establishing any such well might be reviewed upon certiorari, within a time therein limited, and prescribed the practice in that respect, and further declared that if no certiorari were brought within the time so limited, the well should be deemed to have been legally established, and its legality should not thereafter be questioned. Upon an affidavit for writ of certiorari to bring up the record of such well commissioner for review, stating that no application, signed as required by law, was presented to or filed with the well commissioner, and that he made his order establishing such well, without such application, and it appearing that no certiorari was brought within the time limited as above, it was held that the establishment of the well must be deemed to be legal, and that certiorari would not lie to review the action of the well commissioner in establishing the same. *State v. Board of Assessment*, 1 S. Dak. 62.

Same—Board of Assessment.—A new law upon the subject of *artesian wells* took effect July 1, 1889, which provided for the completion of proceedings initiated under the old law, and the further proceedings after the establishment of the well were had under the new law (chapter 14, Laws 1889). Section 14 of this law provides for a board of assessment to apportion and assess the cost of construction of any such well, to be composed of the well commissioner, the chairman of the board of county commissioners, and the county treasurer. Section 18 provides that if any member of said board is disqualified for causes therein stated, the sheriff shall take the place of such disqualified member, or, if the sheriff is so disqualified, the coroner shall act on said board. From the procuring affidavit of the relator it appeared that the well commissioner was so disqualified, and did not act on said board; that the chairman of the board of county commissioners, the county treasurer, and the sheriff were all duly qualified; but that the board which did meet, and assumed to make the assessment complained of, consisted of the county treasurer and coroner only. No reason appearing therefor, it was held that the county treasurer and coroner did not constitute a board of assessment under the law, and their attempted assessments were void. Such self-constituted board having no legal existence had no functions, judicial or otherwise, and could make no record which could be brought to this court upon certiorari. *State v. Board of Assessment*, 1 S. Dak. 62.

it designates one thing of many, one item of several, a portion of a complex whole.¹

Patents.—As to patents on processes for boring, see *Andrews v. Cross*, 8 Fed. Rep. 275; *Andrews v. Carman*, 13 Blatchf. (U. S.) 309. And see the title PATENT LAW.

1. *Junge v. Hedden*, 37 Fed. Rep. 197, affirmed in 146 U. S. 238.

"Article, as defined by lexicographers, is 'a distinct portion or part, a joint or a part or member, one of various things,' etc. It is a word of separation to individualize and distinguish some particular thing from the general thing or whole of which it forms a part, as an *article* in an agreement, an *article* of faith, an *article* of a newspaper, or an *article* of merchandise. It is derived from the Greek, the original or radical word meaning to join or to fit to as a part, and it is only very recently, * * * that it has been applied to denote such material or corporeal things as goods or physical property, and then only in the sense of something that is separate and individual in itself, as salt is a necessary *article*, or a hammer is a useful *article*." *Wetzell v. Dinsmore*, 4 Daly (N. Y.) 195, reversed in 54 N. Y. 496.

Other Valuable Article—Ice.—A statute making it a trespass to remove from the lands of another any tree, stone, timber, or "other valuable *article*," was held to include the removing of ice. *State v. Pottmeyer*, 33 Ind. 402, 5 Am. Rep. 224.

Article of Food.—Rye-chop, which is food for horses, does not come within an act making it unlawful for any person to buy up "any provision or *article* of food coming to market." *Botelov v. Washington*, 2 Cranch (C. C.) 676.

Baggage—"Articles, Goods, or Things," in an act making a railway company liable for loss or injury to "any *articles*, goods, or things" in the receiving, forwarding, or delivering thereof, occasioned by negligence of the company or its servants, was held to include a passenger's luggage. *Cohen v. South Eastern R. Co.*, 2 Exch. Div. 253.

Watch—Articles of Gold and Silver Manufacture.—Gold and silver watches and watch-chains, though usually worn about the person, were held to come within this definition, in an act limiting an innkeeper's liability on compliance with certain requirements. *Stewart v. Parsons*, 24 Wis. 241.

Money—Articles and Necessaries.—Under the Bankruptcy Act, money could not be set apart by the assignee to the bankrupt as coming within the description of "other *articles* and necessities of such bankrupt," unless such money was the proceeds of specific things which could be set apart under this head; and a classification of the goods sold, as "dry and fancy goods," was held insufficient. *In re Welch*, 5 Ben. (U. S.) 230.

Insurance. (See the title MARINE INSURANCE.)—The words "all other *articles* perishable in their own nature," in a policy of insurance, mean "those *articles* not particularly enumerated, which are liable to perish of themselves in the course of the voyage, without any external injury." *Astor v. Union*

Ins. Co., 7 Cow. (N. Y.) 216. But where "dried fish" were included in the memorandum, the above expression was held not to include "pickled fish," as *expressio unius exclusio est alterius*. *Baker v. Ludlow*, 2 Johns. Cas. (N. Y.) 289.

Articles of Comfort and Support for which the wife's estate might become liable were held to include medicines and the professional services of a physician. *May v. Smith*, 48 Ala. 483. See the title SEPARATE PROPERTY OF MARRIED WOMEN.

Articles of Glass.—Under the tariff act of July 30, 1846, imposing certain duties on "manufactures, *articles*, vessels, and wares of glass," all kinds of window glass were held to be included. *Roosevelt v. Maxwell*, 3 Blatchf. (U. S.) 391.

Articles Subject to Legal Restrictions.—See the title FIRE INSURANCE; and see LEGAL.

Revenue Laws.—See the title REVENUE LAWS.

Articles and Effects.—See EFFECTS.

Articles of Necessity.—As to the construction of this term within the Sunday Law, see NECESSITY; and see the title SUNDAY.

Articles Used in Packing. (See the title FIRE INSURANCE.)—In an insurance policy this term was held to cover coal in a yard which was shown to be necessary in carrying on the packing business. *Phoenix Ins. Co. v. Favorite*, 49 Ill. 259. See also *Home Ins. Co. v. Favorite*, 46 Ill. 270.

Growing Crop—Article of Personal Property.—In *State v. Williams*, 32 Minn. 539, a growing crop was held to be an *article* of personal property within a statute against fraudulent sales. The court said: "The words of the statute are not very aptly chosen, but the word '*article*' is here used in the sense of one of many, and the expression 'any *article* of personal property' means any kind of personal property; that is, any personal property."

Carrier Limiting His Liability upon the Article Forwarded. (See also the titles CARRIERS OF GOODS; EXPRESS COMPANIES.)—A transportation company received a package containing three cases of a particular drug separately addressed to the plaintiffs, and then wrapped up in a proper cover in a single package similarly addressed. The receipt or bill of lading contained a clause that the holder should not demand more than fifty dollars for any loss or damage to the "*article* forwarded." But one of the cases reached the plaintiffs. It was held that "the *article* forwarded" was the single package, and that the plaintiffs were not entitled to recover fifty dollars upon each of the missing cases; but *quære* whether if the cases had contained different kinds of drugs, and the company had had knowledge of that fact, the decision would have been different. *Wetzell v. Dinsmore*, 54 N. Y. 496, overruling 4 Daly (N. Y.) 195.

Same—Baggage. (See also the title BAGGAGE.)—But a printed notice given by a carrier that he would not become liable for baggage for an amount exceeding one hundred

ARTICULATE SPEECH.—Articulate speech is an uttered sound produced by the human voice.¹

ARTIFICE.—In its bad sense “artifice” is defined as a trick or fraud.²

ARTIFICER.—An artificer is one by whom anything is made.³

dollars upon “any *article*,” was held to qualify his responsibility, not as to a trunk or piece of baggage and its entire contents in gross, but as to any *article* contained in the piece of baggage, not exceeding one hundred dollars for any single item. *Hopkins v. Westcott*, 6 Blatchf. (U. S.) 64.

Article or Part of an Article in the Factory Acts Extension Act, 30 and 31 Vict., c. 103, § 3, does not include a “ship,” though it does an “iron plate,” although the same may be used in shipbuilding. *Palmer's Shipbuilding, etc., Co. v. Chaytor*, L. R. 4 Q. B. 209, 10 B. & S. 177. (See also **FACTORY ACT**.)

Article of Manufacture.—An act passed to protect designers against copiers of their designs, in respect of the application thereof to ornamenting any “*article of manufacture*,” by complying with certain provisions, was held to include pattern pieces of paper hangings. “It is equally an article of manufacture or an article of trade, whether it be manufactured and sold as a pattern or for actual use.” *Heywood v. Potter*, 1 El. & Bl. 439, 72 E. C. L. 439. (See also **MANUFACTURE**.)

Articles and Commodities.—Where a statute forbade any person to sell to any slave any *article* or “commodity,” it was held that the words *article* and “commodity” embraced most movable things which could become the subject of commerce. *Shuttleworth v. State*, 35 Ala. 417.

Ejusdem Generis—Articles or Objects.—Under an act requiring a certain statement to be made in returns or lists of “income or *articles* or objects charged with an internal tax,” it was held that the latter word included gross receipts, while *articles* might “be deemed to apply to enumerated goods in use or on sale, or produced by manufacture, already specified in the law.” *Wells v. Shook*, 8 Blatchf. (U. S.) 257.

Same—Any Other Article or Thing.—An act forbidding the conveyance into any prison, with intent to facilitate the escape of a prisoner, of any mask, dress, or other disguise, or of “any other *article* or thing,” was held to include a crowbar. *Reg. v. Payne*, L. R. 1 C. C. 27.

Same—Articles and Effects.—But where the words of the statute were “*articles* and effects,” they were held to be *ejusdem generis* with those which went before, and not to apply to a yacht. *In re Blake*, 1 Jebb 71.

Articles Composed of India Rubber.—In *Junge v. Hedden*, 146 U. S. 238, affirming *Junge v. Hedden*, 37 Fed. Rep. 197, the court said: “In common usage, ‘*article*’ is applied to almost every separate substance or material, whether as a member of a class, or as a particular substance or commodity.” And it was held in that case that the term in the paragraph prescribing the tax on *articles* composed of India rubber was used in a broad sense and covered equally things manufactured, things

unmanufactured, and things partly manufactured.

Horses.—In *Llandaff, etc., Dist. Market Co. v. Lyndon*, 8 C. B. N. S. 515, 98 E. C. L. 515, it was held that a horse was an *article* within a statute forbidding the sale of *articles* in respect to which market tolls were by the statute authorized to be taken.

Articles Demanded.—As to the meaning of these words in the English statute prohibiting the sale to a purchaser of an *article* not of the nature, substance, or quality of the article demanded by the purchaser, see *White v. Bywater*, 19 Q. B. Div. 582; *Morton v. Green*, 4 Couper's Justiciary Rep. 469; *Knight v. Bowers*, 14 Q. B. Div. 845; *Higgins v. Hall*, 50 J. P. 788; *Lane v. Collins*, 14 Q. B. Div. 193; *Horder v. Grainger*, 44 J. P. 188. See also the title **ADULTERATION**, vol. 1, p. 738.

1. Vocal Sound and Articulate Speech.—*Telephone Cases*, 126 U. S. 532. This was a patent case. The court further said: “It is contended, however, that ‘vocal sounds’ and ‘*articulate speech*’ are not convertible terms, either in acoustics or in telegraphy. It is unnecessary to determine whether this is so or not. *Articulate speech* necessarily implies a sound produced by the human voice, and, as the patent on its face is for the art of changing the intensity of a continuous current of electricity by the undulations of the air caused by sonorous vibrations, and speech can only be communicated by such vibrations, the transmission of speech in this way must be included in the art. The question is not whether ‘vocal sounds’ and *articulate speech* are used synonymously as scientific terms, but whether the sound of *articulate speech* is one of the ‘vocal or other sounds’ referred to in this claim of the patent. We have no hesitation in saying that it is, and that if the patent can be sustained to the full extent of what is now contended for, it gives to Bell, and those who claim under him, the exclusive use of his art for that purpose until the expiration of the statutory term of his patented rights.”

2. *Webst. Dict.*, followed in *State v. Hemm*, 82 Iowa 617, a seduction case. See also *Hawn v. Baughart*, 76 Iowa 683. And see the title **SEDUCTION**.

3. *Johnson's Dict.*; *Parkerson v. Wightman*, 4 Strobb. (S. Car.) 365.

An *artificer* is a skilled workman. *Morgan v. London General Omnibus Co.*, 13 Q. B. Div. 832.

Distinguished from Merchant.—“Only those who traffic in the way of commerce by importation or exportation, or carry on business by way of emption, vendition, barter, permutation, or exchange, and who make it their living to buy and sell by a continued assiduity or frequent negotiation in the mystery of merchandise, are esteemed merchants. Those who buy goods to reduce them by their own

ARTIFICIAL.—See note 1.

ARTIFICIAL PERSONS. (See also the title CORPORATIONS.)—Artificial persons are such as are created and devised by human laws, for the purposes of society and government, and called corporations or bodies politic.²

ARTISAN.—See note 3.

art or industry into other forms and then to sell them are *artificers*, not merchants." Jac. L. Dict., *quoted in* Lansdale v. Brashear, 3 T. B. Mon. (Ky.) 335.

English Statute.—Within the repealed English statute of 4 Geo. IV., c. 34, which enacted that if any *artificer* broke his contract with his employer, he should be committed to a house of correction, it was held that skilled men employed to plate a vessel were within the meaning of the term *artificers*. Lawrence v. Todd, 14 C. B. N. S. 554, 108 E. C. L. 554.

Nor is one less an *artificer* because he is at liberty to employ other workmen under him. Lawrence v. Todd, 14 C. B. N. S. 554, 108 E. C. L. 554.

Same—Master Tailor.—And so a master tailor was held an *artificer*. *Ex p.* Gordon, 25 L. J. M. C. 12.

Same—Manual Labor Required.—"A designer of patterns for a calico-printer was held an *artificer*. *Ex p.* Ormerod, 13 L. J. M. C. 73, 1 D. & L. 825. In that case Williams, J. (as reported in 1 D. & L.), said: 'I cannot conceive that the word *artificer* only applies to persons engaged in such occupations as require *merely* manual labor. The party who makes this application to the court, himself states that he is a pattern designer, a person in fact who makes the drawing of the pattern, which is then engraved on the printing rollers, and subsequently transferred in colors to the fabric itself. He is therefore the party who sets all in motion. He contributes in the most material degree to the printing of calico, and may therefore, I think, be properly included under the term *artificer*.' As reported in the Law Journal, Williams, J., commenced these observations thus: 'I cannot conceive that the term *artificer*, used in the statute, is confined to those instances only in which *great* manual labor is required.' But whether *mere* or *great* were the word used by that learned judge, there can be little doubt that the personal exercise of some manual labor, and that of a skilled kind, is essential to the term *artificer*.' Stroud's Judicial Dict.

Truck or Store Order Acts. (See also the title STORE ORDER ACTS.)—In the Truck Act (1 and 2 Wm. IV., c. 37) it is enacted in the interpretation clause "that in the meaning and for the purposes of this act all workmen, laborers, and other persons in any manner engaged in the performance of any work, employment, or operation of what nature soever, in or about the several trades and occupations aforesaid, shall be and be deemed *artificers*." The term *artificers* in this act has been held to apply only to those who are actually and personally employed to do the work, and not where the procuring work to be done by the hands of others comprehends the whole of what a man contracts for, not even where the

employee may do some portion of the work himself. Ingram v. Barnes, 7 El. & Bl. 119, 90 E. C. L. 119.

"If the contract is not for the labor, but for the result or effect of the labor, as for instance a contract for the removal of a quantity of clay, that is not within the act, because there the contract is not for the labor, but for that which the labor is to accomplish." Sleeman v. Barrett, 2 H. & C. 942. See to the same effect Sharman v. Sanders, 13 C. B. 166, 76 E. C. L. 166.

For other cases construing the term as used in this act, see Bowers v. Lovekin, 6 El. & Bl. 584, 88 E. C. L. 584; Weaver v. Floyd, 21 L. J. Q. B. 151; Riley v. Warden, 2 Exch. 59; Pillar v. Llynvi Coal, etc., Co., L. R. 4 C. P. 752.

Sunday Law—Farmer.—A farmer is not within a statute enacting that no tradesman, *artificer*, workman, laborer, or other person whatsoever should pursue his ordinary calling upon the Lord's Day. Reg. v. Cleworth, 4 B. & S. 927, 116 E. C. L. 927.

1. Artificial Road.—A proviso in a statute prohibited a railroad company from using any railroad, turnpike, or *artificial* road without obtaining the consent of the parties owning the same. It was held that the company could not use the paved streets of the city without the consent of the city council. The court said: "That graded and paved streets of the city are *artificial* roads, admits of no question. These are as much so as are turnpikes, which are but graded roads covered with gravel or stone. In a loose sense, most roads are *artificial* roads, but there are in our legislation many instances in which a distinction seems to have been made between the common country road and the streets of a city; and the fact that *artificial* roads are coupled with railroads and turnpikes evidences that the legislature had in view something *ejusdem generis*, something of the same nature as turnpikes. It is manifest that the phrase '*artificial* roads' was used to express more than was expressed by the words 'railroads' and 'turnpikes.' It is of larger significance. They are mentioned, and in addition to them a more comprehensive description of roads, to wit, *artificial* roads. What are these if not streets of the city graded and paved? Nothing else than such streets seems to meet the added description, unless it be plankroads, and if such alone were intended, it would have been natural to have named them with railroads and turnpikes rather than to have used a more comprehensive term." Com. v. Central, etc., R. Co., 52 Pa. St. 506.

2. 1 Bl. Com., *quoted in* Thompson v. Bacon, 22 Wend. (N. Y.) 590.

3. Mechanic's Lien. (See also the title MECHANIC'S LIEN.)—In Raines v. Dooley, 23 Ark. 329, it was held that a lumberman was not an

ARTIST.—See note 1.

AS.—The word “as” is defined as follows: Like, similar, of the same kind, or in the same manner, in the manner in which.² When the context seems

artisan, builder, or mechanic, and, therefore, was not entitled to a lien under the *Arkansas* statute.

1. **Professional Artist.** (See also the title **CONTRACT LABOR LAW**.)—A woman who is engaged as a milliner is not a professional *artist* within the exception of the act of Congress prohibiting the immigration of aliens under a contract to perform labor. The court said: “It is claimed by the defendant, firstly, that this case is taken out of the operation of this act by the use, in the proviso of the fifth section, of the words ‘professional *artist*,’ this lady, with whom he contracted in Paris to perform labor or service here, and whose passage he paid, being, as he claims, a ‘professional *artist*’ within the meaning of that proviso. It is well settled by authority (*Mailard v. Lawrence*, 16 How. (U. S.) 251) that the popular and received import of words furnishes the general rule for the interpretation of public laws. Under this rule, defendant’s contention is unsound. Milliners, dress-makers, tailors, cooks, and barbers (some of whom, no doubt, call themselves *artists*), are not *artists* within the popular and received import of that word.” *U. S. v. Thompson*, 41 Fed. Rep. 29.

2. *Hooper v. Wells*, 27 Cal. 30, 85 Am. Dec. 211. See also *Den v. Cubberly*, 12 N. J. L. 314.

As in the Sense of When.—*As* is sometimes read “when;” for example, in a direction that property shall be divided among children, share and share alike, *as* they arrive at the age of twenty-one. *Seibert’s Appeal*, 13 Pa. St. 504.

Bills and Notes.—As to the effect of a party signing a bill or note “as agent,” “as guardian,” etc., see the title **AGENCY**, vol. 1, p. 1042.

As Executor.—See the title **EXECUTORS AND ADMINISTRATORS**.

As Administrator.—See the title **EXECUTORS AND ADMINISTRATORS**.

As the Crow Flies.—See **CROW**.

As Far.—See **FAR**.

As Follows.—See **FOLLOWS**.

As Fast.—See **FAST**.

As For.—See **FOR**.

As Is Most Convenient.—See **CONVENIENT**.

As Limited by Law.—See **LIMITED**.

As Long as.—See **LONG**.

As Near as may Be.—See **NEAR**.

As Represented.—See **REPRESENTED**.

As Soon as Possible.—See **SOON**.

As Such.—See **SUCH**.

As To.—See **TO**.

As Trustees.—See the title **TRUSTS AND TRUSTEES**.

As Aforesaid—Statutes. (See also **AFORESAID**, vol. 1, p. 918.)—Where an act (Stat. 12 and 11 Vict., c. 92, § 3) prohibited the keeping or using or acting in the management of any place for the purpose of fighting or baiting any bull, etc., and imposed a penalty therefor, and then went on: “and every person who shall in any manner encourage, aid, or assist at the fighting or baiting of any bull, etc., *as aforesaid*, shall forfeit and pay a penalty not ex-

ceeding five pounds for every such offense,” it was held that *as aforesaid* meant in a place so used as is mentioned before, and that a person did not incur this latter penalty by aiding and assisting at cockfighting in any place, but only if the place was one so kept or used for the purpose as to subject the keeper of it to the penalty imposed by the first clause of the section. *Clark v. Hague*, 2 El. & El. 281, 105 E. C. L. 281.

Where a testator made a certain devise with limitations, and then in a second clause made a devise over *as aforesaid*, it was held that the words *as aforesaid* drew down to the second clause the limitations of the first, and showed that the testator meant that the devisees over should take the same estate as they would have done had the devise passed to them under the limitations in the first clause. *Meredith v. Meredith*, 10 East 503.

Same—Wills. (See also the title **WILLS**.)—A trust in a will, in relation to devises and bequests previously given and by the words of the will restrained to property “devised and bequeathed *as aforesaid*,” will not extend to different bequests subsequently given by codicil in lieu of those given by the will. *Roberts v. Wills*, 20 N. J. L. 591.

Same—To What the Words Refer.—In *Den v. Zabriskie*, 15 N. J. L. 411, it was said: “The ground taken by the plaintiffs’ counsel was that the testator’s daughter, *Adriantye*, took a fee simple, and this construction was attempted to be sustained and fortified by a critical examination of the latter clause, or rather the repetition of the devise, to which is annexed the exclusion of the husband. The testator, after giving the estate to his daughter, ‘and to her heirs lawfully from her body begotten,’ adds, ‘which said estate I do hereby devise and bequeath unto my said daughter *Adriantye*, and to her heirs and assigns, *as aforesaid*, exclusive of her said husband, etc.’ First: it is said the words *as aforesaid*, in this latter clause, refer to and are substituted for the word ‘forever’ in the first clause, and then it will be read, ‘which said estate I devise and bequeath to my said daughter *Adriantye*, her heirs and assigns forever.’ So making by this latter clause, which must prevail over the former, a complete gift in fee in express terms. This argument is ingenious, but not sound. Instead of introducing a new devise in the will, the testator only recited the one already made, for the simple purpose of coupling it with an exclusion of the husband, and, for the sake of brevity, omits the formal words of limitation, substituting for them the words *as aforesaid*. So that those words refer to and stand for the particular description of heirs before mentioned, and not exclusively to the word ‘forever.’ This, I think, is the plain and true reading of the will, and therefore that the criticism of the plaintiffs’ counsel will not help him.”

As My Own—Deed or Will.—A clause in an instrument read: “The condition of the above

to require it, "as" is equivalent to "it" or "that" or "which."¹

ASCENDANT. (See also ANCESTOR; and the title SUCCESSION.)—The word "ascendant" has two meanings. It includes persons related or connected in the ascending line by consanguinity or affinity, and in the more restricted sense it includes only those related by consanguinity.²

ASCERTAIN.—To ascertain means to make sure or certain, to fix, to establish, to determine, to settle.³

ASPHALT.—See note 4.

ASPHYXIA.—"Asphyxia" is defined originally as a want of pulse, or cessation of the motion of the heart and arteries; as now used, apparent death or suspended animation, particularly from suffocation or drowning or the inhalation of irrespirable gases; recently applied also to the collapsed state in cholera, with want of pulse.⁵

ASPORTATION. (See also the title LARCENY.)—"Asportation" means a taking out of the possession of the owner without his privity and consent,

named gift is to take effect at my death; until then, the property is to remain *as* my own." The question arose whether the instrument was a deed or a will, and whether the donee took a present interest in it. The court said: "By this, when taken in connection with the words which precede it, we understand that the operation of the gift, so far as possession was concerned, was to be postponed until the death of the donor, up to which time the property was to remain, not his own, but *as* his own. The word *as*, in our opinion, is the qualifying word of the clause, and shows that the donor did not intend to hold the property absolutely up to the period to which he had postponed the enjoyment of the interest he had given." *Elmore v. Mustin*, 28 Ala. 309.

1. **Equivalent to It or That.**—Thus where a statute made abortion a crime, "unless the same were done *as* necessary for the preservation of the mother's life," it was held that this exception might be read "unless the same were done it were necessary," and that the exception was sufficiently negated by the words in the indictment, "it not being then and there necessary to administer said drug." *Beasley v. People*, 89 Ill. 577.

2. *Bernard v. Vignaud*, 10 Martin (La.) 561.

The term *ascendants* is opposed to "descendants." *Bryan v. Walton*, 20 Ga. 512.

3. *Worcester's Dict.*, followed in *Brown v. Lyddy*, 11 Hun (N.Y.) 451. In that case, a lease containing the privilege of renewal provided that if the parties were unable to agree upon the rent, an arbitrator should be chosen by each party, the two to determine the value of the lot. It also provided that if a renewal was refused, the lessor should pay to the lessee the value of the building on the lot "to be *ascertained* by three disinterested persons." It was held that it was intended that the value of the building should be *ascertained* in the same manner as that of the lot for the purpose of fixing the rent. The court said: "The word *ascertain*, however, has its meaning, and therefore its force. To make sure or certain; to fix; to establish; to determine; to settle, are the definitions of that word, according to *Worcester*, and this would seem to demand the observance of the usual mode of investigation in order to establish, to determine, to settle the value."

To *ascertain* means to find out. *Perry County v. Selma, etc.*, R. Co., 58 Ala. 565.

To *ascertain* is to find out or learn for a certainty by prior examination or experiment. *State v. Boyd*, 31 Neb. 734.

Ascertain has two meanings: First, known; second, made certain. *Sidebottom v. Sidebottom*, L. R. 2 P. & D. 365.

Ascertained in the Sense of Judicially Ascertained.—The constitution of *Nebraska* provides that in all cases of claims against corporations, the exact amount due shall be first *ascertained*, and after the corporate property shall have been exhausted the original subscribers thereof shall be individually liable. It was held that the word *ascertained* in this provision means judicially *ascertained*, and to judicially *ascertain* the amount due from a corporation to a creditor means to have the finding and judgment or decree of a court as to such amount. *Globe Pub. Co. v. State Bank*, 41 Neb. 194.

Condition Precedent.—Where money to be paid or service to be rendered has to be *ascertained* in a certain way, the words "to be *ascertained*" seem to imply a condition precedent. *Braunstein v. Accidental Ins. Co.*, 31 L. J. Q. B. 24.

Jurisdiction of Surrogate.—Where a statute provided that upon an application for the probate of a will, the surrogate shall *ascertain* whether any of the persons interested are minors, it was held that while it is common to furnish the requisite information in the original petition, no rule compels the surrogate to *ascertain* it in that way alone. And when after proceedings for probate actually begun, a minor becomes interested by reason of the death of one of the parties and the surrogate *ascertains* that fact, his duty and right to bring in such minor and appoint for him a special guardian is equally plain. *Russell v. Hartt*, 87 N. Y. 23.

4. **Asphalt Pavement.**—The ordinary paving called *asphalt* is the overlaying of a mixture of *asphalt*, lime, and sand upon a body of rock or stone. *Olsson v. Topeka*, 42 Kan. 712.

5. *State v. Baldwin*, 36 Kan. 20, in which case it was held that it was no error in the trial court to give this definition of *asphyxia*, taken from Webster's Dictionary. See also *U. S. v. Barber*, 20 D. C. 93.

and without the *animus revertendi*.¹

ASS.—See note 2.

ASSAILANT. (See the titles ASSAULT AND BATTERY; HOMICIDE; SELF-DEFENSE.)—An “assailant” means one who assails or assaults; the aggressor.³

1. *Wilson v. State*, 21 Md. 9.

2. In *Richardson v. Duncan*, 2 Heisk. (Tenn.) 220, it was held that an *ass* was within the meaning of the law exempting from execution a horse, mule, or yoke of oxen in the hands of a person engaged in agriculture.

3. *Scales v. State*, 96 Ala. 75. And in that case it was held that *assailant* meant the one who committed the first assault. The court said: “We do not think the Circuit Court erred in admitting the dying declarations in evidence. The brother of the deceased and the physician who wrote down what was said each testified that the deceased made the statements that were written down, and that his mind was clear at the time. The facts are unlike those presented in the case of *McHugh v. State*, 31 Ala. 317. Section 3727 of the Code of 1886 was made to figure in the trial of this case. Its language is: ‘When the killing in any sudden rencounter or affray is caused by the *assailant* by the use of a deadly weapon, which was concealed before commencement of the fight, his adversary having no deadly weapon drawn, such killing is murder in the second degree, and may, according to the circumstances, be murder in the first degree.’ What is the meaning of the word *assailant* in this section? *Assailant* means one who assails, or who assaults, the aggressor. All the testimony shows that *McCain* was the *assailant*, the one who committed the first assault, the one who struck the first blow. It follows that § 3727 of the Code has nothing to do with this case. If one assaulted, suddenly and under the maddening influence of the blow, slays the *assailant*, and there is nothing else in the transaction, this is manslaughter, and not murder. But murder ‘is frequently committed during personal rencounters into which the parties enter mutually, or in many cases in which the party slain strikes the first blow. Murderers sometimes provoke an enemy or in-

tended victim to assault them, that, under the protection which the law is supposed to furnish them, they may wreak vengeance upon him, who, by this contrivance, is made to appear to be the aggressor. A homicide thus perpetrated is the most atrocious murder in the first degree.’ *Mitchell v. State*, 60 Ala. 26; *Ex p. Nettles*, 58 Ala. 268. Another principle should be here stated. ‘If the blow given, or about to be given, be not such as to endanger his [the assaulted’s] life, or to expose him to grievous bodily harm, as the law defines that term, then a fatal blow struck by him, even from sudden passion and without formed design, is manslaughter in the first degree. And a killing under circumstances which do not amount to proof of formed design—willful, deliberate, malicious, and premeditated—which is defined above as constituting murder in the first degree, and which is not toned down to manslaughter, or to self-defense, as defined above, is murder in the second degree. We have spoken of formed design as of two classes, general and special. The former is evidenced by carrying weapons likely to produce death, with the purpose previously formed to use them in resentment of any blow that may be received, come from what quarter it may, even though the blow be of a character not endangering life or limb. Such formed design has no particular person as its objective aim. It is aimed at whoever may become the *assailant*. If preparation be made, and the design be formed and executed by slaying an adversary in resentment or resistance of a blow not likely to produce death, or inflict grievous bodily harm, this savors largely of the extreme wickedness of universal malice, and would be murder; and if such design was formed wilfully, and carried into execution pursuant to such formed design, this would be murder in the first degree.’ *Mitchell v. State*, 60 Ala. 26; *Ex p. Nettles*, 58 Ala. 268.”

ASSAULT AND BATTERY.

BY FRANK W. JONES.

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CROSS-REFERENCES.

As to matters of *PROCEDURE*, see the title *ASSAULT AND BATTERY* in the *ENCYCLOPÆDIA OF PLEADING AND PRACTICE*, vol. 2, p. 835.

For other matters of *SUBSTANTIVE LAW* and *EVIDENCE* related to this subject, see the following titles in this work: *ACCESSORY*, vol. 1, p. 257; *ACCIDENT*, vol. 1, p. 272; *ACCOMPLICES*, vol. 1, p. 389; *AFFRAY*, vol. 1, p. 915; *AIDER AND ABETTOR*; *BREACH OF THE PEACE*; *CRIMINAL LAW*; *DUELING*; *FALSE IMPRISONMENT*; *HOMICIDE*; *NEGLIGENCE*; *PRIZE FIGHT*; *RAPE*; *RIOT*; *ROUT*; *SELF-DEFENSE*; *UNLAWFUL ASSEMBLY*.

I. DEFINITIONS—Assault.—An assault is an attempt unlawfully to apply any, even the least, actual force to the person of another, directly or indirectly; the act of using gestures towards another, giving him reasonable ground to believe that the person using the gestures meant to apply such actual force to his person, as aforesaid; or the act of depriving another of his liberty; in either case, without the consent of the person assaulted, or with consent if it is obtained by fraud.¹

Battery.—A battery is an unlawful touching of the person of another by the aggressor himself, or by some substance set in motion by him.²

II. ESSENTIAL ELEMENTS OF AN ASSAULT OR BATTERY—1. Intent—How Far Essential.—To constitute an indictable assault or battery, there must always be an intent, expressed or implied, to do injury to another;³ but one may be liable

1. Stephen's Dig. of Crim. Law (Am. ed.) 181.

Other Definitions of Assault.—An assault is an attempt with force or violence to do a corporal injury to another, and may consist of any act tending to such corporal injury, accompanied with such circumstances as denote, at the time, an intention, coupled with the present ability, of using actual violence against the person. *Hays v. People*, 1 Hill (N. Y.) 351; *Tarver v. State*, 43 Ala. 354. See also *Bass v. State*, 6 Baxt. (Tenn.) 579.

It seems that an assault is an attempt or offer with force and violence to do a corporal hurt to another, as by striking at him with or without a weapon, or presenting a gun at him at such distance to which the gun will carry, or pointing a pitchfork at him standing within the reach of it, or by holding up one's fist at him, or by any other such like act done in an angry, threatening manner. 1 Hawk. P. C. (Curw. ed.), p. 110, § 1; *Bloomer v. State*, 3 Sneed (Tenn.) 66.

An assault is an attempt or offer to do personal violence to another; it is an inchoate violence with the present means of carrying the intent into effect. The intention to do harm is of

the essence of the offense, and this intention is to be ascertained by the jury from the circumstances. *Richels v. State*, 1 Sneed (Tenn.) 606; *Tarver v. State*, 43 Ala. 354; *People v. Lilley*, 43 Mich. 521.

2. *Kirland v. State*, 43 Ind. 153. See *Westcott v. Arbuckle*, 12 Ill. App. 577; *Hunt v. People*, 53 Ill. App. 111, 1 Bouvier's Inst., § 2214.

Other Definitions of Battery.—A battery consists in a violent, angry, rude, or insolent striking or touching of a person, either by the defendant or by any substance put in motion by him. 1 Hawk. P. C., c. 62, § 2.

A battery consists in the unlawful and unjustifiable use of force and violence, however slight, upon the person of another. *Com. v. McKie*, 1 Gray (Mass.) 61, 61 Am. Dec. 410; *Com. v. Clark*, 2 Met. (Mass.) 24; *Engelhardt v. State*, 88 Ala. 100, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 783.

The least touching of another in anger is a battery. *Per Holt, C. J.*, in *Cole v. Turner*, 6 Mod. 149.

3. **Intent—England.**—*Rex v. Gill*, 1 Stra. 190; *Weaver v. Ward*, Hob. 134; *Gibbons v. Pepper*, 4 Mod. 405; *Short v. Lovejoy*, Bull

in a civil action for assault or battery, where there was an entire absence of intent to do any injury, the ground of liability being that the assault was committed in the pursuance of an unlawful act or was the result of negligence.¹

Accidental Injury.—An accidental hurt, in which the actor is blameless, does not amount to a battery, and the person inflicting such injury is not liable either criminally or civilly.²

Intent Presumed.—If injury would be the natural consequence of the overt act on the part of the aggressor, an unlawful intent is presumed, unless such

N. P. 16; *Cole v. Turner*, 6 Mod. 149; *Coward v. Baddeley*, 4 H. & N. 478.

Alabama.—*State v. Blackwell*, 9 Ala. 79.

California.—*People v. McMakin*, 8 Cal.

547.

Illinois.—*Paxton v. Boyer*, 67 Ill. 132, 16 Am. Rep. 615.

Iowa.—*State v. Malcolm*, 8 Iowa 413.

Massachusetts.—*Com. v. Randall*, 4 Gray (Mass.) 36; *Brown v. Kendall*, 6 Cush. (Mass.) 292; *Com. v. Mann*, 116 Mass. 58.

Mississippi.—*Smith v. State*, 39 Miss. 521.

Missouri.—*State v. Sears*, 86 Mo. 169.

New York.—*People v. Terrell* (Supreme Ct.), 33 N. Y. St. Rep. 368.

Tennessee.—*Richels v. State*, 1 Sneed (Tenn.) 606.

Texas.—*Warren v. State*, 33 Tex. 517; *Berry v. State*, 30 Tex. App. 423.

See *Meredith v. State*, 60 Ala. 441; *Morris v. Platt*, 32 Conn. 75; *Woodruff v. Woodruff*, 22 Ga. 237; *State v. Neal*, 37 Me. 468; *Com. v. Bryant*, 9 Phila. (Pa.) 595.

See also *infra*, this title, *Evidence—Evidence of Intent*.

Intended Unlawful Violence.—An assault necessarily includes the idea of intended unlawful violence towards the person alleged to have been assaulted. In every assault, there must be an intent to injure. The test is, Was there, in fact, a present purpose of doing an injury? If so, the acts will amount to an assault; otherwise they may not. *White v. State*, 29 Tex. App. 530.

And when an assault is charged, the jury are to decide whether there was an intention to do any violence or injury. *Handy v. Johnson*, 5 Md. 450.

Offer to Strike—Condition Precedent.—*Pearson, C. J.*, in *State v. Myerfield*, Phil. (N. Car.) 108, said: "An offer to strike is an act which is the beginning of the act of striking, and most usually results in a blow, as, if one draws back his fist or raises a stick, it is violence begun to be executed, and amounts to an assault, being an offer to strike. This is the general rule. There are two exceptions: 1st. When the offer is explained by a declaration showing that it is not the intention of the party to strike; the law makes an allowance for the angry passions of man, and the act is treated as a mere gesture of passion. * * * 2d. When the offer is made with a condition precedent, showing that it is not the intention to strike, provided the condition is performed. In these cases a distinction is taken; if the condition is one which the party has a right to impose, the offer to strike unless the condition is complied with is not an assault; as, if one being forbidden is about to enter my

house, and I raise a stick and say, 'If you attempt to enter I will knock you down,' there is no assault. But if the condition be one which the party has no right to impose, the offer to strike is an assault, notwithstanding the condition, for no man can take advantage of his own wrong; as, if one raises a stick and says, 'Pull off your hat,' or 'Deliver up your money, or I will knock you down.' See *Keefe v. State*, 19 Ark. 190; *U. S. v. Myers*, 1 Cranch (C. C.) 310; *U. S. v. Richardson*, 5 Cranch (C. C.) 348.

1. *Leame v. Bray*, 3 East 593; *Weaver v. Ward*, 4 Hob. 134; *Underwood v. Hewson*, 1 Stra. 596; *Welch v. Durand*, 36 Conn. 182; *Paxton v. Boyer*, 67 Ill. 132; *Peterson v. Hafner*, 59 Ind. 130; *Beach v. Hancock*, 27 N. H. 223.

The case of *Scott v. Shepherd*, 2 W. Bl. 892, 3 Wils. 403, well known as the "Squib Case," is an illustration of a person being civilly liable for an assault without any special criminal intent. In that case, the defendant threw a lighted squib from the street into a market house, where a fair was being held and where there were various stands where people were selling pastry and other wares. The squib fell upon the stand of A, who, in order to prevent injury to himself and his wares, caught it up and threw it across the house, where it fell upon the stand of B, who, in the same way, caught it up and threw it away again, striking the plaintiff in the face and putting out his eye. It was held that the defendant was liable to the plaintiff in an action of assault and battery. *De Grey, C. J.*, in delivering judgment, said: "The throwing the squib by the defendant was an unlawful act at common law, as the squib had a natural power and tendency to do mischief indiscriminately. * * * No man contracts guilt in defending himself; the second and third men were not guilty of any trespass, but all the injury was done by the first act of the defendant. * * * For I conceive all the facts of throwing the squib must be considered as one single act, namely, the act of the defendant, the same as if it had been a cracker made with gunpowder which had bounded and rebounded again and again before it had struck out the plaintiff's eye."

For further discussion of this question, see *infra*, this title, *The Civil Action—When It Lies—Injuries Inflicted through Negligence*.

2. *Gibbons v. Pepper*, 4 Mod. 405; *Wakeman v. Robinson*, 1 Bing. 213, 8 E. C. L. 478; *Offman v. Eppers*, 41 Wis. 251.

For further discussion of this question, see *infra*, this title, *Defenses—Accident*.

presumption is repelled by the evidence.¹

Specific Intent need Not be Executed.—It is not necessary that the specific intent be executed, and so one who knowingly hurls a missile into a crowd, without aiming at any person in particular, commits, nevertheless, a battery upon the person struck.²

Intent and Injury must Concur.—To constitute a battery, the intent to injure must concur with the use of unlawful violence upon the person of the assaulted party, but the slightest degree of force suffices to constitute violence, and the intended injury may be to the feelings or mind of the latter, as well as to the corporeal person.³

1. *Studstill v. State*, 7 Ga. 2; *Hill v. State*, 63 Ga. 578, 36 Am. Rep. 120; *Perry v. People*, 14 Ill. 496; *Conn v. People*, 116 Ill. 458; *State v. Gilman*, 69 Me. 163, 31 Am. Rep. 257; *Com. v. Randall*, 4 Gray (Mass.) 36; *Com. v. McLaughlin*, 5 Allen (Mass.) 507; *People v. Jassino*, 100 Mich. 536; *Smith v. Com.*, 100 Pa. St. 324; *Jarnigan v. State*, 6 Tex. App. 465. See also *Ogletree v. State*, 28 Ala. 693; *Morgan v. State*, 33 Ala. 413; *Simpson v. State*, 59 Ala. 1, 31 Am. Rep. 1; *Lacefield v. State*, 34 Ark. 275, 36 Am. Rep. 8; *Handy v. Johnson*, 5 Md. 450; *Kuney v. Dutcher*, 56 Mich. 308; *Barcus v. State*, 49 Miss. 17, 19 Am. Rep. 1; *State v. Crawford*, 2 Dev. (N. Car.) 425; *Rex v. Howlett*, 7 C. & P. 274, 32 E. C. L. 508; *Reg. v. Jones*, 9 C. & P. 258, 38 E. C. L. 109.

Alleged Assault with Intent to Murder.—The accused, while intoxicated, and without provocation or known grudge, fired his pistol towards his friend and missed him, though but seven or eight feet distant. The court held that the material question thus raised was, whether the accused fired at the party for the purpose of striking him, or shot in mere bravado, and that this issue should have been submitted to the jury directly and distinctly, and not by mere implication; that a charge was erroneous which, in effect, assumed the purpose to strike, and which instructed the jury that the law implied malice from the deadly nature of the weapon used. *Walker v. State*, 7 Tex. App. 627. See also *Agitone v. State*, 41 Tex. 501.

In a prosecution for an assault with intent to murder, it is not error to instruct that the accused is presumed to have intended the natural and proximate consequences of his voluntary acts, but such presumption should be limited to actual results of the act proved. *Krchnavy v. State*, 43 Neb. 337.

Rebuttable Presumption.—The presumption, however, that one intends the consequences of his acts, is not conclusive in case of a crime, such as assault with intent to murder, the gist of which is the intent itself. *People v. Sweeney*, 55 Mich. 586.

2. *Reg. v. Smith*, 33 Eng. L. & Eq. 567; *James v. Campbell*, 5 C. & P. 372, 24 E. C. L. 367; *Scott v. Shepherd*, 2 W. Bl. 892, 3 Wils. 403; *Peterson v. Haffner*, 59 Ind. 130, 26 Am. Rep. 81; *Vandermark v. People*, 47 Ill. 122; *Dunaway v. People*, 110 Ill. 333, 51 Am. Rep. 686; *State v. Myers*, 19 Iowa 517; *Conway v. Reed*, 66 Mo. 346, 27 Am. Rep. 354; *Murphy v. State*, 43 Neb. 34; *Corning v. Corning*, 6 N. Y. 97; *Callahan v. State*, 21 Ohio St. 306;

Bratton v. State, 10 Humph. (Tenn.) 103; *Cowley v. State*, 10 Lea (Tenn.) 282; *State v. Meadows*, 18 W. Va. 658. But see *Com. v. Morgan*, 11 Bush (Ky.) 601.

General Malice.—Where a party charged with an assault with intent to commit murder insists that the prosecuting witness was shot by accident, and it is proven that the shooting was done recklessly, in utter disregard of the lives of others, the act of such party will be construed as implying general malice, rendering him amenable to the penalties of the law. *Vandermark v. People*, 47 Ill. 122.

Where a shot discharged at one injures another who is at the time known to be in such position or proximity that his injury may be reasonably apprehended as a probable consequence of the act, in such case the law does not permit such reckless disregard of, and indifference to, results to pass with impunity, but will hold the intent to have embraced the victim; and the principle is the same whether one or many are imperiled. *Callahan v. State*, 21 Ohio St. 306; *Walker v. State*, 8 Ind. 290; *Com. v. Lister*, 15 Phila. (Pa.) 405.

Attack upon Wrong Party.—A person intending to kill and murder his enemy, who mistakes in the dark a friend for such enemy, and assails him with a deadly weapon and dangerously wounds him, but desists from the attack as soon as he discovers his mistake, is guilty of an assault with intent to kill and murder. *McGehee v. State*, 62 Miss. 772, 52 Am. Rep. 209.

3. *Chamberlain v. Chandler*, 3 Mason (U. S.) 242; *State v. Epperson*, 27 Mo. 255; *Jarnigan v. State*, 6 Tex. App. 465; *Donaldson v. State*, 10 Tex. App. 307; *Floyd v. State*, 29 Tex. App. 341. See also *Higginbotham v. State*, 23 Tex. 574; *State v. Benedict*, 11 Vt. 236, 34 Am. Dec. 688.

Intention must Concur with the Act.—It was held in *Tuberville v. Savage*, 1 Mod. 3, that the intention must concur with the act, to constitute an assault, and that where a man laid his hand upon his sword, and said: "If it were not assize time, I would not tike such language," it was held to be no assault. *Blake v. Barnard*, 9 C. & P. 626, 38 E. C. L. 259.

In every assault, there must be an intention to injure, coupled with an act which must at least be the beginning of the attempt to injure then, and not an act of preparation for some contemplated injury that may afterwards be inflicted. *Collins v. State*, 43 Tex. 577; *Higginbotham v. State*, 23 Tex. 574.

Words Qualifying Threatening Act.—It is not sufficient to constitute an assault, that a man

2. Overt Act in Assault—*a*. GENERALLY.—To constitute an assault, there must be some demonstration of violence, some overt act which amounts to an attempt.¹

of ordinary firmness should believe he was about to be struck; but if it be collected from the circumstances that, notwithstanding appearances to the contrary, there was not a present intention to do an injury, there is no assault. Where the defendant, at the time he raised his whip and shook it at the plaintiff, though within striking distance, made use of the words, "Were you not an old man I would knock you down," this does not import a present intention to strike, and does not, in law, amount to an assault. *State v. Crow*, 1 Ired. (N. Car.) 375.

If a man raise his hand against another within striking distance, saying, "If it were not for your gray hairs I would tear your heart out," it is not an assault, because the words explain the action and repel the idea of an intent to strike. *Com. v. Eyre*, 1 S. & R. (Pa.) 347; *Chamberlain v. State*, 2 Tex. App. 451; *Bell v. State*, 29 Tex. 492; *Rainbolt v. State*, 34 Tex. 286.

Offer to Strike with Deadly Weapon.—In *State v. Myerfield*, Phil. (N. Car.) 108, the court said: "An offer to strike with the fist, or a stick or a whip, is not an assault, provided there be no present intention to strike, which may be inferred from the declarations of the party and the accompanying circumstances; or provided the intention to strike is made to depend upon a condition precedent which the party has a right to impose; but an offer to strike with a deadly weapon cannot be thus explained. There is in the nature of things a marked difference between the act of raising a stick, or a whip, and talking about striking 'with ifs and ands,' and the act of drawing a bowie knife, or of cocking a pistol and bringing it to bear upon the person. The former may be passed over as gestures of anger, but the latter cannot be explained away in that manner, and the law could not tolerate such acts and be true to itself." *State v. Morgan*, 3 Ired. (N. Car.) 186, 38 Am. Dec. 714; *State v. Hampton*, 63 N. Car. 13; *State v. Church*, 63 N. Car. 15.

1. England.—*Morton v. Shoppee*, 3 C. & P. 373, 14 E. C. L. 355; *Rawlings v. Till*, 3 M. & W. 28; *Stephen v. Myers*, 4 C. & P. 349, 19 E. C. L. 414; *Pursell v. Horn*, 8 Ad. & El. 602, 35 E. C. L. 472.

United States.—*U. S. v. Myers*, 1 Cranch (C. C.) 310; *U. S. v. Kierman*, 3 Cranch (C. C.) 435; *U. S. v. Hand*, 2 Wash. (U. S.) 435.

Alabama.—*State v. Blackwell*, 9 Ala. 79; *Balkum v. State*, 40 Ala. 671; *Engelhardt v. State*, 88 Ala. 100.

Arkansas.—*Yoes v. State*, 9 Ark. 42.

California.—*People v. Yslas*, 27 Cal. 630.

Georgia.—*Brown v. State*, 95 Ga. 481.

Indiana.—*Cutler v. State*, 59 Ind. 300.

Missouri.—*State v. Painter*, 67 Mo. 84.

New Hampshire.—*Beach v. Hancock*, 27 N. H. 223, 59 Am. Dec. 373; *State v. Gorham*, 55 N. H. 152.

New York.—*People v. Powers*, 1 Wheel.

Cr. Cas. (N. Y.) 405; *People v. Ryan*, 55 Hun (N. Y.) 214.

North Carolina.—*State v. Rawles*, 65 N. Car. 334; *State v. Neely*, 74 N. Car. 425, 21 Am. Rep. 496.

Tennessee.—*Bloomer v. State*, 3 Sneed (Tenn.) 66.

Texas.—*Cato v. State*, 4 Tex. App. 87.

Vermont.—*Clark v. Downing*, 55 Vt. 259, 45 Am. Rep. 612; *Bishop v. Ranney*, 59 Vt. 316.

Wisconsin.—*Barnes v. Martin*, 15 Wis. 240, 82 Am. Dec. 670.

See also *People v. Campbell*, 30 Cal. 312. See also *Lee v. State* (Tex. Crim. App. 1895), 31 S. W. Rep. 667.

Unequivocal Purpose of Violence United with Overt Act.—If A pursues B with a stick or piece of board raised in a striking attitude, and is stopped by a third person when within two or three steps of B, this constitutes an assault, although A could not have struck B with the stick in his hand at the place where he was stopped. *State v. Vannoy*, 65 N. Car. 532.

It is an assault to threaten a person with a dangerous weapon within striking distance, though the party threatened is not actually struck. *Liebstadter v. Federgreen* (Supreme Ct.), 29 N. Y. Supp. 1039; *State v. Lightsey*, 43 S. Car. 114.

In *State v. Davis*, 1 Ired. (N. Car.) 125, 35 Am. Dec. 735, *Gaston, J.*, said: "It is difficult in practice to draw the precise line which separates violence menaced from violence begun to be executed, for, until the execution of it has begun, there can be no assault. We think, however, that where an unequivocal purpose of violence is accompanied by any act which, if not stopped or diverted, will be followed by personal injury, the execution of the purpose is then begun, the battery is attempted." See also *State v. Gentry*, 2 Jones (N. Car.) 406; *State v. Reavis*, 113 N. Car. 677. See also the next subdivision, in the text of this article, *Ability in Assault*, and the notes thereto.

Drawing a Pistol.—To constitute an assault, there must be a commencement of an act which, if not prevented, would produce a battery; the drawing of a pistol without presenting or cocking it is not an assault. *Lawson v. State*, 30 Ala. 14. But if one should draw a pistol and present it at another person in a threatening manner, then he would be guilty of an assault. *State v. Dooley*, 121 Mo. 591.

Riding Threateningly Near a Person.—To ride a horse so near to one as to endanger his person and create a belief in his mind that it was the intention of the rider to ride over him, would be an assault. *State v. Sims*, 3 Strobb. (S. Car.) 137.

To attempt to run against the wagon of another person on a highway is an assault. *People v. Lee*, 1 Wheel. Cr. Cas. (N. Y.) 364.

Threats and Demonstrations of Violence.—Where the plaintiff was in defendant's workshop and refused to leave when desired, and

b. THREATS AND ABUSIVE LANGUAGE.—Mere words or menaces do not, of themselves, constitute an assault,¹ and consequently mere threatening language and abuse, however violent in its character, unaccompanied by any overt act of hostility, is no legal provocation for assault and battery.²

3. Ability in Assault.—The present apparent ability to execute the

the defendant and his servants surrounded him and tucked up their sleeves and aprons, and threatened to break his neck if he did not go out, whereupon the plaintiff, apprehensive of violence, departed, it was held to be an assault. *Read v. Coker*, 13 C. B. 850, 76 E. C. L. 850. See also *People v. Sayers* (Mich. 1895), 63 N. W. Rep. 1002.

Where Intent is Abandoned.—Where an act is done with intent to commit an assault, but the intent is voluntarily abandoned, or is prevented, while the distance between the parties is too great to commit an actual assault, there can be no conviction as for an assault. *People v. Lilley*, 43 Mich. 521.

1. *Johnson v. State*, 35 Ala. 363; *Chapman v. State*, 78 Ala. 463, 56 Am. Rep. 42; *Cutler v. State*, 59 Ind. 300; *Keyes v. Devlin*, 3 E. D. Smith (N. Y.) 518; *State v. Milsaps*, 82 N. Car. 549; *Spears v. State*, 2 Tex. App. 244; *Berkeley v. Com.*, 88 Va. 1017. See also *Meade's Case*, 1 Lew. 184; *Reid v. State*, 71 Ga. 865.

Mere Threats.—A mere threat, unaccompanied by an offer or attempt to strike, is not an assault. *State v. Mooney*, Phil. (N. Car.) 434; *State v. Church*, 63 N. Car. 15; *People v. Lilley*, 43 Mich. 521; *Smith v. State*, 39 Miss. 521.

2. Threats Not Legal Provocation.—*United States*.—*Cushman v. Ryan*, 1 Story (U. S.) 100.

Alabama.—*Keiser v. Smith*, 71 Ala. 481, 46 Am. Rep. 342; *Ex p. Sloane*, 95 Ala. 22; *Jones v. State*, 96 Ala. 102.

Illinois.—*Scott v. Fleming*, 16 Ill. App. 539; *Donnelly v. Harris*, 41 Ill. 126; *Ogden v. Claycomb*, 52 Ill. 365; *Sorgenfrei v. Schroeder*, 75 Ill. 397; *Gizler v. Witzel*, 82 Ill. 322; *Steffy v. People*, 130 Ill. 98; *Crosby v. People*, 137 Ill. 325.

Indiana.—*Norris v. Casel*, 90 Ind. 143.

Iowa.—*State v. Cokely*, 4 Iowa 477; *Ireland v. Elliott*, 5 Iowa 478, 68 Am. Dec. 715; *Thrall v. Knapp*, 17 Iowa 468; *Thompson v. Mumma*, 21 Iowa 65.

Louisiana.—*Richardson v. Zuntz*, 26 La. Ann. 313.

Minnesota.—*Crosby v. Humphreys* (Minn. 1894), 60 N. W. Rep. 843.

Missouri.—*Murray v. Boyne*, 42 Mo. 472; *State v. Griffin*, 87 Mo. 608; *State v. Rider*, 90 Mo. 54.

Nebraska.—*Haman v. Omaha Horse R. Co.*, 35 Neb. 74, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 803.

New York.—*Keyes v. Devlin*, 3 E. D. Smith (N. Y.) 518.

South Carolina.—*State v. Wood*, 1 Bay (S. Car.) 351; *State v. Workman*, 39 S. Car. 151.

Texas.—*State v. Briggs* (Tex. Crim. App. 1893), 21 S. W. Rep. 46; *White v. State* (Tex. Crim. App. 1895), 29 S. W. Rep. 1094.

Vermont.—*Goldsmith v. Joy*, 61 Vt. 488,

15 Am. St. Rep. 923; *Wiley v. Carpenter*, 64 Vt. 212.

Wisconsin.—*State v. Martin*, 30 Wis. 216, 11 Am. Rep. 567.

Hawaii.—*Irwin v. Porter*, 1 Hawaiian Rep. 159.

See also *State v. Skidmore*, 87 N. Car. 509.

As to proving threats on the part of the plaintiff against the defendant to diminish the recovery of damages in a civil action, see *infra*, this title, *The Civil Action—Damages—Evidence in Aggravation or Mitigation of Damages*.

See also *infra*, this title, *Evidence—Evidence of Intent*.

Threats of a Dangerous Man.—Threats of a dangerous man afford no justification or excuse for an assault upon him, when he is doing nothing reasonably calculated to induce the threatened party to believe himself in immediate and imminent danger. *Nash v. State*, 2 Tex. App. 362. See *Summers v. State* (Tex. Crim. App. 1895), 33 S. W. Rep. 124.

Insulting Remarks No Defense.—It was held in *Timon v. State* (Tex. Crim. App. 1895), 30 S. W. Rep. 808, that grossly insulting words will not constitute a defense or reduce aggravated to simple assault, though they may mitigate the punishment. See *Barbee v. State* (Tex. Crim. App. 1895), 29 S. W. Rep. 776.

Insult to a Woman.—Insulting remarks addressed to a woman will not justify her escort in assaulting the person uttering them. *State v. Nicolai*, 8 Mo. App. 598.

Rule in Alabama and Georgia.—But in Alabama and Georgia, by statute, where opprobrious words are uttered in the presence of the party, which in their nature are supposed to arouse the passion, they may, under certain circumstances, be adjudged by the jury to justify an instant and appropriate resentment, not disproportioned to the provocation. *Brown v. State*, 74 Ala. 42; *Prior v. State*, 77 Ala. 56; *Spigner v. State*, 103 Ala. 30; *Mitchell v. State*, 41 Ga. 527; *Tucker v. Walters*, 78 Ga. 232; *Hodgkins v. State*, 89 Ga. 761; *Murphy v. State*, 92 Ga. 75; *Baker v. State*, 94 Ga. 700. But see *Suggs v. Anderson*, 12 Ga. 461.

Defense Not to be Invoked by Party First Using Abusive Language.—It has been held, however, in *Alabama*, that the statute which allows a defendant who is prosecuted for an assault and battery to give in evidence any opprobrious words or abusive language used by the person assaulted or beaten at or near the time of the assault or affray, and declares that such evidence shall be good in extenuation or justification, as the jury may determine, was intended as a shield and not as a sword, and cannot be invoked by a defendant who first used insulting words and struck the first blow. *Brown v. State*, 74 Ala. 42. See generally the title THREATS AND THREATENING LETTERS.

unlawful intent is absolutely necessary to constitute an assault, or, in other words, the act and the means must be reasonably adapted to the end.¹

Ability Apparent Only.—The ability, however, to execute the wrongful intent may be only apparent, not actual.²

1. *Reg. v. St. George*, 9 C. & P. 483, 38 E. C. L. 193; *State v. Blackwell*, 9 Ala. 79; *Beasley v. State*, 18 Ala. 535; *Lawson v. State*, 30 Ala. 14; *Tarver v. State*, 43 Ala. 354; *People v. McMakin*, 8 Cal. 547; *State v. Swails*, 8 Ind. 524, 65 Am. Dec. 772; *Howard v. State*, 67 Ind. 401; *Bradley v. State*, 10 Smed. & M. (Miss.) 618; *Hays v. People*, 1 Hill (N. Y.) 351; *State v. Napper*, 6 Nev. 113; *State v. Godfrey*, 17 Oregon 300; *Jarnigan v. State*, 6 Tex. App. 465. See also *Henry v. State*, 18 Ohio 32.

Assault with Pistol.—It has been held in *Alabama*, that to constitute an assault with a pistol, it is necessary that the pistol should be presented at the person to have been assaulted, within the distance in which the pistol may do execution. *Tarver v. State*, 43 Ala. 354. See also *Allen v. State*, 28 Ga. 395, 73 Am. Dec. 760; *State v. Taylor*, 20 Kan. 643.

2. *Mullen v. State*, 45 Ala. 43, 6 Am. Rep. 691; *Kunkle v. State*, 32 Ind. 220, *criticising* *State v. Swails*, 8 Ind. 524, 65 Am. Dec. 772; *State v. Shipman*, 81 N. Car. 513; *State v. McAfee*, 107 N. Car. 812. See also *Com. v. Shaw*, 134 Mass. 221; *State v. Rawles*, 65 N. Car. 334; *Richels v. State*, 1 Sneed (Tenn.) 606.

Apparent Ability Sufficient.—The essence of the wrong is the putting a man in present fear of violence, so that any act fitted to have that effect on a reasonable man may be an assault, though there is no real present ability to do harm. *Pollock on Torts* 185; *State v. Martin*, 85 N. Car. 508, 39 Am. Rep. 711.

Where A was advancing in a threatening attitude with an intention to strike B, so that the blow would have almost immediately reached B if he had not been stopped, it was held that it was an assault in point of law, though at the particular moment when A was stopped he was not near enough for the blow to take effect. *Stephen v. Myers*, 4 C. & P. 349, 19 E. C. L. 414. See *State v. Yancey*, 74 N. Car. 244. See also *supra*, *Overt Act in Assault*, and notes.

It was held in *Crumbley v. State*, 61 Ga. 582, that for a person to shoot at another with a gun, at the distance of twenty steps, was an assault, even if the gun were only loaded with powder.

Texas.—Formerly, in Texas, in order to constitute an assault, there must have been an actual ability to commit an injury, that is, the person making the assault must have been in such a position that, if not prevented, he might inflict a battery upon the person assailed; and second, he must have been within such distance of the person assailed as to make it within his power to commit a battery by the use of the means with which he attempted it. *Jarnigan v. State*, 6 Tex. App. 465; *Robinson v. State*, 31 Tex. 170.

But under art. 489 of the Rev. Penal Code of Texas, the actual ability to commit a

battery need not be shown in order to constitute or prove an assault; it is sufficient if the ability is apparent. *Kief v. State*, 10 Tex. App. 286; *Ray v. State* (Tex. Crim. App. 1893), 21 S. W. Rep. 540; *Coker v. State*, 22 Tex. App. 20; *Bradberry v. State*, 22 Tex. App. 273; *Atterberry v. State*, 33 Tex. Crim. Rep. 88, *disapproving* *Robinson v. State*, 31 Tex. 170.

Presenting Unloaded Pistol.—It has been held that if a person presented a pistol, supposed to be loaded, at another, so near as to have been dangerous to life if the pistol, being loaded, had gone off, this was an assault in law, though the pistol was not in fact loaded. *Keefe v. State*, 19 Ark. 190; *State v. Shepard*, 10 Iowa 126; *Beach v. Hancock*, 27 N. H. 229, 59 Am. Dec. 373; *People v. Morehouse* (Supreme Ct.), 6 N. Y. Supp. 763; *State v. Cherry*, 11 Ired. (N. Car.) 475; *State v. Smith*, 2 Humph. (Tenn.) 457. See also *Reg. v. St. George*, 9 C. & P. 483, 38 E. C. L. 193; *Caldwell v. State*, 5 Tex. 18; *State v. Sears*, 86 Mo. 169.

If A menacingly points at B a gun which B has reasonable cause to believe loaded, and B is thereby put in fear of immediate bodily injury, A is guilty of an assault, although he knows the gun is not loaded. *Com. v. White*, 110 Mass. 407.

Other authorities are to the effect that, to present or aim an unloaded gun at a person within shooting distance, in such a manner as to terrify him, he not knowing that the gun is not loaded, will not support an action for criminal assault, although it may support a civil action for damages. *State v. Godfrey*, 17 Oregon 300, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 815; *Klein v. State*, 9 Ind. App. 365; *State v. Napper*, 6 Nev. 113; *McKay v. State*, 44 Tex. 43; *Reg. v. Baker*, 1 C. & K. 254, 47 E. C. L. 254; *Reg. v. James*, 1 C. & K. 530, 47 E. C. L. 530; *Blake v. Barnard*, 9 C. & P. 626, 38 E. C. L. 259; *Reg. v. Oxford*, 9 C. & P. 525, 38 E. C. L. 208. See also *People v. Jacobs*, 29 Cal. 579; *Vaughan v. State*, 3 Smed. & M. (Miss.) 553; *Fastbinder v. State*, 42 Ohio St. 341.

In *Chapman v. State*, 78 Ala. 463, 56 Am. Rep. 42, *Somerville, J.*, delivering the opinion of the court, said: "On this question the adjudged cases, both in this country and in England, are not agreed, and a like difference of opinion prevails among the most learned commentators on the law. We have had occasion to examine these authorities with some care on more occasions than the present, and we are of the opinion that the better view is, that presenting an unloaded gun at one who supposes it to be loaded, although within the distance the gun would carry if loaded, is not, without more, such an assault as can be punished criminally, although it may sustain a civil suit for damages. The conflict of authorities on this subject is greatly attributable

Ability and Intent must Concur.—The ability to do the act must concur with the intent.¹

4. Force in Battery—*a. UNLAWFUL FORCE*—(1) *Generally*.—Any force whatsoever, be it ever so small, actually brought to bear upon the person of another with an unlawful intent, will amount to a battery. The law cannot draw the line between different degrees of force, and, therefore, totally prohibits the first and lowest stage of it.² And generally it is immaterial

to a failure to observe the distinction between these two classes of cases. A civil action would rest upon the invasion of a person's right to live in society without being put in fear of personal harm, and can often be sustained by proof of a negligent act resulting in unintentional injury. *Peterson v. Haffner*, 59 Ind. 130, 26 Am. Rep. 81, *Cooley on Torts*, 161. An indictment for the same act could be sustained only upon satisfactory proof of criminal intention to do personal harm to another by violence."

Burden of Proof on Defendant.—In *Crow v. State*, 41 Tex. 468, it was held that pointing a gun at a person is an assault, unless it appears that the gun was unloaded, and the burden of proof that it was unloaded will be on the defendant.

An Indiana Statute provides that "it shall be unlawful for any person over the age of ten years, with or without malice, purposely to point or aim any pistol, gun, revolver, or other firearm, either loaded or empty, at or toward any other person." One who angrily seeks another who is assaulted in his dwelling and purposely points a gun at the dwelling house door, daring him to come out, and threatening to shoot him, is amenable under such statute. *Lange v. State*, 95 Ind. 114.

1. Intent must Concur with Ability.—*Alabama*.—*State v. Blackwell*, 9 Ala. 79; *Beasley v. State*, 18 Ala. 535; *Shaw v. State*, 18 Ala. 547; *Lawson v. State*, 30 Ala. 14; *Johnson v. State*, 35 Ala. 363; *Mullen v. State*, 45 Ala. 43, 6 Am. Rep. 691.

California.—*People v. Yslas*, 27 Cal. 630; *People v. Lee Kong*, 95 Cal. 666.

Georgia.—*Woodruff v. Woodruff*, 22 Ga. 237.

Indiana.—*West v. State*, 59 Ind. 113; *Cutler v. State*, 59 Ind. 300; *McCulley v. State*, 62 Ind. 428; *Lange v. State*, 95 Ind. 114.

Mississippi.—*Smith v. State*, 39 Miss. 521.

Missouri.—*State v. Epperson*, 27 Mo. 255.

Nevada.—*State v. Rigg*, 10 Nev. 284.

New York.—*People v. Bransby*, 32 N. Y. 525.

North Carolina.—*State v. Myerfield*, Phil. (N. Car.) 108; *State v. Church*, 63 N. Car. 15; *State v. Bryson*, 2 Winst. (N. Car.) 86; *State v. Davis*, 1 Ired. (N. Car.) 125, 35 Am. Dec. 735; *State v. Crow*, 1 Ired. (N. Car.) 375; *State v. Morgan*, 3 Ired. (N. Car.) 186, 38 Am. Dec. 714; *State v. Hampton*, 63 N. Car. 14.

Pennsylvania.—*Com. v. Eyre*, 1 S. & R. (Pa.) 347.

Texas.—*Higginbotham v. State*, 23 Tex. 574; *McKay v. State*, 44 Tex. 43.

Vermont.—*State v. Benedict*, 11 Vt. 236, 34 Am. Dec. 688.

Where neither the real nor the apparent ability is present, there can be no assault. *Smith v. State*, 32 Tex. 593.

2. 3 Bl. Com. 120; *Archbold's Cr. Pr. & Pl.* 283; 1 Russ. on Cr. (9th ed.) 1021; *Cole v. Turner*, 6 Mod. 149; *Engelhardt v. State*, 88 Ala. 100; *Hammond v. Hightower*, 82 Ga. 290; *Hunt v. People*, 53 Ill. App. 111, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 783; *State v. Philley*, 67 Ind. 304; *Norton v. State*, 14 Tex. 387; *Johnson v. State*, 17 Tex. 515. See also *Sloan v. State*, 42 Ind. 570; *State v. Prather*, 54 Ind. 63; *State v. Wright*, 52 Ind. 307.

Spitting in a Man's Face.—Spitting in a man's face in an angry, rude, or insolent manner, amounts to assault and battery. *Buller's N. P.* 15a; *Reg. v. Cotesworth*, 6 Mod. 172. See also *Com. v. Malone*, 114 Mass. 295.

Setting a Dog on a Person.—So there may be an assault and battery by setting a dog on a person, and causing it to bite him. 1 Russell on Crimes (9th ed.) 1021.

Upsetting a Chair.—In *Hopper v. Reeve*, 7 Taunt. 698, 2 E. C. L. 698, it was held that the upsetting of a chair or carriage, in which a person was sitting, was an assault. See also *Clark v. Downing*, 55 Vt. 259, 45 Am. Rep. 612.

Exposure to the Weather.—It has been held that to improperly expose a female servant to the inclemency of the weather, whereby the servant became sick and emaciated, was an act in the nature of an assault and battery. *Rex v. Ridley*, 2 Campb. 650; *Reg. v. March*, 1 C. & K. 496, 47 E. C. L. 496. See also *Com. v. Stoddard*, 9 Allen (Mass.) 280.

Shoving Another with Open Hand.—Where defendant went to the prosecutor and said: "I once thought we were friends, but I understand you have said thus and so about me, and you have got to take it back," and the prosecutor refused to retract, whereupon the defendant put his hand open and flat upon the prosecutor's breast and pushed him back some steps, when he fell over a flour barrel, the court held this to be an assault and battery. *State v. Baker*, 65 N. Car. 332.

Merely Touching Another in Anger.—To touch another in anger, though in the slightest degree, or under pretense of passing, is, in law, a battery. *Cole v. Turner*, 6 Mod. 149; *U. S. v. Ortega*, 4 Wash. (U. S.) 531.

Indecent Liberties with a Woman.—For a man, without some innocent reason or excuse, to put his arm around the neck of another's wife, against her will, is an assault and battery. *Goodrum v. State*, 60 Ga. 509; *Young v. State*, 31 Tex. Crim. Rep. 24; *Reg. v. Dungey*, 4 F. & F. 99.

It was held in *Ridout v. State*, 6 Tex. App.

whether the force applied be direct or indirect.¹

(2) *Administering Poison or Drugs*.—In the United States, according to weight of authority, administering poison or any other harmful drug or substance to a person, with intent to inflict injury, amounts to assault and battery.²

In England the courts appear to be divided upon this question.³

(3) *False Imprisonment*.—The unlawful taking and detaining of a person, without his consent, will amount to assault and battery.⁴

b. **LAWFUL FORCE**—(1) *Generally*.—In order to constitute an assault and battery, the force used must be unlawful, so that where force is used in the

249, that the indecent handling or fondling of the person of a female by a male, without her consent and against her will, is an assault.

See also *infra*, this title, *Indecent Assault*.

1. **Indirect Force**.—*Scott v. Shepherd*, 3 Wils. 411; *State v. Davis*, 1 Hill (S. Car.) 45; *Dodwell v. Burford*, 1 Mod. 24; *Collins v. Benison*, Say. 138; *Horne v. Mandelbaum*, 13 Ill. App. 607. See *Kirland v. State*, 43 Ind. 146, 13 Am. Rep. 386; *State v. Edge*, 1 Strobb. (S. Car.) 91; *Vandenburgh v. Truax*, 4 Den. (N. Y.) 464, 47 Am. Dec. 268.

In *Com. v. Stratton*, 114 Mass. 303, 19 Am. Rep. 350, Wells, J., in delivering the opinion of the court, said: "If one should hand an explosive substance to another, and induce him to take it by misrepresenting or concealing its dangerous qualities, and the other, ignorant of its character, should receive it and cause it to explode in his pocket or hand, and should be injured by it, the offending party would be guilty of a battery, and that would necessarily include an assault; although he might not be guilty even of an assault if the substance failed to explode or failed to cause an injury. It would be the same if it exploded in his mouth or stomach. If that which causes the injury is set in motion by the wrongful act of the defendant, it cannot be material whether it acts upon the person injured, externally or internally, by mechanical or chemical force."

Attacking a Horse Attached to a Carriage.—It was held in *Marentille v. Oliver*, 2 N. J. L. 358, that to attack and strike with a club, with violence, a horse attached to a carriage in which a person was riding, was an assault upon the person in the carriage. See also *Dodwell v. Burford*, 1 Mod. 24; *Bull v. Colton*, 22 Barb. (N. Y.) 94.

Striking a Cane in Another's Hand.—Striking anything attached to a person, as a cane, etc., if intended as a rudeness and affront, amounts to assault and battery. *Respublica v. De-Longchamps*, 1 Dall. (U. S.) 111.

Assault with Vitriol.—An assault may be committed by throwing oil of vitriol upon the person. *People v. Bracco*, 69 Hun (N. Y.) 206; *People v. Stanton*, 106 Cal. 139.

Explosion of Powder.—One who attempts to commit a violent injury on the person of another by means of the explosion of powder, is guilty of an assault with a deadly weapon, although he is not present when the explosion occurs. *People v. Pape*, 66 Cal. 366.

2. *Johnson v. State*, 92 Ga. 36; *People v.*

Blake, 1 Wheel. Cr. Cas. (N. Y.) 490. See also *Bechtelheimer v. State*, 54 Ind. 128.

Poison or Deleterious Drug.—A person is guilty of assault and battery who delivers to another a thing to be eaten, knowing that it contains a foreign substance and concealing the fact, if the other, in ignorance of the fact, eats it, and is injured in health. *Com. v. Stratton*, 114 Mass. 303, 19 Am. Rep. 350; *Carr v. State*, 135 Ind. 1.

Contra.—It has been held in *Texas* that to administer poison to a person is not an assault. *Garnet v. State*, 1 Tex. App. 605, 28 Am. Rep. 425.

Separate Offense in Michigan.—In Michigan, mingling poison with food with intent to inflict injury, is made a distinct offense by statute. *People v. Carmichael*, 5 Mich. 10, 71 Am. Dec. 769; *People v. Edwards*, 5 Mich. 22.

3. **England**.—In *Reg. v. Button*, 8 C. & P. 660, 34 E. C. L. 573, it was held that the administering of poison or a deleterious drug to a person who takes it willingly, but in ignorance of the real nature of the drug or substance, will amount to assault and battery by the person so administering it. See also *Treeve's Case*, 2 East P. C. 821.

But in *Reg. v. Dilworth*, 2 M. & Rob. 531; *Reg. v. Walkden*, 1 Cox C. C. 282; *Reg. v. Hanson*, 2 C. & K. 912, 61 E. C. L. 912, it was held that this would not amount to an assault and battery. See also *Reg. v. Smith*, 34 U. C. Q. B. 552.

4. *Long v. Rogers*, 17 Ala. 540; *Blythe v. Tompkins*, 2 Abb. Pr. (N. Y. Supreme Ct.) 468; *Williams v. Garrett*, 12 How. Pr. (N. Y. Supreme Ct.) 456; *State v. Lunsford*, 81 N. Car. 528; *State v. Reavis*, 113 N. Car. 677; *Bloomer v. State*, 3 Sneed (Tenn.) 66. See also *State v. Rollins*, 8 N. H. 550; *Bird v. Jones*, 7 Q. B. 742, 53 E. C. L. 742; *Booth v. Hanley*, 2 C. & P. 288, 12 E. C. L. 130; *Parsons v. Harper*, 16 Gratt. (Va.) 64.

See also the titles **ABDUCTION**, vol. 1, p. 162; **FALSE IMPRISONMENT**.

Actual Force Not Necessary.—No actual force is necessary to constitute a false imprisonment. If a man is restrained of his personal liberty by fear of personal difficulty, that amounts to a false imprisonment. *Smith v. State*, 7 Humph. (Tenn.) 43.

Arrest on Mesne Process.—It has been held in *Massachusetts* that a person who causes another to be arrested on mesne process in an action of tort, without first making the affidavit required by the *Massachusetts* statute of 1854, c. 63, is liable to an action by the person arrested. *Cody v. Adams*, 7 Gray (Mass.) 59. See also the title **ARREST**.

execution of a lawful act, it does not amount to an assault.¹

(2) *By Officers*.—An officer of the law commits no assault and battery if, in the performance of his duty, he makes use of that degree, and that degree only, of force which is reasonably necessary for the accomplishment of his purpose.²

Liable for Excess of Force.—He is liable only when he uses an excess of force over and above this limit.³

1. 1 Russell on Crimes (9th ed.) 1026; *Spicer v. People*, 11 Ill. App. 294.

2. **Officer Using Lawful Force**.—1 Russell on Crimes (9th Am. ed.) 1026; *Cox v. Cole-crimes*, 1 B. & C. 37, 8 E. C. L. 17; *Rex v. Mitton*, 3 C. & P. 31, 14 E. C. L. 196; *Collier v. Hicks*, 2 B. & Ad. 663, 22 E. C. L. 161; *U. S. v. Fullhart*, 47 Fed. Rep. 802; *Patterson v. State*, 91 Ala. 58; *Bryan v. Bates*, 15 Ill. 87; *Neal v. Joyner*, 89 N. Car. 287; *State v. Bryant*, 65 N. Car. 327; *State v. Belk*, 76 N. Car. 10; *State v. McNinch*, 90 N. Car. 696; *State v. Sigman*, 106 N. Car. 728; *Furr v. Moss*, 7 Jones (N. Car.) 525. See also *Powers v. Mulvey*, 51 Conn. 433; *Isley v. Huber*, 45 Ind. 421; *People v. Gulick*, Hill & D. Supp. (N. Y.) 229; *Brockway v. Crawford*, 3 Jones (N. Car.) 433, 67 Am. Dec. 250.

Serving a Subpoena.—Where a person goes to the house of another for the purpose of serving a subpoena upon him, and the latter is in the house at the time, these circumstances amount to a legal license to enter, and if the person having the process finds the outer door open and enters peaceably, he is lawfully there, and may use such force as is necessary to overcome any resistance he may meet with in the service of the subpoena, being liable only for an excess of violence beyond what is necessary to overcome the resistance. *Hager v. Danforth*, 20 Barb. (N. Y.) 16.

Coroner Ejecting Spectators from Inquest.—No action will lie against the judge of a court of record for an act done by him in his judicial capacity, and, therefore, trespass cannot be maintained against a coroner for turning a person out of a room where he is about to make an inquisition. *Garnett v. Fer-rand*, 6 B. & C. 611, 13 E. C. L. 277.

Arrest without Warrant.—A police officer arresting a person without a warrant, for being intoxicated in a public street, is not liable criminally for an assault if he had reasonable cause to believe such person to be intoxicated, although he was not in fact intoxicated. *Com. v. Presby*, 14 Gray (Mass.) 65.

No assault is committed by an officer who makes an arrest without a warrant, where there is *prima facie* ground for suspecting that a felony has been committed. *People v. Wolven*, 7 N. Y. Leg. Obs. 89; *Burns v. Erben*, 1 Robt. (N. Y.) 555, affirmed in 40 N. Y. 463.

Discretion of Officer in Making Arrest.—An officer who has arrested a prisoner under a state warrant has a right to tie him if he believes it is necessary to secure him, and of this necessity he is himself the sole judge. *State v. Stalcup*, 2 Ired. (N. Car.) 50; *State v. Pugh*, 101 N. Car. 737, 9 Am. St. Rep. 44; *Patterson v. State*, 91 Ala. 58.

But the law does not clothe a police officer with authority to judge arbitrarily of the necessity of killing a prisoner to secure him, or of killing a person to prevent a rescue, and it must be left to the jury to pass upon such killing. *State v. Bland*, 97 N. Car. 438.

Liability of De Facto Officer Making Arrest.—Where an officer set up his title to an office, in justification of his official act for which an action of trespass for assault and battery was brought, it was held that he must prove his legal title to the office; that it was not sufficient in him to show that he was an officer *de facto*. *Grace v. Teague*, 81 Me. 559.

Arrest on Insufficient Affidavit.—A warrant for the arrest of the defendant in a civil action in a justice's court, issued upon an insufficient affidavit, constitutes no ground of defense in favor of the party procuring it, in an action against him for an assault and battery committed in an attempt to execute the warrant; but if such warrant was regular upon its face, it is a protection to the person not a party to the action in which it was issued, who took no part in procuring it, and had no knowledge of the facts in relation to the issue thereof, except what appeared upon the warrant itself, and he, having been empowered by the justice to execute the warrant, is not guilty of any abuse of process. *Mudrock v. Killips*, 65 Wis. 626.

Liability for Arrest and Discharge without Trial.—It was held in *State v. Parker*, 75 N. Car. 249, 22 Am. Rep. 669, that men may not be arrested, imprisoned, and released upon the judgment or at the discretion of the constable or any one else, and, therefore, where a town constable arrested a person who was intoxicated, without a warrant, and imprisoned him in the "lock-up" until he became sober, when he was released, having never been carried before a magistrate or other person to have the charge investigated, the constable was guilty of assault and battery. See *Brock v. Stimson*, 108 Mass. 520, 11 Am. Rep. 390.

Arrest by Special Deputy.—A special deputy is bound to show his warrant if requested to do so, and if he omits, the party against whom the warrant is may resist the arrest, and the warrant, under such circumstances, is no protection against an action for an assault, battery, and false imprisonment. *Frost v. Thomas*, 24 Wend. (N. Y.) 418.

3. **Excessive Force in Arrest**.—*Belch v. Ar-nott*, 9 U. C. P. 68; *Shanley v. Wells*, 71 Ill. 78; *State v. Stalcup*, 2 Ired. (N. Car.) 50; *State v. Belk*, 76 N. Car. 10; *State v. Sigman*, 106 N. Car. 728; *State v. Pugh*, 101 N. Car. 737, 9 Am. St. Rep. 44; *Skidmore v. State*, 2 Tex. App. 20; *Golden v. State*, 1 S. Car. 292; *Com. v. Ruggles*, 6 Allen (Mass.) 588. See also *Zube v. Weber*, 67 Mich. 52;

Any Indifferent Person enjoys the same immunity as a regular officer of the law, when the circumstances clothe him with a similar duty.¹

(3) *By Parents, and Persons in Loco Parentis*.—Force used upon the person is not unlawful, and does not amount to an assault and battery, in the exercise of the right of moderate restraint or correction given by law to the parent over the child,² or to one standing *in loco parentis*, as the guardian over the ward,³ the master over his apprentice,⁴ or the teacher over the scholar.⁵ In

Wakeley *v.* Hart, 6 Binn. (Pa.) 316; Com. *v.* Deacon, 8 S. & R. (Pa.) 49.

Where one of the marshals of the city of London, whose duty it was, on the day of a public meeting in Guild Hall, to see that a passage was kept for the carriages of members of the corporation and others, directed a person in the front of the crowd to stand back, and, on being told that he could not for those behind him, struck him immediately in the face, saying that he would make him, it was held that a more moderate degree of pressure ought to have been exercised, and some little time given to remove the party in a more peaceable way, and that consequently the marshal had been guilty of too violent an assertion of his authority. Imason *v.* Cope, 5 C. & P. 193, 24 E. C. L. 274.

The force used must be only so great as is necessary for the purpose of effecting the object in view, and if there be an excess of violence, the officer will be guilty of an assault. If, therefore, a constable is preventing a breach of the peace, and any person stands in the way with the intent to prevent him from so doing, the constable is justified in taking such person into custody, but not in striking him. Levy *v.* Edwards, 1 C. & P. 40, 11 E. C. L. 306.

Serving a Civil Process.—It was held in Hull *v.* Bartlett, 49 Conn. 64, that an officer cannot use force to identify a defendant on whom he wishes to serve a civil process.

It has been held in *England* that a person may, under particular circumstances, lay hands on another, in order to serve him with process. Harrison *v.* Hodgson, 10 B. & C. 445, 21 E. C. L. 109.

Firing at a Person to Secure His Arrest.—Firing a gun upon a person in order to secure his arrest is justifiable only where it is necessary. It is not justifiable where the arrest can be secured by less dangerous means. Lander *v.* Miles, 3 Oregon 36.

1. State *v.* Mahon, 3 Harr. (Del.) 568; Main *v.* McCarty, 15 Ill. 441; People *v.* Adler, 3 Park. Cr. Rep. (N. Y. Supreme Ct.) 249; Lander *v.* Miles, 3 Oregon 36; State *v.* Bryant, 65 N. Car. 327. See also Mitchell *v.* State, 12 Ark. 50, 54 Am. Dec. 253.

Private Citizen Called to Assist Officer.—Where an officer, in making a lawful arrest on a warrant, calls on another person to assist him, the officer's act becomes a trespass *ab initio* by reason of his neglect to return his process, but the person who assisted in the arrest does not also become a trespasser. Dehm *v.* Hinman, 56 Conn. 320.

Prevention of Unlawful Acts.—Where a man lays his hands upon another to prevent his fighting, or otherwise committing a breach of the peace, he will not be guilty of assault and

battery. Spicer *v.* People, 11 Ill. App. 294.

2. **Correction of Child by Parent**.—Johnson *v.* State, 2 Humph. (Tenn.) 283, 36 Am. Dec. 322. See also Smith *v.* Slocum, 62 Ill. 354; Turner *v.* State (Tex. Crim. App. 1896), 33 S. W. Rep. 972.

The law will not interfere in the domestic government of families by punishing a parent for the correction of his child, however severe or unmerited it may be, unless it produces permanent injury, or is inflicted from malicious motives, and not from an honest purpose. State *v.* Jones, 95 N. Car. 588, 59 Am. Rep. 282.

Father Beating Son to Death.—Where a father beat his son so severely for theft that he died, it was held that the father was guilty of manslaughter only. Anonymous, 1 East P. C. 261.

Does Not Apply to Conventional Relationship.—The provision of the Code of *Texas*, which recognizes the right of a parent to chastise his child, applies only when the real, and not a mere conventional, relation of parent and child exists between the parties. Davis *v.* State, 6 Tex. App. 133.

3. **Correction of Ward by Guardian**.—Dean *v.* State, 89 Ala. 46; State *v.* Harris, 63 N. Car. 1; State *v.* Alford, 68 N. Car. 322; Gorman *v.* State, 42 Tex. 221; Snowden *v.* State, 12 Tex. App. 105, 41 Am. Rep. 667; Stanfield *v.* State, 43 Tex. 167.

4. **Correction of Apprentice by Master**.—2 Kent's Com. 261; Rex *v.* Kellery, 2 Show. 289; Matthews *v.* Perry, 10 Conn. 455; People *v.* Philips, 1 Wheel. Cr. Cas. (N. Y.) 155; Com. *v.* Baird, 1 Ashm. (Pa.) 267. See Com. *v.* Conrow, 2 Pa. St. 402; Cooper *v.* State, 8 Baxt. (Tenn.) 324, 35 Am. Rep. 704. See also the title APPRENTICES.

The Right cannot be Delegated.—It was held in People *v.* Philips, 1 Wheel. Cr. Cas. (N. Y.) 155, that while a master has authority to chastise his apprentice in a moderate degree, this right is strictly personal, and that he cannot direct or permit his foreman to chastise him for any offense whatsoever.

5. **Correction of Pupil by Teacher**.—Boyd *v.* State, 88 Ala. 169, 16 Am. St. Rep. 31; Sheehan *v.* Sturges, 53 Conn. 481; Cooper *v.* McJunkin, 4 Ind. 290; Danenhoffer *v.* State, 69 Ind. 295, 35 Am. Rep. 216; Vanvactor *v.* State, 113 Ind. 276, 3 Am. St. Rep. 645; State *v.* Mizner, 45 Iowa 248, 24 Am. Rep. 769; Patterson *v.* Nutter, 78 Me. 509, 57 Am. Rep. 818; Com. *v.* Randall, 4 Gray (Mass.) 36; Derkins *v.* Goss, 20 Cent. L. J. 418; Heritage *v.* Dodge, 64 N. H. 297; Com. *v.* Seed, 5 Pa. L. J. 78; Bolding *v.* State, 23 Tex. App. 172; Hutton *v.* State, 23 Tex. App. 386, 59 Am. Rep. 776; Dowlen *v.* State, 14 Tex. App. 61;

all such cases the law presumes, from the relations of the parties, an entire absence of any criminal or unlawful intent to injure, and only the use of unnecessary and excessive force will render them liable.¹

(4) *By Husband*.—At common law, the husband had authority to chastise his wife moderately,² although the tendency of modern decisions, both in

Kinnard v. State (Tex. Crim. App. 1895), 33 S. W. Rep. 234; *Hathaway v. Rice*, 19 Vt. 102; *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156. See also *Fertich v. Michener*, 111 Ind. 472, 60 Am. Rep. 709; *Starr v. Liftchild*, 40 Barb. (N. Y.) 541.

The law confides to school masters and teachers a discretionary power for the infliction of punishment upon their pupils, and will not hold them responsible criminally, unless the punishment be such as to occasion permanent injury to the child, or be inflicted merely to gratify their own evil passions. *State v. Pendergrass*, 2 Dev. & B. (N. Car.) 365, 31 Am. Dec. 416.

Legal Presumption that Chastisement was Proper.—When the relation of schoolmaster and scholar or any similar relation is established in the defense of a prosecution upon assault and battery, the legal presumption is that the chastisement was proper, and this, to warrant a conviction, must be rebutted by showing that it was excessive or without any proper cause. *Anderson v. State*, 3 Head (Tenn.) 455.

Power must be Exercised in Moderation.—A teacher, in the exercise of the power of corporal punishment, must not make such power a pretext for cruelty and oppression; but the cause must be sufficient, the instrument suitable, and the manner and extent of the correction, the part of the person to which it is applied, and the temper in which it is inflicted, should be distinguished with the kindness, prudence, and propriety which become the station. *Cooper v. McJunkin*, 4 Ind. 290.

Teacher Exceeding His Authority.—It was held in *Morrow v. Wood*, 35 Wis. 59, 17 Am. Rep. 471, that where a father had directed his child, in attendance upon a public school, to pursue only certain studies selected by the father from those required or permitted by law to be taught in such school and actually taught therein, and had forbidden the child to pursue a certain other study, and this fact was known to the teacher of the school, such teacher was not authorized to inflict corporal punishment on the child for the purpose of compelling him to pursue the study so forbidden by the father.

General Rule as to Excess.—The question as to when a teacher exceeds his authority in the infliction of corporal punishment is discussed at length in *State v. Pendergrass*, 2 Dev. & B. (N. Car.) 365, 31 Am. Dec. 416, and Judge Gaston there lays down the general rule that teachers exceed the limits of their authority when they cause lasting mischief, but act within the limits of it when they inflict temporary pain.

Whether a chastisement is moderate or excessive must necessarily depend upon the age, sex, condition, and disposition of the scholar, with all the attending and sur-

rounding circumstances to be judged by the jury, under the direction of the court as to the law of the case. *Dowlen v. State*, 14 Tex. App. 61; *Stanfield v. State*, 43 Tex. 167.

If the punishment is clearly excessive, then the master should be held liable for such excess, though he acted from good motives in inflicting the punishment, and, in his own judgment, considered it necessary and not excessive; but if there is any reasonable doubt whether the punishment was excessive, the master should have the benefit of the doubt. *Lander v. Seaver*, 32 Vt. 114, 76 Am. Dec. 156.

Adult Pupils.—If a person who has attained his majority voluntarily attends school, creating the relation of teacher and pupil, he thereby waives any privilege which his age confers, and subjects himself to like discipline with those who are within the school, and such scholar may be punished for refractory conduct, and the teacher may escape liability therefor upon proof that the chastisement was, under the circumstances, reasonable. *State v. Mizner*, 45 Iowa 248, 24 Am. Rep. 769. See *McGregor v. State*, 4 Tex. App. 599.

1. *Rex v. Cheeseman*, 7 C. & P. 455, 32 E. C. L. 583; *Fletcher v. People*, 52 Ill. 395; *Gardner v. State*, 4 Ind. 632; *Com. v. Randall*, 4 Gray (Mass.) 36; *Com. v. Coffey*, 121 Mass. 66; *State v. Harris*, 63 N. Car. 1; *Com. v. Blaker*, 1 Brews. (Pa.) 311; *Johnson v. State*, 2 Humph. (Tenn.) 283, 36 Am. Dec. 322; *Kinnard v. State* (Tex. Crim. App. 1895), 33 S. W. Rep. 234; *Hathaway v. Rice*, 19 Vt. 102. See also *State v. Bitman*, 13 Iowa 485.

Chastisement of Two-year-old Child.—An infant two years old is not capable of appreciating correction, and a father, therefore, is not justified in correcting it; and if the infant dies, owing to such correction, the father is guilty of manslaughter. *Reg. v. Griffin*, 11 Cox C. C. 402.

Flogging with a Saw.—It was held in *Neal v. State*, 54 Ga. 281, that it was not error in the judge, at the trial of one for an assault and battery in whipping his own child, a girl ten years old, with a saw twenty-two inches long and three-fourths of an inch wide, to charge the jury that if there was no reason for the whipping, "one lick" with such an instrument was unlawful.

2. **Common Law.**—*Bacon's Abr.*, tit. Assault and Battery, C. 373; 1 *Black. Comm.* 444. See also *Rex v. Lister*, 1 *Stra.* 478.

In *Bradley v. State*, Walk. (Miss.) 156, it was said that perhaps the husband should still be permitted to exercise the right of moderate chastisement in cases of great emergency, and to use salutary restraints in every case of misbehavior, without subjecting himself to vexatious prosecutions resulting in

England and America, is to regard all such punishment inflicted upon the wife as assault and battery.¹

(5) *By Other Persons in Authority*.—All persons in authority, such as the commanding officers in the army or navy,² the superintendent of an almshouse,³ the keeper of a jail,⁴ or the master of a vessel,⁵ have authority to use such

the discredit and shame of all the parties concerned.

North Carolina.—It was formerly held in *North Carolina* that a husband could not be convicted of a battery on his wife, unless he inflicted a permanent injury, and used such excessive violence or cruelty as indicated malignity or vindictiveness, and it made no difference if the husband and wife were living separate by agreement. *State v. Black*, 1 Winst. (N. Car.) 266.

In *State v. Rhodes*, Phil. (N. Car.) 453, 98 Am. Dec. 78, it was held that the laws of that state do not recognize the right of the husband to whip his wife, but that the courts will not interfere to punish him for moderate correction of her, even if there has been no provocation for it; and in determining whether the husband has been guilty of an indictable assault and battery upon his wife, the criterion is the effect produced, and not the manner of producing it, or the instrument used. See also *State v. Hussey*, Busb. (N. Car.) 123. And see the following note for later *North Carolina* cases.

1. Modern Doctrine as to Wife Whipping.—*Pearman v. Pearman*, 1 S. & T. 601; *State v. Buckley*, 2 Harr. (Del.) 552; *Com. v. McAfee*, 108 Mass. 458, 11 Am. Rep. 383; *People v. Winters*, 2 Park. Cr. Rep. (Clinton Oyer & T. Ct.) 10; *Perry v. Perry*, 2 Paige (N. Y.) 501; *Owen v. State*, 7 Tex. App. 329. See also *Gholston v. Gholston*, 31 Ga. 625; *Poor v. Poor*, 8 N. H. 307, 29 Am. Dec. 664; *Taylor v. Taylor*, 76 N. Car. 433; *James v. Com.*, 12 S. & R. (Pa.) 220.

It was held in *State v. Oliver*, 70 N. Car. 60, that the old doctrine that the husband had the right to whip his wife, provided he used a switch no larger than his thumb, no longer governs the decisions of the courts in *North Carolina*, and the opinion, more in accordance with present civilization, that a husband has no legal right to chastise his wife under any circumstances, prevails.

It has been held in *Texas* that the husband's authority over the wife does not extend to corporal punishment, and any violence to her, save in self-defense, or to prevent her unwarrantable interference in the exercise of his parental authority, will be illegal. *Gorman v. State*, 42 Tex. 221.

In *Fulgham v. State*, 46 Ala. 143, it was said that the authority for "wife whipping" rests upon the relic of a barbarous and unchristian "privilege," which, even in the mother country, was never claimed to be law except among people of the "lower rank." The law in this country recognizes no such distinction.

Mitigating Circumstances.—In *Alabama* it has been held that the husband, when indicted for assault and battery on his wife, may show in mitigation of the fine that at the time of the assault he was immediately provoked

to its commission by her bad behavior and misconduct. *Robbins v. State*, 20 Ala. 36; *Greta v. State*, 10 Tex. App. 36. See *Gaugler v. State* (Tex. Crim. App. 1893), 22 S. W. Rep. 147.

2. Officers in Army and Navy.—*Wilkes v. Jackson*, 11 Eng. L. & Eq. 386; *Wilkes v. Dinsman*, 7 How. (U. S.) 89.

The defendant may even justify a mayhem if done by him as an officer in the army, for disobeying orders, and he may give in evidence a sentence of the council at war upon a petition against him by the plaintiff; and if, by the sentence, the petition is dismissed, it will be conclusive evidence in favor of the defendant. *Lane v. Hegberg*, Buller N. P. 192.

Flogging Prohibited by Statute.—Flogging is now forbidden by statute in the United States army, navy, military prisons, and on board vessels of commerce. Rev. Stat. U. S., pp. 239, 243, 284, 900. See also *U. S. v. Collins*, 2 Curt. (U. S.) 194.

3. Chastisement of a Pauper.—Where, without anger or rudeness and solely for the purpose of preserving discipline, the superintendent of a county asylum for paupers administered moderate physical chastisement to an unruly pauper in his charge, it was held that he did not thereby commit an assault and battery. *State v. Neff*, 58 Ind. 516.

In *State v. Hull*, 34 Conn. 132, it was held that the keeper has no right to confine and chain a pauper, although of a turbulent character, where there is no such impending danger from him as to make it necessary. See also *State v. Hawkins*, 77 N. Car. 494.

Cutting Off Hair of a Pauper.—It was held in *Forde v. Skinner*, 4 C. & P. 239, 19 E. C. L. 364, that if parish officers cut off the hair of a pauper in the poorhouse by force and against the will of such pauper, this is an assault, and if it be done as a matter of degradation and not with a view to cleanliness, that will be an aggravation, and go to increase the damages.

4. Corporal Punishment Inflicted on Convicts.—*Bacon's Abr.*, tit. Assault and Battery, C., 373.

The tendency of modern legislation, however, is to abolish all forms of corporal punishment, and it is now held in most of the states that the keeper of a jail, or the lessee or manager of convicts, has no power to inflict even moderate chastisement upon a prisoner, unless specially authorized to do so by statute. *Prewitt v. State*, 51 Ala. 33; *Cornell v. State*, 6 Lea (Tenn.) 624. See also *State v. Roseman*, 108 N. Car. 765.

5. Master of a Vessel.—*Fuller v. Colby*, 3 Woodb. & M. (U. S.) 1; *Sheridan v. Furbur*, 1 B. & H. (Adm.) 423; *U. S. v. Ruggles*, 5 Mason (U. S.) 192; *U. S. v. Wickham*, 1 Wash. (U. S.) 316; *U. S. v. Lunt*, 1 Sprague (U. S.) 311; *Hannen v. Edes*, 15 Mass. 347; *Brown v. Howard*, 14 Johns. (N. Y.) 119; *Flemming*

force as may be necessary and reasonable for the maintenance of discipline and good order, unless prohibited by statute from so doing.

Master.—According to the better doctrine, the master has no authority to chastise his servant, no matter how flagrant his violation of duty may be.¹

III. AGGRAVATED ASSAULTS—1. **Generally.**—An aggravated assault has been defined to be, at the common law, one that has, in addition to the mere intent to commit it, another object which is also criminal,² but it may be doubted whether at common law the term had a technical and definite meaning. It seems rather to have been a phrase used by the commentators and text-writers in contradistinction to “common assault,” to include all those species of assault which, for various reasons, had come to be regarded as more heinous than common assaults, or had been singled out and made the subject of special legislative provision.³ In the criminal codes of some of the states of the Union, the term “aggravated assault” is given a definite and peculiar meaning of its own.⁴ Using the term in the large and general sense, not only assaults

v. Ball, 1 Bay (S. Car.) 3. See also *Watson v. Christie*, 2 B. & P. 225; *U. S. v. Collins*, 2 Curt. (U. S.) 194; *Gabrielson v. Waydell*, 135 N. Y. 1.

In *Sampson v. Smith*, 15 Mass. 365, *Parker, C. J.*, said: “The right of the master to use force and personal violence, to quell insurrection, or to exact obedience to orders or to regular duty, can never be questioned. Without such power, every crew would be in a state of anarchy, and the lives and property of all concerned in continual jeopardy.”

Chastisement by Subordinate Officer.—The master of a ship, when on board, has, generally, the sole authority to authorize punishment to be inflicted on any of the crew, and if he is present when any punishment is inflicted by a subordinate officer, and he can prevent it and does not, he is personally responsible for the act. Neither the mate nor any subordinate officer has authority to punish any seaman, even for improper behavior or misconduct to himself personally, when the master is on board, except by the authority, express or implied, of the master, or when the necessities of the ship’s service require instantaneous punishment, as by blows or otherwise, to compel a seaman to do his duty. In the absence of the master, the next highest officer on board succeeds to his rights of authority *pro tempore*, so far as they are necessary for the due performance of the ship’s duties. *U. S. v. Taylor*, 2 Sumn. (U. S.) 584.

1. **Master Chastising Servant.**—1 *Cool. Bl.* 428; 2 *Kent’s Com.* 261; *Matthews v. Terry*, 10 Conn. 455; *Com. v. Baird*, 1 Ashm. (Pa.) 267; *Cooper v. State*, 8 Baxt. (Tenn.) 324, 35 Am. Rep. 704; *Davis v. State*, 6 Tex. App. 133.

It was anciently held that a lord might beat his villain without cause, but that if he commanded another to do it, an action of battery would lie against him. 3 *Bacon’s Abr.* 567; *Anonymous*, 2 Mod. 167.

Master Chastising His Slave.—Prior to the abolition of slavery, a master could chastise his own slave, but any one else doing so, without his express authority, was liable for assault and battery. *Townsend v. Jeffries*, 24 Ala. 329; *State v. Stephenson*, 20 Tex. 151.

A slave who has secured his freedom can-

not maintain an action for assault and battery and false imprisonment for his detention from the time of filing his petition to the time of judgment. *Queen v. Ashton*, 3 Har. & M. (Md.) 439.

2. *Norton v. State*, 14 Tex. 393; 1 *Bouv. Inst.*, § 2213.

3. The term “aggravated assault” is so used by *East*, 1 P. C. 406; and by *Russell*, 1 *Russ. on Crs.* (9th Am. ed.) 1036.

In construing a statute providing a punishment for assaults with intent to murder, maim, rob, etc., *Brickell, C. J.*, in *Simpson v. State*, 59 Ala. 1, 31 Am. Rep. 1, said: “It is apparent the statute was intended for the punishment of several distinct offenses, the elements of each being an act done which of itself, though it may be an indictable offense, is aggravated by the intent attending it, and the higher offense contemplated. Each was an offense known to the common law, indictable and punishable as a misdemeanor. We do not mean, of course, that each was at common law recognized as a separate, distinct technical offense. An assault was a misdemeanor; if attended with a felonious intent, the intent was a matter of aggravation, justifying the imposition of severer punishment—not other or additional punishment than that inflicted on misdemeanors, but severer in degree.”

4. **Texas.**—In *Norton v. State*, 14 Tex. 387, an aggravated assault is defined thus: “Any circumstances of aggravation in the manner or character of the assault or battery, by which it exceeds the incidents or consequences of a common assault and battery; anything by which it is made to exceed in wantonness, violence, or injury, what would be sufficient to warrant a conviction for a common assault and battery (as contradistinguished from such assaults as are committed with some other criminal intent than simply to assault or beat, and are made, by the law, distinct offenses) may be justly said to aggravate the character of the offense, or to render it of an aggravated nature. * * * Whenever there are such circumstances of aggravation attending the commission of the offense, as the use of bludgeons, missiles, or instruments or weapons of any kind capable of inflicting injury beyond what may ordinarily

with certain prescribed intents, but also assaults by stabbing,¹ wounding,² shooting,³ or by any use of a deadly weapon,⁴ are aggravated assaults, in some states made felonious.⁵ Every aggravated assault includes a common assault.⁶

be inflicted by a blow with the fist, and used in such a manner as to be likely to inflict such injury, and especially where so used as to cause a wounding, the offense must be deemed to be of an aggravated nature within the meaning of the statute." See also *State v. Lutterloh*, 22 Tex. 210; *Cato v. State*, 4 Tex. App. 87; *Johnson v. State*, 7 Tex. App. 210; *Mooring v. State*, 42 Tex. 85; *McCullough v. State*, 24 Tex. App. 129; *Moore v. State*, 33 Tex. Crim. Rep. 306.

In *Texas* an assault committed in a brutal fashion by a powerful man upon a decrepit old man, is held to be an aggravated assault. *Bowden v. State*, 2 Tex. App. 56.

Assault upon an Officer.—In *Massachusetts* a person making an assault upon an officer in the discharge of his duty, having knowledge of his official character, is guilty of an aggravated assault. *Com. v. Kirby*, 2 Cush. (Mass.) 577.

1. Assault by Stabbing.—*Hodges v. State*, 15 Ga. 117; *State v. Brown*, 21 La. Ann. 347; *Ruby v. State*, 7 Mo. 206.

2. Assault by Wounding.—*Reg. v. Bowen*, 1 C. & M. 149, 41 E. C. L. 86; *Com. v. Gallagher*, 6 Met. (Mass.) 565; *Carrico v. State*, 11 Mo. 579; *State v. Bailey*, 21 Mo. 484; *State v. Ray*, 37 Mo. 365; *State v. Thompson*, 30 Mo. 470; *State v. Brown*, 60 Mo. 141; *Skidmore v. State*, 2 Tex. App. 20.

3. Assault by Shooting.—*State v. Comfort*, 5 Mo. 357; *State v. Vaughn*, 26 Mo. 29; *Callahan v. State*, 21 Ohio St. 306; *Heller v. State*, 23 Ohio St. 582. See also *Bradberry v. State*, 22 Tex. App. 273 (criticising Robinson v. State, 31 Tex. 170).

4. Assault with Deadly Weapon—California.—*People v. Nugent*, 4 Cal. 341; *People v. Davidson*, 5 Cal. 133; *People v. Vanard*, 6 Cal. 562; *People v. War*, 20 Cal. 117; *People v. Congleton*, 44 Cal. 92.

Georgia.—*Prior v. State*, 41 Ga. 155.

Massachusetts.—*Com. v. Gallagher*, 6 Met. (Mass.) 565.

Missouri.—*Jennings v. State*, 9 Mo. 862; *Carrico v. State*, 11 Mo. 579; *State v. Jordan*, 19 Mo. 212; *State v. Magrath*, 19 Mo. 678; *State v. York*, 22 Mo. 462; *State v. Chandler*, 24 Mo. 371, 69 Am. Dec. 432; *State v. Greenhalgh*, 24 Mo. 373; *State v. Epperson*, 27 Mo. 255; *State v. Ray*, 37 Mo. 365.

Nevada.—*State v. Napper*, 6 Nev. 113.

North Carolina.—*State v. Gunter*, 116 N. Car. 1068.

Texas.—*State v. Franklin*, 36 Tex. 155.

Wisconsin.—*McKinney v. State*, 25 Wis. 378. See also *Humphries v. State*, 5 Mo. 203.

See *infra*, this title, *Assault with Dangerous or Deadly Weapon*.

5. Felony by Statute.—*People v. War*, 20 Cal. 117; *Johnston v. State*, 7 Mo. 183; *State v. Davis*, 29 Mo. 391; *State v. Thompson*, 30 Mo. 470; *State v. Brown*, 60 Mo. 141. See also *State v. Smalls*, 17 S. Car. 62.

6. Aggravated Assault Includes Common Assault.—A defendant indicted for an assault

and battery, with intent to commit a specific crime, may be convicted of a simple assault and battery though there be no count in the indictment to that effect. Greater offenses embrace the lesser of a kindred character.

Alabama.—*State v. Stedman*, 7 Port. (Ala.) 495; *Carpenter v. State*, 23 Ala. 84; *Smith v. State*, 86 Ala. 28.

Arizona.—*West v. Territory* (Arizona 1894), 36 Pac. Rep. 207; *Evans v. Territory* (Arizona 1894), 36 Pac. Rep. 209.

Arkansas.—*McBride v. State*, 7 Ark. 374; *Guest v. State*, 19 Ark. 405; *Cameron v. State*, 13 Ark. 712; *Bryant v. State*, 41 Ark. 359; *State v. Cryer*, 20 Ark. 64.

California.—*People v. Davidson*, 5 Cal. 133; *People v. Fine*, 53 Cal. 263; *People v. English*, 30 Cal. 214; *People v. Holland*, 59 Cal. 364; *People v. Gordon*, 88 Cal. 422; *People v. Pape*, 66 Cal. 366.

Dakota.—*People v. Odell*, 1 Dakota 189; *State v. Johnson*, 3 N. Dak. 150.

Florida.—*Winburn v. State*, 28 Fla. 339.

Georgia.—*Corley v. State*, 95 Ga. 465; *Clark v. State*, 12 Ga. 350; *Jenkins v. State*, 92 Ga. 470.

Illinois.—*Carpenter v. People*, 5 Ill. 197; *Kennedy v. People*, 122 Ill. 649.

Iowa.—*State v. Walters*, 45 Iowa 389; *State v. Graham*, 51 Iowa 72; *State v. Cody* (Iowa 1895), 62 N. W. Rep. 702.

Kansas.—*State v. Schreiber*, 41 Kan. 307; *State v. Cooper*, 31 Kan. 505.

Kentucky.—*Dickerson v. Com.*, 2 Bush (Ky.) 1; *Tyra v. Com.*, 2 Metc. (Ky.) 1.

Louisiana.—*State v. Hertzog*, 41 La. Ann. 775; *State v. Parker*, 42 La. Ann. 972.

Maine.—*State v. Phinney*, 42 Me. 384.

Massachusetts.—*Com. v. Kirby*, 2 Cush. (Mass.) 577; *Com. v. Fischblatt*, 4 Met. (Mass.) 354; *Com. v. Drum*, 19 Pick. (Mass.) 479; *Com. v. Burke*, 14 Gray (Mass.) 100; *Com. v. McGrath*, 115 Mass. 150.

Michigan.—*People v. McDonald*, 9 Mich. 150; *Hanna v. People*, 19 Mich. 316; *People v. Courier*, 79 Mich. 366.

Minnesota.—*State v. Vadnais*, 21 Minn. 382.

Missouri.—*State v. Grimes*, 29 Mo. App. 470; *State v. Burk*, 89 Mo. 635; *State v. Schloss*, 93 Mo. 361; *State v. Brent*, 100 Mo. 531; *State v. Buchler*, 103 Mo. 203; *State v. Baldrige*, 105 Mo. 319; *State v. King*, 111 Mo. 576.

Nevada.—*State v. Robey*, 8 Nev. 312; *State v. Collyer*, 17 Nev. 275.

New Hampshire.—*State v. Webster*, 39 N. H. 96.

New York.—*People v. Casey*, 72 N. Y. 393; *People v. Hickey*, 11 Hun (N. Y.) 631; *O'Leary v. People*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 187.

North Carolina.—*State v. Slagle*, 82 N. Car. 653; *State v. Watts*, 82 N. Car. 656; *State v. Perkins*, 82 N. Car. 681; *State v. Reaves*, 85 N. Car. 553; *State v. Ray*, 89 N. Car. 587; *State v. Russell*, 91 N. Car. 624.

Ohio.—*Stewart v. State*, 5 Ohio 241; *Heller*

2. Assault with Intent to Murder.—An assault with intent to murder¹ involves the concurrence of two distinct elements, an intent to murder, and an assault or attempt to carry out that intention.²

The Intent to Murder.—The intent to commit the specific crime is the essence of the offense,³ but the intent must often of necessity be inferred from the

v. State, 23 Ohio St. 582; *Howard v. State*, 25 Ohio St. 399; *Barber v. State*, 39 Ohio St. 660; *Hanson v. State*, 43 Ohio St. 376.

Tennessee.—*State v. Bowling*, 10 Humph. (Tenn.) 52; *Morton v. State*, 91 Tenn. 437.

Texas.—*Montgomery v. State*, 4 Tex. App. 140; *Givens v. State*, 6 Tex. 343; *Gardenhiser v. State*, 6 Tex. 348; *Shadle v. State*, 34 Tex. 572; *Harrison v. State*, 10 Tex. App. 93; *Johnson v. State*, 17 Tex. App. 565; *Moore v. State*, 33 Tex. Crim. Rep. 351; *Robertson v. State*, 30 Tex. App. 498.

Vermont.—*State v. Reed*, 40 Vt. 603.

Wisconsin.—*State v. Felner*, 19 Wis. 561; *McKinney v. State*, 25 Wis. 378; *Sullivan v. State*, 44 Wis. 595; *Vosburgh v. State*, 82 Wis. 168.

See also *State v. Foster*, 33 Iowa 525; *Francisco v. State*, 24 N. J. L. 30; *Sweeden v. State*, 19 Ark. 205.

Contra, *Gillespie v. State*, 9 Ind. 380, *overruling* *State v. Kennedy*, 7 Blackf. (Ind.) 233; *State v. Ackles*, 8 Wash. 462. See also *State v. Freels*, 3 Humph. (Tenn.) 228.

1. Assault with Intent to Murder.—In *Meredith v. State*, 60 Ala. 441, *Brickell, C. J.*, said: "An assault with intent to murder is not a statutory but a common-law offense. The statute, without adding to or diminishing the elements of the offense as it was known to the common law, by the severer punishment it inflicts, converts it from a high misdemeanor into a felony. No other facts need be proved than such as were essential to be proved at common law. An assault, an intentional attempt by violence, without legal excuse, and without sufficient provocation, to do an injury to the person of another, accompanied by facts and circumstances indicative of an attempt to take life, constitutes the offense."

A person is guilty of an assault with an intent to commit murder, who shoots at another with a shotgun, pistol, or revolver, with intent unlawfully, wilfully, feloniously, and of his malice aforethought, either express or implied, to kill him. *Hanrahan v. People*, 91 Ill. 142; *Wagner v. State* (Tex. Crim. App. 1895), 33 S. W. Rep. 124.

Texas.—When Murder Includes Assault with Intent to Murder.—It has been held in *Texas* under the statutes of that state that an indictment charging a murder by violence includes not only a charge of every inferior degree of culpable homicide, but also the charge of an assault with intent to murder; consequently, where the accused was indicted and tried for murder, and convicted of assault with intent to murder, and the evidence showed that the deceased received from the accused a stab, which was probably but not inevitably fatal, and died two days afterwards, but his death, according to the testimony, resulted solely from engorgement of the lungs caused by

drunkenness and exposure, the conviction was sustained. *Stapp v. State*, 3 Tex. App. 138.

2. Attempt and Intent Essential.—*People v. Devine*, 59 Cal. 630; *White v. State*, 3 Tex. App. 605. See also *Bass v. State*, 6 Baxt. (Tenn.) 581.

In an assault with intent to murder, while the specific intent is the gist of the offense, still, so long as the crime remains in mere intention it is not punishable, but if an attempt is made to execute the intention, which falls short of its consummation, the crime is committed, because the act and intent coalesce and the intent has passed into action, although that action was futile. *Watts v. State*, 30 Tex. App. 533. See also *Evans v. State* (Tex. Crim. App. 1894), 28 S. W. Rep. 948.

3. Alabama.—*Simpson v. State*, 59 Ala. 1, 31 Am. Rep. 1; *Smith v. State*, 83 Ala. 26.

Arkansas.—*Felker v. State*, 54 Ark. 489.

California.—*People v. Mize*, 80 Cal. 41.

Connecticut.—*State v. Fiske*, 63 Conn. 388.

Illinois.—*Hamilton v. People*, 113 Ill. 34, 55 Am. Rep. 396; *Crosby v. People*, 137 Ill. 325.

Iowa.—*State v. White*, 41 Iowa 316, 20 Am. Rep. 602.

Maine.—*State v. Neal*, 37 Me. 468.

Nebraska.—*Botsch v. State*, 43 Neb. 501.

New York.—*Slatterly v. People*, 58 N. Y. 354.

Tennessee.—*State v. Anderson*, 2 Overt. (Tenn.) 6.

Texas.—*Johnson v. State*, 1 Tex. App. 609; *Anderson v. State*, 1 Tex. App. 730; *Smith v. State*, 1 Tex. App. 516; *Hodges v. State*, 3 Tex. App. 470; *Ewing v. State*, 4 Tex. App. 417; *Gillespie v. State*, 13 Tex. App. 415; *Courtney v. State*, 13 Tex. App. 502; *Davis v. State*, 15 Tex. App. 475; *Wood v. State*, 27 Tex. App. 393; *Hooper v. State*, 29 Tex. App. 614; *Patrick v. State* (Tex. Crim. App. 1895), 33 S. W. Rep. 352.

What Intent Sufficient.—In *Allen v. State*, 52 Ala. 391, it was held that an intent to maim or murder, whether deliberate or formed on the instant, whether it is specific or general, if directed against the person charged in the indictment to have been assaulted, amounts to the criminal intent described in the statute.

It has been held that to constitute assault with intent to murder, the act must be voluntary and unlawful, and done with the means and ability to accomplish it and with malice aforethought. The other ingredients may be essential in part as evidence of, but they cannot be said to be, malice aforethought. *Hayes v. State*, 14 Tex. App. 330. See also *Long v. State*, 46 Ind. 582; *Dennison v. State*, 13 Ind. 510; *Harris v. State*, 8 Tex. App. 91.

The malice may be either express or implied. *Haurchau v. People*, 91 Ill. 142;

character of the assault, the want or the use of a deadly weapon, and the presence or absence of excusing or palliating circumstances.¹

Test that Resulting Homicide would have Been Murder.—In order to convict upon the charge of assault with intent to murder, the evidence must be such as would have warranted a conviction for murder in some degree,² had death ensued

Anderson v. State, 1 Tex. App. 730; *Wilson v. State*, 4 Tex. App. 637.

To constitute an assault with intent to murder, which is a felony by statute, it is not sufficient to prove a general felonious intent or any other than the particular intent alleged in the indictment. The burden of proving the alleged intent, as well as the other facts which constitute the felony, is on the state, and its actual existence is a question of fact for the jury, in the decision of which they ought to act on those presumptions which are recognized by law, so far as they are applicable, and their own judgment and experience, as applied to all the circumstances in evidence. *Ogletree v. State*, 28 Ala. 693; *Simpson v. State*, 59 Ala. 1, 31 Am. Rep. 1; *Morgan v. State*, 13 Smed. & M. (Miss.) 242; *Jones v. State*, 11 Smed. & M. (Miss.) 315. See also *State v. Gainus*, 86 N. Car. 632.

Intent to Commit Any Felonious Homicide Sufficient.—It was held in *People v. Shaw*, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 327, that an indictment under the *New York Rev. Stat.*, charging the committing of an assault and battery with a deadly weapon with intent to kill, is sustained by proof that the act was done with intent to commit any felonious homicide, it not being necessary to prove an intent to commit murder.

Aiming at One and Wounding Another.—It was held in *Lacefield v. State*, 34 Ark. 275, 36 Am. Rep. 8, that where one aiming at A misses him and wounds B, he cannot be convicted of assault with intent to kill B. *Contra*, *State v. Gilman*, 69 Me. 163, 31 Am. Rep. 257; *Callahan v. State*, 21 Ohio St. 306. See also, to the same effect, *Walker v. State*, 8 Ind. 290; *Dunaway v. People*, 110 Ill. 333, 51 Am. Rep. 686; *State v. Jump*, 90 Mo. 171.

1. Inference of Intent.—*Meredith v. State*, 60 Ala. 441. See also *infra*, this title, *Evidence—Evidence of Intent*.

An intent to take life, in an assault with intent to murder, may, like the malicious intent of the murder, be inferred from the character of the assault, the use of a deadly weapon, and other attending circumstances. *Walls v. State*, 90 Ala. 619, *explaining and qualifying* *Smith v. State*, 88 Ala. 23; *Crawford v. State*, 86 Ala. 16; *Jolly v. State*, 94 Ala. 19.

Intent Inferred from Means Used.—If the means used in committing an assault and battery are such as would ordinarily and probably produce death, the jury may find the defendant guilty of the alleged intent. *Hughes v. State*, 65 Ind. 39.

To justify an inference of intent to murder, in the commission of an assault and battery, there must be some adaptation, real or apparent, in the act done and the means used to accomplish the alleged purpose. If it be evident to every reasonable mind that the means

used are entirely inadequate to the consummation of the intent charged, that fact will rebut or disprove the felonious intent, and a conviction cannot be justified. But where the object is not accomplished because of an impediment, which is of such a nature as to be wholly unknown to the offender, who used the appropriate means, though not fully, or only apparently, adapted to the object, the criminal intent is present. *Kunkle v. State*, 32 Ind. 220; *Mullen v. State*, 45 Ala. 43, 6 Am. Rep. 691.

Shooting with Pistol.—If a man shoots with a pistol at another and hits him, the law presumes, *prima facie*, that he did it with malice, even when the act was done recklessly in sport, nor does the friendly relation of the parties rebut the presumption. *Collier v. State*, 39 Ga. 31, 99 Am. Dec. 449; *Perry v. People*, 14 Ill. 496; *Com. v. Reynolds*, 120 Mass. 190, 21 Am. Rep. 510; *People v. Vinegar*, 2 Park. Cr. Rep. (Saratoga Oyer & T. Ct.) 24.

Stabbing.—The same presumption arises in the case of an assault by stabbing, and to rebut it the proof, either on the part of the state or the prisoner, must be of such a nature as to show that the stabbing was done under such circumstances as would, had death ensued therefrom, have mitigated the offense from murder to manslaughter, or excusable homicide, or to leave it doubtful whether it was not so done. *Wright v. State*, 9 Yerg. (Tenn.) 343. See also *Conn v. People*, 116 Ill. 458.

Deadly Weapon Not Essential.—It was held in *Monday v. State*, 32 Ga. 672, 79 Am. Dec. 314, that while an intent to murder is usually manifested by the use of a deadly weapon, the employment of which is ordinarily calculated to produce death, still an assault with intent to murder may be committed without the use of a weapon that would be likely to produce death. See also *Southworth v. State*, 5 Conn. 325.

Intent Deduced from Facts as They Appeared to Defendant.—It was held in *State v. Foley*, 12 Mo. App. 431, that the question whether one charged with an assault with intent to kill is guilty of a felonious intent in committing the act charged, must be determined by the facts as perceived by the defendant himself.

2. Whether Murder in the First or Second Degree Immaterial.—In an indictment for an assault with intent to commit the crime of murder, it is wholly immaterial whether the murder intended would, if consummated, have been murder in the first or second degree. *Meredith v. State*, 60 Ala. 441; *People v. Scott*, 6 Mich. 287; *State v. Williams*, 23 N. H. 321; *Sharp v. State*, 19 Ohio 379; *Wright v. State*, 9 Yerg. (Tenn.) 342; *Wilson v. State*, 4 Tex. App. 637; *Stapp v. State*, 3 Tex. App. 138. *Compare* *Bonfanti v. State*, 2 Minn. 123; *Dains v. State*, 2 Humph. (Tenn.) 439.

from the assault.¹ Accordingly, if the evidence should show that, had homicide resulted, the offense would have been manslaughter only, then the accused cannot be convicted of an assault with intent to murder.²

Assault with Intent to Kill.—The rule is otherwise under a statute directed against assaults with intent to kill.³

1. **Crime must have Been Murder had Death Ensued**—*Alabama*.—Scitz *v.* State, 23 Ala. 42; Smith *v.* State, 83 Ala. 26; Lawrence *v.* State, 84 Ala. 424; McCormack *v.* State, 102 Ala. 156.

Arkansas.—McCoy *v.* State, 8 Ark. 451; Cole *v.* State, 10 Ark. 318; Lacefield *v.* State, 34 Ark. 275, 36 Am. Rep. 8.

California.—People *v.* Landman, 103 Cal. 577.

Delaware.—State *v.* Jefferson, 3 Harr. (Del.) 571.

Georgia.—Elliott *v.* State, 46 Ga. 159; Seborn *v.* State, 51 Ga. 1164; Jackson *v.* State, 51 Ga. 402; Smith *v.* State, 52 Ga. 88.

Illinois.—Hopkinson *v.* People, 18 Ill. 264.

Indiana.—Kunkle *v.* State, 32 Ind. 220.

Kentucky.—Wilson *v.* Com., 3 Bush (Ky.) 105; Rapp *v.* Com., 14 B. Mon. (Ky.) 494.

Michigan.—Maher *v.* People, 10 Mich. 212, 81 Am. Dec. 781; Roberts *v.* People, 19 Mich. 401; Wilson *v.* People, 24 Mich. 410.

New Hampshire.—State *v.* Butman, 42 N. H. 490.

New York.—Rumsey *v.* People, 19 N. Y. 41.

Ohio.—Nichols *v.* State, 8 Ohio St. 435; State *v.* Stout, 49 Ohio St. 270.

South Carolina.—State *v.* White, 21 S. Car. 597.

Tennessee.—State *v.* Anderson, 2 Overt. (Tenn.) 6.

Texas.—Yanez *v.* State, 20 Tex. 656; Lockwood *v.* State, 1 Tex. App. 749; Hodges *v.* State, 3 Tex. App. 470; Ferguson *v.* State, 6 Tex. App. 504.

Virginia.—Read *v.* Com., 22 Gratt. (Va.) 924.

See also State *v.* Moran, 46 Kan. 318; State *v.* York, 22 Mo. 462.

Fact that Resulting Homicide would have Been Murder Not Conclusive.—While it is true that, in order to convict of assault with intent to commit murder, the circumstances must be such that, had death ensued, it would amount to murder, still in a prosecution for assault with intent to murder, even though the evidence shows that it would have been murder had death ensued, that fact in itself will not be sufficient ground for the jury to infer the existence of the intention to murder. If the mortal blow was unlawful and malicious, and death ensued, the perpetrator is guilty of murder, although he did not intend to murder. People *v.* Mize, 80 Cal. 41; State *v.* Evans, 39 La. Ann. 912; Simpson *v.* State, 59 Ala. 1, 31 Am. Rep. 1.

2. **Resulting Manslaughter Not Sufficient.**—It is a general and well-established rule that in a prosecution for an assault with an intent to murder, if the evidence should show that had homicide resulted the offense would have been manslaughter, then the accused cannot be convicted of assault with intent to murder, but only of simple assault, or of aggra-

vated assault in states having such a statutory offense.

California.—People *v.* Vanard, 6 Cal. 562; People *v.* English, 30 Cal. 214; People *v.* Congleton, 44 Cal. 92; *Ex p.* Max, 44 Cal. 579; People *v.* Marseiler, 70 Cal. 98; People *v.* Bentley, 75 Cal. 407.

Connecticut.—State *v.* Nichols, 8 Conn. 496.

Florida.—Pittman *v.* State, 25 Fla. 648.

Georgia.—Seborn *v.* State, 51 Ga. 164; Meeks *v.* State, 51 Ga. 429; Smith *v.* State, 52 Ga. 88.

Illinois.—Beckwith *v.* People, 26 Ill. 500.

Indiana.—Wall *v.* State, 23 Ind. 150.

Iowa.—State *v.* Dixon, 3 Iowa 416; State *v.* Shepard, 10 Iowa 126; State *v.* White, 45 Iowa 325; State *v.* Connor, 59 Iowa 357, 44 Am. Rep. 686; State *v.* Postal, 83 Iowa 460.

Kentucky.—Slaughter *v.* Com. (Ky. 1893), 22 S. W. Rep. 645.

Maine.—State *v.* Waters, 39 Me. 54; State *v.* Phinney, 42 Me. 384; State *v.* Clair, 84 Me. 248.

Michigan.—People *v.* Prague, 72 Mich. 178.

New Hampshire.—State *v.* Butman, 42 N. H. 490.

New York.—People *v.* Dartmore, 48 Hun (N. Y.) 321; Slatterly *v.* People, 58 N. Y. 354.

Texas.—Carter *v.* State, 28 Tex. App. 355; Spivey *v.* State, 30 Tex. App. 343; Beatty *v.* State, 30 Tex. App. 677; Low *v.* State (Tex. Crim. App. 1892), 20 S. W. Rep. 366.

Vermont.—State *v.* Reed, 40 Vt. 603.

See State *v.* Moran, 46 Kan. 318.

Mutual Combat.—If, in a mutual combat on equal terms, suddenly and willingly engaged in by both combatants, neither one seeks nor takes undue advantage, and one is killed, the offense is but manslaughter, no matter which struck the first blow, and if death did not ensue from such a combat, the offense could be no more than aggravated assault. But if one took undue advantage, as by using a deadly weapon, and killed his antagonist therewith, the homicide would be murder, and if death did not ensue, the offense would be assault with intent to murder. Wilson *v.* State, 4 Tex. App. 637.

It was formerly held in *Alabama* to be a capital offense for a slave to assault a white person with intent to kill, although if the intention had been consummated, the killing would have been manslaughter only. Nancy *v.* State, 6 Ala. 483.

Assault on Slaves.—It was held in U. S. *v.* Lloyd, 4 Cranch (C. C.) 468, that a simple assault and battery on a slave was not an indictable offense, and that a simple assault upon a slave, even with intent to murder him, was not an offense at common law.

3. **Assaults with Intent to Kill.**—In State *v.* Reed, 40 Vt. 603, it was pointed out that there is a well-recognized distinction between

3. Assault with Dangerous or Deadly Weapon — A Statutory Offense. —

By statute, in most of the states, one class of aggravated assaults is made to depend upon the character of the weapon used in the assault.¹ The provisions of the statutes are varied; some statutes are directed against the use of deadly or dangerous weapons "with an intent to kill a human being or to commit a felony upon the person or the property of the one assaulted,"² or "with intent to inflict grievous bodily harm;"³ while, under other statutes, the mere use of the weapon, without reference to the intent with which it is employed, is sufficient.⁴

Gravamen of the Offense.—Under statutes which make the intent with which the weapon is used a constituent element, the use of the dangerous or deadly weapon, with intent to inflict bodily harm, constitutes the gist of the offense, as distinguishing the act from an ordinary assault.⁵ Therefore, the mere

an assault with intent to murder and an assault with intent to kill. In the former case, the proof must be such as shows that if death had been caused by the assault, the assailant would have been guilty of murder; and in the latter case, the proof need only be established that, had death ensued, the crime would have been manslaughter. In the former case, the intent must be the result of malice aforethought, and in the latter, the result of sudden passion or emotion, without time for deliberation or reflection.

To the same effect are *Hall v. State*, 9 Fla. 203, 76 Am. Dec. 617; *Warrock v. State*, 9 Fla. 404.

It was held in *Ex p. Brown*, 40 Fed. Rep. 81, that to make an assault with intent to kill, § 2142 of the Rev. Stat. of the *United States* does not require that the act should have been murder if death had ensued. If it would have been only manslaughter in case of death, it will be an assault with intent to kill if death does not ensue. *U. S. v. Tharp*, 5 Cranch (C. C.) 390, is to the same effect.

There is no statutory offense in *Michigan* or *Texas* consisting of "assault with intent to kill." *Wilson v. People*, 24 Mich. 410; *Wright v. People*, 33 Mich. 300; *People v. Lilley*, 43 Mich. 521; *Lockwood v. State*, 1 Tex. App. 749; *Sheffield v. State*, 1 Tex. App. 640.

It was held in *O'Leary v. People*, 4 Park. Cr. Rep. (N. Y. Supreme Ct.) 187, that an assault and battery with intent to kill is not a felony, unless committed with a deadly weapon, or by such other means or force as are likely to produce death.

1. *U. S. v. Small*, 2 Curt. (U. S.) 241; *State v. Leonard*, 22 Mo. 449; *Briggs v. State*, 6 Tex. App. 144; *Hunt v. State*, 6 Tex. App. 663; *Flournoy v. State*, 16 Tex. 30; *State v. Franklin*, 36 Tex. 155; *Skidmore v. State*, 43 Tex. 93; *Wilson v. State*, 4 Tex. App. 637.

No Offense under United States Statutes.—Formerly, in the *United States*, there was no punishment provided for an assault with a dangerous weapon, committed within the exclusive jurisdiction of the *United States*, if committed on land, even if it involved an attempt to commit murder. *U. S. v. Williams*, 2 Fed. Rep. 61.

2. See *New York Penal Code*, § 217.

3. See *California Penal Code*, § 245; *Montana Penal Code*, § 401.

4. Not Necessary to Prove Intent.—It was held in *Texas*, under art. 496, § 8, of Criminal Laws of *Texas*, which defines one class of aggravated assaults as an assault committed with a deadly weapon, under circumstances not amounting to an intent to murder or maim, that if the assault be made with a deadly weapon, it is *ipso facto* an aggravated assault, because of the weapon used, and it is unnecessary to allege or prove the intent with which the assault was made. *Hunt v. State*, 6 Tex. App. 663; *Pinson v. State*, 23 Tex. 582.

It has been held in an indictment for an assault with a dangerous weapon, under § 5346 of the *United States Rev. Stat.*, providing that "every person who, etc., with a dangerous weapon, or with intent to perpetrate any felony, commits an assault on another, shall, etc.," that the word "assault" carries with it an allegation of illegality, and that malice is not an ingredient of the offense. *U. S. v. Lunt*, 1 Sprague (U. S.) 311. See also *U. S. v. Gallagher*, 2 Paine (U. S.) 447.

5. *People v. Vanard*, 6 Cal. 562; *People v. Lightner*, 49 Cal. 226; *People v. Congleton*, 44 Cal. 92; *Kruget v. State*, 1 Neb. 365; *State v. Moore*, 82 N. Car. 659; *State v. Russell*, 91 N. Car. 624; *Pinson v. State*, 23 Tex. 579. See also *People v. Nugent*, 4 Cal. 341.

Proof of Wounding or Battery Not Essential.—It has been held in some states that the statutory offense of assault with a deadly weapon, with intent to do great bodily harm, is complete without proof of the battery or wounding; that proof of the assault, the weapon, and the intent, is sufficient. *People v. Keefer*, 18 Cal. 636; *People v. Yslas*, 27 Cal. 630; *State v. Agee*, 68 Mo. 264; *State v. McClure*, 25 Mo. 338; *State v. Vaughn*, 26 Mo. 29; *People v. Ryan*, 55 Hun (N. Y.) 214. See also *People v. Connor*, 53 Hun (N. Y.) 352.

In *Missouri* it has been held, on an indictment for felonious assault and battery, under a statute (§ 38, art. 2, Rev. Code 1845, p. 351) which enacted "That if any person shall be maimed, wounded, or disfigured, or receive great bodily harm, or his life be endangered by the act, etc., of another, in cases and under circumstances which would constitute a murder or manslaughter if death had ensued, the person by whose act, etc., such injury or danger of life shall be occasioned shall, in cases not otherwise provided for, be punished, etc.;"

possession of a deadly weapon, without using it or the intent to use it, will not constitute the offense,¹ nor will the intent without the use.² But under statutes which declare the crime complete by the mere use of a dangerous or deadly weapon, it is unnecessary to allege or prove any intent whatsoever.³

What Constitutes Dangerous or Deadly Weapon.—A dangerous or deadly weapon is one likely to produce death or great bodily harm. The words "dangerous" and "deadly" are practically synonymous when used in this connection.⁴

When a Question of Law for the Court.—Where a weapon and the manner of its use in the commission of an assault are such as to admit of but one conclusion in that respect, the question whether or not it is deadly, within the meaning of the law of homicide, is one of law, and the court should take the responsibility to so declare.⁵

that if the wound inflicted be a dangerous wound, likely to produce death, it is sufficient, although the weapon be not a deadly weapon, and if the weapon used be a deadly weapon, or one likely to produce great bodily harm, it is not necessary that the wound should be a dangerous one. *Carrico v. State*, 11 Mo. 579.

1. The Act and Intent must Concur.—*Walker v. State*, 73 Ala. 17; *Ex p. Ah Cha*, 40 Cal. 426; *People v. Murat*, 45 Cal. 281; *Tarpley v. People*, 42 Ill. 340; *State v. Painter*, 67 Mo. 84; *State v. Sears*, 86 Mo. 169; *State v. Napper*, 6 Nev. 113.

It was held in *Mulligan v. People*, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 105, that a conviction for an attempt to discharge a pistol, under the *New York* statute, cannot be had where the individual indicted proceeded no further towards an actual discharge or shooting than to raise and point the pistol uncocked at the party threatened.

2. People v. Dodel, 77 Cal. 293; *Sullivan v. State*, 44 Wis. 595.

3. U. S. v. Lunt, 1 Sprague (U. S.) 311; *Hunt v. State*, 6 Tex. App. 663; *Pinson v. State*, 23 Tex. 582. See also *U. S. v. Gallagher*, 2 Paine (U. S.) 447.

4. Dangerous or Deadly Weapon—United States.—*U. S. v. Williams*, 2 Fed. Rep. 61.

Illinois—*McNary v. People*, 32 Ill. App. 58. *Kentucky*—*Wilson v. Com.*, 3 Bush (Ky.) 105; *Com. v. Branham*, 8 Bush (Ky.) 387.

Minnesota.—*State v. Dineen*, 10 Minn. 407.

North Carolina.—*State v. Jarrott*, 1 Ired. (N. Car.) 76; *State v. Collins*, 8 Ired. (N. Car.) 407.

Texas.—*Kouns v. State*, 3 Tex. App. 13; *McReynolds v. State*, 4 Tex. App. 327; *Hunt v. State*, 6 Tex. App. 663; *Wilson v. State*, 15 Tex. App. 150.

Washington.—*State v. Rosener*, 8 Wash. 42.

In *People v. Rodrigo*, 69 Cal. 601, it was held that the following instruction to the jury was correct: "A deadly weapon is any weapon or instrument by which death may be produced, or would be likely to be produced, when used in the manner in which it may appear it was used in the affray. The jury are the judges as to whether the weapon was, or was not, a deadly weapon."

In *Pittman v. State*, 25 Fla. 648, it was held that any weapon is a deadly weapon which is likely to produce death, but a weapon capable of producing death is not necessarily a weapon likely to produce death.

5. Question of Law for the Court.—*U. S. v. Williams*, 2 Fed. Rep. 61; *Krchnavy v. State*, 43 Neb. 337; *State v. Rigg*, 10 Nev. 284; *State v. Jarrott*, 1 Ired. (N. Car.) 76; *State v. Craton*, 6 Ired. (N. Car.) 164; *State v. West*, 6 Jones (N. Car.) 509; *State v. Collins*, 8 Ired. (N. Car.) 407; *State v. Phillips*, 104 N. Car. 786. See also *People v. McNutt*, 93 Cal. 658.

Judicial Notice.—Courts will take judicial notice of the fact that some weapons are deadly, without any distinctive averment in the indictment to that effect. *Dollarhide v. U. S.*, 1 Morr. (Iowa) 233, 39 Am. Dec. 460; *State v. Ostrander*, 18 Iowa 435; *Hamilton v. People*, 113 Ill. 34, 55 Am. Rep. 396; *State v. Swann*, 65 N. Car. 330.

Pistols.—It was held in *U. S. v. Wilson*, 1 Baldw. (U. S.) 78, that pistols are dangerous weapons, and the offer or threat to shoot with them comes within the law without proof that they were loaded, the presumption being that they were loaded. *U. S. v. Wood*, 3 Wash. (U. S.) 440.

But it is held in *People v. Jacobs*, 29 Cal. 579, that a pistol may be of such dimensions as to be a deadly weapon without being charged, and it may be so small as to be, without being charged, a very insignificant instrument of assault, and it would, therefore, be necessary to both aver and prove that the pistol was a deadly weapon, in support of an indictment charging an assault with a deadly weapon. See *Riggs v. Com. (Ky. 1895)*, 33 S. W. Rep. 413.

It was held in *U. S. v. Williams*, 2 Fed. Rep. 61, that a loaded pistol is not only a dangerous weapon, but a deadly weapon, the prime purpose of its construction and use being to endanger and destroy life, and that this is a fact of such general notoriety that courts must take notice of it.

Auger.—It has been held in *Missouri* that an auger is a dangerous weapon. *Jennings v. State*, 9 Mo. 862.

Ax.—The description in an indictment of the instrument with which an assault was made, as "an ax," *ex vi termini*, imports a deadly weapon. *State v. Shields*, 110 N. Car. 497; *Dains v. State*, 2 Humph. (Tenn.) 439.

Brass Knuckles.—In *Texas* brass knuckles are held to be deadly weapons. *Wilks v. State*, 3 Tex. App. 34.

Loaded Pistol, and Hoe.—Such things as all persons of ordinary intelligence are presumed to know are not required to be proved.

When a Question of Fact for the Jury.—But where it may or may not be likely to produce fatal results, according to the manner of its use, or the part of the body at which the blow is aimed, its character in that respect is one of fact for the jury.¹

It is not, therefore, necessary, on the trial of parties for an assault with a loaded pistol and a hoe, with intent to murder, to prove that they were deadly weapons. *Hamilton v. People*, 113 Ill. 34, 55 Am. Rep. 396.

Club.—It was held in *State v. Phillips*, 104 N. Car. 786, that a club is such an instrument in its weight, dimensions, and character, that the court must conclude that a blow struck with it by a man would probably produce death or great bodily harm; that a club means not only a large, but a heavy stick, and it is, therefore, a deadly weapon.

Champagne Bottle.—It was held in *Wilson v. State*, 33 Ga. 207, that a champagne bottle, thrown at the head, is a deadly weapon.

Pestle.—It was held in *Raspberry v. State*, 1 Tex. App. 664, that an ordinary pestle, when used as a club, may inflict serious bodily injury and may, therefore, be a deadly weapon.

Sledge Hammer.—It was held in *Philpot v. Com.*, 86 Ky. 595, that a sledge hammer is a deadly weapon within the meaning of § 2, art. 4, c. 29, of *Kentucky Gen. Stat.*, which provides for the punishment of any person who "shall wilfully and maliciously cut, strike, or stab another with a knife, sword, or other deadly weapon, with intent to kill."

Lethal Weapons.—It was held in *State v. Godfrey*, 17 Oregon 300, that guns, swords, pistols, knives, and the like, are lethal weapons, as a matter of law, when used within striking distance from the party assaulted; all others are lethal or not, according to their capability of producing death or great bodily harm in the manner in which they are used, and of this the jury must be the judges. See also *State v. Herron*, 12 Mont. 230; *State v. Huntley*, 91 N. Car. 617.

1. **Question of Fact for Jury**—*United States v. Williams*, 2 Fed. Rep. 61.

Alabama.—*Sylvester v. State*, 71 Ala. 17.

California.—*People v. Rodrigo*, 69 Cal. 601.

Indiana.—*Barker v. State*, 48 Ind. 163; *Doering v. State*, 49 Ind. 56, 19 Am. Rep. 669.

Kentucky.—*Duncan v. Com.*, 6 Dana (Ky.) 295; *Woodson v. Com.* (Ky. 1893), 21 S. W. Rep. 584; *Smallwood v. Com.* (Ky. 1896), 33 S. W. Rep. 822.

Missouri.—*State v. Sebastian*, 81 Mo. 514.

Nebraska.—*Krchnavy v. State*, 43 Neb. 337.

New York.—*Nelson v. People*, 23 N. Y. 293; *People v. Cavanagh*, 62 How. Pr. (Albany Oyer & T. Ct.) 187; *Abbott v. People*, 86 N. Y. 461; *People v. Irving*, 95 N. Y. 541.

Texas.—*Sheffield v. State*, 1 Tex. App. 640. See also *Wilson v. State*, 15 Tex. App. 150; *Branch v. State* (Tex. Crim. App. 1895), 33 S. W. Rep. 356.

In *Rex v. Howlett*, 7 C. & P. 274, 32 E. C. L. 508, it was held that it was a question for the jury to consider whether the instrument employed was, in its ordinary use, likely to cause death; or, if it was an instrument not likely, under ordinary circumstances, to cause death, whether it was used in such an extraor-

dinary manner as to make it likely to cause death, either by continued blows or otherwise.

Belaying Pin.—It was held in *U. S. v. Small*, 2 Curt. (U. S.) 241, that the question whether an assault was with a dangerous weapon or not may depend upon matter of fact, as upon the manner of the assault, and in such a case the court cannot declare, as a matter of law, that the assault, if committed with a belaying pin, was with a dangerous weapon. The question must be left to the jury. The danger referred to is danger to life. See also *Blige v. State*, 20 Fla. 742, 51 Am. Rep. 628.

Chair.—A chair is not necessarily a deadly weapon; whether it is such, must depend upon its size or weight, in connection with the manner of its use and the part of the person that is struck with it. There may be chairs so small that they would not, when so used, be likely to produce death or serious bodily injury. *Kouns v. State*, 3 Tex. App. 13.

Glass Tumbler.—It was held in *Coney v. State*, 2 Tex. App. 62, that a glass tumbler may be used in such a manner as to become a dangerous weapon.

Horse Shoe.—It was held in *People v. Cavanagh*, 62 How. Pr. (Albany Oyer & T. Ct.) 187, that what is a "sharp, dangerous weapon," within the meaning of the *New York* statute (c. 74, Laws of 1854) is a question of fact for the jury. The weapon used must be sharp, as well as dangerous, and if not a knife, dirk, or dagger, it must be similar to one of them, that is, one which would inflict a similar wound. In this case, it was held that a horse shoe was not a "sharp, dangerous weapon."

Hand Spike.—A hand spike may be a dangerous weapon. *Reg. v. Shea*, 8 New Bruns. 129.

Iron Bolt.—It was held in *State v. Lowry*, 33 La. Ann. 1224, that an iron bolt, rod, or pin may be a dangerous weapon, whether the point be sharp or not.

Knife as a Deadly Weapon.—It was held in *Hilliard v. State*, 17 Tex. App. 210, that an allegation in the indictment that the offense charged was committed with a deadly weapon, imposes upon the state the burden of establishing by proof the deadly character of such weapon, and that a knife may, or may not, be a deadly weapon, according to the length of the blade, etc. See also *McNary v. People*, 32 Ill. App. 58; *State v. Erwin*, 91 N. Car. 545; *Wilson v. State* (Tex. Crim. App. 1895), 29 S. W. Rep. 41; *Whitten v. State* (Tex. Crim. App. 1894), 28 S. W. Rep. 474.

It was held in *Sylvester v. State*, 71 Ala. 17, that the refusal of a charge requested by the defendant, on trial for murder, which assumes, as a matter of law, that a pocket-knife is not a deadly weapon, is free from error. *State v. Jacob*, 10 La. Ann. 141. See also *State v. Hertzog*, 41 La. Ann. 775.

Pin.—Where the accused pushed a pin down an infant's throat, thereby producing death, this was held to be a killing with a deadly weapon. *State v. Norwood*, 115 N. Car. 789.

4. Assault with Intent to Commit Rape—Intent Is the Essence of the Offense.—In order to convict a person of assault with intent to commit rape, the evidence must show that he not only made an assault upon a female, but that it was his intention at the time, forcibly and against her will, to have carnal knowledge of the person assaulted.¹

Pistol Used as a Club.—When a gun or pistol is used simply to strike with, it is not necessarily a deadly weapon, but would be such or not according to its size and the manner of using it. Its character is usually for the jury to determine. *Prior v. State*, 41 Ga. 155; *Hunt v. State*, 6 Tex. App. 663; *State v. Franklin*, 36 Tex. 155; *Shadle v. State*, 34 Tex. 572; *Skidmore v. State*, 43 Tex. 93; *Ballard v. State* (Tex. App. 1890), 13 S.W. Rep. 674. See also *Allen v. People*, 82 Ill. 610; *Com. v. Fenno*, 125 Mass. 387; *State v. Napper*, 6 Nev. 113.

Pitchfork.—It was held in *Filkins v. People*, 69 N. Y. 101, 25 Am. Rep. 143, that a blow given with the handle of a pitchfork is not an assault with a "sharp, dangerous weapon." *People v. Hickey*, 11 Hun (N. Y.) 631. See *State v. Beverlin*, 30 Kan. 611.

Policeman's Mace.—On the trial of an indictment for assault and battery, the court charged the jury that a policeman's mace, with which the blow was struck, was a dangerous weapon. It was held, on appeal, that the charge was erroneous. Whether the weapon used was or was not dangerous, was a question of fact and not of law, and should have been submitted to the jury. *Doering v. State*, 49 Ind. 56, 19 Am. Rep. 669; *Berry v. Com.*, 10 Bush (Ky.) 15.

Shovel.—A shovel has also been held to be a deadly weapon. *State v. Beadon*, 17 S. Car. 55.

Stick.—Where the only evidence as to the character of the weapon used was that "it was a good-sized walking stick made of Bois d'Arc and loaded," the court held that there was no evidence that it was a deadly weapon. *Stevens v. State*, 27 Tex. App. 461. See also *State v. Porter*, 101 N. Car. 713; *People v. Comstock*, 49 Mich. 330. But see *Tatum v. State*, 59 Ga. 638.

Where it only appears that the weapon used was a stick of curled hickory of ordinary size, and that the slayer struck with the larger end thereof, it falls peculiarly in the province of the jury to ascertain whether such a weapon, so used by the slayer, was likely to produce fatal consequences or not. *State v. Jarrott*, 1 Ired. (N. Car.) 76. See also *State v. Painter*, 67 Mo. 84.

Stone.—A stone may or may not be a dangerous weapon, depending upon its size and other circumstances. A large, heavy stone in the hands of a man intending to do great bodily harm is likely to produce that result. *State v. Dineen*, 10 Minn. 407. See also *Regan v. State*, 46 Wis. 256; *State v. Seamons*, 1 Greene (Iowa) 418.

1. Assault with Intent to Rape—England.—*Rex v. Lloyd*, 7 C. & P. 318, 32 E. C. L. 523; *Reg. v. Stanton*, 1 C. & K. 415, 47 E. C. L. 415.

Arkansas.—*Charles v. State*, 11 Ark. 389; *Pleasant v. State*, 13 Ark. 360.

California.—*People v. Fleming*, 94 Cal. 308.

Georgia.—*Taylor v. State*, 50 Ga. 79.

Illinois.—*Stevens v. People*, 158 Ill. 111, citing 19 AM. AND ENG. ENCYC. OF LAW (1st ed.) 969; *Barr v. People*, 113 Ill. 471.

Iowa.—*State v. Hagerman*, 47 Iowa 151; *State v. Kendall*, 73 Iowa 255, 5 Am. St. Rep. 679.

Massachusetts.—*Com. v. Merrill*, 14 Gray (Mass.) 415, 77 Am. Dec. 336.

Missouri.—*State v. Priestley*, 74 Mo. 24; *State v. Harney*, 101 Mo. 470; *State v. Owsley*, 102 Mo. 678.

New York.—*Reynolds v. People*, 41 How. Pr. (N. Y. Supreme Ct.) 179; *People v. Kirwan* (Supreme Ct.), 22 N. Y. Supp. 160.

North Carolina.—*State v. Massey*, 86 N. Car. 658, 41 Am. Rep. 478.

Tennessee.—*Wyatt v. State*, 2 Swan (Tenn.) 394.

Texas.—*Thompson v. State*, 43 Tex. 583; *Brown v. State*, 27 Tex. App. 330; *Brown v. State*, 7 Tex. App. 569; *Burney v. State*, 21 Tex. App. 565; *Taylor v. State*, 22 Tex. App. 529, 58 Am. Rep. 656; *Porter v. State*, 33 Tex. Crim. Rep. 385.

Virginia.—*Com. v. Fields*, 4 Leigh (Va.) 648.

See also *Proctor v. Com.* (Ky. 1892), 20 S. W. Rep. 213; *State v. Burgdorf*, 53 Mo. 65; *Crew v. State* (Tex. Crim. App. 1893), 22 S. W. Rep. 973; *Outlaw v. State*, 35 Tex. 481; *State v. Mueller*, 85 Wis. 203.

Specific Intent to Commit Rape Essential.—In order to constitute assault with intent to rape, the assault must be accompanied with the specific intention to rape; to have carnal knowledge of the woman without her consent, and by the use of such force as should be sufficient to overcome such resistance as the woman should make. *Shields v. State*, 32 Tex. Crim. Rep. 502.

In *Com. v. Merrill*, 14 Gray (Mass.) 415, 77 Am. Dec. 336, the court said: "The nature of the charge presupposes that the intent was not carried out. It is, therefore, necessary that the acts and conduct of the prisoner should be shown to be such that there can be no reasonable doubt as to the criminal intent. If these acts and conduct are equivocal, or equally consistent with the absence of the felonious intent charged in the indictment, then it is clear that they are insufficient to warrant a verdict of guilty." *State v. Massey*, 86 N. Car. 658, 41 Am. Rep. 478, *overruling* *State v. Neely*, 74 N. Car. 425, 21 Am. Rep. 496, on this point. See also *Peterson v. State*, 14 Tex. App. 162.

To authorize a conviction of the offense of assault with intent to rape, it devolves upon the state to prove satisfactorily such specific intent. That particular intent, no other, will constitute this offense. Thus an assault with intent to have improper connection with a woman, but

Would Act, if Accomplished, have Been Rape.—To constitute an assault with intent to commit rape, the circumstances must be such as to show that it would have been rape had the accused carried out his intent.¹ There can be no assault with intent to rape upon a consenting female.²

without the use of force, and not without the consent of the woman, would not be an assault with intent to commit rape. *People v. Manchego*, 80 Cal. 306; *State v. Canada*, 68 Iowa 391; *Pefferling v. State*, 40 Tex. 486; *Curry v. State*, 4 Tex. App. 574; *Thomas v. State*, 16 Tex. App. 535; *Passmore v. State*, 29 Tex. App. 241; *Robertson v. State*, 30 Tex. App. 498.

Force an Essential Ingredient.—Force is an essential ingredient of the offense of assault with intent to commit rape, and where the evidence shows no intention on the part of the defendant forcibly to have carnal knowledge of the woman assaulted, a verdict of guilty of assault with intent to commit rape is error. *Jones v. State*, 90 Ala. 628, 24 Am. St. Rep. 850; *Johnson v. State*, 63 Ga. 355; *Irving v. State*, 9 Tex. App. 66. See also *House v. State*, 9 Tex. App. 53.

In *Connecticut*, in order to complete the offense of assault with intent to rape, there must be some actual violence—that is, physical force—on the person of the female assaulted. *State v. Wells*, 31 Conn. 210.

A conviction for an assault with intent to commit rape by force is not warranted by proof that the defendant, against the will of the female, indecently fondled her with intent to induce her thereby to submit to his embrace. It must appear that his intent was to accomplish his purpose by force and against her will. *Sanford v. State*, 12 Tex. App. 196; *Saddler v. State*, 12 Tex. App. 194.

Missouri and New York.—It has been held in *Missouri* that it is not necessary, to constitute an assault with intent to rape, that actual violence should be used; that if the intent with the present means of carrying it into effect exists, and preparations therefor have been made, the assault is complete. *State v. Montgomery*, 63 Mo. 296; *State v. Smith*, 80 Mo. 516; *State v. Shroyer*, 104 Mo. 441, 24 Am. St. Rep. 344.

Where the accused decoyed a female under ten years of age into a building for the purpose of ravishing her, and was there detected while standing within a few feet of her in a state of indecent exposure, it was held that though there was no evidence of his having actually touched her, he was properly convicted of an assault with intent to commit rape. *Hays v. People*, 1 Hill (N. Y.) 351.

Desistance on Account of Resistance.—If the defendant did in fact intend forcibly to know a female carnally, and against her will, and the effort be made to accomplish his purpose, the mere desisting from further effort on account of resistance, inability to overcome the resistance, or from fear, does not relieve him from the guilt of an assault with intent to rape. *Lewis v. State*, 35 Ala. 380; *People v. Stewart*, 97 Cal. 238; *Taylor v. State*, 50 Ga. 79; *State v. Elick*, 7 Jones (N. Car.) 68. See also *Glover v. Com.*, 86 Va. 382.

Corroboration.—It has been held in *Iowa* that a statute providing that a person cannot be convicted for rape unless the complaining witness be corroborated by other evidence, tending to connect the defendant with the commission of the crime (*Iowa Code*, § 4560), does not apply to the case of an assault with intent to commit rape. *State v. Hatfield*, 75 Iowa 592. See *State v. Stowell*, 60 Iowa 535. This rule has also been adopted in *California*. *People v. Stewart*, 90 Cal. 212; *People v. Mesa*, 93 Cal. 580; *People v. Fleming*, 94 Cal. 308; *People v. Stewart*, 97 Cal. 238.

Attempt to Commit Rape.—An attempt to commit rape is not the same thing as an assault with intent to commit rape. *Fox v. State*, 34 Ohio St. 377. See also *Brown v. State*, 7 Tex. App. 569; *Rex v. Philipps*, 6 East 464; *State v. Martin*, 3 Dev. (N. Car.) 329.

The Texas Penal Code (art. 523), defining the offense of assault with intent to commit rape, uses the words "intent" and "attempt" interchangeably. *Curry v. State*, 4 Tex. App. 574. See also the titles ATTEMPTS; RAPE.

1. *Sullivant v. State*, 8 Ark. 400; *People v. Quin*, 50 Barb. (N. Y.) 128; *Smith v. State*, 12 Ohio St. 466, 80 Am. Dec. 355; *Thomas v. State*, 16 Tex. App. 535; *Rhodes v. State*, 1 Coldw. (Tenn.) 351.

Whether Consummated Act would have Been Rape, the Criterion.—To constitute an assault with intent to commit rape, there must have been an attempt to commit rape, and that intent must have been manifested by an assault for that purpose upon the person intended to be ravished. Both of these ingredients are necessary to constitute the offense. *Garrison v. People* 6 Neb. 274.

Where the defendants administered to a woman liquor, which produced a stupor and insensibility that would have prevented any effectual resistance, had she been inclined to resist, it was held that as the violation of the person of the female, under such circumstances, would not have constituted the crime of rape, the defendants could not be convicted of an assault with intent to commit rape. *People v. Quin*, 50 Barb. (N. Y.) 128.

Charge of Rape Includes Assault with Intent.—Where the accused is indicted for rape, he may be convicted of assault with intent to commit rape, the latter offense being necessarily included in the former. *Reg. v. Hallitt*, 9 C. & P. 748, 38 E. C. L. 318; *Richardson v. State*, 54 Ala. 158; *State v. Shepard*, 7 Conn. 54; *Prindeville v. People*, 42 Ill. 217; *State v. Vinsant*, 49 Iowa 241; *Com. v. Cooper*, 15 Mass. 187; *Campbell v. People*, 34 Mich. 351; *State v. Johnson*, 30 N. J. L. 185; *Mings v. Com.*, 85 Va. 638; *Glover v. Com.*, 86 Va. 382; *State v. Mueller*, 85 Wis. 203. See *People v. Bartow*, 1 Wheel. Cr. Cas. (N. Y.) 378.

2. **Consenting Female.**—*People v. Brown*, 47 Cal. 447; *State v. Pickett*, 11 Nev. 255, 21

5. Indecent Assault.—If a man takes improper liberties with the person of a female, or indecently fondles her against her will and consent, he is guilty of indecent assault.¹

IV. WHO ARE CRIMINALLY LIABLE—In General All Participants Principals.—An assault and battery being a misdemeanor,² all persons who are present at the commission of an assault and battery, aiding, encouraging or inciting the principal participant by words, gestures, looks or signs, or who, in any way, countenance or approve the assault, are in law deemed to be principals, and a blow by one is a blow by each and all.³

Am. Rep. 754; *People v. Bransby*, 32 N. Y. 525; *Hull v. State*, 22 Wis. 580.

For a full discussion of this subject, see *infra*, this title, *Consent*.

1. Indecent Assault.—Reg. v. Day, 9 C. & P. 722, 38 E. C. L. 306; *Norris v. State*, 87 Ala. 85; *Goodrum v. State*, 60 Ga. 509; *Com. v. Bean*, 111 Mass. 438; *People v. Hicks*, 98 Mich. 86; *People v. Justices*, 18 Hun (N. Y.) 330; *Mitchell v. Work*, 13 R. I. 645; *Young v. State*, 31 Tex. Crim. Rep. 24. See also *Newell v. Whitcher*, 53 Vt. 589, 38 Am. Rep. 703; *Cracker v. Chicago*, etc., R. Co., 36 Wis. 657.

Texas—Aggravated Assault.—Violent and indecent familiarity with the person of a female, without her consent, and without the specific intent to rape, by an adult male person, is an aggravated assault under the statutes of *Texas*. *Curry v. State*, 4 Tex. App. 574; *Robertson v. State*, 30 Tex. App. 498; *Ridout v. State*, 6 Tex. App. 249; *Sanford v. State*, 12 Tex. App. 196.

Master Taking Indecent Liberties with Female Scholar.—If a master takes indecent liberties with a female scholar without her consent, he is liable to be punished for an assault, though she did not resist. A master took very indecent liberties with a female scholar of the age of thirteen, by putting her hand in his breeches, pulling up her petticoats, and putting his private parts to hers; she did not resist, but it was against her will. The jury found him guilty of an assault with intent to commit rape, and also of a common assault; and the judges thought the finding as to the latter clearly right. *Rex v. Nichol, R. & R. C. C. 130*; Reg. v. McGavaran, 3 C. & K. 320.

Indecent Exposure of Person of Female Patient.—A girl of sixteen was taken by her parents to the defendant, a German quack, on account of fits. He said he would cure her, and bade her come again the next morning; she went accordingly the next morning alone, and he told her she must strip naked. She refused to comply at first, but upon being told that she must, or otherwise he could do her no good, she began to untie her dress and he stripped off all her clothes. She did nothing; he pulled off everything. She told him she did not like to be stripped in that manner. When she was naked he rubbed her with a liquid. The case was left to the jury to consider whether the defendant believed that stripping the girl would assist his judgment, or whether he did not strip her wantonly, without thinking it necessary, and the jury were instructed that the making the girl

strip and pulling off her clothes might, under the latter circumstances, justify a verdict for an assault. The jury found the defendant guilty, and, upon a case reserved, it was held that the conviction was right. *Rex v. Rosinski*, 1 M. C. C. 19. See also *Rex v. Nichol, R. and R. C. C. 130*; Reg. v. Ellis, 2 C. and K. 470, 61 E. C. L. 470.

Consent Obtained by Fraud.—Where a medical practitioner has sexual connection with a female patient of the age of fourteen years, she having for some time been receiving medical treatment from him, the court held that he was guilty of an assault, the jury having found that she was ignorant of the nature of the defendant's act, and made no resistance solely from a *bona fide* belief that the defendant was, as he represented, treating her medically, with a view to her cure. Reg. v. Case, 1 Eng. L. & Eq. 544.

Embracing a Young Girl.—Where it was shown that the defendant put his arms around the waist of a girl under the age of fourteen years, but took no other liberties with her, it was held that he could not be convicted of indecent assault. *People v. Sheffield* (Mich. 1895), 63 N. W. Rep. 65.

Indecent Assault on Young Boys.—The prisoner was indicted for assaulting two boys, each of whom was eight years of age. It was proved that the prisoner took the boys into a field, and did acts towards them which amounted to indecent assaults, unless they consented to them. The boys stated in evidence that they did not know what he was going to do to them when he did each of the acts in question. Upon this evidence, the judge left to the jury the question whether the boys merely submitted to the acts, ignorant of what was going to be done to them, or of the nature of what was being done, or if they exercised a positive will about it and consented to what the defendant did; and told the jury that in the former case they would find the defendant guilty, in the latter case they would acquit him. The jury found the prisoner guilty on the ground that the boys merely submitted to his act, not knowing its nature. It was held that the judge was right, and the conviction must be upheld. Reg. v. Lock, L. R. 2 C. C. 10. See also *Cliver v. State*, 45 N. J. L. 46.

2. See the title **ACCESSORY**, vol. I, p. 261.

3. **General Rule—All Principals—United States.**—*U. S. v. Ricketts*, 1 Cranch (C. C.) 164.

Alabama.—*Thompson v. State*, 25 Ala. 41; *Tanner v. State*, 92 Ala. 1; *Jolly v. State*, 94 Ala. 19.

A different rule would apply where, by statute, a particular species of assault is made a felony.¹

Infants.—An infant under seven years of age is conclusively incapable of committing crime; for the legal presumption is that he cannot have discretion.² A child above seven years of age may be criminally liable for assault and battery, but the law protects children between the ages of seven and fourteen, who are accused of crime, by requiring the prosecution to establish by clear and strong proof the capacity of the child to entertain a criminal intent.³

Illinois.—Hildreth v. Hancock, 156 Ill. 618.

Iowa.—State v. McClintock, 8 Iowa 203; State v. Myers, 19 Iowa 517; Cleveland v. Stilwell, 75 Iowa 466.

Massachusetts.—Lincoln v. Hapgood, 11 Mass. 358; Halsey v. Woodruff, 9 Pick. (Mass.) 555; Com. v. Hurley, 99 Mass. 433; Fuller v. Chamberlain, 11 Met. (Mass.) 503.

Missouri.—State v. Nelson, 98 Mo. 414; Goetz v. Ams, 27 Mo. 28; State v. Gray, 21 Mo. 492; State v. Gooch, 105 Mo. 392.

Nebraska.—Cooney v. Burke, 11 Neb. 258.

New Hampshire.—State v. Stone, 65 N. H. 124.

North Carolina.—State v. Rawles, 65 N. Car. 334.

Ohio.—Bell v. Miller, 5 Ohio 251; Baker v. State, 12 Ohio St. 214.

Texas.—Dunman v. State, 1 Tex. App. 593.

South Carolina.—State v. Lymburn, 1 Brev. (S. Car.) 397, 2 Am. Dec. 669.

See also Reg. v. Bowen, 1 C. & M. 149, 41 E. C. L. 86; Rex v. Collision, 4 C. & P. 565, 19 E. C. L. 529; Brown v. Perkins, 1 Allen (Mass.) 89; Colquitt v. State, 34 Tex. 550; McMahon v. State, 16 Tex. App. 357; Hilmes v. Stroebel, 59 Wis. 74; Timothy v. Simpson, 6 C. & P. 499, 25 E. C. L. 509; Kuney v. Dutcher, 56 Mich. 308.

Fight by Mutual Consent.—If two parties go out to strike each other, and do so, both are guilty of assault and battery, and it is quite immaterial which one strikes first. Reg. v. Lewis, 1 C. & K. 419, 47 E. C. L. 419; Rex v. Perkins, 4 C. & P. 537, 19 E. C. L. 515; Fussell v. State, 94 Ga. 78.

Some Overt Act Necessary.—In order to render a person liable for an assault and battery, where he did not actually participate therein, it must be shown that he did some act, however slight, to encourage it; merely thinking the punishment merited, and taking pleasure therein, is not sufficient. Blue v. Christ, 4 Ill. App. 351.

Prize Fights.—According to the earlier decisions, it was held that persons present at a prize fight, for the purpose of seeing the persons strike each other, were all principals in the breach of the peace, and indictable for an assault as well as the actual combatants. Rex v. Billingham, 2 C. & P. 234, 12 E. C. L. 105; Rex v. Perkins, 4 C. & P. 537, 19 E. C. L. 515; Rex v. Murphy, 6 C. & P. 103, 25 E. C. L. 301.

But in Reg. v. Coney, 8 Q. B. Div. 534, these earlier decisions were overruled, and it was held, by a divided court, that mere voluntary presence at a prize fight does not, as a matter of law, necessarily render the persons so

present guilty of an assault as aiding and abetting in such fight.

See also the titles PRIZE FIGHTS; AIDER AND ABETTOR.

Person Not Present at the Assault.—To render a party liable for trespass who was not present, such party must knowingly and intentionally have encouraged its commission in a way calculated to cause it to be done. Bird v. Lynn, 10 B. Mon. (Ky.) 422.

Commanding Officers of Militia.—Commanding officers of companies of militia, marching through the country, will be liable for disorders committed by the soldiers under their command, which they knew about and did nothing to prevent or to detect and punish. Avery v. Bulkly, 1 Root (Conn.) 275.

Liability of Feme Covert.—An indictment will not lie against a *feme covert* for an assault and battery committed in the company and by the command of her husband. Com. v. Neal, 10 Mass. 152, 6 Am. Dec. 105; Brazil v. Moran, 8 Minn. 236, 83 Am. Dec. 772. For further discussion of this subject, see the title HUSBAND AND WIFE.

1. See the title ACCESSORY, vol. 1, p. 260.

2. **Infants under Seven.**—1 Hale P. C. 27; Willet v. Com., 13 Bush (Ky.) 230; People v. Townsend, 3 Hill (N. Y.) 479. See also the titles CRIMINAL LAW; INFANTS.

3. **Infants over Seven Years of Age.**—Godfrey v. State, 31 Ala. 323, 70 Am. Dec. 494; State v. Fowler, 52 Iowa 103; Com. v. Mead, 10 Allen (Mass.) 398; State v. Tice, 90 Mo. 112; State v. Guild, 10 N. J. L. 163, 18 Am. Dec. 404; State v. Learnard, 41 Vt. 585. See also Stephenson v. State, 28 Ind. 272.

Presumption in Favor of Infant under Fourteen.—An infant under the age of fourteen years cannot commit the crime of rape, nor be guilty of an assault with intent to commit rape. State v. Handy, 4 Harr. (Del.) 566; State v. Sam, Winst. (N. Car.) 300; Rex v. Eldershaw, 3 C. & P. 396, 14 E. C. L. 367; Reg. v. Philips, 8 C. & P. 736, 34 E. C. L. 610. See also Rex v. Groombridge, 7 C. & P. 582, 32 E. C. L. 641; State v. Pugh, 7 Jones (N. Car.) 61; Williams v. State, 20 Fla. 777.

Rebuttable Presumption.—It has been held in Louisiana, New York, Ohio, and Tennessee that the law presumes that an infant under the age of fourteen is incapable of committing rape or assault with intent to commit rape, but that this presumption may be rebutted by proof that such person has arrived at the age of puberty. State v. Jones, 39 La. Ann. 935; People v. Randolph, 2 Park. Cr. Rep. (N. Y. Supreme Ct.) 174; Williams v. State, 14 Ohio 222, 45 Am. Dec. 536; Hiltabiddle v. State, 35 Ohio St. 52, 35 Am. Rep.

V. DEFENSES—1. Self-defense—*a*. WHEN ASSAULTED.—It is a good defense to a charge of assault and battery, that the force charged was made necessary to repel a threatened or actual attack of the prosecutor.¹

Apparent Danger Ground for Self-defense.—It is not necessary that the danger should be real, but it is sufficient if it is apparent only, provided any reasonable man would have acted likewise under similar circumstances.²

592; *Wagoner v. State*, 5 Lea (Tenn.) 352. *Contra*, *Com. v. Green*, 2 Pick. (Mass.) 380, Parker, C. J., *dissenting*. See also the title RAPE.

1. Self-Defense.—*Simpson v. State*, 59 Ala. 1, 31 Am. Rep. 1; *Morris v. Platt*, 32 Conn. 75; *Tucker v. Walters*, 78 Ga. 232; *Miller v. State*, 74 Ind. 1; *Agee v. State*, 64 Ind. 340; *Shain v. Markham*, 4 J. J. Marsh. (Ky.) 578, 20 Am. Dec. 232; *Rogers v. Waite*, 44 Me. 275; *State v. Stockton*, 61 Mo. 382; *State v. McNamara*, 100 Mo. 100; *State v. Burwell*, 63 N. Car. 661; *State v. Sherman*, 16 R. I. 631; *Burch v. State*, 43 Tex. 376; *State v. Blodgett*, 50 Vt. 142. See also *Lacewell v. State*, 95 Ga. 346; *Vandermark v. People*, 47 Ill. 122; *Runyan v. State*, 57 Ind. 80, 26 Am. Rep. 52; *Com. v. Jardine*, 143 Mass. 567; *Drew v. Comstock*, 57 Mich. 176; *Gallagher v. State*, 3 Minn. 270.

See generally the titles SELF-DEFENSE; HOMICIDE.

Mere Words and Threats never justify an assault. See *supra*, this title, *Essential Elements of an Assault or Battery—Overt Act in Assault—Threats and Abusive Language*.

Defense from Serious Bodily Harm.—The right of self-defense exists as well when serious bodily injury is threatened and the danger is imminent and pressing, as when life is menaced, and a charge of the court is erroneous if it limits the right of self-defense to the latter condition when, under the defense, the jury might conclude that, though the life of the accused was not imperiled, he was in imminent danger of serious bodily injury. *Anderson v. State*, 1 Tex. App. 730.

Where Two Persons Fight Willingly.—When two persons meet together mutually, and use insulting words, and then fight willingly, or by mutual consent, it is immaterial which commenced the quarrel, and neither can set up the plea of self-defense, nor can he who provoked the quarrel set up that defense, being regarded as the aggressor, although he afterwards fought unwillingly. But he who is not the aggressor, merely using offensive words in reply to such words, and not fighting willingly, may protect himself from assault and injury by opposing force with force, so far as may be necessary. *Howell v. State*, 79 Ala. 283. See *State v. Newland*, 27 Kan. 764.

Call upon the Authorities for Assistance Not Necessary.—A party assailed may seek the protection of the authorities, but his failure to do so does not deprive him of the right to justify himself in the same manner, and to the same extent, and by the same means, as if he had done so. *Evers v. People*, 3 Hun (N. Y.) 716, *affirmed* in 63 N. Y. 625. See also *State v. Lull*, 48 Vt. 581.

Self-defense by Trespasser.—A trespasser

upon the land of another may exercise his right of self-defense, if the owner of said land uses unnecessary violence in ejecting him. *People v. Gulick*, Hill & D. Supp. (N. Y.) 229. See also *Irwin v. Yeager*, 74 Iowa 174; *Hinton v. State*, 24 Tex. 454.

Husband Defending Himself against Wife.—A husband has a right to defend himself against an assault committed upon him by his wife, unless he employs greater force than is necessary to repel the violence of his wife, and he cannot be held guilty of assault and battery. *Leonard v. State*, 27 Tex. App. 186.

Assault upon a Foreign Minister.—The law is the same in the case of a defendant charged with an assault of a foreign minister as of one charged with the same offense against a citizen, and if the minister gave the first assault, the defendant will be excused for the subsequent battery. *U. S. v. Liddle*, 2 Wash. (U. S.) 205; *U. S. v. Ortega*, 4 Wash. (U. S.) 531.

Rule in Civil Actions.—The rule of self-defense is the same in civil actions as in criminal proceedings, and what would justify one who was assailed by another in repelling the assault by force will shield him from damages in civil proceedings. *Baker v. Gausin*, 76 Ind. 317; *Thomason v. Gray*, 82 Ala. 291.

2. Apparent Danger Only—*Alabama*.—*Christian v. State*, 96 Ala. 89.

California.—*People v. Anderson*, 44 Cal. 65.

Connecticut.—*Morris v. Platt*, 32 Conn. 75.

Indiana.—*Baker v. Gausin*, 76 Ind. 317.

Iowa.—*State v. Fraunburg*, 40 Iowa 555; *State v. Collins*, 32 Iowa 36.

Nebraska.—*Barr v. State*, 45 Neb. 458.

New York.—*Evers v. People*, 3 Hun (N. Y.) 716, *affirmed* in 63 N. Y. 625.

Pennsylvania.—*Com. v. Ellenger*, 1 Brews. (Pa.) 352.

Texas.—*Munden v. State*, 37 Tex. 353.

Wisconsin.—*Higgins v. Minaghan*, 78 Wis. 603, 23 Am. St. Rep. 428; *Keep v. Quallman*, 68 Wis. 451.

See also *People v. De Los Angeles*, 61 Cal. 188; *Hulse v. Tollman*, 49 Ill. App. 490; *State v. McKinley*, 82 Iowa 445; *People v. Lennon*, 71 Mich. 298, 15 Am. St. Rep. 259; *State v. Lull*, 48 Vt. 581.

If one is pursued or assaulted in such a way as to induce in him a reasonable and well-grounded belief that he is actually in danger of losing his life, or receiving great bodily harm, under the influence of such apprehension he will be justified in defending himself, whether the danger was real or only apparent; and though he be mistaken in his reasonable conviction, he will not be criminally liable. *Campbell v. People*, 16 Ill. 17; *Hopkinson v. People*, 18 Ill. 264; *People v. Anderson*, 44 Cal. 65; *State v. Sloan*, 47 Mo. 604; *State v. Eaton*, 75 Mo. 586; *Nichols v. Winfrey*, 79 Mo. 544.

Excessive Force must Not be Used.—The general rule is that a person acting on the defensive is entitled to use as much force as he reasonably believes to be necessary to protect himself;¹ but the force employed must not be out of proportion to the apparent urgency of the occasion. If the person assaulted uses excessive force beyond what is necessary for self-defense, then he is himself guilty of assault and battery.²

Repelling Threatened Danger by Striking First.—A person threatened with attack is not required to wait until struck, but may, in the exercise of the right of self-defense, strike first. *State v. McDonald*, 67 Mo. 13. See also *Keep v. Quallman*, 68 Wis. 451.

Apprehension must Be Reasonable.—To justify one in the shooting of another in self-defense, it is essential that his apprehension of serious or great bodily injury be reasonable. It is not proper to say in an instruction "if he had any such apprehension." *Lawlor v. People*, 74 Ill. 228. See also *May v. State*, 6 Tex. App. 191.

Jury to Decide Reasonableness of Belief.—A defendant who has reason to believe, and does believe, at the time and under the circumstances, that he is in immediate danger, is justified in resisting his assailant, though the danger did not in fact exist, but the jury must determine the reasonableness of this belief. *State v. Nash*, 88 N. Car. 618.

It was held in *Cross v. State*, 63 Ala. 40, that to make a case of justifiable self-defense, the evidence must show that the difficulty was not provoked or encouraged by the defendant; that he was, or appeared to be, so menaced at the time as to create a reasonable apprehension of danger to his life, or grievous bodily harm, and that there was no other reasonable hope of escape from such impending terror.

Attempted Rape.—A woman is justified in repelling an attempted rape by the use of a deadly weapon, but if indicted for using such weapon, she must show, by way of defense, that the circumstances were such as to justify her, as a reasonable person, in believing that she was actually in danger of being ravished. *People v. De Los Angeles*, 61 Cal. 188.

Burden of Proof—Self-defense.—It has been held in *Iowa* that in a prosecution for an assault, the burden is upon the state to show that the defendant did not act in self-defense. *State v. Fowler*, 52 Iowa 103; *State v. Morphy*, 33 Iowa 270, 11 Am. Rep. 122; *State v. Porter*, 34 Iowa 131.

1. *State v. Brooks*, 99 Mo. 137. See also *State v. Scott*, 24 Kan. 68.

May Use Sufficient Force to Prevent Repetition of Attack.—Where a man strikes at another at a distance which permits of the latter being struck, he is justified in using such a degree of force as will prevent a repetition. *Per Parke, B., Anonymous*, 2 Lew. 48.

A violent attack is a sufficient excuse for going beyond the mere necessities of self-defense and chastising the aggressor within such bounds as do not exceed the natural limits of the provocation. *People v. Pearl*, 76 Mich. 207, 15 Am. St. Rep. 304. See also *Taylor v. Clendening*, 4 Kan. 452.

Assailed Party Not Obligated to Retreat.—When-

ever a forcible felony is attempted against person or property, the person resisting the attempt is not obliged to retreat, but may pursue his adversary, if necessary, till he finds himself out of danger, but he may not properly take life if the evil may be prevented by other means within his power. *Pond v. People*, 8 Mich. 150. See also *Waldon v. State*, (Tex. Crim. App. 1895), 29 S. W. Rep. 273.

Assault by Body of Rioters.—Upon the question of self-defense, there is a difference between an assault and battery by a body of rioters and by a single person. In the former case, the assaulted party may act with more promptness and resort to more forcible means to protect himself and his family than in the latter case. *Higgins v. Minaghan*, 78 Wis. 603, 23 Am. St. Rep. 428.

2. **Using Excessive Force—England.**—*Rex v. Whalley*, 7 C. & P. 245, 32 E. C. L. 502; *Reg. v. Mabel*, 9 C. & P. 474, 38 E. C. L. 189.

Delaware.—*Hazel v. Clark*, 3 Harr. (Del.) 22.

Illinois.—*Trogden v. Henn*, 85 Ill. 237; *Ogden v. Claycomb*, 52 Ill. 365; *Gizler v. Witzel*, 82 Ill. 322.

Indiana.—*Philbrick v. Foster*, 4 Ind. 442.

Maine.—*Rogers v. Waite*, 44 Me. 275.

Massachusetts.—*Com. v. Ford*, 5 Gray (Mass.) 475; *Tyson v. Booth*, 100 Mass. 258.

Michigan.—*Ayres v. Birtch*, 35 Mich. 501.

Minnesota.—*Gallagher v. State*, 3 Minn. 270.

New Hampshire.—*Dole v. Erskine*, 35 N. H. 503.

New York.—*Elliott v. Brown*, 2 Wend. (N. Y.) 497; *Scribner v. Beach*, 4 Den. (N. Y.) 448, 47 Am. Dec. 265.

Pennsylvania.—*Com. v. Ellenger*, 1 Brews. (Pa.) 352.

Texas.—*Cotton v. State*, 4 Tex. 260.

Vermont.—*Bartlett v. Churchill*, 24 Vt. 218.

See also *Seymour v. Bailey*, 76 Ga. 338; *Brown v. Gordon*, 1 Gray (Mass.) 182.

The Rule on this Point is well laid down by a writer on Scotch law: "Though fully justified in repelling the party, he is not to carry his resentment to such a length as to become the assailant in his turn, as by continuing to beat the aggressor after he has been disabled or has submitted, or by using a lethal or ponderous weapon, as a knife, poker, hatchet, or hammer, against a fist or cane, or, in general, pushing his advantage in point of strength or weapon to the utmost. In such cases, the defense degenerates into aggression, and the original assailant is entitled to demand punishment for the new assault committed on him after his original attack has been duly chastised." *Alison Prin. Crim. Law of Scot.* 177.

A Trespasser on a Train is not justified in shooting a servant of the railroad company

Amount of Force Is Question for Jury.—It is a question for the jury to decide whether the force used in repelling an attack was moderate and appropriate under the circumstances.¹

Aggressor cannot Plead Self-defense.—The plea of self-defense is not available by

who attempts to put him off, when he can with safety get off and avoid the shooting. *People v. Douglass*, 87 Cal. 281.

Force Used must Be Moderate.—To justify an assault on the ground that it was made in repelling an attack, it must appear that the force used was necessary to repel such attack, and was appropriate in kind and suitable in degree. *O'Leary v. Rowan*, 31 Mo. 117.

Proof that the Prosecutor Was the Aggressor will not justify an enormous battery, nor indeed any beyond the bounds of self-defense. *State v. Quin*, 3 Brev. (S. Car.) 515.

Force to be Used Only as Last Resort.—A person assaulted cannot use force if he can otherwise protect himself, if he has other means of avoiding the assault which are available, and that appear to him at the time sufficient, and are in fact available. *People v. McGrath*, 47 Hun (N. Y.) 325; *Howland v. Day*, 56 Vt. 318.

Excessive Violence Renders Perpetrator Guilty of Assault.—Where a man disarms the aggressor, or puts it out of his power to do further injury, he ought to desist from further violence, and if he commits any further outrage he becomes the aggressor. *Cockcroft v. Smith*, 2 Salk. 642; *Elliott v. Brown*, 2 Wend. (N. Y.) 497; *State v. Wood*, 1 Bay (S. Car.) 351.

While the law makes reasonable allowance for the infirmity of human judgment under the influence of sudden passion, and does not require men to measure with mathematical exactness the degree of force necessary to repel an assault, there are some broad landmarks beyond which this benignity of the law should not be carried; and where it appears from the evidence that the defendant used more force than he had a right to consider needful for his own protection, he is himself guilty of an assault. *Boren v. Bartleson*, 39 Ill. 43.

Law Gives No Right of Revenge.—If one strikes another a blow, that other has a right to defend himself and to strike a blow in his defense, but he has no right to revenge himself; and if, when all the danger is passed, he strikes a blow not necessary for his defense, he commits an assault and battery. *Reg. v. Driscoll*, 1 C. & M. 214, 41 E. C. L. 120. See also *State v. Lawry*, 4 Nev. 161; *Stewart v. State*, 66 Ga. 90; *Hanson v. European*, etc., R. Co., 62 Me. 84, 16 Am. Rep. 404; *State v. Gibson*, 10 Ired. (N. Car.) 214.

Use of Deadly Weapon in Self-defense.—A man is not allowed by law to use a deadly weapon in repelling an assault, unless the assault is of such a character as apparently to threaten him with death or serious bodily harm. *State v. Ferguson*, 26 Mo. App. 8.

Use of Firearms to Frighten a Person.—The testimony of the defendant that he shot merely to scare the trespasser out of his field, without intending to kill him, is inconsistent with any theory of self-defense. *Rauk v. State*, 110 Ind. 384.

Where the evidence shows that the defendant shot at the assaulted party, either to frighten him, or with intent to kill him, the question of self-defense is not in issue, and the failure of the court to submit such an issue is not error. *Ulun v. State* (Tex. Crim. App. 1895), 32 S. W. Rep. 699.

As to firing a pistol to frighten an actual assailant, see *Com. v. Mann*, 116 Mass. 58, stated in the following note to this section.

Attack with Fist Returned with Deadly Weapon.—Where A and B engaged in mutual combat, and A struck B with his fist, who, without attempting to withdraw, struck back with a deadly weapon, it was held that B's act was not justifiable on the ground of self-defense. *Presser v. State*, 77 Ind. 274; *Close v. Cooper*, 34 Ohio St. 98. See also *Rutledge v. State* (Tex. Crim. App. 1895), 33 S. W. Rep. 347.

As a general rule, the law will not justify a man who repels a blow with the fist by stabbing his assailant. *Floyd v. State*, 36 Ga. 91, 91 Am. Dec. 760.

Original Aggressor's Rights after His Adversary has Resorted to Deadly Weapon.—Where a person did not bring on the combat in order to wreak his revenge on his enemy and shield himself behind the pretext of self-defense, and where the quarrel is sudden, and no felonious intent is entertained, and no deadly weapon is used by him at the outset, the right to defend his life against an assault with a deadly weapon still exists in his favor, and is not abrogated by reason of the fact that he began the sudden quarrel. *State v. Hitchens*, 2 Harr. (Del.) 527; *State v. Culler*, 82 Mo. 623.

1. Amount of Force Question for Jury.—*Cannon v. State*, 80 Ga. 758; *Schnier v. People*, 23 Ill. 17; *Barnes v. Gray*, 5 Har. & J. (Md.) 436; *Com. v. Bush*, 112 Mass. 280; *Tyson v. Booth*, 100 Mass. 258; *Kent v. Cole*, 84 Mich. 579; *State v. Stockton*, 61 Mo. 382; *State v. Alley*, 68 Mo. 124; *Gallagher v. State*, 3 Minn. 270; *State v. Dixon*, 75 N. Car. 275; *Edwards v. Leavitt*, 46 Vt. 126. See also *Com. v. Goodwin*, 3 Cush. (Mass.) 154; *Brown v. Gordon*, 1 Gray (Mass.) 182; *Hanson v. European*, etc., R. Co., 62 Me. 84, 16 Am. Rep. 404.

On the trial of an assault and battery with a pistol, there was evidence that a quarrel occurred between the defendant and A; that the latter, while retreating, threw a beer mug at the defendant, who fired two shots from a pistol, one of which hit A. The defendant testified that he was in fear of his life; that he did not intend to hit A, but meant to frighten him to prevent him from throwing more beer mugs at him. The court held that whether the defendant was justified in firing a pistol was a question of fact for the jury, and that an instruction that a person who fires a pistol to frighten an assailant is guilty of an assault, if he hits him, was erroneous. *Com. v. Mann*, 116 Mass. 58.

one who himself brings on an affray, or who prepares himself for an encounter in which he intends to gratify his malice.¹

b. RESISTING ARREST—Unlawful Arrest.—It is a good defense to a charge of assault and battery, that the defendant used the force charged in resistance to unlawful arrest.²

Lawful Arrest in Unlawful Manner.—An arrest, even if lawful, made in such a menacing manner as to threaten death or bodily harm, is held to justify resistance, even to the killing of an officer.³

Excessive Force Not to be Used.—No more force must be used than is necessary,

1. Aggressor may Not Plead Self-Defense.—*Page v. State*, 69 Ala. 229; *Johnson v. State*, 69 Ala. 253; *Henry v. State*, 79 Ala. 42; *Thomason v. Gray*, 82 Ala. 291; *Hulse v. Tollman*, 49 Ill. App. 490; *Von Reeden v. Evans*, 52 Ill. App. 209; *State v. Christian*, 66 Mo. 138; *State v. Maguire*, 69 Mo. 197; *Jones v. Gale*, 22 Mo. App. 637; *State v. White*, 18 R. I. 473; *Escajeda v. State* (Tex. Crim. App. 1893), 21 S. W. Rep. 361; *Crist v. State*, 21 Tex. App. 361. See also *Eiland v. State*, 52 Ala. 322; *McNay v. Stratton*, 9 Ill. App. 215; *Williams v. State*, 30 Tex. App. 429; *State v. Briggs* (Tex. Crim. App. 1893), 21 S. W. Rep. 46; *Powell v. State*, 32 Tex. Crim. Rep. 230; *Pugh v. State*, 2 Tex. App. 539; *Vaiden v. Com.*, 12 Gratt. (Va.) 717.

One who, by conduct calculated to produce a breach of the peace, provokes an assault, cannot protect himself from responsibility therefor upon the ground that he fought in self-defense. *State v. Shields*, 110 N. Car. 497.

A man who seeks a fight, or provokes another to strike him, cannot justify returning the blow on the ground of self-defense. *State v. Bryson*, Winst. Eq. (N. Car.) 86.

Fact that Party Assailed Was Desperate No Defense.—One who commits an act of unlawful force, and thereby brings on a conflict in which he assaults another, cannot excuse the assault by saying that the person assailed was reputed to be violent, and that he acted in self-defense. *People v. Miller*, 49 Mich. 23.

Revival of Right of Self-defense.—Where the defendant went into the house of the prosecuting witness to commit an assault, but abandoned such intention and attempted to avoid the difficulty with his adversary, and was then pursued, his right of self-defense revived, and he had the right to kill his adversary, to prevent being killed or suffering serious bodily injury himself. *McSpatton v. State*, 30 Tex. App. 616. See also *State v. Hutchins*, 2 Harr. (Del.) 527; *State v. Culler*, 82 Mo. 623, stated in a preceding note.

Where the court charges the jury that "if the defendant sought and brought on a conflict with M., then he cannot avail himself of the law of self-defense, though in such conflict his life or person were endangered," it was held, on appeal, that this instruction was insufficient under the evidence adduced. The charge should have been qualified by the further instruction that if the defendant provoked the contest, though without any intention to kill or inflict serious bodily injury, he would not be wholly deprived of the

right of self-defense. *Carter v. State*, 28 Tex. App. 355. See also *Fussell v. State*, 94 Ga. 78.

Imperfect Self-defense.—The doctrine of imperfect self-defense, as applied to murder cases, has no application to assault merely. *State v. Gilmore*, 95 Mo. 554; *State v. Melton*, 102 Mo. 683.

For a full discussion of this question, see the title HOMICIDE.

2. Codd v. Cabe, 1 Exch. Div. 352; *Alford v. State*, 8 Tex. App. 545; *Massie v. State*, 27 Tex. App. 617; *State v. Hooker*, 17 Vt. 658. See also *Rex v. Stockley*, 1 East P. C. 310; *Kerman v. State*, 11 Ind. 471; *Com. v. Drew*, 4 Mass. 391; *Meuly v. State*, 26 Tex. App. 274. See also the title ARREST.

Officer with No Authority to Arrest, or Not Showing His Authority.—If an officer has no authority to make an arrest, or, having authority, is not known to be an officer, and does not in some way notify the party that he is an officer and has authority, the party arrested may lawfully resist the arrest as if it were made by a private person. *State v. Belk*, 76 N. Car. 10. See also *State v. Kirby*, 2 Ired. (N. Car.) 201.

Resisting Arrest by Private Citizen.—It was held in *People v. Denby*, 108 Cal. 54, that a person innocent of any offense is justified in resisting an arrest, or attempt to arrest him, on the charge of vagrancy, made by a private citizen acting under the authority of *California Penal Code*, § 837, allowing a private citizen to arrest another for public offense committed or attempted in his presence.

3. James v. State, 44 Tex. 314.

Accidental Killing in Resisting Unlawful Arrest.—On a trial for murder for killing one of the constable's posse while resisting arrest, an instruction that if the defendants believed the arrest a mere pretext by the deceased and others to disarm them and inflict bodily harm, they might resist by any means in their power, was held defective in not saying that if the jury found the deceased was present in good faith, under lawful summons, to assist in the arrest, yet, that if the defendants had reason to believe that the constable and others of the posse were making the arrest with such unlawful intent, and that the deceased, with such others present as were lawfully disposed, would not or could not protect them, then the defendants might resist, and, if necessary, kill the constable, or other unlawful assailant, and that if, in using such right with reasonable precaution, they accidentally killed the deceased, they should be acquitted. *Minniard v. Com.*, 87 Ky. 213.

and if one uses greater force than is necessary in resisting an arrest, he will be guilty of an assault, even though the attempted arrest be unlawful.¹

2. Defense of Family.—Whatever force may lawfully be used in one's own defense will be justified, if used in the defense of one's family,² of wife or husband,³ parent or child,⁴ master or servant,⁵ this right being limited only by the rule laid down above, that the force employed must not be out of proportion to the apparent urgency of the occasion, and when the danger is repelled, justification for the further use of violence is at an end.⁶

3. Defense of Property.—Just as the right of every one to defend his life and person from violence is recognized by law, so also he can justify the exercise of reasonable force in protecting his property, both real and personal.⁷

1. *People v. Murray*, 54 Hun (N. Y.) 406; *Galvin v. State*, 6 Coldw. (Tenn.) 283. See also *Noles v. State*, 26 Ala. 31, 62 Am. Dec. 711.

Excessive Force.—Persons interfering with an arrest by an officer under a criminal process, not knowing that he is an officer, and acting in the discharge of his duty, but interfering with the intention of quelling the fight, if they use more force than is necessary for that purpose, are liable to an indictment for an assault. *Com. v. Cooley*, 6 Gray (Mass.) 350.

2. *State v. Kennedy*, 20 Iowa 569; *State v. Melton*, 102 Mo. 683; *Gatliff v. Territory*, 2 Okla. 523. See also *Stoneman v. Com.*, 25 Gratt. (Va.) 887.

Defense of One's Brother Who Provoked Difficulty.—The right of one to defend his brother is not greater than the brother's right to defend himself, and where one brother provoked the difficulty resulting in an assault by the other, the latter cannot be acquitted upon the ground that he acted in defense of his brother. *State v. Melton*, 102 Mo. 683.

Bystander Not Preventing may Be Guilty Himself of Assault.—See *Gillon v. Wilson*, 3 T. B. Mon. (Ky.) 216, where it was held that if persons in company with the assailant failed, when it was in their power, to prevent a merciless battery on a feeble man, though they did prevent his being murdered, the omission to interfere, with other slight circumstances, might convict them all as principals in the trespass.

3. Defense of Husband or Wife.—*Biggs v. State*, 29 Ga. 723, 76 Am. Dec. 630; *Staten v. State*, 30 Miss. 619; *State v. Bullock*, 91 N. Car. 614.

4. Parent or Child.—*Obier v. Neal*, 1 Houst. (Del.) 449; *Hill v. Rogers*, 2 Iowa 67; *Com. v. Malone*, 114 Mass. 295; *Patten v. People*, 18 Mich. 314, 100 Am. Dec. 173; *State v. Johnson*, 75 N. Car. 174; *Crowder v. State*, 8 Lea (Tenn.) 669. See also *Flint v. Bruce*, 68 Me. 183.

Assault in Aid of a Parent.—Though a son may forcibly repel an unlawful attack upon his parent, he is not allowed, when his parent is the assailant, to inflict injury on the party assailed. *Waddell v. State*, 1 Tex. App. 720; *Pinson v. State*, 23 Tex. 579; *Obier v. Neal*, 1 Houst. (Del.) 449. See also *State v. Brittain*, 89 N. Car. 481.

If a father and his adversary are engaged in a fight on equal terms, the son's inter-

ference is not justifiable. *State v. Johnson*, 75 N. Car. 174.

If the father was in fault in beginning the combat, before the son could be excused in stabbing in defense of the father, it should appear that the latter had abandoned, or offered to abandon, the combat, provided the fierceness of his adversary permitted, or he had time to do so. *Crowder v. State*, 8 Lea (Tenn.) 669.

Attack in Alleged Defense of Son.—In *State v. Hays*, 67 Mo. 692, it is held that it is no defense to an indictment for felonious assault, that the defendant was led to commit the assault by information, brought to him by others, that the person he assaulted was about to take the life of his son, when such was not the fact. It was his duty, when he came upon the ground, to judge from what he saw whether the information was correct.

5. Master or Servant.—3 Bl. Comm. 3; *Tickell v. Read*, Lofft. 215; *Pond v. People*, 8 Mich. 150; *Fortune v. Jones*, 30 Ill. App. 116. See also *Orton v. State*, 4 Greene (Iowa) 140, where it was held that a master has a right to do that in defense of his apprentice, which would amount to an assault if such relationship did not exist between them.

Where Servant Was the Aggressor.—The right of a master to defend his servant does not extend to a case where the servant is the aggressor, nor to a case of mutual assault. *Fortune v. Jones*, 30 Ill. App. 116.

6. Defense must Not Exceed Bounds of Moderation.—*Barfoot v. Reynolds*, 2 Stra. 953; *Reg. v. Driscoll*, 1 C. & M. 214, 41 E. C. L. 120; *State v. Gibson*, 10 Ired. (N. Car.) 214; *State v. Bullock*, 91 N. Car. 614. See also *Cockcroft v. Smith*, 11 Mod. 43.

Question of Excessive Force for Jury.—While a wife has a right to fight in a necessary defense of her husband, yet if she uses excessive force she is guilty. Whether such force was used, and whether she acted freely or under constraint of her husband, are questions properly submitted to the jury upon the evidence in the case. *State v. Bullock*, 91 N. Car. 614.

7. Defense of Property—England.—*Alderson v. Waistell*, 1 C. & K. 358, 47 E. C. L. 358.

California.—*People v. Payne*, 8 Cal. 341; *People v. Flanagan*, 60 Cal. 2, 44 Am. Rep. 52.

Connecticut.—*Baldwin v. Hayden*, 6 Conn. 453; *Heminway v. Heminway*, 58 Conn. 443.

Illinois.—*Brown v. People*, 39 Ill. 407; *Roach v. People*, 77 Ill. 25.

Danger must be Reasonably Apprehended.—To justify a resort to force in defense of property, the danger should be such as to induce one exercising reasonable and proper judgment to interfere to prevent the consummation of the injury.¹

The Amount of Force used must not be more than is necessary under the circumstances.²

Iowa.—State v. Kennedy, 20 Iowa 569.

Kentucky.—Gray v. Combs, 7 J. J. Marsh. (Ky.) 478, 23 Am. Dec. 431.

Massachusetts.—Com. v. Goodwin, 3 Cush. (Mass.) 154; Com. v. Donahue, 148 Mass. 529, 12 Am. St. Rep. 591.

Missouri.—State v. Dooley, 121 Mo. 591.

Nebraska.—Fosbinder v. Svitak, 16 Neb. 499.

New Hampshire.—State v. Elliot, 11 N. H. 540.

New York.—Harrington v. People, 6 Barb. (N. Y.) 607; Gyre v. Culver, 47 Barb. (N. Y.) 592; Sage v. Harpending, 49 Barb. (N. Y.) 166; Filkins v. People, 69 N. Y. 101, 25 Am. Rep. 143; Bliss v. Johnson, 73 N. Y. 529.

North Carolina.—State v. Briggs, 3 Ired. (N. Car.) 357.

Pennsylvania.—Overdeer v. Lewis, 1 W. & S. (Pa.) 90, 37 Am. Dec. 440.

South Carolina.—State v. Lazarus, 1 Mill Const. (S. Car.) 34.

Texas.—Souther v. State, 18 Tex. App. 352.

See also Dinan v. Gibbon, 63 Cal. 387; People v. Batchelder, 27 Cal. 69.

By the Common Law, a man may justify a battery on a person who endeavors to wrongfully dispossess him of his lands or take away his goods; for self-defense is the primary law of nature; but care must be taken not to exceed the bounds of mere defense, prevention, or recovery, so as to become vindictive. 3 Bl. Comm. 121; 1 Hawk. P. C. 130; Jones v. Tresilian, 1 Mod. 36; Gregory v. Hill, 8 T. R. 299; Baldwin v. Hayden, 6 Conn. 453; Gates v. Lounsbury, 20 Johns. (N. Y.) 427.

Defense of Property against Forcible Trespasser.—It is error to exclude evidence that an assault was committed in defense of the defendant's property, or that of others intrusted to his care, against a forcible trespasser. Filkins v. People, 69 N. Y. 101, 25 Am. Rep. 143, reversing 1 Sheld. (N. Y.) 504. If the evidence proves the assault to have been in defense of property, the defendant may be convicted because of the use of excessive force; but he cannot be convicted under a statute requiring "an intent to do bodily harm," although unjustifiable means may have been resorted to, if the intention was merely to defend the possession of the goods, and there was no malicious intent. See Harrington v. People, 6 Barb. (N. Y.) 607.

The owner of land may resist a trespasser upon it who seeks, without right, to remove therefrom chattels that have been sold to another, for whom such landowner is protecting them, and if, in so doing, he has reasonable apprehension of danger from an intruder, resistance with a deadly weapon is justifiable. People v. Dann, 53 Mich. 490, 51 Am. Rep. 151.

Right of Tenant to Defend Possession.—The rightful owner of a house, having obtained

possession thereof peaceably, and having a right to the possession, will be justified in using all the force necessary to defend his possession; and any one who has rented the house as tenant of the owner, and acts under him in entering it, possesses the same right to use force in keeping the possession as the owner has. Corey v. People, 45 Barb. (N. Y.) 262. See also Bliss v. Johnson, 73 N. Y. 529.

Resisting Lawful Owner.—But mere possession of premises will not justify violence to prevent the rightful occupant from gaining an entrance. Liebstadter v. Federgreen, 80 Hun (N. Y.) 245.

Resisting Levy of Execution.—The right to use force in defense of one's personal property does not authorize a defendant in execution to forcibly resist an officer in the discharge of his duty. State v. Cokely, 4 Iowa 477. See also People v. Cooper, 13 Wend. (N. Y.) 379.

Defense of Property against an Officer.—In some states, it has been held that where an officer attempts to take goods belonging to one person, and in his possession, upon a writ against another person, the person having the rightful possession of the goods has no legal right to defend such possession against the officer by force. State v. Richardson, 38 N. H. 208, 75 Am. Dec. 173; Faris v. State, 3 Ohio St. 159; State v. Downer, 8 Vt. 424, 30 Am. Dec. 482; State v. Miller, 12 Vt. 437; State v. Buchanan, 17 Vt. 573. See also Merritt v. Miller, 13 Vt. 416.

But in other states it has been held that the rightful owner of goods is warranted in maintaining his possession by force against the officer, under such circumstances, in the same manner as he might against any trespasser who was not an officer. Smith v. State (Ala. 1895), 17 So. Rep. 107; Wentworth v. People, 5 Ill. 550; Com. v. Kennard, 8 Pick. (Mass.) 133; People v. Hubbard, 24 Wend. (N. Y.) 369.

Constructive Possession of Part of House.—Gaining an entrance to a part of a house does not establish such constructive possession as will justify committing assault and battery upon the occupants if they seek to remove obstructions. Soule v. Hough, 45 Mich. 418.

1. People v. Flanagan, 60 Cal. 2, 44 Am. Rep. 52; Hill v. Rogers, 2 Iowa 67.

Mere Apprehension of Encroachment.—The mere suspicion or fear of encroachment is not a justification for the use of force. McAuley v. State, 3 Greene (Iowa) 435.

2. Wharton v. People, 8 Ill. App. 232; Kunkle v. State, 32 Ind. 220; State v. Kennedy, 20 Iowa 569; Com. v. Goodwin, 3 Cush. (Mass.) 154; Newkirk v. Sabler, 9 Barb. (N. Y.) 652. See also Com. v. Ribert, 144 Pa. St. 413; Kerrains v. People, 60 N. Y. 221; Parke v. Gilligan, 14 Misc. Rep. (N. Y. City Ct.) 121.

4. Recapture of Property.—A person is justified, according to what seems the better doctrine, in using reasonable force in regaining his momentarily interrupted possession of personal property, where such property was taken from him by force or fraud;¹ but he is not justified in using force to retake

Question of Fact for Jury.—Whether the violence committed upon a trespasser in taking the property of the defendant was greater than the exigencies of the occasion required, is a question of fact to be determined by the jury. *Riddle v. Brown*, 20 Ala. 412, 56 Am. Dec. 202.

Assault with Intent to Kill in Defense of Property.—An assault with intent to kill cannot be justified on the ground that it was necessary to prevent a trespass on property. A man cannot, even in defense of his person or property, except in extreme cases, endanger human life or do great bodily harm. *State v. Dooley*, 121 Mo. 591; *Rauk v. State*, 110 Ind. 384; *State v. Morgan*, 3 Ired. (N. Car.) 186, 38 Am. Dec. 714.

Assault with Deadly Weapon in Alleged Defense of a Right.—On the trial of an indictment for an assault with a deadly weapon with intent to inflict upon the prosecuting witness a bodily injury, it is not a defense that such prosecuting witness, before the assault was committed, had wrongfully deprived the defendant of the use of water, and thereby prevented him from working his mining ground. *Territory v. Drennan*, 1 Mont. 41.

1. Using Force to Retake One's Own Property—England.—1 Hawk. P. C., c. 64, § 1; *Rex v. Mitton*, 3 C. & P. 31, 14 E. C. L. 196; *Blades v. Higgs*, 10 C. B. N. S. 713, 100 E. C. L. 713.

Connecticut.—*Baldwin v. Hayden*, 6 Conn. 453; *Heminway v. Heminway*, 58 Conn. 443. **Illinois.**—*Mills v. Wooters*, 59 Ill. 234.

Massachusetts.—*Stone v. Lahey*, 133 Mass. 426; *Com. v. Donahue*, 148 Mass. 529, 12 Am. St. Rep. 591.

Missouri.—*State v. Dooley*, 121 Mo. 591.

New Hampshire.—*State v. Elliot*, 11 N. H. 540; *Hopkins v. Dickson*, 59 N. H. 235.

New York.—*Hyatt v. Wood*, 4 Johns. (N. Y.) 150, 4 Am. Dec. 258.

Tennessee.—*Anderson v. State*, 6 Baxt. (Tenn.) 608.

Vermont.—*Johnson v. Perry*, 56 Vt. 703, 48 Am. Rep. 826.

See also *Laird v. Davis*, 17 Ala. 448; *Bowler v. Eldridge*, 18 Conn. 1; *Gyre v. Culver*, 47 Barb. (N. Y.) 592; *Johnson v. State*, 26 Tex. App. 631; *White v. Twitchell*, 25 Vt. 620. But compare *Bowman v. Brown*, 55 Vt. 184.

Limits of the Right of Recapture.—In *Com. v. Donahue*, 148 Mass. 529, 12 Am. St. Rep. 591, *Holmes, J.*, after stating the doctrine as laid down in the text, proceeded as follows: "There are weighty decisions which go further than those above cited, and which hardly can stand on the right of self-defense, but involve other considerations of policy. It has been held that even where a considerable time had elapsed between the wrongful taking of the defendant's property and the assault, the defendant had a right to regain possession by reasonable force, after demand upon the third person in possession, in like manner as

he might have protected it without civil liability. Whatever the true rule may be, probably there is no difference in this respect between the civil and the criminal law. *Blades v. Higgs*, 10 C. B. N. S. 713, 100 E. C. L. 713, 12 C. B. N. S. 501, 104 E. C. L. 501, 13 C. B. N. S. 844, 106 E. C. L. 844, 11 H. L. Cas. 621; *Commonwealth v. McCue*, 16 Gray (Mass.) 227. The principle has been extended to a case where the defendant had yielded possession to the person assaulted, through the fraud of the latter. *Hodgeden v. Hubbard*, 18 Vt. 504, 46 Am. Dec. 167. See *Johnson v. Perry*, 56 Vt. 703, 48 Am. Rep. 826. On the other hand, a distinction has been taken between the right to maintain possession and the right to regain it from another who is peaceably established in it, although the possession of the latter is wrongful. *Bobb v. Bosworth*, Litt. Sel. Cas. (Ky.) 81, 12 Am. Dec. 273. See *Barnes v. Martin*, 15 Wis. 240, 82 Am. Dec. 670; *Andre v. Johnson*, 6 Blackf. (Ind.) 375; *Davis v. Whitridge*, 2 Strob. (S. Car.) 232, 3 Bla. Com. 4."

Recapture of One's Goods on the Land of Another.—In *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80, it was held that a person entitled to the immediate possession of property located upon the premises of another, without the fault of the party entitled to the possession of such property, may enter those premises after demand, and without legal process, against the consent of the party in possession, and by force remove the property, provided no more force is employed than becomes necessary by the resistance interposed by the other party to prevent the entry and removal of the property. But see *Newkirk v. Sabler*, 9 Barb. (N. Y.) 652.

Retaking Real Estate by Force.—If the owner of land wrongfully held by another enters and expels the occupant, but makes use of no more force than is necessary to accomplish this, he will not be liable to an action of trespass *quare clausum*, nor for assault and battery, nor for injury to the occupant's goods, although, in order to effect such expulsion and removal, it becomes necessary to use so much force and violence as to subject him to indictment at common law for breach of the peace, or, under the statute, for making a forcible entry. *Manning v. Brown*, 47 Md. 506; *Stone v. Lahey*, 133 Mass. 426.

Request for Delivery should Precede Force.—If a person withholds a receipt for money to which he is not entitled, a request therefor must precede the use of force to recover it. *Dyk v. DuYoung*, 35 Ill. App. 138. But see *Com. v. Donahue*, 148 Mass. 529, 12 Am. St. Rep. 591, where a doubt on this point is expressed.

Where Possession was Obtained by Fraud.—A party has a right to use reasonable force to recover his property fraudulently taken from his possession. *Com. v. Lynn*, 123 Mass. 218.

the property, provided the right to the possession of such property is in dispute.¹

5. Ejectment of Trespassers.—A person who has ordered or requested an intruder to leave his premises, or premises of which he is rightfully in charge or control, may use all force reasonably necessary to eject him if he refuses to go.²

See also *Davis v. Whitridge*, 2 Strobb. (S. Car.) 232.

Where a person purchased a stove by means of fraudulent representations as to solvency and ability to pay therefor, it was held that he acquired no right, either of property or possession; and that the vendor might retake the property, using no more force than was necessary to accomplish the object, and that no action would lie against him for assault and battery in the recapture of the property. *Hodgeden v. Hubbard*, 18 Vt. 504, 46 Am. Dec. 167.

1. The cases cited below, apparently in conflict with the line of decisions cited above, holding that a person has a right to use reasonable force in recapturing his property taken from him by force or fraud, may be partially reconciled by taking note of the fact that in all these cases the party attacked had some color of title to the property, or the possession had been peaceably surrendered to him.

Where Title to Property Is in Dispute.—*Andre v. Johnson*, 6 Blackf. (Ind.) 375; *Kunkle v. State*, 32 Ind. 220; *Bobb v. Bosworth*, Litt. Sel. Cas. (Ky.) 81, 12 Am. Dec. 273; *Com. v. Haley*, 4 Allen (Mass.) 318; *Com. v. McCue*, 16 Gray (Mass.) 226; *Kirby v. Foster*, 17 R. I. 437; *Harris v. Marco*, 16 S. Car. 575; *Barnes v. Martin*, 15 Wis. 240, 82 Am. Dec. 670; *Huppert v. Morrison*, 27 Wis. 365. See also *Bliss v. Johnson*, 73 N. Y. 529; *Scribner v. Beach*, 4 Den. (N. Y.) 448, 47 Am. Dec. 265; *Chambers v. Miller*, 3 F. & F. 202; *Fredericksen v. Singer Mfg. Co.*, 38 Minn. 356.

Battery in Recovery of Property Stolen.—It has been held in *Alabama* that an assault and battery cannot be justified, excused, or extenuated by evidence showing that the party assaulted had possession of the defendant's horse, which had been stolen, and refused to surrender it upon demand. *Hendrix v. State*, 50 Ala. 148.

Forcible Entry.—In *Bristol v. Burr*, 120 N. Y. 427, it was held that one having a legal right to the possession of premises in the actual possession of another is not justified in entering and forcibly expelling the latter, and for so doing he is liable. See also *Denver, etc., R. Co. v. Harris*, 122 U. S. 597; *Westcott v. Arbuckle*, 12 Ill. App. 577.

In *Sampson v. Henry*, 11 Pick. (Mass.) 379, *Wilde, J.*, in delivering the opinion of the court, said: "The law does not allow any one to break the peace and forcibly to redress his private wrongs. He may make use of force to defend his lawful possession, but, being dispossessed, he has no right to recover possession by force and by a breach of the peace. This is no defense in an action for the personal injury. This principle applies to the possession and dispossession of personal property, and ought especially to be rigidly ob-

served in relation to a man's dwelling house, in which he is peculiarly protected by the law."

For Further Discussion of This Subject, see the title RECAPTION.

2. Using Force to Eject Trespassers—England.—*Green v. Bartram*, 4 C. & P. 308, 19 E. C. L. 400; *Weaver v. Bush*, 8 T. R. 78.

California.—*McCarthy v. Fremont*, 23 Cal. 196; *Chapell v. Schmidt*, 104 Cal. 511.

Georgia.—*Hammond v. Hightower*, 82 Ga. 290; *Clarke v. State*, 89 Ga. 768.

Illinois.—*Woodman v. Howell*, 45 Ill. 367, 92 Am. Dec. 221; *Abt v. Burgheim*, 80 Ill. 92; *Long v. People*, 102 Ill. 331; *Robinson v. Clark*, 53 Ill. App. 368; *Bower v. Robinson*, 53 Ill. App. 370.

Kentucky.—*M'Iloy v. Cochran*, 2 A. K. Marsh. (Ky.) 271.

Maine.—*Stearns v. Sampson*, 59 Me. 568, 8 Am. Rep. 442.

Massachusetts.—*Com. v. Clark*, 2 Met. (Mass.) 23; *Low v. Elwell*, 121 Mass. 309, 23 Am. Rep. 272.

Michigan.—*Breitenbach v. Trowbridge*, 64 Mich. 393, 8 Am. St. Rep. 829; *People v. Foss*, 80 Mich. 559, 20 Am. St. Rep. 532.

New York.—*Newkirk v. Sabler*, 9 Barb. (N. Y.) 652; *Conway v. Carpenter*, 80 Hun (N. Y.) 428; *O'Donnell v. McIntyre*, 118 N. Y. 156, affirming 37 Hun (N. Y.) 627; *Parsons v. Brown*, 15 Barb. (N. Y.) 590.

Ohio.—*Pitford v. Armstrong*, Wright (Ohio) 95.

Texas.—*Circle v. State* (Tex. Crim. App. 1893), 22 S. W. Rep. 603.

Vermont.—*Harrison v. Harrison*, 43 Vt. 417.

See also *Com. v. Beals*, 133 Mass. 396; *Franck v. Wiegert*, 56 Mich. 472; *Drew v. Comstock*, 57 Mich. 176; *Marsh v. Bristol*, 65 Mich. 378; *Haywood v. Miller*, 3 Hill (N. Y.) 90; *Comstock v. Dodge*, 43 How. Pr. (N. Y. Ct. App.) 97; *Beecher v. Parmele*, 9 Vt. 352, 31 Am. Dec. 633. But see *State v. Lightsey*, 43 S. Car. 114, where it was held that the owner of land has no right to use force to eject a mere trespasser.

Disorder at Funeral.—To an action of assault and battery, a plea that the plaintiff disturbed the congregation while the minister was performing the rites of burial, and that the defendant (though neither constable, church warden, nor other officer) *molliter manus imposuit* to prevent such disturbance, is a good justification. *Gleever v. Hynde*, 1 Mod. 168.

Sexton Ejecting Undertaker from Church.—The sexton of a church building who is charged with the care of it, and the duty of conducting funerals therein, may lawfully remove from it an undertaker, who, after being warned to desist and leave, persists in conducting a funeral there, in violation of rules prescribed

Force Used must Be Reasonable.—But he must be careful not to exceed the bounds of reasonable force, for he will then be guilty of an assault.¹

Common Carriers.—So the agents and servants of a common carrier have authority to eject persons, who persist in violating the reasonable rules and regulations of the company, from the coaches or waiting rooms belonging to such company,² provided the proper limitation is observed in the

by the authorities of the church to maintain order and prevent interference with other religious exercises. *Com. v. Dougherty*, 107 Mass. 243.

Trespassers in Unfinished Building.—Carpenters and bricklayers who are building a house have a right to remove gently all persons who come into the building without authority, if they refuse to depart when requested to do so. *U. S. v. Bartle*, 1 Cranch (C. C.) 236.

Ejecting Person from Gambling Room.—The law knows no reasonable rule for the protection of a gambling room, or games played in violation of law; hence, a gambler on trial for an assault cannot justify on the ground that the assault was committed in ejecting the person assaulted, from a gambling room, for disorder. *Pierce v. State*, 21 Tex. App. 540.

Battery on Cotenant or His Agent.—A tenant in common has no right to inflict a battery upon one who enters upon the land under the authority of the cotenant, and in this respect there is no distinction between the cotenant and one entering with him and under his authority. *Causee v. Anders*, 4 Dev. & B. (N. Car.) 246. See also *Com. v. Lakeman*, 4 Cush. (Mass.) 597; *Com. v. Rigney*, 4 Allen (Mass.) 316.

Beating Trespasser.—It has been held in *Louisiana* that an owner of property is justified in beating a trespasser only where the battery is necessary to the defense of his property. *Stachlin v. Destrehan*, 2 La. Ann. 1019.

Catholic Priest Ejecting Bystander before Administering a Sacrament.—A Catholic priest has no legal authority, by virtue of his priestly character, to remove forcibly from a room a person lawfully there, although the priest is about to administer an office of his religion to a sick person at the latter's request. *Cooper v. McKenna*, 124 Mass. 284, 26 Am. Rep. 667.

Request to Depart should Precede Use of Force.—In order to justify an assault in ejecting a trespasser from one's premises, where he entered peaceably, it should be shown that the defendant first requested the trespasser to depart, and that he refused. *Polkinhorn v. Wright*, 8 Q. B. 197, 55 E. C. L. 197; *Thompson v. Berry*, 1 Cranch (C. C.) 45; *Robinson v. Hawkins*, 4 T. B. Mon. (Ky.) 34; *State v. Woodward*, 50 N. H. 527; *People v. Van Vechten*, 2 N. Y. Crim. Rep. 291; *State v. Burke*, 82 N. Car. 551; *State v. Taylor*, 82 N. Car. 554; *Rex v. Howard*, 1 Hawaii 66. See *State v. Chavis*, 80 N. Car. 357.

But where the Trespasser Uses Actual Force in effecting an entrance, then no request is necessary before forcibly ejecting him. *Green v. Goddard*, 2 Salk. 641; *Polkinhorn v. Wright*, 8 Q. B. 197, 55 E. C. L. 197; *Tullay v. Reed*, 1 C. & P. 6, 11 E. C. L. 297.

1. Force Employed must Be Reasonable.—*Chapell v. Schmidt*, 104 Cal. 511; *Jones v.*

Jones, 71 Ill. 562; *Abt v. Burgheim*, 80 Ill. 92; *Long v. People*, 102 Ill. 331; *Everton v. Esgate*, 24 Neb. 235; *People v. Van Vechten*, 2 N. Y. Crim. Rep. 291; *State v. Leggett*, 104 N. Car. 784; *Pitford v. Armstrong*, Wright (Ohio) 95; *Glass v. O'Grady*, 17 U. C. C. P. 233; *Rex v. Howard*, 1 Hawaii 66. See also *Davis v. Lennon*, 8 U. C. Q. B. 599; *Loomis v. Terry*, 17 Wend. (N. Y.) 497, 31 Am. Dec. 306.

Question of Fact for Jury.—Whether the defendant used more force than was necessary in ejecting the trespasser, is a question of fact for the jury. *Com. v. Dougherty*, 107 Mass. 250; *Com. v. Clark*, 2 Met. (Mass.) 23; *State v. Taylor*, 82 N. Car. 554.

Purpose for which Force Used.—The jury must decide whether the force used by the defendant was used for the purpose of removing the trespasser or intruder. *Com. v. Dougherty*, 107 Mass. 250.

Relative Age and Size of Parties.—In determining the amount or degree of force necessary to be used by the defendant in putting the plaintiff off his premises, the jury may consider the age and relative size of the parties. *Thomason v. Gray*, 82 Ala. 291.

Excessive Force.—The plea of *molliter manus imposuit*, in order to turn the plaintiff out of the defendant's house, where she continued against his will, is not an answer to a charge against the defendant for striking the plaintiff repeated blows with great force and violence several times, and knocking her down. *Gregory v. Hill*, 8 T. R. 299; *Likes v. Van Dike*, 17 Ohio 454. See also *State v. Smith*, 3 Dev. & B. (N. Car.) 117.

Limits of the Right of Defense of Property.—In an action for assault and battery, the old form of the defendant's plea, *molliter manus imposuit* (he laid hands gently upon him), shows the full extent to which the law allows a man to defend himself, even from an unprovoked attack. The defendant ought not, in the first instance, to begin with striking the plaintiff, but the law allows him, either in defense of his person or possessions, to lay his hands on the plaintiff, and then he may say, if any further mischief ensues, it is in consequence of the plaintiff's own act (in the language of the old law, *son assault demesne*), so that the battery follows from the resistance. *Dean v. Taylor*, 11 Exch. 68; *State v. Taylor*, 82 N. Car. 554.

But under no circumstances is it lawful, merely for the purpose of resisting a trespass to property, to use violence likely to imperil life or limb, even though such violence be necessary for the purpose. 2 Inst. 316; Clerk & Lindsell on Torts, 108.

2. Agents of Common Carriers.—*United States.*—*Jencks v. Coleman*, 2 Sumn. (U. S.) 224.

amount of force used in effecting the ejectment.¹

Innkeepers.—An innkeeper may expel disorderly guests from his inn by laying his hands upon them, or may, in the same way, prevent the entrance of improper persons.²

6. Consent—In Common Assault.—In cases where life and limb are exposed to no serious danger in the common course of things, consent is a good defense to the charge of assault,³ provided there is no breach of the

Illinois.—Chicago, etc., R. Co. v. Parks, 18 Ill. 460, 68 Am. Dec. 562.

Iowa.—State v. Chovin, 7 Iowa 204; Law v. Illinois Cent. R. Co., 32 Iowa 534.

Kansas.—Southern Kansas R. Co. v. Hinsdale, 38 Kan. 507.

Maine.—State v. Goold, 53 Me. 279.

Massachusetts.—O'Brien v. Boston, etc., R. Co., 15 Gray (Mass.) 20, 77 Am. Dec. 347.

Missouri.—Canfield v. Chicago, etc., R. Co., 59 Mo. App. 354; Brown v. Hannibal, etc., R. Co., 66 Mo. 588.

New Jersey.—State v. Ross, 26 N. J. L. 224; State v. Overton, 24 N. J. L. 435, 61 Am. Dec. 671; State v. Campbell, 32 N. J. L. 309.

New York.—People v. Jillson, 3 Park. Cr. Rep. (N. Y.) 234; Barney v. Oyster Bay, etc., Steamboat Co., 67 N. Y. 301, 23 Am. Rep. 115. See also Robinson v. State, 54 Ala. 86; Illinois Cent. R. Co. v. Whittemore, 43 Ill. 420, 92 Am. Dec. 138; Marquette v. Chicago, etc., R. Co., 33 Iowa 562; State v. Dennison, 108 Mo. 541; State v. Thompson, 20 N. H. 250.

For a Detailed Treatment of This Subject, see the titles CARRIERS OF PASSENGERS; RAILROADS; TICKETS AND FARES.

Ejectment of Person from Railroad Station.—A station master of a railroad depot has a right to eject therefrom any person who persists in violating the reasonable regulations of the railroad company, prescribed for their conduct while in such station. Harris v. Stevens, 31 Vt. 79, 73 Am. Dec. 337; Com. v. Power, 7 Met. (Mass.) 596, 41 Am. Dec. 465. See Beeson v. Chicago, etc., R. Co., 62 Iowa 173.

1. Kline v. Central Pac. R. Co., 37 Cal. 400, 99 Am. Dec. 282; Hanson v. European, etc., R. Co., 62 Me. 84, 16 Am. Rep. 404; Baltimore, etc., R. Co. v. Blocher, 27 Md. 277; Brown v. Hannibal, etc., R. Co., 66 Mo. 588; Sandford v. Eighth Ave. R. Co., 23 N. Y. 343, 80 Am. Dec. 286; Hamilton v. Third Ave. R. Co., 13 Abb. Pr. N. S. (N. Y. Super. Ct.) 318; Healey v. City Passenger R. Co., 28 Ohio St. 23. See also Chicago, etc., R. Co. v. Parks, 18 Ill. 460, 68 Am. Dec. 562. See also *infra*, this title, *Action against Corporation*.

Fight between Conductor and Passenger.—On prosecution of a street-car conductor for assault and battery on a passenger who declined to pay his fare, the evidence being conflicting as to which was the aggressor, but there being some evidence to show that the passenger first assaulted the conductor with a walking stick, it was held that evidence was admissible to show that the stick had the appearance of being loaded, with a view to determine whether the conductor had used a reasonable degree of force in ejecting the passenger from the car. Law v. State (Tex. Crim. App. 1895), 29 S. W. Rep. 160.

2. Ejectment of Guest by Innkeeper.—If a guest at an inn conducts himself in a disorderly manner, and the landlord requests him to depart and he refuses to do so, the landlord is justified in laying hands upon him and putting him out of the house. Howell v. Jackson, 6 C. & P. 723, 25 E. C. L. 617.

An innkeeper has the same control over his dwelling as a private citizen has over his own, and is responsible for the consequences of his conduct. So the innkeeper may, by reasonable force, prevent any one from entering his house, nor is he guilty of an assault and battery for so doing. Com. v. Mitchel, Pars. Eq. Cas. (Pa.) 431; State v. Steele, 106 N. Car. 766, 19 Am. St. Rep. 573. See also Burrell v. State, 129 Ind. 290; Webster v. Watts, 11 Q. B. 311, 63 E. C. L. 311; Markham v. Brown, 8 N. H. 523, 31 Am. Dec. 209; Steinmetz v. Kelly, 72 Ind. 442, 37 Am. Rep. 170.

3. Reg. v. Wollaston, 12 Cox C. C. 180; Fitzgerald v. Cavin, 110 Mass. 153; Pillow v. Bushnell, 5 Barb. (N. Y.) 156; McCue v. Klein, 60 Tex. 168, 48 Am. Rep. 260. See also Christopherson v. Bare, 11 Q. B. 473, 63 E. C. L. 473; Cadwell v. Farrell, 28 Ill. 438; Duncan v. Com., 6 Dana (Ky.) 295; Smith v. Simon, 69 Mich. 481; State v. Burnham, 56 Vt. 445, 48 Am. Rep. 801.

Consent as Defense to Indictment for Prize Fighting.—In Reg. v. Coney, 8 Q. B. Div. 534, Stephen, J., said: "The principle as to consent seems to me to be this: When one person is indicted for inflicting personal injury upon another, the consent of the person who sustains the injury is no defense to the person who inflicts the injury, if the injury is of such a nature, or is inflicted under such circumstances, that its infliction is injurious to the public, as well as to the person injured. But the injuries given and received in prize fights are injurious to the public, both because it is against the public interest that the lives and health of the combatants should be endangered by blows, and because prize fights are disorderly exhibitions, mischievous on many obvious grounds. Therefore, the consent of the parties to the blows which they mutually receive does not prevent those blows from being assaults."

Chastising One at His Own Request.—Where one inflicted a whipping on another at the request of the latter, to save him, as it was thought, from prosecution for felony, and it appeared that the whipping was not done from a malicious or revengeful disposition, it was held not to constitute an assault and battery. State v. Beck, 1 Hill (S. Car.) 363, 26 Am. Dec. 190.

Vaccination by Ship's Surgeon.—When the surgeon of a foreign steamship, bringing

peace,¹ and consent is not obtained by fraud, or through ignorance or incapacity.²

In Assault with Intent to Rape.—Consent is also a good defense to the charge of assault with intent to commit rape,³ provided the female is of the legal age of consent.⁴

immigrants to a port in this country, where the quarantine regulations require vaccination as a prerequisite to landing, vaccinates an immigrant whose behavior indicates consent on her part, whatever her unexpressed feelings may be, he is justified in the act, and the ship owner is not liable therefor as for an assault. *O'Brien v. Cunard Steamship Co.*, 154 Mass. 272.

1. Consent—Must Be No Breach of Peace—*England.*—*Boulter v. Clarke*, Bull. N. P. 16. *Indiana.*—*Adams v. Waggoner*, 33 Ind. 531, 5 Am. Rep. 230.

Kansas.—*State v. Newland*, 27 Kan. 764. *Massachusetts.*—*Com. v. Collberg*, 119 Mass. 350, 20 Am. Rep. 328.

Missouri.—*Jones v. Gale*, 22 Mo. App. 637. *North Carolina.*—*Stout v. Wren*, 1 Hawks. (N. Car.) 420, 9 Am. Dec. 653.

Texas.—*King v. State*, 4 Tex. App. 54, 30 Am. Rep. 160.

Vermont.—*State v. Burnham*, 56 Vt. 445, 48 Am. Rep. 80r; *Willey v. Carpenter*, 64 Vt. 212.

Wisconsin.—*Shay v. Thompson*, 59 Wis. 540, 48 Am. Rep. 538.

See also *Logan v. Austin*, 1 Stew. (Ala.) 476; *People v. Sanchez*, 24 Cal. 17; *State v. Williams*, 75 N. Car. 134. But see *Champer v. State*, 14 Ohio St. 437.

Breach of the Peace.—One may recover in an action for assault and battery, although he agreed to fight with his adversary, for, such agreement to break the peace being void, the maxim *volenti non fit injuria* does not apply. *Bell v. Hansley*, 3 Jones (N. Car.) 131; *Shay v. Thompson*, 59 Wis. 540, 48 Am. Rep. 538. But see *Galbraith v. Fleming*, 60 Mich. 403, where it was held that while such voluntary act on the part of the plaintiff would not preclude the state from punishing him or the defendant for a breach of the peace, it nevertheless prevents him from recovering compensation for injuries received by his own seeking, and in violation of law. See also *Reg. v. Coney*, 8 Q. B. Div. 534.

2. Reg. v. Locke, 12 Cox C. C. 244; *Reg. v. Flattery*, 13 Cox C. C. 388. See also *Reg. v. March*, 1 C. & K. 406, 47 E. C. L. 496.

Incapacity to Give Valid Consent.—It was held in *Com. v. Nickerson*, 5 Allen (Mass.) 518, that a child of the age of nine years is incapable of giving a valid assent to a forcible transfer of him, by a stranger, from the legal custody of his father, to the custody of his mother, who has no right thereto; and evidence of such assent is incompetent in defense to an indictment for assault and battery upon him in making such transfer.

Consent of a child under ten years of age does not waive an assault. *Territory v. Keyes*, 5 Dakota 244; *People v. McDonald*, 9 Mich. 150.

3. Consent to Sexual Intercourse.—*People v. Brown*, 47 Cal. 447; *Stevens v. People*, 158

Ill. Ill., citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 784; *State v. Pickett*, 11 Nev. 255, 21 Am. Rep. 754; *People v. Bransby*, 32 N. Y. 525; *Hull v. State*, 22 Wis. 580. See *Rex v. Erickson*, 54 Hawaii 159.

But where one lays hold of a woman with the intention of having sexual intercourse with her against her will, and she resists for a while, but ultimately yields, such person is guilty of assault with intent to commit rape. *Dickey v. McDonnell*, 41 Ill. 62; *State v. Atherton*, 50 Iowa 189, 32 Am. Rep. 134; *State v. Hartigan*, 32 Vt. 607, 78 Am. Dec. 609. See also *Reg. v. Hallett*, 9 C. & P. 748, 38 E. C. L. 318; *State v. Cross*, 12 Iowa 66, 79 Am. Dec. 519; *Dean v. Raplee*, 145 N. Y. 319; *State v. Long*, 93 N. Car. 542.

The fact that the prosecutrix, in an indictment for an assault with intent to rape, is a lewd woman, only goes to her credibility. If the prosecutrix consented to have sexual intercourse with the defendant upon certain terms, which the defendant refused, and attempted by force to carnally know her without her consent, he is guilty of assault with intent to rape, if he does not succeed. *State v. Long*, 93 N. Car. 542.

Contraction of Venereal Disease by Consenting Female.—Consent of a female to sexual connection has been held to be no defense to assault in communication of venereal disease. *Reg. v. Bennett*, 4 F. & F. 1105; *Reg. v. Sinclair*, 13 Cox C. C. 28. But see *Hegarty v. Shine*, 12 Ir. L. T. Rep. 100, cited in 18 Alb. L. J. 202.

Brutality in Performance of Sexual Act.—The performance of the sexual act, even with the consent of the woman, may be so brutal on the part of the man as to amount to an assault and battery. *Richie v. State*, 58 Ind. 355.

Consent Obtained by Fraud.—Carnal knowledge of a married woman, obtained by fraud in personating her husband, does not amount to rape, and, therefore, where a man was indicted for an assault with intent to commit rape on a married woman, it was error for the court to charge the jury that, if he intended to have connection with her by fraud in personating her husband, he was guilty. *State v. Brooks*, 76 N. Car. 1; *Wyatt v. State*, 2 Swan. (Tenn.) 394. See the title RAPE.

Consent of Husband.—*State v. Boyland*, 24 Kan. 186, is indirect authority for the proposition that a husband's assent is no valid defense to a charge of indecent assault on his wife.

4. Females under Legal Age of Consent.—By the weight of authority in the *United States* a child under ten (in some states twelve) years of age, is incapable of consenting to the sexual act, and therefore, any one attempting to have sexual connection with a female under the age of consent is guilty of rape, if the connection is consummated, and of assault

7. Accident.—It is a good defense, in an action for assault and battery, to show that the injury inflicted by the defendant was the result of unavoidable accident, in the pursuance of a lawful act, and that there was no want of prudence or care on the part of the defendant.¹

with intent to rape, if it is not consummated, even if such female does give her consent to the act.

California.—People v. Stewart, 85 Cal. 174.

Dakota.—Territory v. Keyes, 5 Dakota 244.

Delaware.—State v. Handy, 4 Harr. (Del.) 566.

Iowa.—State v. Newton, 44 Iowa 45.

Louisiana.—State v. Miller, 42 La. Ann. 1186, 21 Am. St. Rep. 418.

Massachusetts.—Com. v. Roosnell, 143 Mass. 32.

Michigan.—People v. McDonald, 9 Mich. 150; People v. Courier, 79 Mich. 366; People v. Goulette, 82 Mich. 36.

New York.—Hays v. People, 1 Hill (N. Y.) 351; Singer v. People, 13 Hun (N. Y.) 418, affirmed in 75 N. Y. 608.

North Carolina.—State v. Johnston, 76 N. Car. 209; State v. Dancy, 83 N. Car. 608.

Texas.—Mayo v. State, 7 Tex. App. 342.

Virginia.—Givens v. Com., 29 Gratt. (Va.) 830; Lawrence v. Com., 30 Gratt. (Va.) 845; Glover v. Com., 86 Va. 382.

Wisconsin.—Fizell v. State, 25 Wis. 364.

But according to the *English* authorities, followed by some courts in the *United States*, in cases of carnal connection consummated, or, as the case may be, only attempted, with children under ten years of age, and consenting to such connection, the connection, if consummated, does not constitute rape; and where it is not consummated, the person so attempting cannot be found guilty of an assault with intent to commit rape. Reg. v. Read, 2 C. & K. 957, 61 E. C. L. 957; Reg. v. Cockburn, 3 Cox C. C. 543; Reg. v. Johnson, 10 Cox C. C. 114; Reg. v. Banks, 8 C. & P. 574, 34 E. C. L. 531; Reg. v. Meredith, 8 C. & P. 589, 34 E. C. L. 539; Reg. v. Martin, 9 C. & P. 213, 38 E. C. L. 85; State v. Pickett, 11 Nev. 255, 21 Am. Rep. 754; Smith v. State, 12 Ohio St. 466, 80 Am. Dec. 355; O'Meara v. State, 17 Ohio St. 515. See Reg. v. Beale, L. R. 1 C. C. 10; also Toulet v. State, 100 Ala. 72, citing 19 AM. AND ENG. ENCYC. OF LAW (1st ed.) 948, 949.

Consent and Submission Distinguished.—On an indictment for attempting to carnally know and abuse a girl under ten years of age, with a count for a common assault, the attempt was proved, but it could not be shown that the child was under ten years of age, and it also appeared that no violence was used by the accused, and no actual resistance made by the girl. It was held that, although consent on the part of the girl would put an end to the charge of assault, yet there was a great difference between consent and submission, and that although, in the case of an adult, submitting quietly to any outrage of this kind would go far to show consent, yet that in the case of a child the jury should consider whether the submission of the child was voluntary on her part, or was the result of fear

under the circumstances in which she was placed. Reg. v. Day, 9 C. & P. 722, 38 E. C. L. 306.

There may be submission by a child of tender years without legal consent. Cliver v. State, 45 N. J. L. 46.

1. Accident.—Gibbons v. Pepper, 4 Mod. 405; Wakeman v. Robinson, 1 Bing. 213, 8 E. C. L. 478; Razor v. Kinsey, 55 Ill. App. 605; Talmage v. Smith, 101 Mich. 370; Harvey v. Dunlop, Hill & D. Supp. (N. Y.) 193; Turner v. State (Tex. Crim. App. 1896), 33 S. W. Rep. 972; Vincent v. Stinehour, 7 Vt. 62, 29 Am. Dec. 145. See also Bullock v. Babcock, 3 Wend. (N. Y.) 391.

Mere Negligence or Recklessness, however, is no defense to a civil action of assault and battery. See *infra*, this title, *The Civil Action—When It Lies—Injuries Inflicted through Negligence*.

Grasping Another to Prevent Falling.—It was held in Carl v. Bagdeley, 5 U. C. L. J. 262, that where one is falling, and, to save himself, grasps hold of another, it is not an assault.

Accidental Shooting.—It was held in Morris v. Platt, 32 Conn. 75, that where a person, in lawful self-defense, fires a pistol at an assailant, and missing him, wounds an innocent bystander, he is not liable for the injury, if guilty of no negligence.

Presumption that the Striking Was Accidental.—Where A threw a stick that struck the plaintiff, but it did not appear for what purpose the stick was thrown, it was held that it was fair to conclude that the stick was thrown for a proper purpose, and that the striking of the plaintiff was an accident. Alderson v. Waistell, 1 C. & K. 358, 47 E. C. L. 358.

Blow Struck in Separating Two Dogs.—The defendant interfered with two dogs which were fighting, and, in raising his stick for that purpose, accidentally struck the plaintiff and injured him. In an action of trespass for the assault, the court held that the interfering with the dogs was a lawful and proper act, which the defendant might do by the use of proper and safe means, and that if in so doing, and while using due care, taking all proper precautions necessary to the exigency of the case to avoid any hurt to others, the injury to the plaintiff occurred, the defendant was not liable therefor. Brown v. Kendall, 6 Cush. (Mass.) 292.

Contributory Negligence.—The doctrine that contributory negligence on the part of the plaintiff will defeat his action, has no application to a case of unlawful assault and battery, and no defense can be predicated thereon. Steinmetz v. Kelly, 72 Ind. 442, 37 Am. Rep. 170; Whitehead v. Mathaway, 85 Ind. 85; Ruter v. Foy, 46 Iowa 132; Kain v. Larkin, 56 Hun (N. Y.) 79. See also Talmage v. Smith, 101 Mich. 370.

VI. THE CIVIL ACTION—1. When It Lies—*a. GENERALLY.*—In all cases where a defendant is guilty of a criminal or indictable assault and battery, a civil action for damages will, under the same state of facts, lie against him in favor of the party assaulted and beaten.¹ A prosecution and conviction for the crime will not be a bar to the civil action,² and although the party is liable to indictment, yet exemplary damages may be recovered against him in a civil action.³

b. INJURIES INFLICTED THROUGH NEGLIGENCE.—There are cases of violence inflicted which will sustain a civil action for damages, and yet will not be punishable criminally by indictment; as, for instance, an injury resulting from the recklessness or negligence of the defendant without any criminal intent.⁴

1. Civil Action.—*Thomason v. Gray*, 82 Ala. 291. See also *Chapman v. State*, 78 Ala. 463, 56 Am. Rep. 42; *Kaline v. Stover*, 88 Iowa 245.

Preponderance of Evidence.—In a civil suit, brought merely to recover damages for a personal injury, a mere preponderance of the evidence is sufficient upon which to base a finding, and it is proper to so instruct the jury. *Miller v. Balthasser*, 78 Ill. 302; *Dean v. Raplee*, 145 N. Y. 319; *Elliott v. Van Buren*, 33 Mich. 49; *Shaul v. Norman*, 34 Ohio St. 157.

2. Conviction of the Crime No Defense to Civil Action.—*Jones v. Clay*, 1 B. & P. 191; *Wilson v. Middleton*, 2 Cal. 54; *Bundy v. Maginess*, 76 Cal. 532; *Reddin v. Gates*, 52 Iowa 210; *Corwin v. Walton*, 18 Mo. 71, 59 Am. Dec. 285; *Towle v. Blake*, 48 N. H. 92; *Rosenberg v. Salvatore (City Ct.)*, 1 N. Y. Supp. 326; *Roberts v. Mason*, 10 Ohio St. 277; *Hoadley v. Watson*, 45 Vt. 289, 12 Am. Rep. 197; *Edwards v. Leavitt*, 46 Vt. 126; *McWilliams v. Bragg*, 3 Wis. 424; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582. See *Caverno v. Jones*, 61 N. H. 623.

Failure to Prosecute No Bar to Civil Action.—An assault with intent to kill, when committed by one white person upon another, not being a felony in *Alabama*, a failure to prosecute, or the compromise of a prosecution commenced, does not prevent recovery in a civil action for damages. *Phillips v. Kelly*, 29 Ala. 628.

Record of Conviction Inadmissible.—It was held in *Caverno v. Jones*, 61 N. H. 623, that the record of the conviction of either party, under a plea of not guilty upon an indictment for assault, was not competent evidence upon a trial in trespass for the same offense.

But it has been held that evidence of conviction and fine in a criminal prosecution may be introduced in a civil action for the same offense for the purpose of mitigating damages. *Smithwick v. Ward*, 7 Jones (N. Car.) 64, 75 Am. Dec. 453; *Flanagan v. Womack*, 54 Tex. 45; *Shook v. Peters*, 59 Tex. 393.

3. Phillips v. Kelly, 29 Ala. 628; *Reed v. Kelly*, 4 Bibb (Ky.) 400; *Boetcher v. Staples*, 27 Minn. 308, 38 Am. Rep. 295; *Wheatley v. Thorn*, 23 Miss. 62; *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270; *Cook v. Ellis*, 6 Hill (N. Y.) 466, 41 Am. Dec. 757; *Hoadley v. Watson*, 45 Vt. 289, 12 Am. Rep. 197; *Brown v. Swineford*, 44 Wis. 282, 28 Am. Rep. 582. *Contra*, *Cherry v. McCall*, 23 Ga. 193.

Exemplary Damages after Criminal Conviction.—It was held in *Cook v. Ellis*, 6 Hill (N.

Y.) 466, 41 Am. Dec. 757, that in an action for assault and battery, though it appeared that the defendant had been prosecuted criminally for the same matter, and fined two hundred and fifty dollars, which he had paid, the plaintiff might nevertheless recover exemplary damages if the jury thought proper to allow them.

Where Prosecutor Receives Part of the Fine.—In *Jacks v. Bell*, 3 C. & P. 316, 14 E. C. L. 325, it was held that a person who has preferred an indictment for an assault, from which he did not receive any personal injury, and has succeeded in it, and received from the treasury a part of the fine imposed upon the defendant, is not entitled in an action against the same defendant to recover more than nominal damages.

Where Prosecutor is at Fault.—In *Bankston v. Folks*, 38 La. Ann. 267, it was held that he who is in fault, and sues for damages resulting from that fault, cannot recover for the injuries inflicted on him, although the perpetrator of them is not justified in law in his own conduct.

4. Injury from Mere Negligence—England.—*Leane v. Bray*, 3 East 593; *Weaver v. Ward*, Hob. 134; *Underwood v. Hewson*, 1 Stra. 596. *Connecticut.*—*Welch v. Durand*, 36 Conn. 183, 4 Am. Rep. 55.

Illinois.—*Little v. Munson*, 54 Ill. App. 437. *Michigan.*—*Talmage v. Smith*, 101 Mich. 370; *Markley v. Whitman*, 95 Mich. 236.

Missouri.—*Goetz v. Ambis*, 27 Mo. 28.

New Hampshire.—*Kendall v. Drake* (N. H. 1892), 30 Atl. Rep. 524.

New York.—*Bullock v. Babcock*, 3 Wend. (N. Y.) 391; *Percival v. Hickey*, 18 Johns. (N. Y.) 257, 9 Am. Dec. 210.

Wisconsin.—*Hoffman v. Eppers*, 41 Wis. 251; *Vosburg v. Putney*, 80 Wis. 523.

See *Laurent v. Bernier*, 1 Kan. 401; *Com. v. Adams*, 114 Mass. 323, 19 Am. Rep. 362; *Vandenburgh v. Truax*, 4 Den. (N. Y.) 464, 47 Am. Dec. 268; *Krall v. Lull*, 49 Wis. 403.

Gross Negligence.—Where the defendant fired a pistol, the ball of which grazed and hit the plaintiff, and it was found that the injury was unintentional, but was the result of gross and culpable negligence on the part of the defendant, it was held that trespass *vi et armis* would lie. *Welch v. Durand*, 36 Conn. 182, 4 Am. Rep. 55.

Recklessness in Sport.—Where a boy, thirteen years old, threw a piece of mortar at another boy, and a part of it struck a third

c. ACTION AGAINST MASTER FOR ASSAULT BY SERVANT.—The master is liable in a civil action for an assault committed by his servant, where the acts of the servant which constitute the assault are performed while engaged in the execution of some matter which is within the real or apparent scope of the duties intrusted to him.¹

d. ACTION AGAINST CORPORATION.—A corporation is liable in a civil action for an assault and battery committed by its agent within the scope of his employment.² The tendency of modern decisions is to hold corporations

person and injured his eye, though there was no intention to inflict the injury, and the act was done in sport, yet it was held that the perpetrator was liable, in an action against him by the person injured, for damages occasioned by the assault and battery. *Peterson v. Haffner*, 59 Ind. 130, 26 Am. Rep. 81.

Riding Bicycle against Footman.—One who rudely, and in such a reckless manner as to show a disregard of consequences, rides his bicycle against a person standing upon a town sidewalk, is liable in an action for assault and battery. *Mercer v. Corbin*, 117 Ind. 450, 10 Am. St. Rep. 76.

When Intent Becomes Material.—In civil actions, the motive, intent, or design of the wrongdoer towards the plaintiff is immaterial where the act occasioning the injury is unlawful; but where the party inflicting the injury is no wrongdoer, but is exercising a right, or doing a lawful act, and injury results to another, then the intent becomes material, as does also the question of reasonable care. *Paxton v. Boyer*, 67 Ill. 132, 16 Am. Rep. 615; *Brown v. Kendall*, 6 Cush. (Mass.) 292.

Runaway Horse.—The rider of a horse which runs away, without his fault, and injures another, is not thereby made liable for an assault, but it is otherwise if his recklessness or carelessness contributed in any way to the injury. *Gibbons v. Pepper*, 4 Mod. 405.

Aiding a Drunken Man.—If one intends to do a lawful act, as, for instance, to assist a drunken man, or prevent him from going without help, and in so doing the drunken man is injured, it is not an actionable battery, provided the defendant acted in good faith and from lawful motives; in other words, provided he was free from all blame. *Hoffman v. Eppers*, 41 Wis. 251.

1. See the titles AGENCY, vol. 1, p. 1153, *et seq.*; MASTER AND SERVANT.

Liability of Proprietor for Acts of Salesman.—The plaintiff went to the defendant's store in New York city to purchase an ulster. After she had examined one and put it on, preparatory to its purchase, the floorwalker, in the employ of the defendant, approached her and told her she did not wish to purchase the ulster, but was a spy from a rival establishment, and told the salesman to take the cloak from the plaintiff, which was done. The court held that this constituted an assault, and that the defendants were liable. *Geraty v. Stern*, 30 Hun (N. Y.) 426.

Master Liable for Acts of His Mate.—The master of a ship, who permits his mate to inflict an unjustifiable and excessive beating upon a sailor in his presence, is responsible

to the sailor in damages for the assault. *Burrmeister v. Seyer*, 2 Hawaii 255.

2. Assault and Battery by Corporate Agents—*England.*—*Eastern Counties R. Co. v. Brown*, 6 Exch. 314; *Seymour v. Greenwood*, 30 L. J. Exch. 189; *Bayley v. Manchester, etc.*, R. Co., L. R. 7 C. P. 415.

United States.—*Denver, etc., R. Co. v. Harris*, 122 U. S. 597.

Alabama.—*Owsley v. Montgomery, etc.*, R. Co. 37 Ala. 560.

California.—*Turner v. North Beach, etc.*, R. Co., 34 Cal. 594; *Kline v. Central Pac. R. Co.*, 37 Cal. 400, 99 Am. Dec. 282.

Illinois.—*Chicago, etc., R. Co. v. Williams*, 55 Ill. 185, 8 Am. Rep. 641; *St. Louis, etc., R. Co. v. Dalby*, 19 Ill. 353; *Chicago, etc., R. Co. v. Barrett*, 16 Ill. App. 17.

Indiana.—*Jeffersonville R. Co. v. Rogers*, 38 Ind. 116, 10 Am. Rep. 103; *Pittsburgh, etc., R. Co. v. Theobald*, 51 Ind. 246; *Indianapolis, R. Co. v. Anthony*, 43 Ind. 183; *Terre Haute, etc., R. Co. v. Fitzgerald*, 47 Ind. 79; *Terre Haute, etc., R. Co. v. Jackson*, 81 Ind. 19; *American Express Co. v. Patterson*, 73 Ind. 430.

Kentucky.—*Sherley v. Billings*, 8 Bush (Ky.) 147, 8 Am. Rep. 451.

Maine.—*Hanson v. European, etc., R. Co.*, 62 Me. 84, 16 Am. Rep. 404.

Maryland.—*Baltimore, etc., R. Co. v. Blocher*, 27 Md. 277.

Massachusetts.—*Kruleritz v. Eastern R. Co.*, 143 Mass. 228; *Holmes v. Wakefield*, 12 Allen (Mass.) 580, 90 Am. Dec. 171; *Frost v. Domestic Sewing Mach. Co.*, 133 Mass. 563; *Ramsden v. Boston, etc., R. Co.*, 104 Mass. 117, 6 Am. Rep. 200; *Hewett v. Swift*, 3 Allen (Mass.) 420; *Moore v. Fitchburg R. Corp.*, 4 Gray (Mass.) 465, 64 Am. Dec. 83.

Mississippi.—*New Orleans, etc., R. Co. v. Hurst*, 36 Miss. 660, 74 Am. Dec. 785.

Missouri.—*Perkins v. Missouri, etc., R. Co.*, 55 Mo. 201; *Malecek v. Tower Grove, etc., R. Co.*, 57 Mo. 17; *Travers v. Kansas Pac. R. Co.*, 63 Mo. 421; *Brown v. Hannibal, etc., R. Co.*, 66 Mo. 588; *Canfield v. Chicago, etc., R. Co.*, 59 Mo. App. 354.

Nevada.—*Quigley v. Central Pac. R. Co.*, 11 Nev. 350, 21 Am. Rep. 757.

New Jersey.—*Brokaw v. New Jersey, etc., R. Co.*, 32 N. J. L. 328, 90 Am. Dec. 659.

New York.—*Hamilton v. Third Ave. R. Co.*, 13 Abb. Pr. N. S. (N. Y. Super. Ct.) 318; *Priest v. Hudson River R. Co.*, 40 How. Pr. (N. Y. Super. Ct.) 456, *affirmed* in 65 N. Y. 589; *O'Connell v. Samuel*, 81 Hun (N. Y.) 357; *Shea v. Sixth Ave. R. Co.*, 62 N. Y. 180, 20 Am. Rep. 480; *Rounds v. Delaware, etc., R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597; *Mott*

liable for assaults committed by their servants, even outside the scope of their employment, when a duty is imposed upon such corporation to provide for the safety and protection of the person assaulted, arising from contractual relations.¹

v. Consumers' Ice Co., 73 N. Y. 543; *Lynch v. Metropolitan El. R. Co.*, 90 N. Y. 77, 43 Am. Rep. 141; *Dwinelle v. New York Cent.*, etc., R. Co., 120 N. Y. 117, 17 Am. St. Rep. 611; *Stewart v. Brooklyn, etc.*, R. Co., 90 N. Y. 588, 43 Am. Rep. 185, *distinguishing* *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 122, 7 Am. Rep. 418; *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 23, 7 Am. Rep. 293.

Ohio.—*Passenger R. Co. v. Young*, 21 Ohio St. 518, 8 Am. Rep. 78; *Atlantic, etc.*, R. Co. *v. Dunn*, 19 Ohio St. 162, 2 Am. Rep. 382; *Smith v. Pittsburg, etc.*, R. Co., 23 Ohio St. 10, *Healey v. City Passenger R. Co.*, 28 Ohio St. 23.

Pennsylvania.—*Pennsylvania R. Co. v. Vandiver*, 42 Pa. St. 365, 82 Am. Dec. 520; *Pittsburg, etc.*, Passenger R. Co. *v. Donahue*, 70 Pa. St. 119.

South Carolina.—*Reading v. South Carolina R. Co.*, 3 S. Car. 1, 16 Am. Rep. 681; *Palmer v. Charlotte, etc.*, R. Co., 3 S. Car. 580.

Texas.—*International, etc.*, R. Co. *v. Kentle* (Tex.), 16 Am. & Eng. R. Cas. 337.

Wisconsin.—*Milwaukee, etc.*, R. Co. *v. Finney*, 10 Wis. 388; *Craker v. Chicago, etc.*, R. Co., 36 Wis. 657.

See also *General Omnibus Co. v. Limpus*, 9 Jur. N. S. 333; *Pendleton v. Kinsley*, 3 Cliff. (U. S.) 416; *Pittsburgh, etc.*, R. Co. *v. Hinds*, 53 Pa. St. 512, 91 Am. Dec. 224.

See also the titles CARRIERS OF PASSENGERS; CORPORATIONS; MASTER AND SERVANT; NEGLIGENCE; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; RAILROADS; ULTRA VIRES; and the title AGENCY, vol. 1, p. 1153.

It was formerly laid down that a corporation could neither maintain nor be made defendant in an action of battery, for the reason that a corporation could neither beat nor be beaten, being a body politic. 1 Bl. Comm. 466; *Orr v. U. S. Bank*, 1 Ohio 36, 13 Am. Dec. 588.

Liable whether Particular Act is Authorized or Not.—A carrier is responsible for the acts of agents performed in the line of their duties, whether the particular act is authorized or not. *Louisville, etc.*, R. Co. *v. Kelly*, 92 Ind. 371, 47 Am. Rep. 149.

In *Cohen v. Dry Dock, etc.*, R. Co., 69 N. Y. 170, the court said: "While the master is not responsible for the wilful wrong of the servant, not done with a view to the master's service, or for the purpose of executing his orders; if the servant is authorized to use force against another, when necessary, in executing his master's orders, and if, while executing such orders, through misconduct or violence of temper, the servant use more force than is necessary, the master is liable. A master who puts a servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion,

or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes beyond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another." See also the title AGENCY, vol. 1, p. 1156.

Corporation Liable for Illegal Arrest.—An English statute authorizes the servants of railroad companies to make arrests in certain cases, and it was held in *Goff v. Great Northern R. Co.*, 30 L. J. Q. B. 148, that a railway corporation was responsible for the torts of its servants in arresting and imprisoning an innocent man. See also *Evansville, etc.*, R. Co. *v. McKee*, 99 Ind. 519, 50 Am. Rep. 102; *Galveston, etc.*, R. Co. *v. Donahoe*, 56 Tex. 162.

Negligence of Agents.—It is the duty of the agents of a railroad company to ascertain whether a passenger has purchased a ticket before ejecting him from the cars, and their negligence in this respect cannot be treated or urged as a defense, nor considered in mitigation of damages. *Quigley v. Central Pac. R. Co.*, 11 Nev. 350, 21 Am. Rep. 757.

1. *United States*.—*Pendleton v. Kinsley*, 3 Cliff. (U. S.) 416.

Illinois.—*Chicago, etc.*, R. Co. *v. Flexman*, 103 Ill. 546; *Wabash, etc.*, R. Co. *v. Rector*, 104 Ill. 296.

Indiana.—*Terre Haute, etc.*, R. Co. *v. Jackson*, 81 Ind. 19; *Louisville, etc.*, R. Co. *v. Kelly*, 92 Ind. 371, 47 Am. Rep. 149.

Iowa.—*Bryan v. Chicago, etc.*, R. Co., 63 Iowa 464.

Kentucky.—*Sherley v. Billings*, 8 Bush (Ky.) 147, 8 Am. Rep. 451.

Maine.—*Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 2 Am. Rep. 39; *Hanson v. European, etc.*, R. Co., 62 Me. 84, 16 Am. Rep. 404.

Massachusetts.—*Ramsden v. Boston, etc.*, R. Co., 104 Mass. 117, 6 Am. Rep. 200; *Bryant v. Rich*, 106 Mass. 189, 8 Am. Rep. 311.

Missouri.—*Malecek v. Tower Grove, etc.*, R. Co., 57 Mo. 18.

New York.—*Lynch v. Metropolitan El.*, etc., R. Co., 90 N. Y. 77, 43 Am. Rep. 141; *Stewart v. Brooklyn, etc.*, R. Co., 90 N. Y. 588, 43 Am. Rep. 185; *Kosters v. Brooklyn, etc.*, R. Co., 10 Misc. Rep. (Brooklyn City Ct.) 18.

Tennessee.—*Springer Transp. Co. v. Smith*, 16 Lea (Tenn.) 498.

Texas.—*International, etc.*, R. Co. *v. Kentle* (Tex.), 16 Am. & Eng. R. Cas. 337.

Wisconsin.—*Craker v. Chicago, etc.*, R. Co., 36 Wis. 657.

Implied Contract for Safe Transportation.—In every contract of carriage between a common carrier and a passenger, there is a stipulation implied by law that the passenger should be humanely treated, and a guaranty that the servants of the carriers, engaged in the performance of their master's contract, shall not unjustifiably assault or beat him, or otherwise maltreat him, while the master sustains

2. Damages — a. COMPENSATORY DAMAGES.—In an action for an assault and battery, damages should be given as nearly as possible in conformity to the consequences which have ensued therefrom;¹ and in estimating them the jury is not to be restricted to the actual loss, but may consider the pain, suffering, and wounded feelings of the plaintiff.²

such contract relations to him. *Chicago, etc., R. Co. v. Barrett*, 16 Ill. App. 17. See also the title **CARRIERS OF PASSENGERS**.

Assault by Waiters on Steamboat.—Common carriers of passengers by a steamboat are liable for an assault and battery committed by their steward and table waiters on a passenger for his interference by a proper remark with their rude treatment of his relative, a fellow passenger, in reference to a meal which he had taken on the boat. *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 311. See also *Nieto v. Clark*, 1 Cliff. (U. S.) 145.

Assault by Brakeman.—While it is a general rule that where an employee goes outside the line of his employment, and for purposes of his own inflicts an injury upon the person of one who has no claim upon the employer, arising from any special relation existing between them, the employer is not liable, yet, in the case of a common carrier of passengers this rule does not apply; and where a passenger, lawfully upon a train of cars, is wilfully assaulted by a brakeman upon such train, the railroad company is liable for the injury inflicted. *Chicago, etc., R. Co. v. Flexman*, 9 Ill. App. 250. See *Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 2 Am. Rep. 39.

Must Be within Scope of Servant's Authority.—In some cases, however, the corporation has been said not to be liable, unless the servant making the assault appears to have been acting within the scope of his authority, or there was a subsequent ratification of his conduct by the corporation. *Ward v. General Omnibus Co.*, 42 L. J. C. P. 265; *Turner v. North Beach, etc., R. Co.*, 34 Cal. 594; *Johnson v. Chicago, etc., R. Co.*, 58 Iowa 348, 8 Am. & Eng. R. Cas. 206; *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87, 8 Am. St. Rep. 512; *Ware v. Baratara, etc., Canal Co.*, 15 La. 169, 35 Am. Dec. 189; *McKeon v. Citizens' R. Co.*, 42 Mo. 79; *Higgins v. Watervliet Turnpike Co.*, 46 N. Y. 23, 7 Am. Rep. 293; *Isaacs v. Third Ave. R. Co.*, 47 N. Y. 122, 7 Am. Rep. 418; *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 373. See also *Rounds v. Delaware, etc., R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597; *M'Manus v. Crickett*, 1 East 106; *Wood v. Detroit City St. R. Co.*, 52 Mich. 402, 50 Am. Rep. 259.

The question whether a corporation is liable for the tortious acts of its agents and servants is to be determined upon the same principles as determine the question of the liability of the master for the torts of his servant. To fix the liability of the corporation for the tortious act of one of its servants done in obedience to a command of his officer, the act must be connected with the business for which the company was incorporated. *Brokaw v. New Jersey, etc., R. Co.*, 32 N. J. L. 328, 90 Am. Dec. 659.

Duty of Carrier to Protect Passengers from Assaults of Fellow Passengers.—It is held in *New Orleans, etc., R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689, that it is the duty of the conductor of a passenger train to preserve order on his train, to protect passengers from insult and injury from their fellow passengers, and, if it be necessary to enable him to discharge his duty, he should stop the train and summon to his aid his fellow employees on it and passengers who are willing to assist, and eject from the train any person or passenger guilty of disorderly, insulting, or threatening conduct; and a failure to discharge this duty, so far as he has the means or power, renders the railway company liable in damages to the insulted or injured passenger. See also *Flint v. Norwich, etc., Transp. Co.*, 34 Conn. 554; *Pittsburg, etc., R. Co. v. Pillow*, 76 Pa. St. 510, 18 Am. Rep. 424.

It was held in *Pittsburgh, etc., R. Co. v. Hinds*, 53 Pa. St. 512, 91 Am. Dec. 224, that there is no such privity between a railroad company and a passenger as to make them liable for that passenger's injury to another upon the principle of *respondet superior*. See *Putnam v. Broadway, etc., R. Co.*, 55 N. Y. 108, 14 Am. Rep. 190.

1. *Fetter v. Beale*, 1 Salk. 11; *Sheridan v. Furbur*, 1 B. & H. Adm. 423; *Schelter v. York, Crabbe (U. S.)* 449; *Cushman v. Ryan*, 1 Story (U. S.) 91; *Slater v. Rink*, 18 Ill. 527; *Jones v. Jones*, 71 Ill. 562; *Welch v. Ware*, 32 Mich. 77; *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270; *Causee v. Anders*, 4 Dev. & B. (N. Car.) 246; *Coffin v. Spencer*, 2 Hawaiian 23.

Recovery for Injuries Naturally the Result of Wrongful Act.—Whatever injurious consequences result naturally from the wrongful act done become elements of damage, and it is not necessary that the particular form or nature of the results should have been contemplated or foreseen by the wrongdoer. *Sloan v. Edwards*, 61 Md. 89.

Recovery for Medical Aid and Wages Lost.—In an action of trespass *vi et armis* for assault and battery, causing injury to the plaintiff, the expenses incurred for medical aid, nursing, loss of earnings, etc., which were the natural results of the injury, may be recovered as damages. *Hawes v. O'Reilly*, 126 Pa. St. 440.

Exhibiting Photograph of Wounds.—In order to explain to the jury the nature of the battery and its effects upon the plaintiff, a photograph of the plaintiff's back, showing the marks of the stripes inflicted by the defendant, is competent evidence, if the photograph is identified by the person who took it, and who testifies that it gives a correct representation of what it purports to represent, and was taken soon after the battery complained of. *Reddin v. Gates*, 52 Iowa 210.

2. Pain and Wounded Feelings—Georgia.—*Ratteree v. Chapman*, 79 Ga. 574.

b. EXEMPLARY DAMAGES.—The great weight of authority is to the effect that exemplary damages may be allowed where malice, violence, oppression, or wanton recklessness characterize the assault, or where the act complained of partakes of a criminal or wanton nature.¹ Some authorities, however,

Iowa.—*McKinley v. Chicago, etc., R. Co.*, 44 Iowa 314, 24 Am. Rep. 748; *Gronan v. Kukkuck*, 59 Iowa 18.

Illinois.—*Von Reeden v. Evans*, 52 Ill. App. 209.

Indiana.—*Taber v. Hutson*, 5 Ind. 322, 61 Am. Dec. 96; *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116, 10 Am. Rep. 103; *Morgan v. Kendall*, 124 Ind. 454; *Wolf v. Trinkle*, 103 Ind. 355; *Kelley v. Kelley*, 8 Ind. App. 606.

Maine.—*Wadsworth v. Treat*, 43 Me. 163.

Maryland.—*Sloan v. Edwards*, 61 Md. 89.

Massachusetts.—*Smith v. Holcomb*, 99 Mass. 552; *Hawes v. Knowles*, 114 Mass. 518, 19 Am. Rep. 383.

Michigan.—*Fay v. Swan*, 44 Mich. 544.

Missouri.—*West v. Forrest*, 22 Mo. 344.

New Jersey.—*Allen v. Camden, etc., Ferry Co. (N. J.)*, 30 Alb. L. J. 476.

New York.—*Keyes v. Devlin*, 3 E. D. Smith (N. Y.) 518; *Ford v. Jones*, 62 Barb. (N. Y.) 484.

Tennessee.—*Louisville, etc., R. Co. v. Garrett*, 8 Lea (Tenn.) 438, 41 Am. Rep. 640.

Texas.—*Shook v. Peters*, 59 Tex. 393.

West Virginia.—*Beck v. Thompson*, 31 W. Va. 459, 13 Am. St. Rep. 870.

Wisconsin.—*Morely v. Dunbar*, 24 Wis. 183; *Wilson v. Young*, 31 Wis. 574; *Craker v. Chicago, etc., R. Co.*, 36 Wis. 657.

Hawaii.—*Coffin v. Spencer*, 2 Hawaiian 23. See also *Beach v. Hancock*, 27 N. H. 223, 59 Am. Dec. 373.

Humiliation and Degradation of Passenger.—It has also been held that, in estimating damages for the expulsion of a passenger from a railroad train, it is proper to consider the humiliation and degradation imposed upon the injured person by the wrong done him, and if such wrong is done under circumstances of peculiar indignity and degradation, that fact is to be considered as an element of compensation, even in cases where vindictive damages cannot be given. *Pennsylvania R. Co. v. Connell*, 112 Ill. 297, 54 Am. Rep. 238; *Lake Erie, etc., R. Co. v. Fix*, 88 Ind. 381, 45 Am. Rep. 464; *Shepard v. Chicago, etc., R. Co.*, 77 Iowa 54; *Southern Kansas R. Co. v. Rice*, 38 Kan. 398, 5 Am. St. Rep. 766; *Philadelphia, etc., R. Co. v. Rice*, 64 Md. 63; *Carsten v. Northern Pac. R. Co.*, 44 Minn. 454, 20 Am. St. Rep. 589; *McGinnis v. Missouri Pac. R. Co.*, 21 Mo. App. 399; *Quigley v. Central Pac. R. Co.*, 11 Nev. 350, 21 Am. Rep. 757; *Allen v. Camden, etc., Steamboat Ferry Co.*, 46 N. J. L. 198; *Delaware, etc., R. Co. v. Walsh*, 47 N. J. L. 548; *Smith v. Pittsburg, etc., R. Co.*, 23 Ohio St. 10; *Hays v. Houston, etc., R. Co.*, 46 Tex. 272; *International, etc., R. Co. v. Wilkes*, 68 Tex. 617, 2 Am. St. Rep. 515. See also *Southern Kansas R. Co. v. Hinsdale*, 38 Kan. 507. But see *Illinois Cent. R. Co. v. Sutton*, 53 Ill. 397.

In estimating compensatory damages for
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actions for unwarrantable assaults on passengers by carriers' servants, the jury may take into consideration, as elements of the damages, loss of time, inability to attend to business, pecuniary expenses, bodily pain, incurable hurt, personal inconvenience, and mental anguish caused by bodily pain. *International, etc., R. Co. v. Kentle (Tex.)*, 16 Am. & Eng. R. Cas. 337.

Compensatory Damages when No Battery is Committed.—It was held in *Leach v. Leach (Tex. Civ. App. 1895)*, 33 S. W. Rep. 703, that damages may be allowed as compensation for mental distress and humiliation, although there was no actual battery.

Colored Woman Ejected from Ladies' Car.—Where a colored woman was refused admittance to a ladies' car, solely on account of her color, and was directed to take a seat in another car which was set apart for and mostly occupied by men, and she declined to do so, insisting upon her right to be admitted to the ladies' car, and the evidence justified the conclusion that the brakeman, in excluding her from that car, did so in a very rude manner, it was held that a verdict of two hundred dollars was not excessive, she being entitled to something for the indignity and disgrace imposed upon her. *Chicago, etc., R. Co. v. Williams*, 55 Ill. 185, 8 Am. Rep. 641.

1. Exemplary Damages—England.—*Grey v. Grant*, 2 Wils. 252; *Benson v. Frederick*, 3 Burr. 1845.

United States.—*Gallena v. Hot Springs R. Co.*, 13 Fed. Rep. 116; *Brown v. Evans*, 17 Fed. Rep. 912; *Boyle v. Case*, 18 Fed. Rep. 880; *Denver, etc., R. Co. v. Harris*, 122 U. S. 597.

California.—*Wilson v. Middleton*, 2 Cal. 54; *Wade v. Thayer*, 40 Cal. 578; *Bundy v. Maginess*, 76 Cal. 532.

Connecticut.—*Bartram v. Stone*, 31 Conn. 159; *Welch v. Durand*, 36 Conn. 182, 4 Am. Rep. 55; *Treat v. Barber*, 7 Conn. 279.

Georgia.—*Ratteree v. Chapman*, 79 Ga. 574.

Illinois.—*Jones v. Jones*, 71 Ill. 562; *Harrison v. Ely*, 120 Ill. 83; *Wabash, etc., R. Co. v. Rector*, 104 Ill. 296; *Dickey v. McDonnell*, 41 Ill. 62; *Donnelly v. Harris*, 41 Ill. 126.

Iowa.—*Hendrickson v. Kingsbury*, 21 Iowa 379; *Guengerich v. Smith*, 36 Iowa 587; *Mallett v. Beale*, 66 Iowa 70; *White v. Spangler*, 68 Iowa 222.

Kansas.—*Wiley v. Keokuk*, 6 Kan. 94; *Wiley v. Man-a-to-wah*, 6 Kan. 111.

Kentucky.—*Chiles v. Drake*, 2 Metc. (Ky.) 146, 74 Am. Dec. 406.

Maine.—*Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 2 Am. Rep. 39; *Johnson v. Smith*, 64 Me. 553; *Webb v. Gilman*, 80 Me. 177.

Maryland.—*Byers v. Horner*, 47 Md. 23; *Sloan v. Edwards*, 61 Md. 89.

Michigan.—*Welch v. Ware*, 32 Mich. 77; *Livingston v. Burroughs*, 33 Mich. 511; *Alford v. Vincent*, 53 Mich. 555.

deny the right to recover exemplary damages, and limit the amount of the damages in all cases to a full compensation for the injury sustained.¹

Corporations may be subjected to exemplary damages for the acts of their agents within the scope of their employment, in all cases where natural persons, acting for themselves, if guilty of like tortious acts, would be so liable.²

Discretion of the Jury.—It is a matter largely within the discretion of the jury in all cases, whether under the circumstances of the case exemplary damages should be awarded.³

Minnesota.—Crosby v. Humphreys (Minn. 1894), 60 N. W. Rep. 843.

Missouri.—Corwin v. Walton, 18 Mo. 71, 59 Am. Dec. 285.

New Hampshire.—Towle v. Blake, 48 N. H. 92; Belknap v. Boston, etc., R. Co., 49 N. H. 358.

North Carolina.—Causee v. Anders, 4 Dev. & B. (N. Car.) 246.

Ohio.—Roberts v. Mason, 10 Ohio St. 277.

Tennessee.—Springer Transp. Co. v. Smith, 16 Lea (Tenn.) 498.

Virginia.—Borland v. Barrett, 76 Va. 128, 44 Am. Rep. 152.

Wisconsin.—Brown v. Swineford, 7 Cent. L. J. 208; McWilliams v. Bragg, 3 Wis. 424; Morely v. Dunbar, 24 Wis. 183; Bass v. Chicago, etc., R. Co., 42 Wis. 654, 24 Am. Rep. 437.

Hawaii.—Coffin v. Spencer, 2 Hawaii 23.

See also Huckle v. Money, 2 Wils. 205; Merest v. Harvey, 5 Taunt. 442; Sloan v. Edwards, 61 Md. 89; Lavery v. Crooke, 52 Wis. 612, 38 Am. Rep. 768.

See also the title EXEMPLARY DAMAGES.

"Punitive" Distinguished from "Pecuniary" Damages.—It was held in Hendrickson v. Kingsbury, 21 Iowa 379, that the damages allowed in a civil case by way of punishment have no necessary relation to the penalty incurred for the wrong done to the public, but are called "punitive" damages, by way of distinction from "pecuniary" damages, and to characterize them as a punishment for the wrong done to the individual. See also Garland v. Wholeham, 26 Iowa 185.

Restraint upon Others Considered in Estimating Exemplary Damages.—The public good in the restraint of others from wrongdoing, as well as the punishment of the offender, is to be considered in estimating exemplary damages. Ward v. Ward, 41 Iowa 686.

Actual Damages must be Shown.—No recovery can be had for exemplary damages in the absence of evidence of actual or compensatory damages. Flanagan v. Womack, 54 Tex. 45.

Whether Malice must be Shown.—It has been held that in an action for assault and battery, exemplary damages cannot be allowed, unless the assault is found by the jury to be malicious. Irwin v. Yeager, 74 Iowa 174; Drohn v. Brewer, 77 Ill. 280; Williams v. Garrett, 12 How. Pr. (N. Y. Supreme Ct.) 456.

But it has been held that where the assault is of a grievous or wanton nature, manifesting a wilful disregard of the rights of others, actual malice need not be shown to entitle the aggrieved party to exemplary or vindictive damages. Borland v. Barrett, 76 Va. 128, 44 Am. Rep. 152.

And this seems to be in accord with the general doctrine as to exemplary damages. See the title EXEMPLARY DAMAGES.

Father cannot Recover Exemplary Damages for Injury to Son.—In an action by a father to recover for injuries to his minor son, caused by an assault and battery, the court held that in such case the father is not entitled to exemplary damages; his recovery should be limited to the actual damages sustained by him. Sherman v. Johnson, 58 Vt. 45.

1. The rule seems to be well established in *Indiana* and *Nebraska* that, in a civil action in the nature of trespass *vi et armis* for assault and battery, the plaintiff's right of recovery should be limited to an amount of damages equal to the full compensation for the injury sustained, and that such amount cannot be increased by an addition of punitive or exemplary damages. Taber v. Hutson, 5 Ind. 322, 61 Am. Dec. 96; Nossaman v. Rickert, 18 Ind. 350; Wolf v. Trinkle, 103 Ind. 355; Boyer v. Barr, 8 Neb. 68, 30 Am. Rep. 814. See also Cherry v. McCall, 23 Ga. 193; Humphries v. Johnson, 20 Ind. 190; Austin v. Wilson, 4 Cush. (Mass.) 273, 50 Am. Dec. 766; Atkins v. Gladwish, 25 Neb. 390.

In *Fay v. Parker*, 53 N. H. 342, 16 Am. Rep. 270, where this subject is discussed at length and the cases reviewed, it is held that, in a civil action founded upon a tort, punishable by criminal law, an amount of damages equal to the full compensation of the plaintiff for the injuries sustained by him cannot be increased by the addition of a fine for the punishment of the defendant.

2. Liability of Corporations in Exemplary Damages.—Atlantic, etc., R. Co. v. Dunn, 19 Ohio St. 162, 2 Am. Rep. 382.

It was held in *Bass v. Chicago, etc., R. Co.*, 42 Wis. 654, 24 Am. Rep. 437, that if the agent would be liable in punitive damages if the action were against him, the master is liable in damages of that character in case he authorized the act, or subsequently ratified it, but not otherwise. See also *Goddard v. Grand Trunk R. Co.*, 57 Me. 202, 2 Am. Rep. 39; *Palmer v. Charlotte, etc., R. Co.*, 3 S. Car. 580; *Milwaukee, etc., R. Co. v. Finney*, 10 Wis. 388; *Craker v. Chicago, etc., R. Co.*, 36 Wis. 657; *Bass v. Chicago, etc., R. Co.*, 39 Wis. 636.

But in *Hays v. Houston, etc., R. Co.*, 46 Tex. 272, it was held that exemplary damages cannot be allowed against a corporation, except in cases where the corporation has itself been remiss.

3. *Fabrigas v. Mostyn*, 2 W. Bl. 929; *Huckle v. Money*, 2 Wils. 205; *Gallena v. Hot Springs R. Co.*, 13 Fed. Rep. 116; *Ratteree v. Chapman*, 79 Ga. 574; *McNay v. Stratton*, 9 Ill.

c. EVIDENCE IN AGGRAVATION OR MITIGATION OF DAMAGES—(1) *Evidence in Aggravation*.—All matters showing either special damage or annoyance and vexation to the plaintiff, or malevolence or recklessness on the part of the defendant, may be introduced in evidence for the purpose of increasing the damages allowed.¹

App. 215; *Donnelly v. Harris*, 41 Ill. 126; *Hendrickson v. Kingsbury*, 21 Iowa 379; *Garland v. Wholeham*, 26 Iowa 185; *Root v. Sturdivant*, 70 Iowa 55; *Crosby v. Humphreys*, (Minn. 1894), 60 N. W. Rep. 843. See also *Edmonson v. Machell*, 2 T. R. 4.

Exemplary Damages—Question for the Jury.—It was held in *Wabash*, etc., R. Co. v. *Rector*, 104 Ill. 296, that where an injury is wantonly and wilfully inflicted, the jury may, in addition to the actual damages sustained, visit upon the wrongdoer vindictive or punitive damages by way of punishment for the wrongful act; but whether the party may have such damages rests largely in the discretion of the jury, under all the circumstances, and they should be left free by the court to exercise their own judgment in this respect. See also *Collins v. Waters*, 54 Ill. 485.

Verdict Held Not Excessive.—It was held in *Elliott v. Russell*, 92 Ind. 526, that where a mob seizes a prisoner, under arrest upon a criminal accusation, and hangs him by the neck until he is senseless to extort a confession, fifteen hundred dollars is not excessive damages.

Excessive Damages.—Where plaintiff purchased a ticket at Elko for San Francisco, and was ejected from the cars within half a mile from the town of Elko without sustaining any bodily injury, the conductor using no more force than was necessary to eject him, was delayed one day and had to buy another ticket at the expense of forty dollars and fifty cents, it was held that it was not a case warranting exemplary damages, and that a verdict of five thousand dollars was so excessive as to indicate passion and prejudice on the part of the jury. *Quigley v. Central Pac. R. Co.*, 11 Nev. 350, 21 Am. Rep. 757.

1. *Sloan v. Edwards*, 61 Md. 89; *Pratt v. Ayler*, 4 Har. & J. (Md.) 448; *Handy v. Johnson*, 5 Md. 450; *Elfers v. Woolley*, 116 N. Y. 294; *Borland v. Barrett*, 76 Va. 128, 44 Am. Rep. 152. See also *Blake v. Damon*, 103 Mass. 199; *Hutts v. Shoaf*, 88 Ind. 395.

Proof of Malice.—Any acts or declarations indicative of the existence of malice or ill-will on the part of the defendant towards the plaintiff, at the time of the wrong committed, may be given in evidence to prove malice. *Byers v. Horner*, 47 Md. 23; *Elfers v. Woolley*, 116 N. Y. 294; *Aulger v. Smith*, 34 Ill. 534.

Evidence of Previous Threats.—The plaintiff may give in evidence previous threats made by defendant to him, to increase damages in an action for assault and battery. *Sledge v. Pope*, 2 Hayw. (N. Car.) 402.

Threats Made after the Assault.—In *Spear v. Sweeney*, 88 Wis. 545, it was held that threats and abusive epithets, addressed to the plaintiff fourteen hours after an assault was made upon him, are admissible in evidence to show that the assault was made with express malice. See

also *Blake v. Damon*, 103 Mass. 199; *Breitenbach v. Trowbridge*, 64 Mich. 393, 8 Am. St. Rep. 829.

Evidence of Consequential Suffering to Increase Damages.—In a suit for personal injury on account of an assault and battery, alleging suffering and permanent impairment of health as the result, the testimony of the plaintiff as to wound, pain, suffering, loss of sleep, and poor health afterwards, is not a matter of opinion but a statement of facts, and is admissible for the purpose of increasing damages. *Hamm v. Romine*, 98 Ind. 77. See also *Morgan v. Kendall*, 124 Ind. 454.

Fits Caused by an Assault.—It was held, in *Tyson v. Booth*, 100 Mass. 258, that in an action for an assault the plaintiff, without specially alleging such an element of damages in his declaration, may prove in aggravation of damages that he became subject to fits as a result of the assault.

Imprisonment of Plaintiff.—In an action for assault and battery, the battery being proved, evidence that defendant pursued the plaintiff into his house and kept him a prisoner there for some time, is proper in aggravation of damages. *Worford v. Isabel*, 1 Bibb (Ky.) 247, 4 Am. Dec. 633.

Counsel Fees.—The rule supported by the authorities seems to be that in assessing damages, actual or punitive, the jury cannot take into account the value of the services of counsel or other expenses incident to the prosecution of the action, and that evidence as to the value of such services or the amount of such expenses is inadmissible. *Day v. Woodworth*, 13 How. (U. S.) 363; *Howell v. Scoggins*, 48 Cal. 355; *Barnard v. Poor*, 21 Pick. (Mass.) 378; *Atkins v. Gladwish*, 25 Neb. 390; *Hicks v. Foster*, 13 Barb. (N. Y.) 663; *Lincoln v. Saratoga*, etc., R. Co., 23 Wend. (N. Y.) 425; *Earl v. Tupper*, 45 Vt. 275; *Hoadley v. Watson*, 45 Vt. 289, 12 Am. Rep. 197; *Fairbanks v. Witter*, 18 Wis. 287, 86 Am. Dec. 765. See also *Falk v. Waterman*, 49 Cal. 224.

But it has been held that the jury may, in their estimate of compensatory damages, include the reasonable fees of counsel employed by the plaintiff in the prosecution of his action. *Noyes v. Ward*, 19 Conn. 250; *Roberts v. Mason*, 10 Ohio St. 277.

The same rule is laid down in *Titus v. Corkins*, 21 Kan. 722, in cases in which exemplary or vindictive damages are proper.

Compensation for Loss of Wife's Time.—In an action by husband and wife for an assault and battery upon the wife, compensation for loss of her time cannot be included in the damages, and a joint action will lie only for personal injury to the wife. *Barnes v. Martin*, 15 Wis. 240, 82 Am. Dec. 670, followed in *Kavanaugh v. Janesville*, 24 Wis. 618.

Loss of Office.—It was held in *Brown v.*

Pecuniary Condition of Defendant.—Evidence of the pecuniary circumstances of the defendant is admissible where exemplary damages are to be allowed.¹ But such evidence is inadmissible where only actual or compensatory damages are to be allowed.²

(2) *Evidence in Mitigation*—When Provocation or Excuse may be Shown.—According to some authorities, circumstances of provocation and excuse may be given in evidence in mitigation of exemplary damages.³ But some courts hold that the mitigation must be applied to the actual damages in cases which do not call for exemplary damages.⁴

Cummings, 7 Allen (Mass.) 507, that in an action for an assault and battery, the plaintiff cannot be allowed, for the purpose of showing special damages, to prove that by reason thereof he lost a position to which he was about to be appointed, although the declaration contains averments to that effect, the assault not being the proximate cause of the loss. See also *Boyce v. Bayliffe*, 1 Campb. 58; *Moore v. Adam*, 2 Chit. Rep. 198, 18 E. C. L. 304; *Carsten v. Northern Pac. R. Co.*, 44 Minn. 454, 20 Am. St. Rep. 589; *Hoey v. Felton*, 11 C. B. N. S. 142, 103 E. C. L. 142.

Ferrotypes Admissible in Evidence.—It was held in *Reddin v. Gates*, 52 Iowa 210, that a ferrotypes of the plaintiff taken shortly after the battery and showing his injury, after being properly identified, was admissible in evidence, and the weight to be given to it was a question for the jury to determine.

1. *Brown v. Evans*, 17 Fed. Rep. 912; *Webb v. Gilman*, 80 Me. 177; *Sloan v. Edwards*, 61 Md. 89; *Cochran v. Ammon*, 16 Ill. 316; *McNamara v. King*, 7 Ill. 432; *Rowe v. Moses*, 9 Rich. (S. Car.) 423, 67 Am. Dec. 560; *Harris v. Marco*, 16 S. Car. 575; *Goldsmith v. Joy*, 61 Vt. 488, 15 Am. St. Rep. 923; *Birchard v. Booth*, 4 Wis. 67; *Barnes v. Martin*, 15 Wis. 240, 82 Am. Dec. 670; *Brown v. Swineford*, 44 Wis. 291, 28 Am. Rep. 582; *Draper v. Baker*, 61 Wis. 450, 50 Am. Rep. 143; *Winn v. Peckham*, 42 Wis. 500; *Spear v. Sweeney*, 88 Wis. 545. See also *Meibus v. Dodge*, 38 Wis. 300, 20 Am. Rep. 6. But compare *Coffin v. Spencer*, 2 Hawaiian 23.

Pecuniary Condition of Defendant.—When exemplary or punitive damages are to be given, the condition and circumstances of the defendant may be material. What would be sufficient damages, by way of example and punishment, for a day laborer without means, would be nothing by way of punishment or example to a wealthy corporation. *Belknap v. Boston*, etc., R. Co., 49 N. H. 358. But see *Givens v. Bradley*, 3 Bibb (Ky.) 192, 6 Am. Dec. 646.

Pecuniary Condition of Plaintiff.—It was held in *Sloan v. Edwards*, 61 Md. 89, that the pecuniary circumstances of the plaintiff, and the extent to which his family are dependent upon him for support, may be considered by the jury in estimating damages to be awarded the plaintiff for the injury suffered by him.

It was held in *Gaither v. Blowers*, 11 Md. 536, that in an action for an assault and battery the plaintiff might, with a view to increase his damages, give in evidence the fact that he was a laboring man, who had a wife and

children to support. See also *McNamara v. King*, 7 Ill. 432.

2. *Morgan v. Durfee*, 69 Mo. 469, 33 Am. Rep. 508; *Draper v. Baker*, 61 Wis. 450, 50 Am. Rep. 143; *Hare v. Marsh*, 61 Wis. 435, 50 Am. Rep. 141. See also *Taber v. Hutson*, 5 Ind. 322, 61 Am. Dec. 96.

3. *Bartram v. Stone*, 31 Conn. 159; *Donnelly v. Harris*, 41 Ill. 126; *Crosby v. Humphreys* (Minn. 1894), 60 N. W. Rep. 843; *Hogan v. Ryan* (Supreme Ct.), 5 N. Y. St. Rep. 110; *Saltus v. Kipp*, 12 How. Pr. (N. Y. Super. Ct.) 342; *Dean v. Horton*, 2 McMull. (S. Car.) 147. See also *White v. Swain*, 138 Mass. 325.

Provocation Mitigates Punitive, but Not Actual Damages.—It was held in *Corcoran v. Haran*, 55 Wis. 120, that the fact that an assault and battery were induced by the personal abuse of the assailant by the party assaulted may be considered in mitigation of punitive, but not of actual damages, which include those allowed for mental and bodily suffering.

It was held in *Scott v. Fleming*, 16 Ill. App. 539, that to allow abusive language of the plaintiff to mitigate actual damages, would be virtually allowing it to be used as a defense.

It was held in *Prentiss v. Shaw*, 56 Me. 427, 96 Am. Dec. 475, that while the declarations of the plaintiff made prior to the assault and tending to provoke the same, not being a legal justification thereof, are inadmissible in mitigation of actual damages, still, such declarations made on the same day and communicated to the defendant prior to such arrest, together with all the facts and circumstances fairly and clearly connected with the arrest, indicative of the motives and provocations and conduct of both the parties, are admissible upon the question of damages claimed, upon the grounds of indignities suffered and punitive damages.

4. **Provocation in Mitigation of Actual Damages.**—Some courts hold that where there is a reasonable excuse for the defendant, arising from the provocation or fault of the plaintiff, but not sufficient entirely to justify the act done, there can be no exemplary damages under the circumstances, and mitigation must be applied to actual damages, arguing that if this were not so the plaintiff would get full compensation for damages occasioned by his own wrong, and that the rule ought to be, and practically is, mutual; malice and provocation in defendant being punished by damages exceeding the measure of compensation, and in the plaintiff by giving him less than the measure. *Bingham v. Garnault*, Bull. N. P. 17; *Fraser v.*

What may be Shown in Mitigation or Excuse.—It is admissible, under the rule and within the limits thus stated, to introduce evidence to show an absence of unlawful intent on the part of the defendant;¹ or in certain cases to show that the conduct of the plaintiff towards the defendant had been such as to render the latter, at the time of the assault, justly angry and incensed against him;² but the simple exercise of a legal right is never in law a sufficient

Berkeley, 7 C. & P. 621, 32 E. C. L. 658; Prentiss v. Shaw, 56 Me. 427, 96 Am. Dec. 475; Avery v. Ray, 1 Mass. 12; Robison v. Rupert, 23 Pa. St. 523; Parker v. Cature, 63 Vt. 155; Morely v. Dunbar, 24 Wis. 183. See Wilson v. Young, 31 Wis. 574.

1. Absence of Intent.—In an action for assault and battery, evidence of absence of intention may be submitted in mitigation of damages. James v. Campbell, 5 C. & P. 372, 24 E. C. L. 367.

Illegal Warrant.—In an action for assault and false imprisonment, it was held that a warrant illegal on its face, which had been issued by one of the defendants, as justice of the peace, and under which the other defendant made the arrest, which warrant had been referred to by the plaintiff's witness, was admissible in evidence for the defendants in mitigation of damages. Wasson v. Canfield, 6 Blackf. (Ind.) 406.

Military Order.—While an order issued by the adjutant-general, by order of the executive, to the officers of a public state militia, for the arrest of certain supposed disloyal persons alleged to be connected with the assassination of certain government officers, might not justify, nor fully excuse, such militia officers in an action against them for assault and false imprisonment in making such arrest, it would, nevertheless, be admissible to palliate the acts and mitigate damages. Carpenter v. Parker, 23 Iowa 450.

Fight by Mutual Consent.—It was held in Bartholt v. Wright, 45 Ohio St. 177, 4 Am. St. Rep. 535, that it is allowable to show, in an action for damages for assault and battery, in mitigation of damages, that the parties fought by mutual consent, but that such consent could not be shown as a bar to an action. See also Adams v. Waggoner, 33 Ind. 531, 5 Am. Rep. 230; Galbraith v. Fleming, 60 Mich. 403.

Assault Committed in Serving Attachment.—In Sampson v. Henry, 11 Pick. (Mass.) 379, it was held, in an action of assault and battery, that the circumstance that the defendant entered the house for the purpose of making an attachment was not admissible in evidence in mitigation of damages.

2. Threats.—Evidence of opprobrious language used by plaintiff at the time of the battery, more especially when intended to provoke a quarrel, is admissible in mitigation of damages; but where, after the opprobrious language, a sufficient time has intervened for deliberation, such language will constitute no excuse for the battery. Rochester v. Anderson, 1 Bibb (Ky.) 428.

The fact that threats were made by the plaintiff against the defendant, prior to the assault, must be proved before evidence is admissible relative to the communication of

such threats to the defendant. Hutts v. Shoaf, 88 Ind. 395.

Where Plaintiff Denies having Made Threats.—It is no ground for mitigation of damages for an assault and battery, that the plaintiff denied making statements derogatory to the character of the defendant, whereby the defendant was greatly provoked. Gronan v. Kukkuck, 59 Iowa 18.

Previous Threats—Showing Defendant's Motive in Assault.—Though former threats or insults will not palliate a later assault and battery, yet the defendant may introduce evidence of such threats in mitigation of damages as conducing to show the motives which influenced the defendant's conduct, and that the injury was inflicted in the attempt to prevent the execution of the threats made against him. Waters v. Brown, 3 A. K. Marsh. (Ky.) 557. See Bankston v. Folks, 38 La. Ann. 267; Fairbanks v. Witter, 18 Wis. 287, 86 Am. Dec. 765. See also *infra*, this title, *Evidence—Evidence of Intent*.

In Irwin v. Porter, 1 Hawaii 159, where an assault took place on Monday, the court held evidence of a provocation for the assault occurring on the previous Saturday to be admissible for the purpose of mitigating damages.

Previous Affray.—Where there was an affray between the plaintiff and one of the defendants in the afternoon, and in the evening of the same day the defendants assaulted the plaintiff at his house, it was held that the defendants could show the fact of an affray in the afternoon, but not its details in mitigation of damages for the assault. Currier v. Swan, 63 Me. 323.

Insult to Defendant's Wife.—It was held in Dupee v. Lentine, 147 Mass. 580, in an action for an assault, where the defendant admitted the assault, but offered evidence to show that his wife had been insulted by the plaintiff several hours before, and that he had just learned that fact at the time of the assault, that such evidence was rightly excluded.

Abusive Language of Husband—Assault on Wife.—In an action by a husband and wife for an assault upon the wife, no act or words of the husband, unless the wife participated in them, can be proven in mitigation of damages. Everts v. Everts, 3 Mich. 580.

Newspaper Articles as Provocation.—It was held in Ward v. White, 86 Va. 212, 19 Am. St. Rep. 883, that newspaper articles attacking defendant's character were admissible in the evidence in mitigation of damages, such articles being shown to be the provocation of the assault.

Introduction of a Libel in Evidence.—A having written a novel, B published a libel on A and his family in the form of a critique on the novel, for which A beat him. B brought an

provocation to mitigate an act of violence.¹ The authorities are not in accord as to whether evidence of a criminal conviction for the same assault is admissible to mitigate the damages in a civil action.² The poverty of the defendant may be shown to reduce the damages where evidence of his pecuniary well-being would be admissible to aggravate them.³

Provocation must have Been Recent.—According to the weight of authority, in order to render such evidence admissible in mitigation of damages, the provocation must be shown to have been so recent and immediate as to induce a fair presumption that the violence done was committed under the immediate influence of the feelings and passions excited by it, and before the blood has had time to cool.⁴

action for the assault, and A a cross action for the libel. It was held that in the action for the assault, the libel might be given in evidence in mitigation of damages, although it was the subject of another action; but that, this being so, defendant ought not to derive much advantage from it in diminishing the damages. *Fraser v. Berkeley*, 7 C. & P. 621, 32 E. C. L. 658.

Assault upon Servant by Employer—Proof of Servant's Misconduct.—An employer who, in a fit of passion, assaults his servant for neglect of duty, thereby commits a breach of the peace and actionable wrong; but if, making a reasonable allowance for the infirmities of human temper, the defendant has a reasonable excuse arising from the provocation or fault of the servant, but not sufficient to justify the acts entirely, then damages ought not to be assessed by way of punishment, but the circumstances in mitigation should be considered. *Ward v. Blackwood*, 41 Ark. 295, 48 Am. Rep. 41.

An engineer, finding that his assistant had fired up prematurely, and had gotten such a head of steam on as threatened a dangerous explosion, became violently excited, and struck the fireman. It was held, in an action against him for assault and battery, that the defendant should have been allowed to show the circumstances fully in mitigation of damage. *Bauman v. Bean*, 57 Mich. 1.

Intemperate Habits of Plaintiff.—A person guilty of a wilful assault and battery cannot show that, from the intemperate habits of the other party, the injury was more aggravating than it would have been upon a person of temperate habits. *Littlehale v. Dix*, 11 Cush. (Mass.) 364.

Evidence of the peculiar effect of liquor upon the person assaulted is inadmissible in mitigation of damages, because irrelevant. *Ellis v. Short*, 21 Pick. (Mass.) 142.

1. Exercise of a Legal Right.—The simple exercise of a legal right, no matter how offensive to another, is never, in law, deemed a provocation sufficient to justify or mitigate an act of violence. *State v. Lawry*, 4 Nev. 161.

2. Evidence of Criminal Conviction for the Same Offense.—Some of the authorities are to the effect that in a civil action to recover damages for an assault and battery, the defendant cannot be allowed to prove in mitigation of damages that he has been indicted, convicted, and fined for the same assault and battery. *Phillips v. Kelley*, 29 Ala. 628; *Reed v. Kel-*

ley, 4 Bibb (Ky.) 400. See also *Cook v. Ellis*, 6 Hill (N. Y.) 466, 41 Am. Dec. 757.

On the other hand, it has been held that evidence of the criminal conviction may be introduced to mitigate damages. *Smithwick v. Ward*, 7 Jones (N. Car.) 64, 75 Am. Dec. 453; *Flanagan v. Womack*, 54 Tex. 45; *Shook v. Peters*, 59 Tex. 393. See also *supra*, this title, *The Civil Action—When It Lies—Generally*.

3. Poverty of Defendant to Diminish Damages.—It was held in *Johnson v. Smith*, 64 Me. 553, that in cases where it is competent for the plaintiff to prove the wealth of the defendant to increase damages, it is equally competent for the defendant to show a want of it to diminish them, nor can he be deprived of this right by the omission of the plaintiff to offer any proof on that point, or to make any claim for damages on that ground.

4. Provocation must have Been Recent.—*United States*.—*Brooks v. Carter*, 34 Fed. Rep. 505.

Alabama.—*Kaiser v. Smith*, 71 Ala. 481, 46 Am. Rep. 342.

Connecticut.—*Guernsey v. Morse*, 2 Root (Conn.) 252; *Matthews v. Terry*, 10 Conn. 455; *Richardson v. Hine*, 42 Conn. 206.

Illinois.—*Donnelly v. Harris*, 41 Ill. 126; *Sorgenfrei v. Schroeder*, 75 Ill. 397; *Cummins v. Crawford*, 88 Ill. 312, 30 Am. Rep. 558; *Murphy v. McGrath*, 79 Ill. 594; *Hulse v. Tollman*, 49 Ill. App. 490.

Indiana.—*Fullerton v. Warrick*, 3 Blackf. (Ind.) 219, 25 Am. Dec. 99; *Schlosser v. Fox*, 14 Ind. 365.

Iowa.—*Cronan v. Kukkuck*, 59 Iowa 18; *Ireland v. Elliott*, 5 Iowa 478, 68 Am. Dec. 715; *Thrall v. Knapp*, 17 Iowa 468.

Kentucky.—*Reed v. Kelly*, 4 Bibb (Ky.) 400.

Louisiana.—*Caspar v. Prosadame*, 46 La. Ann. 36.

Maryland.—*Gaither v. Blowers*, 11 Md. 536.

Massachusetts.—*Avery v. Ray*, 1 Mass. 12; *Mowry v. Smith*, 9 Allen (Mass.) 67; *Bonino v. Caledonio*, 144 Mass. 299.

Michigan.—*Heiser v. Loomis*, 47 Mich. 16.

Missouri.—*Coxe v. Whitney*, 9 Mo. 531; *Collins v. Todd*, 17 Mo. 537.

New York.—*Corning v. Corning*, 6 N. Y. 97; *Lee v. Woolsey*, 19 Johns. (N. Y.) 319, 10 Am. Dec. 230; *Willis v. Forrest*, 2 Duer (N. Y.) 310; *Ellsworth v. Thompson*, 13 Wend. (N. Y.) 658.

North Carolina.—*Barry v. Inglis, Tayl.* (N. Car.) 121.

Character of Plaintiff and Defendant.—According to the better doctrine, neither evidence of the bad character of the plaintiff,¹ nor of the previous good character of the defendant,² is admissible for the purpose of mitigating damages.

VII. EVIDENCE—1. Generally.—There are numerous adjudications illustrating no point of substantive law, but turning merely on the question of the sufficiency or insufficiency of the evidence to sustain conviction. For cases in which the evidence was held sufficient³ or insufficient⁴ to convict, see the notes below.

South Carolina.—Dean *v.* Horton, 2 McMull. (S. Car.) 147.

Tennessee.—Jackaway *v.* Dula, 7 Yerg. (Tenn.) 82, 27 Am. Dec. 492.

Wisconsin.—Birchard *v.* Booth, 4 Wis. 67.

See also Tyson *v.* Booth, 100 Mass. 258; Salтус *v.* Kipp, 12 How. Pr. (N. Y. Super. Ct.) 342. See also the previous notes to this section.

1. Character of Plaintiff.—International, etc., R. Co. *v.* Kentle (Tex.), 16 Am. & Eng. R. Cas. 337; Bruce *v.* Priest, 5 Allen (Mass.) 100; Willis *v.* Forrest, 2 Duer (N. Y.) 310; Corning *v.* Corning, 6 N. Y. 97; Smithwick *v.* Ward, 7 Jones (N. Car.) 64, 75 Am. Dec. 453. But see McKenzie *v.* Allen, 3 Strobb. (S. Car.) 546, where it is held that in an action of assault and battery, while the defendant cannot give in evidence the bad character of plaintiff by way of excuse, yet, in mitigation of damages, he may give in evidence the conduct and even the character of the plaintiff, when they form the provocation and inducement to the trespass. See also Keep *v.* Quallman, 68 Wis. 451.

It was held in Gore *v.* Curtis, 81 Me. 403, 70 Am. St. Rep. 265, in an action of trespass for indecent assault, that evidence was inadmissible to prove specific acts of immorality of the plaintiff with other men prior to the alleged assault. But evidence was admitted tending to show the plaintiff's general reputation for unchastity. See also Parker *v.* Couture, 63 Vt. 155.

In Mitchell *v.* Work, 13 R. I. 645, a case of indecent assault, it was held that where the gravamen of the charge is mental and moral outrage, evidence is properly admissible to show that the prosecutrix is unchaste in character, conduct, and reputation, for the purpose of mitigating damages. See also Ford *v.* Jones, 62 Barb. (N. Y.) 484. See *infra*, this title, *Evidence—Character in Evidence*.

2. Character of Defendant.—Brown *v.* Evans, 17 Fed. Rep. 912; Reddin *v.* Gates, 52 Iowa 210; Fahey *v.* Crotty, 63 Mich. 383, 6 Am. St. Rep. 305; Porter *v.* Seiler, 23 Pa. St. 424, 62 Am. Dec. 341. See also *infra*, this section, *Evidence—Character in Evidence*.

3. Evidence Held Sufficient to Convict—Alabama.—Robinson *v.* State, 54 Ala. 86.

Georgia.—Isbell *v.* State, 93 Ga. 194; Wallace *v.* State, 95 Ga. 470; Ford *v.* State (Ga. 1895), 23 S. E. Rep. 996.

Illinois.—Connaghan *v.* People, 88 Ill. 460. *Kentucky.*—Sapp *v.* Com. (Ky. 1895), 33 S. W. Rep. 202.

Nebraska.—Murphy *v.* State, 43 Neb. 34; Whitener *v.* State, 46 Neb. 144; Wells *v.* State (Neb. 1896), 66 N. W. Rep. 29.

Texas.—Yanez *v.* State, 20 Tex. 656; Meredith *v.* State, 40 Tex. 480; Carr *v.* State, 41 Tex. 543; Robertson *v.* State (Tex. Crim. App. 1895), 29 S. W. Rep. 478; Davis *v.* State (Tex. Crim. App. 1895), 29 S. W. Rep. 1079; Thompson *v.* State (Tex. Crim. App. 1895), 30 S. W. Rep. 667; Waechter *v.* State (Tex. Crim. App. 1895), 30 S. W. Rep. 800; McDade *v.* State (Tex. Crim. App. 1895), 33 S. W. Rep. 125; Duke *v.* State (Tex. Crim. App. 1895), 33 S. W. Rep. 349; Halliburton *v.* State (Tex. Crim. App. 1895), 31 S. W. Rep. 297; Denson *v.* State (Tex. Crim. App. 1896), 35 S. W. Rep. 150.

Wyoming.—Bryant *v.* State (Wyoming 1895), 40 Pac. Rep. 518.

Conviction of an Accomplice.—Evidence that one of a noisy crowd, near a police officer, cried, "Kill the d—n son of a b—h," about the time others knocked the officer down, was held sufficient to warrant his conviction for an assault upon the officer. Com. *v.* Hurley, 99 Mass. 433. See also Sturdivant *v.* State, 59 Ark. 267.

Assault with Intent to Rape.—Carter *v.* State, 35 Ga. 263; Com. *v.* Hagenlock, 140 Mass. 125; State *v.* Whitsett, 111 Mo. 202; State *v.* Mitchell, 89 N. Car. 521; Bill *v.* State, 5 Humph. (Tenn.) 155; Crew *v.* State (Tex. Crim. App. 1893), 22 S. W. Rep. 973.

4. Evidence Held Insufficient to Convict.—White *v.* People, 93 Ill. 473; People *v.* Comstock, 49 Mich. 330; People *v.* Curran (Supreme Ct.), 37 N. Y. Supp. 803; Wagner *v.* Aulenbach, 170 Pa. St. 495; Ewing *v.* State, 4 Tex. App. 417; Bawcom *v.* State, 27 Tex. App. 620; Lee *v.* State (Tex. Crim. App. 1895), 31 S. W. Rep. 667; Priest *v.* State (Tex. Crim. App. 1896), 34 S. W. Rep. 611; Patrick *v.* State (Tex. Crim. App. 1895), 33 S. W. Rep. 352.

In Bradley *v.* State, 10 Smed. & M. (Miss.) 618, where the accused was indicted of assault and battery with a deadly weapon on a slave, with intent to commit manslaughter, the proof by a single witness was to the effect that the prisoner was seen with a knife in his hand in pursuit of the slave, when he was stopped by the witness, and then made threats against the slave's life. The court held that this evidence was entirely insufficient to warrant the prisoner's conviction.

Assault with Intent to Rape.—Jones *v.* State, 90 Ala. 628, 24 Am. St. Rep. 850; People *v.* Brown, 47 Cal. 447; Smith *v.* State, 77 Ga. 705; Jacques *v.* People, 66 Ill. 84; People *v.* Kirwan (Supreme Ct.), 22 N. Y. Supp. 160; Passmore *v.* State, 29 Tex. App. 241. See also People *v.* Blute (Supreme Ct.), 20 N. Y. Supp. 455.

2. Evidence of Intent.—Evidence of all words and actions of the defendant at the time of the assault, tending to show the intent with which the assault was made, is admissible.¹

1. Evidence Tending to Show Intent—Alabama.—Gray v. State, 63 Ala. 66.

California.—Maddougall v. Maguire, 35 Cal. 274, 95 Am. Dec. 98.

Georgia.—Howell v. State, 5 Ga. 48.

Kentucky.—Cogswell v. Com. (Ky. 1895), 32 S. W. Rep. 935.

New Hampshire.—Caverno v. Jones, 61 N. H. 623.

Texas.—Colquitt v. State, 34 Tex. 550; Outlaw v. State, 35 Tex. 481; Carr v. State, 41 Tex. 543; Denson v. State (Tex. Crim. App. 1896), 35 S. W. Rep. 150.

See also Walker v. State, 85 Ala. 7, 7 Am. St. Rep. 17; Morton v. State, 91 Tenn. 438; Krchnavy v. State, 43 Neb. 337; People v. Un Dong, 106 Cal. 83; People v. Conley (Mich. 1895), 64 N. W. Rep. 325; Jewett v. Banning, 21 N. Y. 27; Hulse v. Tollman, 49 Ill. App. 490.

Words Indicating Intent.—Words are an important factor in determining the intent with which an act of violence is committed. Tuberville v. Savage, 1 Mod. 3; State v. Rawles, 65 N. Car. 334; Mulligan v. People, 5 Park. Cr. Rep. (N. Y. Supreme Ct.) 105. See also Bartram v. Stone, 31 Conn. 159.

Exclamations of an Accessory.—On the trial of an indictment for assault with intent to kill, exclamations of an accessory made at the time of the assault are admissible to show the intent with which the assault was made. Riggs v. Com. (Ky. 1895), 33 S. W. Rep. 413.

Remarks Made after the Assault.—Upon the trial of the defendant on the charge of assault with intent to kill, a witness testified to a statement of the defendant as follows: "I have fixed one of you, * * * and I would just as soon fix three or four more of you as not." This remark being made immediately after the alleged offense was committed, the court held that it was not admissible as part of the *res gestæ*, but was admissible as an admission that the defendant committed the deed, and also as tending to show ill-will. State v. Smith, 125 Mo. 2.

Expression of Defendant's Countenance.—It is held in State v. Buchler, 103 Mo. 203, that in the trial of an indictment upon the charge of assault with intent to kill, testimony of a witness that the expression on the prisoner's countenance at the time of the assault was that of "anger, ferocity, and vulgar hate," was held to be admissible.

Testimony of Defendant as to His Intention Relevant.—Where the defendant offered to testify that his intention was to have sexual intercourse with the prosecutrix, with her consent, and the evidence was rejected by the trial court, it was held, on appeal, that this was error, and that such evidence was admissible. Lewellen v. State, 33 Tex. Crim. Rep. 412.

A party, when examined as a witness, may be asked as to his own motives and intentions, when these are material. Such testimony is not incompetent because it comes from the

mouth of the defendant. Berry v. State, 30 Tex. App. 423.

Pointing a Pistol at Another.—The act of pointing a pistol at another within shooting distance is not of itself an indictable assault, unless the party intended harm thereby. It would, however, be evidence of an intent to do harm, unaccompanied by other acts or words evincing the absence of all criminal intent. Richels v. State, 1 Sneed (Tenn.) 606.

Intent to Do Great Bodily Harm.—Where the evidence shows that the defendant used a deadly weapon and struck the prosecuting witness a blow in a vital part of the body, whereby he was rendered unconscious, it is sufficient to prove intent to do great bodily harm. People v. Smith (Mich. 1895), 64 N. W. Rep. 200.

Evidence of Nature and Extent of Prosecutor's Injuries.—Upon the trial of an indictment for assault with intent to do great bodily harm, testimony of the prosecuting witness as to the nature and extent of his injuries is admissible to show intent. It has also been held proper to allow the prosecuting witness to exhibit his wounds to the jury. People v. Sutherland (Mich. 1895), 62 N. W. Rep. 566.

Evidence of Intoxication as Bearing on Intent.—On the trial for an assault with intent to murder, the drunkenness of the accused at the time charged will be considered by the jury. It may have produced a state of mind unfavorable to premeditation, although not so excessive as to render him utterly incapable of forming a deliberate purpose. Lancaster v. State, 2 Lea (Tenn.) 575.

Intoxication is no defense to a prosecution for crime, but in some cases evidence of intoxication is admissible to show that no crime has been committed, or to show the degree or grade of the crime; and in a prosecution for maliciously shooting with intent to wound, evidence that the defendant was so much intoxicated that he could not have or form such intent is admissible. Cline v. State, 43 Ohio St. 332; Crosby v. People, 137 Ill. 325.

Intoxication may not, under any circumstances, be regarded as a defense, excuse, or justification to the charge of assault with intent to murder, unless in the case of a person who performs an act under such a state of intoxication as to be unaccompanied by volition, when he has lost control of his will, and is incapable of forming a purpose. People v. Odell, 1 Dakota 197.

Intent—Question for the Jury.—The question as to the intent with which an assault was committed is a question of fact, and if there is evidence tending to prove that the intent was as alleged in the indictment, the verdict will not be set aside on the ground that the evidence is insufficient to sustain the verdict. People v. Estrada, 53 Cal. 600.

Intent Inferred from Circumstances Proved.—Assault and battery with intent to commit a rape may be proved without the testimony of

Evidence of Previous Threats.—For the purpose of showing intent, evidence that threats were made by the defendant at a time previous to the alleged assault is admissible.¹

Evidence of Previous Assaults.—Evidence of previous assaults made by the accused upon the prosecuting witness is also admissible in evidence, to show the intent with which the last assault was made.²

3. Character in Evidence—*a. CIVIL ACTION*—(1) *Character of Plaintiff.*—In a civil action for assault and battery, evidence of the plaintiff's bad character is inadmissible,³ except in actions for assault with intent to commit rape and indecent assault, when evidence of the general reputation of the plaintiff is admissible.⁴

(2) *Character of Defendant.*—In a civil action for damages for assault and battery, the reputation of the defendant as a peaceable citizen is not in issue,

the person injured. Where there is reason to believe that the person injured is kept out of the way by the prisoner or his friends, and the assault and battery, etc., are proved by persons who heard the cries of the woman, and witnessed the transaction from a distance, the jury might infer the intent from the circumstances proved. *People v. Bates*, 2 Park. Cr. Rep. (Franklin Oyer & T. Ct.) 27.

1. *Henderson v. State*, 70 Ala. 29; *Newton v. State*, 92 Ala. 33; *Sharp v. People*, 29 Ill. 464; *Kercheval v. State*, 46 Ind. 120; *State v. Fry*, 67 Iowa 475; *McMahon v. State*, 16 Tex. App. 357. But see *State v. Norton*, 82 N. Car. 628. See also *supra*, this title, *The Civil Action—Damages—Evidence in Aggravation or Mitigation of Damages*.

Threats Made at a Previous Assault.—Where there were two assaults, threats made at the first affray, within a reasonable time of the last, were held admissible, the court confining the jury to the consideration of the threats. *Howland v. Day*, 56 Vt. 318.

Condition Precedent to Introduction of Evidence of Threats.—It was held in *Martin v. State*, 5 Ind. App. 453, that even where threats are conveyed to the defendant prior to the assault, to justify the introduction of evidence of such threats there must have been something in the conduct of the prosecuting witness at the time of the assault to induce the defendant to believe in good faith that he was in danger of being assaulted.

Evidence of Prior Acts as Relative to Intent.—The defendant being indicted for an assault with intent to murder a mulatto woman, with whom he had maintained an illicit connection for several years, and the evidence tending to show that he shot her because of her persistent refusal to return and live with him as before, it was competent for the prosecution to prove, as bearing upon the question of intent, the relation which had existed between them, his repeated efforts to induce her to return, her persistent refusals, his following her from place to place, his threats on each refusal, and his demonstrations of violence on such occasions. *Walker v. State*, 85 Ala. 7, 7 Am. St. Rep. 17.

2. **Evidence of Previous Assaults.**—*Ross v. State*, 62 Ala. 224; *Gray v. State*, 63 Ala. 66; *Brown v. Wheeler*, 18 Conn. 199; *State v.*

Walters, 45 Iowa 389; *Williams v. State*, 8 Humph. (Tenn.) 585.

3. **Civil Action—Character of Plaintiff.**—*Reed v. Kelly*, 4 Bibb (Ky.) 400; *Givens v. Bradley*, 3 Bibb (Ky.) 192, 6 Am. Dec. 646; *Corning v. Corning*, 6 N. Y. 97; *Bruce v. Priest*, 5 Allen (Mass.) 100. See also *McKenzie v. Allen*, 3 Strobb. (S. Car.) 546; *Kuney v. Dutcher*, 56 Mich. 308. *Contra*, *Keep v. Quallman*, 68 Wis. 451; *Galbraith v. Fleming*, 60 Mich. 403, where it was held that the defendant had a right to place before the jury the character of the plaintiff as he knew it to be.

General Reputation for Sobriety.—It is not competent for the plaintiff to introduce evidence of his own reputation for sobriety, and his character and habits in that respect, for the purpose of proving that he was not drunk at the time he alleged that an assault was made upon him. *Morton v. Hall*, 118 Mass. 511. See also *Heland v. Lowell*, 3 Allen (Mass.) 407, 81 Am. Dec. 670.

4. **Character of Plaintiff in Indecent Assault.**—*Gulerette v. McKinley*, 27 Hun (N. Y.) 320; *Crossman v. Bradley*, 53 Barb. (N. Y.) 125; *Parker v. Couture*, 63 Vt. 155; *Watry v. Ferber*, 18 Wis. 500, 86 Am. Dec. 789. See also *Young v. Johnson*, 123 N. Y. 226.

Specific Acts of Lewdness.—It was held in *Ford v. Jones*, 62 Barb. (N. Y.) 484, which was an action for indecent assault, that specific acts of lewdness of the plaintiff might be shown in evidence upon the question of damages. But see *Miller v. Curtis*, 158 Mass. 127.

Assault with Intent to Rape—Character of Prosecutrix.—In *Com. v. Kendall*, 113 Mass. 210, 18 Am. Rep. 469, *Morton, J.*, said: "In cases of rape and of assaults with intent to commit rape, evidence of the bad character of the prosecutrix for chastity is admissible. The reasons for the admission of evidence of this character apply with equal force to cases of assault, where the assault consists in taking indecent liberties with the person of a female. In such cases, where one of the controverted issues is as to the consent of the prosecutrix, we think the evidence is competent. The fact, if proved, that she is of unchaste character, affords some presumption that she consented to the indecent acts, and might reasonably aid the jury in weighing her testimony and deciding this issue." See *Camp v. State*, 3 Ga. 417. See also the title *Rape*.

and testimony as to his good character is not admissible, either to rebut malice or in mitigation of damages.¹

b. CRIMINAL PROSECUTION—(1) *Character of Defendant*.—In a criminal prosecution for an assault, evidence is admissible to show that the defendant is a peaceable and law-abiding citizen in the community where he lives.²

(2) *Character of Prosecutor*.—Evidence as to the reputation of the prosecutor, upon whom the assault was committed, is inadmissible, where a plea of self-defense is not set up.³ But where a proper case of self-defense is made out, evidence as to the quarrelsome and violent character of the prosecutor is admissible.⁴

c. SPECIFIC ACTS.—Evidence of specific acts is inadmissible to prove character upon a prosecution for assault and battery.⁵

1. Civil Action—Character of Defendant.—*United States*.—*Brown v. Evans*, 17 Fed. Rep. 912.

California.—*Anthony v. Grand*, 101 Cal. 235; *Vance v. Richardson* (Cal. 1895), 42 Pac. Rep. 909.

Connecticut.—*Thompson v. Church*, 1 Root (Conn.) 312.

Indiana.—*Sturgeon v. Sturgeon*, 4 Ind. App. 232; *Elliott v. Russell*, 92 Ind. 526.

Iowa.—*Reddin v. Gates*, 52 Iowa 210.

Massachusetts.—*Day v. Ross*, 154 Mass. 13.

Michigan.—*Fahey v. Crotty*, 63 Mich. 383.

Pennsylvania.—*Porter v. Seiler*, 23 Pa. St. 424, 62 Am. Dec. 341.

Contra, *Schuek v. Hagar*, 24 Minn. 339, an action for indecent assault, where it was held that evidence of the chastity and good moral character of the defendant was admissible.

2. Criminal Prosecution—Character of Defendant.—*State v. Schlegel*, 50 Kan. 325; *State v. King*, 78 Mo. 555; *State v. McNamara*, 100 Mo. 100; *Young v. State*, 31 Tex. Crim. Rep. 24. *Contra*, *Drake v. Com.*, 10 B. Mon. (Ky.) 225. See also *Matthews v. State*, 32 Tex. 117.

Reasonable Doubt, Supplemented by Good Character.—In a prosecution for an assault, an instruction that any doubt, supplemented by proof of good character, would authorize an acquittal, is erroneous; it must be a reasonable doubt. *State v. McNamara*, 100 Mo. 100.

Evidence of Character Admissible to Create Doubt.—Evidence of good character is admissible not only in cases where doubt otherwise exists, but may be offered for the purpose of creating a doubt. *People v. Jassino*, 100 Mich. 536.

Reputation for Truth and Veracity.—In an action for assault and battery, the defendant cannot adduce evidence of his character for truth and veracity, since that question is not involved in the issue. *Morgan v. State*, 88 Ala. 223.

Limited to Trait in Issue.—Evidence of the defendant's good character is always admissible, but the inquiry should be limited to the trait in issue. The witness should not be allowed to express his individual opinion. *State v. King*, 78 Mo. 555.

3. Criminal Prosecution—Character of Prosecutor.—*Rex v. Clarke*, 2 Stark. N. P. 241, 3 E. C. L. 393; *Brown v. State*, 74 Ala. 42; *Pleasant v. State*, 15 Ark. 624; *Camp v. State*, 3 Ga. 417; *Crosby v. People*, 137 Ill. 325; *State v.*

Paterno, 43 La. Ann. 514; *People v. Frindel*, 58 Hun (N. Y.) 482; *Stevens v. State*, 1 Tex. App. 591. See also *Abbott v. People*, 86 N. Y. 460.

Reputation for "Butting."—Where evidence shows that the person assaulted was only advancing towards the defendant, and fled as soon as the defendant drew a pistol, it was held proper to exclude evidence tending to show that the party assaulted was a great "butter." *Smith v. State* (Tex. Crim. App. 1892), 20 S. W. Rep. 831.

Assault by Husband for Insult to Wife—His Character Not in Issue.—Where the cause of the assault was insulting words or conduct of the prosecuting witness to the wife of the defendant, evidence of the good or bad character of the prosecuting witness in regard to chastity is irrelevant and inadmissible. *Green v. State* (Tex. App. 1889), 12 S. W. Rep. 872.

Character for Truth and Veracity.—In an action of trespass for assault and battery, the defendant offered to prove that the woman upon whom the alleged assault was made, and who testified to the assault, had a propensity to lie, and that she had lied on other occasions. The court held that this evidence was incompetent. *Com. v. Kennon*, 130 Mass. 39.

Character of Officer.—On a trial for assault with intent to murder, where the evidence showed that the defendant and his companion barred the doors on the approach of the officer, and resisted the officer with drawn pistols, in order to prevent him from arresting the fugitive, evidence that the officer was of an overbearing and vindictive nature was no defense, and inadmissible. *Stewart v. State* (Tex. Crim. App. 1894), 26 S. W. Rep. 203.

4. Lewallen v. State, 6 Tex. App. 475. See also *Harman v. State*, 3 Head (Tenn.) 244; *State v. Nett*, 50 Wis. 524; *Keep v. Quallman*, 68 Wis. 451.

Character of Prosecutor for Peaceableness.—The state may, on trial for assault with intent to kill, introduce evidence of the prosecutor's character for peaceableness, where the defendant has been allowed to testify to facts of which he claims personal knowledge, tending to show the quarrelsome character of the prosecutor. *Bowlus v. State*, 130 Ind. 227.

5. Proof of Another Offense.—*Morgan v. State*, 88 Ala. 223; *Pratt v. State*, 56 Ind. 179; *Com. v. O'Brien*, 119 Mass. 342, 20 Am. Rep. 325; *Sawyer v. People*, 1 N. Y. Crim.

d. DEFENDANT AS WITNESS.—Evidence tending to impeach the character of the defendant, after he has taken the stand as a witness, is admissible.¹

ASSEMBLE—ASSEMBLY.—To assemble is to meet or come together; to convene, whether for an unlawful or a lawful purpose.² Assembly means the meeting of a number of persons in the same place;³ any political meeting required to be held by law.⁴

Rep. 249; *People v. Frindel*, 58 Hun (N. Y.) 482.

A defendant, in a prosecution for assault, who testifies in his own behalf, cannot have his character assailed by evidence showing that he had a pistol on his person at the time of his arrest. *People v. Wong Ah Leong*, 99 Cal. 440.

Where, on a prosecution for assault with intent to kill, the defendant testified as to the general reputation of the prosecuting witness as a dangerous man, it was held that he could not afterwards give evidence to the effect that the witness had pointed a gun at a third person on a former occasion. *Jenkins v. State*, 80 Md. 72.

It was held in *People v. Bishop*, 81 Cal. 113, that the defendant cannot be questioned, on cross-examination, as to whether he has not assaulted certain other persons with a deadly weapon, he not having been questioned in regard to such assault on the examination in chief. Such evidence is inadmissible, either for the purpose of impeaching the defendant's character generally, or for truth and veracity.

1. *State v. Rainsbarger*, 79 Iowa 745; *State v. Smith*, 125 Mo. 2; *State v. Weeden* (Mo. 1896), 34 S. W. Rep. 473.

Former Conviction of a Felony.—Evidence of the former conviction of the defendant of felony is admissible as bearing upon the credibility of the defendant as a witness. *State v. Nelson*, 98 Mo. 414; *Childs v. State* (Tex. Crim. App. 1893), 22 S. W. Rep. 1039.

But evidence of the former conviction of the defendant of a misdemeanor is held to be inadmissible for the purpose of affecting his credibility as a witness. *State v. Smith*, 125 Mo. 2. See generally the title CHARACTER IN EVIDENCE; also the title WITNESSES.

2. In *State v. Kempf*, 26 Mo. 429, the court said: "If any number of persons meet together on a lawful occasion and on a sudden quarrel engage in a fight, they are not guilty of a riot, but of a sudden affray only; (1 Hawk. P. C. 541; 1 Russ. on Cr. 268;) and to constitute a riot the common intent of at least three persons to do any unlawful act must exist, either at the time of their *assembling*, or be formed with the agreement of mutual assistance after they have *assembled*. It is of course not necessary to prove any formal or express agreement or intent; but it may be inferred from circumstances, and is a question of fact for the jury. But the bare fact that three or more persons in a violent manner beat another does not raise the presumption of law that they *assembled* with that intent, or, after being *assembled* agreed mutually to assist one another in executing such a purpose; for if the law from such conduct, deduced the inference, either as a conclusive

or disputable presumption, that the intent existed which is a necessary ingredient in a riot, there would be no distinction between riots and affrays."

3. **Unlawful Assembly.**—See the title UNLAWFUL ASSEMBLY.

4. Such as the General *Assembly*, which includes the Senate and House of Representatives. See the title LEGISLATURE.

Disturbing Meetings Assembled—Religious Worship—Business Meeting. (See also the title DISTURBING MEETINGS.)—In *Wood v. State*, 11 Tex. App. 318, it was held that a prosecution for disturbing a congregation *assembled* for religious worship could not be sustained by proof that the congregation, though disturbed, was *assembled* exclusively for business purposes, even though the proceedings were opened with religious services.

But in *Hollingsworth v. State*, 5 Sneed (Tenn.) 518, a different decision was reached. In that case the court said: "It is not controverted that his conduct was such as to create the kind of disturbance forbidden by the law, if it had been before a congregation engaged in worship. But his defense is rested upon the ground that the law does not apply to a case where the congregation had been dismissed, and the church authorities were engaged in a trial for the administration of discipline. This court has, for the suppression of these offenses, given these acts a broader and more liberal construction, and held that their protection would extend to a religious *assembly*, whether large or small, which might be engaged in public worship, or duties connected with their interest as a church."

Same—Camp Meeting—In *Com. v. Jennings*, 3 Gratt. (Va.) 595, it was held that the *Virginia* statute forbidding the disturbance of congregations *assembled* for religious worship applied not only to disturbances which were made whilst the religious services were progressing, but to disturbances made while the congregation was *assembled* for religious worship at a camp meeting, though it was at night after the religious services were closed for the day and the congregation had retired for rest.

Same—Conclusion of Services.—So in *Kinney v. State*, 38 Ala. 224, it was held that an interruption or disturbance made after the conclusion of the services and the dismissal of the congregation, but while a portion of the people still remained in the house, and before a reasonable time had elapsed for their dispersion, was within the statute against disturbances of an *assembly* of people met for religious worship. To the same effect, see *Williams v. State*, 3 Sneed (Tenn.) 313.

Disturbing Schools.—Where an act made it a criminal offense to interrupt and disturb any

ASSENT. (See also the title CONTRACTS.)—The definition of the word “assent” is to admit a thing as true, to express one’s agreement, acquiescence, concurrence; to yield, agree, approve, accord; the act of the mind in admitting or agreeing to anything; concurrence with; approval, consent.¹

public, private, or select school while the same is in session, a complaint charging a wilful disturbance of “a school met and assembled for culture and improvement in sacred and church music,” was held fatally defective in not alleging that the school was in session; and it was also held that a meeting of persons assembled for the purpose of singing together, for their common improvement in the art of singing, but without a teacher, is not a school within the statute. *State v. Gager*, 28 Conn. 232.

Assembled as the Law Requires.—Where a charter directed that out of certain persons to be nominated in a particular mode “the mayor, aldermen, bailiff, principal burgesses, and other burgesses and inhabitants of the borough for the time being (they being for that purpose congregated and assembled together) or the greater part of them as should be so congregated, might, by the greater part of the voices of them so assembled, choose one to be mayor;” “congregated and assembled” mean so assembled as the law requires, viz., by a majority of each definite body; and a majority of each definite body must be present in order to make a valid election. *Rex v. Bower*, 1 B. & C. 492, 8 E. C. L. 209.

In order to be duly assembled the persons who are to make the election must have notice of the meeting. *Rex v. Ashwell*, 12 East 22.

Bankruptcy.—In *In re Richmond*, 14 Daily Reg. 869, 7 Cent. L. J. 435, it was held that the word assembled as used in the 17th section of the Bankruptcy Amendment Act in the clause: “And such resolution shall, to be operative, have been passed by a majority in number, and three-fourths in value, of the creditors of the debtor, assembled at such meeting, either in person or by proxy,” included every creditor who appeared at any session of the meeting and proved his debt, although at the time the vote was taken such creditor was not present or represented by proxy.

Riot.—See the titles AFFRAY, vol. I, p. 915; RIOTS.

As to the Constitutional Right of the People Peaceably to Assemble and Petition for a Redress of Grievances, see the title CONSTITUTIONAL LAW.

Thieves Assembling.—By 32 and 33 Vict., c. 99, § 10, a penalty is imposed on “every person who occupies or keeps any place where excisable liquors are sold, and knowingly lodges or harbors thieves or reputed thieves, or knowingly permits or suffers them to meet or assemble therein.” One Marshall, who occupied a place where excisable liquors were sold, allowed a meeting to be held there for the purpose of getting up a subscription in aid of the wife and children of a man charged with an offense, or for procuring means for his defense. At the meeting were several thieves, or reputed thieves, who were known by the appellant, Marshall, to be such; but no disorderly

conduct occurred, and the meeting was not held pursuant to any unlawful design. It was held that such an *assemblage* is forbidden by the section, for, said Mellor, J.: “In this case, the occasion of the assembling was that some man having got into trouble through a criminal offense, cards were sent out to his friends inviting them to meet, that funds might be procured for his defense, and consequently a number of persons assembled and were found in this house sitting around a table singing songs and drinking. Clearly, therefore, they, being reputed thieves, did assemble there; in the terms of the section, ‘they did meet and assemble in his house.’ It appears that a number of the persons were thieves and reputed thieves, and it is found as a fact that the landlord knew they were thieves or reputed thieves. Now, it is not every casual meeting of thieves, or reputed thieves, who might accidentally come together, which constitutes an offense for which the landlord is made liable; it would be hard upon him if it were so; but we think that the intention of the legislature was to prohibit the meeting of thieves together in a public house, though they might have no improper object in meeting, and for this reason, viz., that when thieves get together it affords opportunity and inducement to devise crimes and offenses.” *Marshall v. Fox*, L. R. 6 Q. B. 370. See also *Greig v. Benden*, El. Bl. & El. 133, 96 E. C. L. 133; *Belasco v. Hannant*, 3 B. & S. 13, 113 E. C. L. 13; *Parker v. Green*, 6 L. T. 46.

1. *Norton v. Davis*, 83 Tex. 36, where it was held that the word precluded the idea of retraction.

Active or Passive.—In *Welch v. Sackett*, 12 Wis. 243, it is said: “Assent is an act of the mind—that intelligent power in man by which he conceives, reasons, and judges, and of which it is a primary, invariable, and most familiar law that it cannot act with reference to external objects, until, through the medium of the senses, it is impressed with or knows their existence. Hence, without such impression or knowledge, there can be no assent, no *actus contra actum*; and to presume it in opposition to the facts, is to presume that which is impossible; which the law, the rules and precepts of which are in conformity with the unchanging truths of nature, will never do.”

Same—What Constitutes Assent of a Director to Unlawful Acts.—To constitute assent, there must be something more than mere negligence on the part of a director in not knowing what, in the exercise of proper care, he ought to have known. There must be some wilful or intentional violation of duty—an *assenting* to an act, knowing that it is being or is about to be done. But if, with such knowledge, he neither objects to nor opposes it when his duty requires, and when he has the opportunity of doing so, this is assent. *Patterson v. Stewart*, 41 Minn. 85, 16 Am. St. Rep. 671.

See also the title DIRECTORS.

ASSERT.—To assert means to maintain or defend by words or measures; to vindicate.¹

Same—Absent Voters.—See the titles COUNTY SEATS; MUNICIPAL SECURITIES.

In *State v. Brassfield*, 67 Mo. 339, it was held that where the constitution provided that two-thirds of the qualified voters should *assent* to the removal of the county seat, the mere abstaining from voting did not express *assent*. The court said: "To *assent* is 'to admit, yield, or concede, or rather to express an agreement of the mind to what is alleged or proposed.' This is Webster's definition of the word. Does one, by staying from the polls, 'express an agreement of his mind' to a proposition voted upon, or simply manifest thereby an indifference on the subject? Or is it a fair inference that every voter who fails to vote *assents* to the proposition submitted, when, as is well known, at every election, sickness, temporary absence from the election district, and pressing private business which will not admit of postponement, prevent many from voting, who would otherwise gladly cast their votes? But upon what principle is it assumed that the absent voters *assent*? Suppose that not a vote were polled on the proposition submitted, would it be assumed that it had the *assent* of all the qualified voters? This is an extreme case, which we have supposed, but it aptly shows the absurdity of the assumption. The *assent* required is an affirmative, positive act. The constitution does not mean that if no one says nay, all shall be taken as saying yea."

And where the *assent* of two-thirds of the voters of a county was required, a similar conclusion was reached. The court said: "What is the meaning of the word *assent* as used in the fourteenth section? Lexicographers define it, the act of the mind in agreeing to, or *assenting* to a thing; consent, or 'agreement.' 'Consent' is defined to be agreement in opinion or sentiment, the being in one mind, accord, concurrence. Giving to *assent* then its natural signification, it would be the act of the minds of two-thirds of the voters of the county, agreeing to or *assenting* to the subscription; consent to the subscription. The constitution of New York of 1821 contained this provision: 'The *assent* of two-thirds of the members elected to each branch of the legislature shall be requisite to every bill creating, continuing, or altering * * * any body politic or corporate.' Plainly, the obvious intent is that all such measures must receive the vote of two-thirds of the members elected. *People v. Purdy*, 2 Hill (N. Y.) 35. The word *assent* is here used in the sense of expressing by affirmative act, to wit, voting, concurrence, consent, or agreement that the bill shall pass." *Hawkins v. Carroll County*, 50 Miss. 759.

Assent and Consent.—*Assent* is an agreement to, or approval of, an act or thing done. "Consent" is agreement to a thing to be done or about to be done. *Burrill's Law Dict.*

"Consent" is a synonym of *assent*. *Clem v. State*, 33 Ind. 431. But see *Kornegay v. Styron*, 105 N. Car. 14.

Contracts.—Every contract consists of a request on one side and an *assent* on the other. *Jackson v. Galloway*, 5 Bing. N. Cas. 71, 35 E. C. L. 34. See the title CONTRACTS.

Assent is Evidenced by a proposition emanating from one side and acceptance of it on the other, the proposition and acceptance together constituting what is sometimes called a "meeting of the minds." *Fuller v. Kemp* (C. Pl.), 16 N. Y. Supp. 160.

The terms "accept" and "*assent* to" are words of contract. *Chesapeake, etc., Canal Co. v. Baltimore, etc., R. Co.*, 4 Gill & J. (Md.) 5.

Executors.—See also the title EXECUTORS AND ADMINISTRATORS.

The term *assent* is also used where a bequest in trust is made to an executor, to express his willingness to take under the will as legatee in trust and not as executor. *Doe v. Tatchell*, 3 B. & Ad. 675, 23 E. C. L. 157; *Doe v. Sturges*, 7 Taunt. 217, 2 E. C. L. 217.

Presumption.—In many cases where a transaction is manifestly for any one's benefit, his *assent* will be presumed. Thus the *assent* of a grantee in a deed will be presumed. See *Wilt v. Franklin*, 1 Binn. (Pa.) 502, 2 Am. Dec. 474. And see also the title DEEDS.

As to assignments for the benefit of creditors, see the title ASSIGNMENTS FOR THE BENEFIT OF CREDITORS. And see *Crosby v. Hillyer*, 24 Wend. (N. Y.) 280; *Skipwith v. Cunningham*, 8 Leigh (Va.) 271, 31 Am. Dec. 462.

Husband and Wife—Assent of Husband to Conveyance by Wife. (See also the title HUSBAND AND WIFE.)—By signing as guarantor the wife's promissory note, expressed on its face to be secured by a mortgage, a husband *assents* in writing within Gen. Stat. Mass., c. 106, § 3. *Cormerais v. Wesselhoeft*, 114 Mass. 550.

Assent of Executive to a Bill. (See also the title STATUTES.)—The royal *assent* in England is the approval by the sovereign of an act which has passed both houses of Parliament. 1 Bl. Com. 184.

The *assent* of the President of the United States is expressed in similar cases by the word "approved." *Burrill's Law Dict.*

1. *Walker v. Hawley*, 56 Conn. 559.

Falsely Assert.—The plaintiff, during a political campaign, published a letter with the purpose of proving that a candidate for governor had procured his nomination by improper practices. The defendants published an article in their newspaper alluding to the letter as "that remarkable letter of [plaintiff] giving his so-called reasons for falsely *asserting* that Mr. [L.'s] nomination was secured by corrupt means." It was held that the defendants' article did not impute wilful misstatement of a fact to the plaintiff, but that it amounted to no more than the *assertion* that plaintiff's conclusions in said letter were erroneous; and hence the article was not libelous. The court said: "The clause principally relied on as libelous is the following:

ASSESSMENTS.—As to local assessments for improvements by cities and towns, see the title SPECIAL ASSESSMENTS. As to the distinction between assessments and taxes, see the titles SPECIAL ASSESSMENTS; TAXATION. As to the assessment in levying taxes, see the title TAXATION. As to assessments by beneficial societies, see the title BENEFICIAL OR BENEVOLENT ASSOCIATIONS. As to assessments upon stock, see the titles STOCK; STOCKHOLDERS. As to assessment of damages, see the title DAMAGES.

ASSETS.—As to the assets of a bankrupt, see the title INSOLVENCY AND BANKRUPTCY. As to partnership assets, see the title PARTNERSHIP. As to the assets of a corporation, see the title CORPORATIONS (PRIVATE). As to marshaling assets, see the title MARSHALING ASSETS. As to the assets of a decedent, see the titles DEBTS OF DECEDENTS; EXECUTORS AND ADMINISTRATORS.

'The remarkable letter of Albert H. Walker, giving his so-called reasons for falsely asserting that Mr. Lounsbury's nomination was secured by corrupt means.' That clause must be interpreted with reference to the subject-matter to which it relates—the letter or pamphlet of Mr. Walker. If that document had *asserted* as a fact that Mr. Lounsbury's nomination was secured by corrupt means, the language quoted might have been interpreted as imputing to Mr. Walker a wilful falsehood. But a false *assertion*, in logic, ordinarily has a somewhat modified meaning. To say of a man that he reasons from false premises, or draws false conclusions from correct premises, is not libelous. In such cases the word 'false' means no more than that the premises were not true, or that the conclusion was erroneous. So also to say of an advocate before a jury that he falsely *asserted* the guilt or innocence of the accused, that he falsely maintained the affirmative or negative of the issue, is not libelous, inasmuch as it means simply a mistaken view as to the effect of the evidence. Mr. Walker's position in the case before us was like that of an advocate. He had before him certain evidence, from which he vigorously maintained the proposition, according to his belief, that 'the nomination of Phineas C. Lounsbury for governor of Connecticut was accomplished by payments and promises which were of the nature of bribery.' He did not *assert* as a fact that his nomination was so accomplished, but that that was his belief—that the facts and circumstances *convinced him* that it was so. The plaintiff himself (for another purpose) takes the same view. In his brief he says: 'Precisely what the plaintiff did was to publish a large number of facts, not one of which appears to ever have been contradicted anywhere by anybody, and to state that those facts had convinced him that the

nomination of Phineas C. Lounsbury for governor of Connecticut was accomplished by payments and promises which were of the nature of bribery. The plaintiff does not appear to have stated in any way at any time that Mr. Lounsbury's nomination was thus accomplished. Whether or not he would have been justified in making that statement, he appears to have publicly printed that he did not know it to be the fact. His pamphlet on the nomination of Phineas C. Lounsbury consisted of a perfectly justifiable publication of undenied and undeniable facts, relevant to matters of great public importance, and a calm and careful statement of his opinion of the significance of those facts. Whether that opinion was logically drawn from those facts, is a question upon which every reader of that pamphlet was impliedly advised to judge for himself.' This aptly and justly characterizes the pamphlet as an argument sustaining his proposition; and it is clearly referred to as such in the alleged libelous article, '*giving his so-called reasons for falsely asserting that Mr. Lounsbury's nomination was secured by corrupt means.*' The words '*falsely asserting,*' then, when taken in connection with the subject-matter to which they relate, mean no more than that the proposition which he attempted to prove was a false one; that is, that the conclusion or inference which he drew was not justified by the facts.

"That use of the two words is allowable. The second definition given by Webster of the word *assert* is, 'to maintain or defend by words or measures; to vindicate.' And the fifth meaning of the word 'false' is 'not well founded, not firm or trustworthy, erroneous; as a false claim; a false conclusion; a false construction in grammar.'" *Walker v. Hawley*, 56 Conn. 559. See the title LIBEL AND SLANDER.

ASSIGNMENTS.

By JOSEPH R. LONG AND A. S. H. BRISTOW.

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CROSS-REFERENCES.

For Matters of PROCEDURE, see the ENCYCLOPÆDIA OF PLEADING AND PRACTICE, *titles* *EQUITABLE ASSIGNMENTS; PARTIES.*

For other matters of SUBSTANTIVE LAW and EVIDENCE related to this subject, see the following titles in this work: ALTERATION OF INSTRUMENTS; APPRENTICES; ASSIGNMENTS FOR THE BENEFIT OF CREDITORS; ATTACHMENT; BENEFICIAL OR BENEVOLENT ASSOCIATIONS; BILLS OF EXCHANGE AND PROMISSORY NOTES; BONDS; CHAMPERTY AND MAINTENANCE; CHATTEL MORTGAGES; CHOSSES IN ACTION; CONFLICT OF LAWS; CONSIDERATION; CONTRACTS; CROPS; DEEDS; EXECUTION; FIRE INSURANCE; FRAUDULENT SALES AND CONVEYANCES; FUTURE ACQUIRED PROPERTY; GARNISHMENT; INCUMBRANCES; INSURANCE; JUDGMENTS AND DECREES; LEASES; LICENSE; LICENSE (IN PATENT LAW); LIENS; LIFE INSURANCE; MARITIME LIENS; MECHANICS' LIENS; MORTGAGES; MUNICIPAL SECURITIES; NOTICE; ORDERS; PAROL EVIDENCE; PATENTS; PLEDGE; RECORDING ACTS; WITNESSES; WORKING CONTRACTS.

I. DEFINITION.—An assignment is a transfer or making over to another of the whole of any property, real or personal, in possession or in action, or of any estate or right therein.¹ The deed or instrument by which

1. Bouvier L. Dict.; Harlowe v. Hudgins, 84 Tex. 107.

Other Definitions.—An assignment is properly a transfer, or making over to another of the right one has in any estate, but it is usually applied to an estate for life or years. 2 Bl. Com. 326. The term is inapt to describe a conveyance of the fee simple. Franklin v. Kelley, 2 Neb. 79. See also, as to definition, Potter v. Holland, 4 Blatchf. (U. S.) 206; Philadelphia Seventh Nat. Bank v. Shenandoah Iron Co., 35 Fed. Rep. 436; Edison v. Frazier, 9 Ark. 219; Cross v. Sacramento Sav. Bank, 66 Cal. 462; Turk v. Cook, 63 Ga. 681; Schee v. La Grange, 78 Iowa 101; Banning v. Sibley, 3 Minn. 389; Garrettsie v. Van Ness, 2 N. J. L. 17, 2 Am. Dec. 333 (*per* Pennington, J.); Hutchings v. Low, 13 N. J. L. 246; Allen v. Pancoast, 20 N. J. L. 68; Jagoe v. Alleyn, 16 Barb. (N. Y.) 580; Sands v. Hill, 55 N. Y. 18; Griffey v. New York Cent. Ins. Co., 100 N. Y. 417, 53 Am. Rep. 202; Allen v. Bain, 2 Head (Tenn.) 101.

The common-law definition of an assignment is the "transferring and setting over to another of some right, title, or interest in things in which a third person, not a party to the assignment, has a concern and interest." 1 Bacon's Abridg., tit. Assignment; Cowles v. Rickets, 1 Iowa 582.

In common parlance an assignment signifies the transfer of all kinds of property, real, personal, and mixed, and whether the same be in possession or in action. In a more technical sense, an assignment is a transfer of a term of years, but it is used to signify a transfer of some particular estate or interest in lands. 1 Bouv. Inst., § 2076; Ball v. Chadwick, 46 Ill. 28.

Nature of an Assignment.—The idea of an assignment is essentially that of a transfer by one existing party to another existing party of some species of property or valuable interest. Hight v. Sackett, 34 N. Y. 447; Andrews v. National Bank of North America, 7 Hun (N. Y.) 20; and does not include testamentary transfers except in the case of an executor. Hight v. Sackett, 34 N. Y. 447. See also Wildey v. Whitney, 25 How. Pr. (N. Y. Supreme Ct.) 75.

In Wright v. Wright, 1 Ves. 409, Lord Chancellor Hardwicke said: "An assignment [in equity] always operates by way of agreement or contract, amounting, in the consideration of this court, to this, that one agrees with another to transfer and make good that right or interest, which is made good here by way of agreement."

An Assignment as to Bonds and Notes implies more than indorsement; it means indorsement by one party with intent to assign, and an acceptance of that assignment by the other party. Marietta Bank v. Pindall, 2 Rand. (Va.) 465.

"Assignment" is generally used to signify the transfer of a note not negotiable, and "in-

dorsement" to signify a transfer of a note which is negotiable. Townsend v. Carpenter, 11 Ohio 21; Buckner v. Real Estate Bank, 5 Ark. 536; Freeman's Bank v. Ruckman, 16 Gratt. (Va.) 126. See also Tulloss v. Rapelye, 3 Abb. Pr. (N. Y. C. Pl.) 93. "Assignment" is frequently used to express the transfer of promissory notes by delivery, though assignments are generally made by indorsement. Edison v. Frazier, 9 Ark. 219. See also Enloe v. Reike, 56 Ala. 500.

"Assignment" and "indorsement" are sometimes used synonymously to mean a transfer. State v. Millner (Mo. 1895), 33 S. W. Rep. 15.

To assign is "to make over a right to another," and an assignment is a transfer of property. To say that a promissory note has been "duly assigned" is in effect to say that everything has been done to effect a complete transfer of the property, and it therefore imports an actual or constructive delivery and acceptance. Hoag v. Mendenhall, 19 Minn. 335.

See also the title **BILLS AND NOTES**.

Assignment of Written Instrument.—The word "assign," when applied to the transfer of a written instrument, implies a written assignment, unless it is controlled by some adjunct, such as "by delivery," or the like. Andrews v. Brown, 1 Iowa 154. See also Burnsville Turnpike Co. v. State, 119 Ind. 382; Williams v. Soutter, 7 Iowa 435.

See *infra*, this title, *What Constitutes an Assignment*.

"Assign," when Used in a Deed, is tantamount to "grant," and is effectual to pass an estate or freehold. Hutchins v. Carleton, 19 N. H. 487; Harlowe v. Hudgins, 84 Tex. 107.

A Judgment Is Not an Assignment.—The latter is the act of the party, the former the act of the law. Breeding v. Boggs, 20 Pa. St. 33.

An Assignment of a Wife's Choses in Action by the Husband Differs from a Release.—The former will not be operative against the wife surviving her husband, unless founded on valuable consideration; the latter is good without any consideration; the reason of the distinction being that as the husband may bar the wife's right by reducing the choses into possession during her life, his release operating to extinguish the right has the same effect. Hall v. Alexander, 9 Ala. 219.

An Assignment Differs from a Lease only in this: That by a lease one grants an interest less than his own, reserving to himself a reversion; in assignments the assignor parts with the whole property, and the assignee stands, to all intents and purposes, in the place of the assignor. 2 Bl. Com. 326.

The distinction between an assignment and a lease depends solely upon the quantity of interest which passes, and not upon the extent of the premises transferred. When, therefore, the lessee of a house for seven years demises part of the house for the whole of his term, this is not an underlease,

the transfer is made is also called an assignment.¹

II. HISTORY AND DEVELOPMENT.—The history of the law of assignments has been marked by radical changes, and it is intended here to point out in a general way some of the more noticeable departures from the common law.

Assignments at Common Law.—To support an assignment at common law, it was necessary, as a general rule, that the subject-matter thereof should have an actual or potential existence at the time of the assignment.² Accordingly, no possibility, right, title, or thing in action could be granted to third persons, the ground being that such assignment would violate the rules of champerty and maintenance.³

Equitable Assignments.—But the courts of equity disregarded this rule, and effect was given to assignments of future interests of every kind, as well as to assignments of choses in action.⁴ Thus arose what is termed an "equitable assignment," which is defined to be such an assignment as gives the assignee a title which, although not cognizable at law, equity will recognize and protect.⁵ The expression "equitable assignment," when used in connection with these subjects, has no reference to the form or mode of making an assignment, but merely to the remedy or manner of enforcing the rights of the assignee.⁶ Thus while it is true that equity will enforce a transfer of a chose in action imperfect in form, where the intent to assign is manifest,⁷ it is not from this fact that the expression arose, but from the fact that it is only in equity that a chose in action is in any way assignable.⁸

Doctrine in the Courts of Law under Statutory Regulations.—By statutory regulations, both in *England* and the *United States*, however, the law relating to the assignment of possibilities, expectancies, and choses in action, while it

but an assignment *pro tanto*. *Lunsford v. Alexander*, 4 Dev. & B. (N. Car.) 40; *Constantine v. Wake*, 1 Sweeny (N. Y.) 239; *Childs v. Clark*, 3 Barb. Ch. (N. Y.) 52, 49 Am. Dec. 164. See also *Derby v. Taylor*, 1 East 502; *Bridge Proprietors v. State*, 21 N. J. L. 384, affirmed in 22 N. J. L. 593; *Van Rensselaer v. Gallup*, 5 Den. (N. Y.) 454; *Livingston v. Stickle*, 7 Hill (N. Y.) 253.

An assignment of a term of years transfers the whole term of the assignor; an underlease transfers only a part of the estate, or, if it transfers the whole, it is only for a limited time, less than the assignor has in the same. 1 Bouv. Inst., § 2077; *Crusoe v. Bugby*, 3 Wils. 234, 2 W. Bl. 766.

If the lessee reserves the rent to himself on granting over his term, it is an underlease and not an assignment, though he parts with the whole term. *Poultney v. Holmes*, 1 Stra. 405. See the title LEASE.

An Assignment Differs from a Surrender.—An assignment of an estate for life or for years is a transfer of the whole interest of the assignor to some one other than the immediate reversioner or remainderman, holding an estate which was larger than that of the assignor; but when the transfer is made to the person holding the immediate reversion or remainder in fee, it operates as a surrender. *Scott v. Scott*, 18 Gratt. (Va.) 150.

1. "Assignment" Used of Instrument Effecting Transfer.—Bouv. Law Dict. The word "assignment" may sometimes have reference to the instrument which effects the transfer, and sometimes to the transfer itself. *Richardson v. Thurber*, 104 N. Y. 606.

The term "assignment" does not, like

"deed" or "specialty," signify an instrument under seal. *Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331.

2. *Petch v. Tutin*, 15 M. & W. 110; *Moody v. Wright*, 13 Met. (Mass.) 17, 46 Am. Dec. 706.

3. *Lampet's Case*, 10 Coke 48; *Thalhimer v. Brinckerhoff*, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308.

Suit Brought in the Name of the Assignor.—It has for a long time, however, been allowable at common law for suit to be brought by the assignee in the name of the assignor. *Master v. Miller*, 4 T. R. 340. See *infra*, this title, *Rights of Parties—Of the Assignee*.

4. *Row v. Dawson*, 1 Ves. 331; *Trull v. Eastman*, 3 Met. (Mass.) 121, 37 Am. Dec. 126; *Bacon v. Bonham*, 33 N. J. Eq. 614.

5. *Holmes v. Evans*, 129 N. Y. 140. See also *Cincinnati First Nat. Bank v. Coates*, 8 Fed. Rep. 540.

6. *Allen v. Pancoast*, 20 N. J. L. 68.

Imperfect Legal Assignment as Equitable Assignment.—It seems, however, that the law recognizes in some instances an equitable assignment of a subject-matter assignable at law, where it was inoperative as an assignment at law on account of being improperly drawn. Thus in *Bridgham v. Tileston*, 5 Allen (Mass.) 371, it was said by the court that while a lease under seal could not be validly assigned at law, except by a writing under seal, the purchaser of the lease by a written transfer not under seal became its equitable owner.

7. See *infra*, this article, *What Constitutes an Assignment—Form of Assignment—Choses in Action—No Particular Form Necessary*.

8. *Allen v. Pancoast*, 20 N. J. L. 68.

remains unchanged as to the jurisdiction of the courts of equity, has been so greatly modified in regard to the jurisdiction of the courts of law that it may be stated as a general rule that interests of every kind are at present capable of assignment at law.¹

III. PARTIES TO ASSIGNMENT—1. Definitions—Assignor.—A person who makes an assignment, or transfers property to another, is called an assignor.²

Assignee.—A person to whom an assignment is made is called an assignee.³

An Assignee in Fact is the assignee of an assignment made by the act of another.

An Assignee in Law is the assignee of an assignment made by the act of the law, as an executor or administrator.⁴

2. Competency.—A discussion of the competency of parties to contract generally, and hence to enter into a contract of assignment, will be found elsewhere in this work.⁵

1. For a complete discussion of this question, see *infra*, this title, *What may be Assigned*.

2. Bouv. Law Dict.

Whoever Transfers the Whole of a Particular Estate Is an Assignor, whether the estate be personal or real property, or the assignment be by deed or parol. Thus the vendor in a quitclaim deed is an assignor. *Glasford v. Baker*, 1 Wash. Ter. 224.

The Vendor of Personal Property in the Possession of a Third Party is not regarded as the assignor of a thing in action within the meaning of the *New York* act relating to the examination of the assignor of a chose in action as a witness. *McGinn v. Worden*, 3 E. D. Smith (N. Y.) 355. See also *Crosby v. Nichols*, 3 Bosw. (N. Y.) 450. And the vendee in such case is not an assignee. *Penny v. Black*, 6 Bosw. (N. Y.) 50.

The Indorser of Negotiable Paper is not an assignor within the meaning of this statute. *Anderson v. Busted*, 5 Duer (N. Y.) 485; *Hicks v. Wirth*, 4 E. D. Smith (N. Y.) 78, 10 How. Pr. (N. Y.) 555; *Gardner v. Gordon*, 3 Bosw. (N. Y.) 369; *Porter v. Potter*, 18 N. Y. 52. See also *Clark v. Atkinson*, 2 E. D. Smith (N. Y.) 112; *Potter v. Bushnell*, 10 How. Pr. (N. Y.) Supreme Ct. 94. But see as to non-negotiable paper, *Tulloch v. Rapelye*, 3 Abb. Pr. (N. Y. C. Pl.) 93; *Jagoe v. Alleyn*, 16 Barb. (N. Y.) 580.

Nor is a person who transfers a promissory note by delivery without indorsement. *Watson v. Bailey*, 2 Duer (N. Y.) 509; *Gardner v. Gordon*, 3 Bosw. (N. Y.) 369. Compare *Bump v. Van Orsdale*, 11 Barb. (N. Y.) 634, followed in *Jagoe v. Alleyn*, 16 Barb. (N. Y.) 580; and *Potter v. Bushnell*, 10 How. Pr. (N. Y.) Supreme Ct. 94. See also *Collins v. Knapp*, 18 Barb. (N. Y.) 532.

3. Bouv. Law Dict.

The Assignee is the person to whom property is made over or transferred, and this is true whether he receives it in his own right or for the benefit of another, as for the benefit of creditors. *Schee v. La Grange*, 78 Iowa 101.

The term "assignee," in strict legal parlance, is not used to designate the indorsers of bills and notes. *Palmer v. Call*, 2 McCrary (U. S.) 522.

A Purchaser at a Foreclosure Sale is an as-

signee within the meaning of *New York* Code of Civil Procedure, §§ 1525, 1526. *Howell v. Leavitt*, 90 N. Y. 238, followed in *Purdy v. Bennett*, 68 Hun (N. Y.) 227.

The Assignee of a Patent is one who has had transferred to him in writing the whole interest of the original patent, or any undivided part of such whole interest, in every portion of the *United States*. *Potter v. Holland*, 4 Blatchf. (U. S.) 206. See also *Day v. Union India Rubber Co.*, 3 Blatchf. (U. S.) 488.

Under Federal Statute.—The term "assignee," employed in *United States* Rev. Stat., § 629, defining the jurisdiction of the Circuit Court in case of suits by an assignee, covers not merely persons to whom is technically transferred the contract in controversy, but any one who, by virtue of any transfer to him, can claim the beneficial interest. *St. Louis, etc., R. Co. v. Schumacher*, 152 U. S. 77.

4. Bouv. Law Dict.

The Common Acceptation of the Word "Assignee" is limited to an assignee in fact, and does not comprehend an assignee by mere operation of law; and neither a sheriff who has levied a writ of attachment upon chattels, nor the attachment creditor, is an assignee of the attachment debtor within the meaning of the *Kansas* Code of Civ. Pro., § 322; *Burlington Nat. Bank v. Beard*, 55 Kan. 773.

Executors and Administrators are not assignees within the meaning of 3 N. Y. Rev. Stat., § 4 (5th ed.), p. 859. *People v. Prescott*, 3 Hun (N. Y.) 419. See also in *Wisconsin*, Page v. Johnston, 23 Wis. 295.

An administrator is not an assignee within the meaning of the *Arkansas* statute (Gantt's Dig., § 911) requiring an insolvent assignee, when suing, to give security for costs. *Tucker v. West*, 31 Ark. 643.

5. See the titles CONTRACTS; EXECUTORS AND ADMINISTRATORS; TRUSTS AND TRUSTEES.

Sovereign.—As to the power of the sovereign to assign and take by assignment, see *infra*, this title, *Choses in Action Generally—Original Doctrine*.

Public Officers.—See *infra*, this title, *Unearned Wages or Salary—By Public Officers*.

Guardian.—As to the power of a guardian to assign his ward's interests, see the title GUARDIAN AND WARD.

Mental Infirmary.—An assignment made by a person of unsound mind is void, unless made valid by some other fact in the case.¹

Intoxication.—A court of equity will set aside an assignment obtained by the assignee by fraudulently procuring the intoxication of the assignor.² But an assignment for a valuable consideration will not be avoided merely on the ground that the assignor was intoxicated at the time, if his assent was afterwards given when not disabled by intoxication or otherwise.³

Certainty as to Assignee.—An assignment will not be enforced in favor of an uncertain assignee.⁴

Capacity to Contract Required in Equity.—Equity will not imply an assignment between parties who, at law, are incapable under any circumstances of making an express contract of a similar character.⁵

Agent.—An assignment may be made by an agent,⁶ but an unauthorized assignment by an agent is void.⁷

An Attorney at Law, employed to prosecute a suit, cannot assign a judgment recovered, without express authority from his client.⁸

Partners.—One of several partners may make a valid assignment of a partnership claim within the scope of the partnership business.⁹ But an

Imprisoned Convict—Resentence.—In *New York* an assignment made by a convict under sentence is void. But where, after sentence, a new sentence was pronounced at the same term, rendering the first sentence inoperative from the time it was pronounced, an assignment executed by the convict after the first sentence, and before the second, was held valid. *Miller v. Finkle*, 1 Park. Cr. Rep. (N. Y. Supreme Ct.) 374.

A Married Woman may assign her separate estate. *Sherman v. Elder*, 22 N. Y. 381; *Buckley v. Wells*, 33 N. Y. 518; *Gauthier v. Dagenais*, 7 L. C. J. (Can.) 57.

As to the husband's right to assign the wife's property, see the title HUSBAND AND WIFE. Also *De Ronge v. Elliott*, 23 N. J. Eq. 486. See generally the titles MARRIED WOMEN; SEPARATE PROPERTY OF MARRIED WOMEN.

1. Mental Incompetency.—*Marvin v. Inglis*, 39 How. Pr. (N. Y. Ct. App.) 329.

An assignment by an heir of her interest in an estate will not be declared void for want of mental capacity in the assignor, where it appears from the evidence that she fully understood the arrangement, and was of sufficient mental capacity to bind herself by the assignment. *Hodgdon v. Cummings*, 151 Mass. 293. See *Gifford v. Thorn*, 9 N. J. Eq. 702, for evidence held sufficient to establish mental competency of assignor. See also *Parmelee v. Cameron*, 41 N. Y. 393.

2. Intoxicated Person.—*Phillips v. Moore*, 11 Mo. 600. See also *Campbell v. Brackenridge*, 8 Blackf. (Ind.) 471.

3. Arnold v. Hickman, 6 Munf. (Va.) 15.

4. Uncertain Assignee.—Where A made an assignment under the *South Carolina* "prison bounds" act, to B "and other creditors," it was held that the assignment was to B alone, the words "other creditors" being void for uncertainty. *Black v. Shooler*, 2 McCord (S. Car.) 293.

5. McNerny v. Reed, 23 Iowa 410.

6. Agent.—See *St. Louis*, etc., R. Co. v. Camden Bank, 47 Ark. 541; *Cooper v. Finke*,

38 Minn. 2. See *infra*, this section, *Corporations*.

The Master of a Vessel who signs the charter party in his own name may assign a claim for demurrage, etc. *Rupp v. Lobach*, 4 E. D. Smith (N. Y.) 69.

7. Beardsley v. Day, 52 Minn. 451.

A Person Who has Obtained a Judgment for the Benefit of Another cannot assign it; thus it has been held that the mother of a bastard child, which had been legally taken from her, and a guardian appointed, could not assign a judgment obtained in her favor, for the benefit of the child, against the putative father as collateral security for her individual debt. *Heritage v. Hedges*, 72 Ind. 247.

8. Attorney at Law cannot Assign Judgment.—*Wilson v. Wadleigh*, 36 Me. 496; *Head v. Gervais*, 1 Walk. (Miss.) 431, 12 Am. Dec. 577; *Maxwell v. Owen*, 7 Coldw. (Tenn.) 630. See also *Rice v. Troup*, 62 Miss. 186; *Baldwin v. Merrill*, 8 Humph. (Tenn.) 132. See the title ATTORNEY AND CLIENT.

An attorney cannot legally assign a judgment in favor of a state, where there is no statute which authorizes an assignment thereof to be made by the state or by any officer or agent thereof. *Peacock v. Pembroke*, 8 Md. 348.

Authority to Assign a Judgment may be conferred by a power of attorney. *Caley v. Morgan*, 114 Ind. 350.

An Attorney at Law Has No Authority to Take an Assignment of one judgment in satisfaction for another, without special authority. *Clark v. Kingsland*, 1 Smed. & M. (Miss.) 248.

9. Partners.—See the title PARTNERSHIP; *Anderson v. Tompkins*, 1 Brock (U. S.) 456; *Caulfield v. Sanders*, 17 Cal. 569; *Pacific Mut. L. Ins. Co. v. Fisher*, 109 Cal. 566; *Galway v. Fullerton*, 17 N. J. Eq. 389; *Everit v. Strong*, 5 Hill (N. Y.) 163, *affirmed* in 7 Hill (N. Y.) 585; *Moses v. Hatfield*, 27 S. Car. 324; *Clarke v. Hogeman*, 13 W. Va. 718; *M'Millan v. Ritchie*, 7 New Bruns. 242. See also *Pearpoint v. Graham*, 4 Wash. (U. S.) 232; *Car-penter v. Johnson*, 1 Nev. 331.

assignment of a partnership interest made by one partner without the knowledge or authority of the others, and not within the general scope of the partnership business, is void.¹

Tenants in Common.—One of two tenants in common of a bond, or other interest, may assign his own interest therein,² but not that of the other without his consent.³

One of two payees of a note may assign all his interest therein to the other, who may sue as the legal owner of the note.⁴

Corporations.—The attribute of assignability is not confined to rights of action which belong to natural persons, but extends with equal effect to those pertaining to artificial persons,⁵ and an assignment may be made or taken by a corporation through its authorized agents.⁶

Assignment of Firm Debt to Partner.—Debts due to a partnership may be assigned to either of the partners; and a note given to the assignee, for the amount due by the debtor of the firm, extinguishes his debt due the firm. *Lamkin v. Phillips*, 9 Port. (Ala.) 98.

An assignment by one partner to the other of his interest in all the partnership demands is good in equity, and gives to the assignee the right to use the name of the assignor to enable him to collect for his own use any debts due to them jointly at the time. *Lunt v. Stevens*, 24 Me. 534.

Assignment by One Partner to Firm.—Where a partner assigned to his partner and himself a debt due himself, it was held that the assignment was good, and that under 29 Vict., c. 28, and 35 Vict., c. 12 O., he and his partner could sue therefor in their joint names. *Blair v. Ellis*, 34 U. C. Q. B. 466.

A Common Member of Two Firms cannot assign to his partner in one firm, holding a claim against the other, his interest in such claim so as to defeat any equitable defenses to which the members of the other firm would be entitled against their partner, the assignor, had there been no assignment. *Englis v. Furniss*, 4 E. D. Smith (N. Y.) 587, 2 Abb. Pr. (N. Y.) 333.

1. *Hale v. Nashua, etc.*, R. Co., 60 N. Y. 333; *Hudson v. McKenzie*, 1 E. D. Smith (N. Y.) 358. See also *Price v. Jackson*, 3 Ch. Sent. (N. Y.) 26; *Mills v. Pearson*, 2 Hilt. (N. Y.) 16; *Wood v. American F. Ins. Co.*, 149 N. Y. 382, 78 Hun (N. Y.) 109.

2. **Tenants in Common—Bonds.**—*Boyd v. Holmes*, 1 Smith (Ind.) 318, 1 Ind. 480; *McPike v. McPherson*, 41 Mo. 521; *Brown v. Dickenson*, 27 Gratt. (Va.) 690. But see *Skinner v. Bedell*, 32 Ala. 44.

One of several obligees of a bond may assign his interest in the cause of action accrued after breach. *Weik v. Pugh*, 92 Ind. 382.

A Written Permit to Cut Timber from Land, Granted to Two Persons, may be assigned by one of them in his individual name if he is authorized to act for both, and does so act; and his authority to do so may be shown by oral evidence. *Putnam v. White*, 76 Me. 551.

A Claim for Rent belonging to A and B as tenants in common, and not as partners, may be assigned by A to a partnership consisting of B and a third person, and if subsequently ratified by B, the assignment will pass the interest of both. *Chapman v. Plummer*, 36 Wis. 262.

That a tenant in common of real estate may assign his share, see *Boyce v. Coster*, 4 Strobb. Eq. (S. Car.) 25.

An Assignment by One of Two Payees of a promissory note of his interest is good in equity in *Indiana*. *Groves v. Ruby*, 24 Ind. 418.

School Land Certificates.—One of two joint owners of school land certificates cannot assign them as security for his individual debt, so as to affect the rights of the other. *Smith v. Clarke*, 7 Wis. 551.

3. *Brown v. Dickenson*, 27 Gratt. (Va.) 690. See also *De Forrest v. Frary*, 6 Cow. (N. Y.) 151.

One of Several Obligees of a Bond, these not being partners, cannot assign it, nor execute an assignment in the names of himself and co-obligees, unless specially authorized to do so. *Stevens v. Bowers*, 16 N. J. L. 16.

4. **Assignment by One Payee of Note to Another.**—*Smith v. Oldham*, 5 Mo. 483.

Such an assignment is good in equity in *Indiana*. *Fordyce v. Nelson*, 91 Ind. 447.

But it has been held that the assignment of a right of action, in which two or more are jointly interested, to one of the parties, will not enable him to sue in his own name. *McGehee v. Dougherty*, 10 Ala. 863; *Horbach v. Huey*, 4 Watts (Pa.) 455.

5. **Corporations.**—*Grocers' Nat. Bank v. Clark*, 48 Barb. (N. Y.) 26; 2 *Morawitz on Private Corporations*, § 819 (2d ed.).

6. See the titles **CORPORATIONS; OFFICERS AND AGENTS (OF PRIVATE CORPORATIONS).**

A National Bank organized under the laws of the *United States* may take an assignment from a contractor, of money due and to become due from a city of the second class on a contract for paving a street, where such assignment is made to secure an existing *bona fide* indebtedness of the contractor to the bank. *Ottawa First Nat. Bank v. Ottawa*, 43 Kan. 294.

An assignment of a negotiable note to an unauthorized banking association was held void. *McClintick v. Cummins*, 3 McLean (U. S.) 158.

A Corporation may Make an Assignment through an Agent, and the general managing agent having charge of the management of its affairs may make the assignment without express authority from the directors. *McKiernan v. Lenzen*, 56 Cal. 61. See also *Gillett v. Campbell*, 1 Den. (N. Y.) 520.

Where an assignment purports on its face to be the contract of a corporation, and declares that the consideration has been received by the corporation, and that it is executed in pursuance of a resolution passed by the corporation, and is signed by an officer of the corporation, as the act of the corporation, it will be regarded as an assignment by the corporation, and not as the individual contract of the officer.¹

IV. WHAT MAY BE ASSIGNED—1. Choses in Action Generally—*a*. ORIGINAL DOCTRINE—(1) *At Common Law*—Choses in Action Not Assignable.—By the ancient common law, choses in action, with the exception of negotiable instruments,² were held not to be assignable,³ except by or to the

The President and Cashier of a corporation cannot assign its choses in action unless specially authorized to do so. *Hoyt v. Thompson*, 5 N. Y. 320, 19 N. Y. 207. See also *Barrick v. Austin*, 21 Barb. (N. Y.) 241; so also of a treasurer, *Jackson v. Campbell*, 5 Wend. (N. Y.) 572.

The Authority of the Secretary of a corporation to make an assignment for the corporation may be established by his own testimony. See *Patton v. Coen*, etc., *Carriage Mfg. Co.*, 3 Colo. 265.

The Assignment of a Judgment Purporting to be Executed by a Bank, but not containing sufficient evidence of the official character of the persons executing and acknowledging it, is not sufficient to establish the assignee's title to the judgment. *Klemme v. McLay*, 68 Iowa 158.

1. *Gottfried v. Miller*, 104 U. S. 521.

2. For a full discussion of the assignment of negotiable instruments, see the title **BILLS AND NOTES**.

3. **Choses in Action Not Assignable at Common Law.**—2 Bl. Com. 442; 2 Chitty on Contracts (11th Amer. ed.) 1357.

England.—*Wright v. Wright*, 1 Ves. 409; *Chandos v. Talbot*, 2 P. Wms. 601; *Parker v. Wise*, 6 M. & S. 239; *Jones v. Carter*, 8 Q. B. 134, 55 E. C. L. 134; *Johnson v. Collings*, 1 East 98. See also *Ryall v. Rowles*, 1 Ves. 348, 1 Atk. 165, 3 Hare & W. Lead. Cas. 615, 2 White & T. Lead. Cas. 800.

United States.—*Cavender's Case*, 8 Ct. of Cl. 281; *Burke's Case*, 13 Ct. of Cl. 231 (*per* Nott, J.).

Alabama.—*Goodwyn v. Lloyd*, 8 Port. (Ala.) 237; *Dunklin v. Wilkins*, 5 Ala. 199; *Hinton v. Nelms*, 13 Ala. 222; *Price v. Talley*, 18 Ala. 21.

Arkansas.—*Block v. Walker*, 2 Ark. 4 (*per* Lacy, J.).

Illinois.—*McKinney v. Alvis*, 14 Ill. 33; *Olds v. Cummings*, 31 Ill. 188.

Massachusetts.—*Rice v. Stone*, 1 Allen (Mass.) 566; *Dix v. Cobb*, 4 Mass. 508; *Usher v. D'Wolfe*, 13 Mass. 290; *Coolidge v. Ruggles*, 15 Mass. 387.

Mississippi.—*Davis v. Herndon*, 39 Miss. 484.

New Jersey.—*King v. Berry*, 3 N. J. Eq. 44.

New York.—*Greenby v. Wilcocks*, 2 Johns. (N. Y.) 1, 3 Am. Dec. 379; *Bird v. Caritat*, 2 Johns. (N. Y.) 344, 3 Am. Dec. 433; *Thalhimer v. Brinckerhoff*, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308.

South Carolina.—*Charleston v. Price*, 1

McCord (S. Car.) 299; *O'Neill v. South Carolina R. Co.*, 9 Rich. (S. Car.) 465.

Texas.—*Winn v. Ft. Worth, etc.*, R. Co., (Tex. Civ. App. 1896), 33 S. W. Rep. 593, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 827, 3 AM. AND ENG. ENCYC. OF LAW (1st ed.) 236. See also *Clarke v. Koehler*, 32 Tex. 679.

Virginia.—*Brown v. Dickenson*, 27 Gratt. (Va.) 690; *Stebbins v. Bruce*, 80 Va. 389.

See also *McCrum v. Corby*, 11 Kan. 464; *Marshall v. Craig*, 3 Bibb (Ky.) 291; *Lombard v. Ruggles*, 9 Me. 62; *Wellington County v. Wilmot Tp.*, 17 U. C. Q. B. 82.

A Chose in Action at Common Law is not assignable so as to vest in the assignee anything beyond an equitable interest. *Brush v. Curtis*, 4 Conn. 312.

It is a General Rule that choses in action, except negotiable instruments, are not assignable at law so as to authorize the assignee to maintain an action in his own name. *McKinney v. Alvis*, 14 Ill. 33; *Eakins v. Gawley*, 33 U. C. Q. B. 178.

To What Choses in Action Common Law Applies.—A chose in action, to which only the common-law rule applies, is a right to receive or recover a debt, or money, or damages for breach of contract, or for a tort connected with a contract which cannot be enforced without an action at law. *Burke's Case*, 13 Ct. of Cl. 231 (*per* Nott, J.).

A Debt of Trust is a chose in action, and not assignable at common law, nor by statute in *Illinois*, but assignable only in equity. *Kleeman v. Frisbie*, 63 Ill. 483.

Debts, Present and Future, cannot be assigned at law, and in equity only where the assignee has a proper power to sue for, recover, and receive the debts assigned. *Per* Lord Chancellor Hardwicke, in *Ryall v. Rowles*, 1 Ves. 348, 1 Atk. 165, 3 Hare & W. Lead. Cas. 615, 2 White & T. Lead. Cas. 800.

The General Rule of Law Is that a Debt cannot be Assigned.—The exception to that rule is, that where there is a defined and ascertained debt due from A to B, and a debt to the same or a larger amount due from C to A, and the three agree that C shall be B's debtor instead of A, and C promises to pay B, the latter may maintain an action against C. But in such action it is incumbent on the plaintiff to show that at the time when C promised to pay B there was an ascertained debt due from A to B. *Fairlie v. Denton*, 8 B. & C. 395, 15 E. C. L. 246. See also *Crowfoot v. Gurney*, 9 Bing. 372, 23 E. C. L. 309; *Wilson v. Coupland*, 5

king,¹ unless the debtor assented to the assignment and promised to pay the assignee, in which case the assignee might maintain an action against the debtor on the express promise to pay.²

Reasons for this Rule.—The assignment of choses in action was prohibited at common law, in accordance with the general doctrine that a man could not assign that which he did not have in possession,³ and, particularly, because it was believed that to allow a man to make over to a stranger his right of going to law would be a great encouragement to litigiousness,⁴ and would promote champerty and maintenance,⁵ and thus enable the rich and more powerful to work oppression and hardship upon the lower classes.⁶

(2) *In Equity*—Choses in Action Assignable in Equity.—Courts of equity have long since disregarded the common-law rule prohibiting the assignment of choses in action, and such assignments will be protected and enforced in equity if made *bona fide* and for a valuable consideration.⁷

B. & Ald. 228, 7 E. C. L. 77; Hodgson v. Anderson, 3 B. & C. 842, 10 E. C. L. 247; Wharton v. Walker, 4 B. & C. 163, 10 E. C. L. 302; Tatlock v. Harris, 3 T. & R. 180 (*per* Buller, J.); and the title *NOVATION*.

A debt which is the subject of a suit cannot be assigned by the plaintiff during the pendency of the suit, to the prejudice of third persons. Westbrooks v. McDowell, 1 Ga. Dec. 133.

In Mouldsdale v. Birchall, 2 W. Bl. 820, it was held that assumpsit would lie for not paying the consideration of an assignment of an uncertain debt.

A Book Account is a chose in action, and as such cannot be assigned at law so as to enable the assignee to sue thereon in his own name. Mulford v. French, 3 N. J. L. 54; Wright v. Williamson, 3 N. J. L. 520; Norris v. Douglass, 5 N. J. L. 942.

But a book debt may be assigned in equity. Anderson v. Tompkins, 1 Brock. (U. S.) 456; Dix v. Cobb, 4 Mass. 508.

The assessment of debts presents no peculiarities not common to that of choses in action generally, and therefore calls for no special treatment in this article. See *infra*, this title, *Modern Doctrine*, where numerous cases involving the assignment of debts are cited.

Transfer Operating as Covenant.—Where the defendant sold to the plaintiff a claim for loss by firing a ship, it was held that though this could not operate by way of assignment, yet the defendant having received the money was liable to the plaintiff on an implied covenant. Deering v. Farrington, 3 Keb. 304.

1. Exception in Favor of Sovereign.—2 Bl. Com. 442; 2 Story Eq. Juris., § 1039; Breverton's Case, 1 Dyer 306; Master v. Miller, 4 T. R. 340; Miles v. Williams, 1 P. Wms. 249; Stafford v. Buckley, 2 Ves. 170; Lambert v. Taylor, 4 B. & C. 138, 10 E. C. L. 293 (*per* Abbott, C. J.); Burke's Case, 13 Ct. of Cl. 231 (*per* Nott, J.). The same prerogative belongs to the United States. U. S. v. Buford, 3 Pet. (U. S.) 12; U. S. v. White, 2 Hill (N. Y.) 59, 37 Am. Dec. 374.

2. Assent of Debtor.—The general principle of law is that choses in action are not at law assignable. But if assigned, and the debtor promises to pay the debt to the assignee, the

latter may maintain an action for the amount against the debtor as money received to his use. Independently of such promise, there is no pretense that an action can be sustained. *Per* Story, J., in Tiernan v. Jackson, 5 Pet. (U. S.) 580.

See *infra*, this title, *Rights of Parties*.

3. Rice v. Stone, 1 Allen (Mass.) 566.

See *supra*, this title, *History and Development*.

4. Encouragement to Litigiousness.—2 Bl. Com. 442; Hinton v. Nelms, 13 Ala. 222; M'Goon v. Ankeny, 11 Ill. 558; East Tennessee, etc., R. Co. v. Henderson, 1 Lea (Tenn.) 1; Burke's Case, 13 Ct. of Cl. 231 (*per* Nott, J.). See also Usher v. D'Wolfe, 13 Mass. 290.

5. Champerty and Maintenance.—4 Bl. Com. 135; Wright v. Wright, 1 Ves. 409; Goodwyn v. Lloyd, 8 Port. (Ala.) 237; Hinton v. Nelms, 13 Ala. 222; Sanford v. Howard, 29 Ala. 684, 68 Am. Dec. 101; Rice v. Stone, 1 Allen (Mass.) 566; Sprague v. Baker, 17 Mass. 586; Charleston v. Price, 1 McCord (S. Car.) 299; Webber v. Quaw, 46 Wis. 118. See also Carder v. McDermott, 12 Tex. 546.

See the title *CHAMPERTY AND MAINTENANCE*.

6. Hardship and Oppression.—Lampet's Case, 10 Coke 48; Wright v. Wright, 1 Ves. 409; Hinton v. Nelms, 13 Ala. 222; Thalhimer v. Brinckerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308; Stebbins v. Bruce, 80 Va. 389.

7. Choses in Action Assignable in Equity.—2 Bl. Com. 442.

England.—Crouch v. Martin, 2 Vern. 595; Row v. Dawson, 1 Ves. 331, 3 Hare & W. Lead. Cas. 612; Whitfield v. Fausset, 1 Ves. 387; Wright v. Wright, 1 Ves. 409; Townshend v. Windham, 2 Ves. 1; Squib v. Wyn, 1 P. Wms. 378; Chandos v. Talbot, 2 P. Wms. 601; Carteret v. Paschal, 3 P. Wms. 197. See also Ryall v. Rowles, 1 Ves. 348, 1 Atk. 165, 3 Hare & W. Lead. Cas. 615, 2 White & T. Lead. Cas. 800; Tourville v. Naish, 3 P. Wms. 307; Brown v. Heathcote, 1 Atk. 160. *United States.*—Mitchell v. Great Works Milling, etc., Co., 2 Story (U. S.) 648.

Alabama.—Goodwyn v. Lloyd, 8 Port. (Ala.) 237.

Indiana.—Slaughter v. Foust, 4 Blackf. (Ind.) 379.

Origin of this Doctrine.—The doctrine which establishes the assignability in equity of choses in action arose from the public utility of increasing the quantity of transferable property in the aid of commerce and of private credit.¹

Fraud.—A court of equity will not lend its aid to fraud, and will set aside an assignment when fraudulent or contrary to public policy.²

b. MODERN DOCTRINE.—(1) *Generally*—**Common-law Rule Relaxed.**—The ancient rule of the common law prohibiting the assignment of choses in action has been greatly relaxed.

Commercial Paper was First Made Assignable by the law merchant and subsequently by statute, in order to meet the necessities of commerce and trade.³

And Courts of Law, Following the Rules of Equity in this Respect, now take notice of assignments of choses in action generally, and exert themselves to afford them every support and protection not inconsistent with the established principles and modes of proceeding which govern tribunals acting according to the course of the common law,⁴ and will, therefore, recognize and protect

Kentucky.—Breckenridge v. Churchill, 3 J. Marsh. (Ky.) 11.

Massachusetts.—Bigelow v. Willson, 1 Pick. (Mass.) 485; Gardner v. Hoeg, 18 Pick. (Mass.) 168; Clark v. Swift, 3 Met. (Mass.) 390; Dix v. Cobb, 4 Mass. 508; Brown v. Maine Bank, 11 Mass. 153; Parker v. Grout, 11 Mass. 158.

Mississippi.—Scott v. Metcalf, 13 Smed. & M. (Miss.) 563.

Missouri.—Dobyns v. McGovern, 15 Mo. 662.

North Carolina.—Hoppiss v. Eskridge 2 Ired. Eq. (N. Car.) 54.

The common-law rule as to the assignability of choses in action no longer prevails, but in equity the assignee is looked upon as the true owner of the chose. Kountz v. Kirkpatrick, 72 Pa. St. 376, 13 Am. Rep. 687.

The ancient rule of the common law that choses in action could not be assigned was never adopted by courts of equity. Morrison v. Deaderick, 10 Humph. (Tenn.) 342.

A debt or other chose in action may be assigned in equity. Parkhurst v. Dickerson, 21 Pick. (Mass.) 307.

Ground of Equitable Support.—The assignment of choses in action is supported in equity on the ground that it is an agreement by which the assignor is bound to give to the assignee the benefit of that which he has assigned. Hoppiss v. Eskridge, 2 Ired. Eq. (N. Car.) 54.

A Husband Possessed of a Chose in Action in the Right of His Wife may assign it for a valuable consideration. Carteret v. Paschal, 3 P. Wms. 197.

See generally, as to the power of a husband to assign his wife's choses in action, the title **HUSBAND AND WIFE**.

1. 2 Bl. Com. 442; Dix v. Cobb, 4 Mass. 508; Little v. Portland, 26 Oregon 235.

2. **Fraudulent Assignment.**—A court of equity will set aside an assignment void at law and necessarily leading to fraud and corruption. Thus where an attorney, who, from disclosures made to him in his character of attorney, had acquired knowledge of the facts on which a certain claim rested, purchased the same as a matter of speculation for a very

small and inadequate consideration in order to renew litigation, it was held that such assignment was unlawful and void on the ground of champerty. Arden v. Patterson, 5 Johns. Ch. (N. Y.) 44.

For a full treatment of the subject of contracts made with an attorney for the prosecution of a suit, see the titles **ATTORNEY AND CLIENT**; **CHAMPERTY AND MAINTENANCE**.

3. **Common-law Rule Relaxed.**—2 Bl. Com. 442; Master v. Miller, 4 T. R. 320; Block v. Walker, 2 Ark. 4; Rice v. Stone, 1 Allen (Mass.) 566; Jordan v. Gillen, 44 N. H. 424; Thalhimer v. Brinckerhoff, 3 Cow. (N. Y.) 623, 15 Am. Dec. 308; Stebbins v. Bruce, 80 Va. 389; Webber v. Quaw, 46 Wis. 118. See also cases cited in notes immediately following.

The principles first introduced and established by the law merchant in regard to foreign bills of exchange, and afterwards extended and recognized by the statutes of 9 and 10 Wm. III. and 3 and 4 Anne, in relation to inland bills and promissory notes, doubtless give rise to most, if not all, the statutes of assignments of the states of the Union. *Per* Lacy, J., in Block v. Walker, 2 Ark. 4.

In Parker v. Kennedy, 1 Bay (S. Car.) 398, after a review of the history of the assignments of choses in action, Waties, J., concludes: 1st. That the ancient aversion in the law to these assignments has entirely given way to the general benefit and convenience arising from them in modern times. 2d. That the commercial use of any chose in action may alone give negotiability to it without the aid of any statute.

4. **Courts of Law Adopting the Rules of Equity** recognized the rights of assignees of choses in action, and gave them every aid not inconsistent with their mode of proceeding. Welch v. Mandeville, 1 Wheat. (U. S.) 233, 5 Wheat. (U. S.) 277; Lamkin v. Phillips, 9 Port. (Ala.) 98; Taylor v. Galland, 3 Greene (Iowa) 17; Pitts v. Holmes, 10 Cush. (Mass.) 92; Scott v. Metcalf, 13 Smed. & M. (Miss.) 563; Field v. Weir, 28 Miss. 56.

According to Modern Decisions courts of law recognize the assignment of a chose in action, so far as to vest an equitable interest in the assignee, and authorize him to bring an action

the rights of the assignee of a chose in action whether the assignment is good at law or in equity only.¹

To What Extent Still in Force.—The common-law rule now survives only so far as to give form to proceedings at law to enforce the rights of the assignee of a chose in action by requiring in some jurisdictions that the action shall be brought in the name of the assignor to the use of the assignee.²

In those jurisdictions in which the distinction between courts of law and equity has been abolished, or the assignee is permitted by statute to sue in his own name, the common-law doctrine has no longer any force whatever.³

(2) *Test of Assignability.*—The General Test to be Applied in determining the assignability of a chose in action is whether or not it would survive and pass to the personal representative of a decedent. If it would so survive, it may be assigned so as to pass an interest to the assignee which he can in most jurisdictions enforce in his own name; if it does not so survive, it is not assignable either at law or in equity.⁴

in the name of the assignor, and recover a judgment for his own benefit. *Per Shaw, C. J.*, in *Palmer v. Merrill*, 6 Cush. (Mass.) 282, 52 Am. Dec. 782.

See *infra*, this title, *Rights of Parties*.

1. **Courts of Law will Protect the Rights of Assignee—England.**—Winch *v. Keeley*, 1 T. R. 619.

United States.—Corser *v. Craig*, 1 Wash. (U. S.) 424.

Alabama.—Goodwyn *v. Lloyd*, 8 Port. (Ala.) 237.

Connecticut.—Colbourn *v. Rossiter*, 2 Conn. 503; Lyon *v. Summers*, 7 Conn. 399.

Illinois.—Fitzpatrick *v. Beatty*, 6 Ill. 454; Chapman *v. Shattuck*, 8 Ill. 49; Carr *v. Waugh*, 28 Ill. 418; Morris *v. Cheney*, 51 Ill. 451; Donk *v. Alexander*, 117 Ill. 330; Savage *v. Gregg*, 150 Ill. 161; Creighton *v. Hyde Park*, 6 Ill. App. 272; Dehner *v. Helmbacher Forge, etc.*, Mills, 7 Ill. App. 47; Cohen *v. Smith*, 33 Ill. App. 344. See also Hodson *v. McConnel*, 12 Ill. 170.

Kentucky.—Marshall *v. Craig*, 3 Bibb (Ky.) 291.

Maine.—Pollard *v. Somerset Mut. F. Ins. Co.*, 42 Me. 221.

Massachusetts.—Eastman *v. Wright*, 6 Pick. (Mass.) 316 (*per Morton, J.*).

New Hampshire.—Cameron *v. Little*, 13 N. H. 23.

New Jersey.—Belton *v. Gibbon*, 12 N. J. L. 76; Sloan *v. Sommers*, 14 N. J. L. 509; Brown *v. Dunn*, 50 N. J. L. 111.

New York.—Wilkins *v. Batterman*, 4 Barb. (N. Y.) 47; Countryman *v. Boyer*, 3 How. Pr. (N. Y. Supreme Ct.) 386; Littlefield *v. Storey*, 3 Johns. (N. Y.) 425; Eels *v. Finch*, 5 Johns. (N. Y.) 193; Tuttle *v. Bebee*, 8 Johns. (N. Y.) 152; Raymond *v. Squire*, 11 Johns. (N. Y.) 47; Briggs *v. Dorr*, 9 Johns. (N. Y.) 95; Johnson *v. Bloodgood*, 1 Johns. Cas. (N. Y.) 51, 1 Am. Dec. 93; Andrews *v. Beecker*, 1 Johns. Cas. (N. Y.) 411; Wardell *v. Eden*, 2 Johns. Cas. (N. Y.) 121, Col. & C. Cas. (N. Y.) 137. See also Andrews *v. Beecker*, 1 Johns. Cas. (N. Y.) 411.

Rhode Island.—Clarke *v. Thompson*, 2 R. I. 146.

Vermont.—Strong *v. Strong*, 2 Aik. (Vt.) 373; Weeks *v. Hunt*, 6 Vt. 15; Cummings *v.*

Fullam, 13 Vt. 434; Upton *v. Moore*, 44 Vt. 552. See also Lampson *v. Fletcher*, 1 Vt. 168.

There is, in Courts of Law, an Increasing Liberality and disposition to protect the equitable rights of assignees of choses in action. Robins *v. Bacon*, 3 Me. 346; Vose *v. Handy*, 2 Me. 222, 11 Am. Dec. 101.

2. *Burke's Case*, 13 Ct. of Cl. 231 (*per Nott, J.*). The doctrine of equitable assignments has been gradually extending to meet the convenience of trade and business, and has been favorably viewed in the courts of law, subject, however, to the legal principle that in such cases the assignee can enforce his claim only in the name of the assignor unless there be an express promise by the debtor to pay the assignee. Under this limitation, choses in action generally may be the subject of assignment; and debts which are contingent, and money yet to become due, may well be assigned, these circumstances only operating to postpone the liability of the debtor until the contingency happens and the money becomes payable. *Per Dewey, J.*, in *Gibson v. Cooke*, 20 Pick. (Mass.) 15, 32 Am. Dec. 194. See *infra*, this title, *Rights of Parties*.

3. See *infra*, this title, *Rights of Parties*.

4. **Test of Assignability.**—Pomeroy on Remedies and Remedial Rights, §§ 146–147.

United States.—Comegys *v. Vasse*, 1 Pet. (U. S.) 193; Tufts *v. Matthews*, 10 Fed. Rep. 609; Davis *v. St. Louis, etc.*, R. Co., 25 Fed. Rep. 786.

Iowa.—Taylor *v. Galland*, 3 Greene (Iowa) 17.

Kansas.—Stewart *v. Balderston*, 10 Kan. 131; Noble *v. Hunter* (Kan. App. 1896), 43 Pac. Rep. 994.

Michigan.—Final *v. Backus*, 18 Mich. 218; Finn *v. Corbitt*, 36 Mich. 318.

Minnesota.—Tuttle *v. Howe*, 14 Minn. 145, 100 Am. Dec. 205.

Missouri.—Snyder *v. Wabash, etc.*, R. Co., 86 Mo. 613, 29 Am. & Eng. R. Cas. 237; Chouteau *v. Boughton*, 100 Mo. 406; Renfro *v. Prior*, 25 Mo. App. 402; State *v. Heckart*, 49 Mo. App. 280.

New Hampshire.—Jordan *v. Gillen*, 44 N. H. 424.

New York.—Zabriskie *v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551; Devlin *v. New York,*

Rights Arising from Contracts Founded on Personal Confidence.—It results from this rule that rights arising from contracts cannot be transferred if coupled with personal liability, or if they involve a relation of personal confidence, such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided.¹

(3) *Choses ex Contractu.*—All rights of action arising out of contract may be assigned.²

63 N. Y. 8, 50 How. Pr. (N. Y.) 8; Platt v. Stout, 14 Abb. Pr. (N. Y. Supreme Ct.) 178; Butler v. New York, etc., R. Co., 22 Barb. (N. Y.) 110; Foy v. Troy, etc., R. Co., 24 Barb. (N. Y.) 382; Smith v. New York, etc., R. Co., 28 Barb. (N. Y.) 605, 16 How. Pr. (N. Y.) 277; Gould v. Gould, 36 Barb. (N. Y.) 270, 41 Barb. (N. Y.) 654; Dininny v. Fay, 38 Barb. (N. Y.) 18; Mackey v. Mackey, 43 Barb. (N. Y.) 58; Graves v. Spier, 58 Barb. (N. Y.) 349; Zogbaum v. Parker, 66 Barb. (N. Y.) 341, affirmed in 55 N. Y. 120; Purple v. Hudson River R. Co., 4 Duer (N. Y.) 76; Robinson v. Weeks, 6 How. Pr. (N. Y. Supreme Ct.) 161; Fried v. New York Cent. R. Co., 25 How. Pr. (Buffalo Super. Ct.) 285; Marvin v. Inglis, 39 How. Pr. (N. Y. Ct. App.) 329; Drake v. Smith, 12 Hun (N. Y.) 533; Jackson v. Daggett, 24 Hun (N. Y.) 207; Freeman v. Newton, 3 E. D. Smith (N. Y.) 246; Rutherford v. Aiken, 3 Thomp. & C. (N. Y.) 63. But see Hyslop v. Randall, 11 How. Pr. (N. Y. Super. Ct.) 97, 4 Duer (N. Y.) 660.

Ohio.—Grant v. Ludlow, 8 Ohio St. 1.

Pennsylvania.—Sibbald's Estate, 18 Pa. St. 249; North v. Turner, 9 S. & R. (Pa.) 248.

South Dakota.—Ericson v. Brookings County, 3 S. Dak. 434.

Texas.—Galveston, etc., R. Co. v. Freeman, 57 Tex. 156; Stewart v. Houston, etc., R. Co., 62 Tex. 246.

Washington.—Slauson v. Schwabacher Bros. & Co., 4 Wash. 783.

Wisconsin.—Tyson v. McGuineas, 25 Wis. 656; Webber v. Quaw, 46 Wis. 118; Murray v. Buell, 76 Wis. 657, 20 Am. St. Rep. 92.

The power to assign and to transmit to personal representatives are convertible propositions. Zabriskie v. Smith, 13 N. Y. 322, 64 Am. Dec. 551; Byxbie v. Wood, 24 N. Y. 607; Walton v. Rafel, 7 Misc. Rep. (N. Y. C. Pl.) 663. See also Blake v. Griswold, 104 N. Y. 613.

An Action to Recover a Mortgage, or money received thereon, is assignable since it survives to the personal representatives. Marvin v. Inglis, 39 How. Pr. (N. Y. Ct. App.) 329.

The Whole Difficulty in Regard to the Doctrine of Assignment of Torts seems to have arisen from not distinguishing between the cases of torts which pass to an executor or administrator, and mere personal torts, as assault and battery, slander, and the like, which die with the person, and which, all the authorities agree, cannot be assigned. Robinson v. Weeks, 6 How. Pr. (N. Y. Supreme Ct.) 161.

1. *Arkansas Valley Smelting Co. v. Belden Min. Co.*, 127 U. S. 387. See Pollock on Contracts (2d Am. ed.), p. 425; also the title **CONTRACTS**. Special applications of this principle will be found in succeeding subdivisions

of this article; as, for instance, *Executory Contracts Involving Personal Quest or Liability*.

2. **Rights of Action Ex Contractu may be Assigned.**—1 Stimson Am. Stat. Law, § 4031.

Georgia.—Fulcher v. Daniel, 80 Ga. 74; Bewick Lumber Co. v. Hall, 94 Ga. 539.

Illinois.—Savage v. Gregg, 150 Ill. 161.

Kansas.—Under the Kansas Civil Code, § 26, every chose in action is assignable, except those arising from tort, and the rule is the same both in law and equity. *Kansas Midland R. Co.*, 54 Kan. 751.

Minnesota.—Harbord v. Cooper, 43 Minn. 466.

Missouri.—McPike v. McPherson, 41 Mo. 521; Peabody v. Warner, 16 Mo. App. 556; Dean v. Chandler, 44 Mo. App. 338; State v. Heckart, 49 Mo. App. 280.

New York.—Devlin v. New York, 63 N. Y. 8, 50 How. Pr. (N. Y.) 1; Merrick v. Brainard, 38 Barb. (N. Y.) 574; McDougall v. Walling, 48 Barb. (N. Y.) 364; Westcott v. Keeler, 4 Bosw. (N. Y.) 564; Peckham v. Smith, 9 How. Pr. (N. Y. Supreme Ct.) 436; Hyslop v. Randall, 11 How. Pr. (N. Y. Super. Ct.) 97, 4 Duer (N. Y.) 660; Munson v. Riley, 2 E. D. Smith (N. Y.) 130; Monahan v. Story, 2 E. D. Smith (N. Y.) 393. See also Rochester Lantern Co. v. Stiles, etc., Press Co., 135 N. Y. 209.

Wisconsin.—Knowles v. Frawley, 84 Wis. 119.

Canada.—The statute of 35 Vict., c. 12, O., makes "every debt and chose in action arising out of contract," etc., "assignable at law by any form of writing, but subject to such conditions or restrictions with respect to the right of transfer as may be contained in the original contract; and the assignee thereof shall sue thereon in his own name in such action and for such relief as the original holder or assignee of such chose in action would be entitled to sue for." *Wellington v. Chard*, 22 U. C. C. P. 518; *Hostrawser v. Robinson*, 23 U. C. C. P. 350.

This statute applies to assignments made and causes of action accrued before, as well as after, the passing of the act. *Wallace v. Gilchrist*, 24 U. C. C. P. 40.

A Cause of Action Arising upon a Bond Executed to a City, upon taking a contract to do public work, is assignable and passes upon an assignment of a claim for labor. *Sepp v. McCann*, 47 Minn. 364; *Salisbury v. Keigher*, 47 Minn. 367.

The Right of Action on a Contract for Breach of Warranty therein is assignable. *Felt v. Reynolds Rotary Fruit Evaporating Co.*, 52 Mich. 602.

The Right of Action for a Breach of Contract Resulting in a Pecuniary Loss to the contractor

will survive to the personal representatives of the aggrieved party, and is therefore assignable. *Devlin v. New York*, 63 N. Y. 8, 50 How. Pr. (N. Y.) 1.

A Cause of Action for Breach of Covenant of Seisin in a deed was held assignable. *Kimball v. Bryant*, 25 Minn. 496.

The Cause of Action by a Stage Company against the Owners of a Ferry for breach of contract to transport stages safely, whereby a passenger was drowned, is assignable. *Blakeley v. Le Duc*, 22 Minn. 476.

The Right of Action for a Breach of a Contract of Employment, by the dismissal of the employee without reasonable cause, passes to the assignee in bankruptcy as being a part of the personal estate of the insolvent. *Drake v. Beckham*, 11 M. & W. 315.

A Contractor's Claim against Owners of a City Lot for an assessment for street improvements is assignable. *Cochran v. Collins*, 29 Cal. 129. See the title SPECIAL ASSESSMENTS.

A Claim by Stockholders to Recover Back from a Corporation money subscribed and paid in to increase its capital stock, where the company failed to carry out that purpose, is a claim arising out of contract, and therefore assignable, and capable of enforcement by the assignee in his own name. *Peckham v. Smith*, 9 How. Pr. (N. Y. Supreme Ct.) 436.

A Promise to Pay for Goods, which contains a provision leaving it optional with the payee to reclaim the goods, or collect the note in default of payment, is assignable after maturity as a chose in action, and may be sued upon without being indorsed by the assignor. *Bannister v. Rouse*, 44 Mich. 428.

A Credit Check payable on demand, in merchandise, and, by its terms, not transferable, is a chose in action arising on contract, and assignable, under *Georgia Code*, § 2244. *Bewick Lumber Co. v. Hall*, 94 Ga. 539.

A Claim for the Amount Due on a Stock Subscription, where it has been called in by assessment and becomes a liquidated demand on which suit will lie, may, it seems, be assigned before or after judgment. *Wells v. Rodgers*, 50 Mich. 294.

A Railroad Company may Sell a Claim for an Unpaid Subscription to its stock, or make a contract to dispose of it, for the purposes of the road, as much as assign a promissory note. *Morris v. Cheney*, 51 Ill. 451.

The Right of a Corporation to Collect Money Due upon Calls made upon its members for the payment of the balance due on their stock is assignable. *Farmers, etc., Sav. Bank v. Kansas City Pub. Co.*, 3 Dill. (U. S.) 287; *Pickering v. Ilfracombe R. Co.*, L. R. 3 C. P. 235.

In Equity, the Proceeds of a Call determined upon but not made may be assigned. *In re Sankey Brook Coal Co.*, L. R. 9 Eq. 721.

Claims for Services Rendered.—A claim for services rendered by an architect under a contract is assignable. *Hooker v. Eagle Bank*, 30 N. Y. 83.

The claim of a sheriff for services rendered and expenses incurred is assignable. *Birkbeck v. Stafford*, 14 Abb. Pr. (N. Y. Supreme Ct.) 285, 23 How. Pr. (N. Y.) 236.

So also is a claim for fees of a commissioner

appointed to take evidence in election cases. *McCord v. Bellingham*, 2 L. C. J. (Can.) 42.

And the same is true of claims of revolutionary officers for compensation for services as promised by *Virginia*, which remained unpaid at the death of the officer. *Meriweather v. Herran*, 8 B. Mon. (Ky.) 165.

The right of an employee of a corporation to enforce his claim for services against the stockholders personally is assignable. *Day v. Vinson*, 78 Wis. 198; *Day v. Buckingham*, 87 Wis. 215; *Krauser v. Ruckel*, 17 Hun (N. Y.) 463.

The right of action of a material man, on the bond conditioned for the payment of laborers and material men required under *Washington Gen. Stat.*, § 2415, to be taken by a county from a person contracting therewith, is assignable. *Gilmore v. Westerman* (Wash. 1896), 43 Pac. Rep. 345.

A similar cause of action under *Minnesota Sp. L.* 1889, c. 360, § 1, is assignable. *Sepp v. McCann*, 47 Minn. 364; *Salisbury v. Keigher*, 47 Minn. 367. See also *St. Paul v. Butler*, 30 Minn. 459.

So also the claims protected by the *Michigan* statute (*How. Stat.*, §§ 3423-3425) for the protection of laborers and persons furnishing material for the construction and repairs of railroads, are assignable. *Chicago, etc., R. Co. v. Sturgis*, 44 Mich. 538; *Dudley v. Toledo, etc., R. Co.*, 65 Mich. 655. See also, as to similar claims in *Missouri*, *Peters v. St. Louis, etc., R. Co.*, 24 Mo. 586.

The statutory right of a flagman at a railway crossing, appointed under the laws of *New York* 1871, c. 609, § 4, by the highway commissioners, to recover wages from the company, may be assigned. *Stoothoff v. Long Island R. Co.*, 32 Hun (N. Y.) 437.

A Claim against a Town for a Bounty offered by it to volunteers in military service is assignable. *Carner v. Creque*, 46 Barb. (N. Y.) 507, affirmed in 48 N. Y. 385. See also *Blackman v. Dunkirk*, 19 Wis. 183.

A Claim for Prize Money, in the hands of a collecting agent, is assignable. *Danklessen v. Braynard*, 3 Daly (N. Y.) 183.

A Claim against an Attorney for costs, under a statute providing that an attorney shall be liable for costs, is assignable. *Knowles v. Frawley*, 84 Wis. 119.

A Claim against the Winner for Money Lost at Play, or by betting, is assignable. *Meech v. Stoner*, 19 N. Y. 26; *McDougall v. Walling*, 48 Barb. (N. Y.) 364; *Hendrickson v. Beers*, 6 Bosw. (N. Y.) 639. But see *Weyburn v. White*, 22 Barb. (N. Y.) 182.

A Claim for Taxes paid on land, which was subsequently decreed to belong to another, is assignable. *Goodnow v. Litchfield*, 63 Iowa 275.

The Equitable Right of a Tenant to compensation for improvements or betterments made on land is assignable. *Lombard v. Ruggles*, 9 Me. 62.

An Account against an Estate which has been allowed by the administrator and approved by the chief justice is a "written instrument," and assignable within the meaning of the *Texas Act of 1840* (Pasch. Dig., art. 222); *McDonough v. Tutt*, 31 Tex. 199.

A Special Tax Bill for Public Work is assignable, and suit may be brought thereon in the

(4) *Choses ex Delicto*.—The General Doctrine, both at law and in equity, is that a right of action for a pure tort is not the subject of assignment.¹

Statutes.—This rule has been changed to some extent by statute, and has been modified also by the provisions with reference to what choses in action will survive or abate at the death of either or both of the parties.²

Instances of What Assignable.—In accordance with the principles above stated it has been held that the right of action for injuries affecting the estate rather than the person, is assignable;³ as for the unlawful taking and carry-

name of the city to the use of the assignee, *St. Louis v. Rudolph*, 36 Mo. 465; *Kansas City v. Rice*, 89 Mo. 685; or in the name of the assignee, *Bambrick v. Campbell*, 37 Mo. App. 460.

The Right of Seamen to Shares in Prizes captured by privateers, such prizes being required by law to be sold by the marshal and the proceeds paid to the agents, is not assignable at law so as to enable the assignee to sue in his own name. *Usher v. D'Wolfe*, 13 Mass. 290.

A Right to Sue a Trustee for interest or profits of the trust fund was held not assignable in equity. *Hill v. Boyle*, L. R. 4 Eq. 260.

The Right to Enforce the Execution of a Trust in equity is assignable. *Clark v. Crego*, 47 Barb. (N. Y.) 599.

Open Accounts.—It is provided by statute in several states that open accounts may be assigned, and the assignee may sue thereon in his own name. *Andrews v. Brown*, 1 Iowa 154; *Knadler v. Sharp*, 36 Iowa 232; *Crawford v. Brooke*, 4 Gill (Md.) 213; *Devine v. Martin*, 15 Tex. 25; *Smalley v. Taylor*, 33 Tex. 668. *Compare*, as to law in *Arkansas*, *St. Louis, etc., R. Co. v. Camden Bank*, 47 Ark. 541. See also *Mendel v. Davies*, 46 Ark. 420. *Compare*, as to rule at common law, *Anderson v. Lewis*, 10 Ark. 304; *Kendrick v. Glover*, 1 Ga. Dec. 63; *Mt. Olivet Cemetery v. Shubert*, 2 Head (Tenn.) 116.

An ordinary running account between two parties, showing a balance due by one to the other, is assignable, and is within the *Virginia* statute which authorizes the assignee of a bond, note, or writing, not negotiable, to sue thereon in his own name. *Porter v. Young*, 85 Va. 49.

An Unliquidated Balance of accounts is assignable. *Crocker v. Whitney*, 10 Mass. 316; *Wescott v. Potter*, 40 Vt. 271 (*explaining* *Whittle v. Skinner*, 23 Vt. 531, and *overruling* a dictum therein to the contrary).

A balance due on mutual accounts may be assigned. *Bartlett v. Pearson*, 29 Me. 9. See also *Leathers v. Carr*, 24 Me. 351; *Nonantum Worsted Co. v. Webb*, 124 Pa. St. 125.

A Debt evidenced by a negotiable promissory note, lost years after the note had matured and had lost its negotiability, may be assigned by an instrument in writing. *Sauter v. Leverage*, 103 Mo. 615.

By statute in *Missouri*, a debt may be assigned so as to authorize the assignee to maintain an action in his own name. *Walker v. Mauro*, 18 Mo. 564; *Smith v. Schibel*, 19 Mo. 140; *Long v. Constant*, 19 Mo. 320, 61 Am. Dec. 559.

But a debt due on a verbal contract was

held not assignable under the *Missouri* statute. *Charwin v. Labarge*, 1 Mo. 556.

A Contingent Debt Founded on an Existing Contract may be assigned. *Knevals v. Blauvelt*, 82 Me. 458.

A Claim Not Legally Enforceable at the time for a fraud not yet in existence, and the exact amount of which is not known, was held assignable. *Jones v. New York*, 90 N. Y. 387. But see *Nerjes v. Roe* (C. Pl.), 36 N. Y. Supp. 469.

A Right to a Sum of Money Uncertain in Amount at the time, but to be made certain afterwards, is assignable. *Bourne v. Cabot*, 3 Met. (Mass.) 305. See also *Cutts v. Perkins*, 12 Mass. 206; and *infra*, this title, *Future and Contingent Interests*.

1. Right of Action for Tort Not Generally Assignable.—*Stanly v. Duhurst*, 2 Root (Conn.) 52; *Bird v. Hempstead*, 3 Day (Conn.) 272, 3 Am. Dec. 269; *Kansas Midland R. Co. v. Brehm*, 54 Kan. 751; *Final v. Backus*, 18 Mich. 218; *Finn v. Corbitt*, 36 Mich. 318; *Hyslop v. Randall*, 11 How. Pr. (N. Y. Super. Ct.) 97; *Gardner v. Adams*, 12 Wend. (N. Y.) 297; *Sommer v. Wilt*, 4 S. & R. (Pa.) 19. See also cases cited under *Instances of What Not Assignable, infra*.

In *Oliver v. Walsh*, 6 Cal. 456, the rule is laid down broadly that a cause of action for a tort is not assignable. See also *Norton v. Tuttle*, 60 Ill. 130.

Assignment to Attorney.—That a claim for unliquidated damages in an action sounding in tort is not capable of assignment before verdict, is true only in respect to the rights of third parties. As between attorney and client, an assignment of a whole or part of a future verdict is binding, and, if founded upon sufficient consideration, may be enforced. *Patten v. Wilson*, 34 Pa. St. 299. See the title ATTORNEY AND CLIENT.

2. Kansas Midland R. Co. v. Brehm, 54 Kan. 751; *Haight v. Hayt*, 19 N. Y. 464. See *Hall v. Cincinnati, etc., R. Co.*, 1 Disney (Ohio) 58.

3. Injuries Affecting Estate Rather than Person Assignable—Michigan.—*Finn v. Corbitt*, 36 Mich. 318.

Missouri.—*Shultz v. Christman*, 6 Mo. App. 338.

New York.—*Merrick v. Brainard*, 38 Barb. (N. Y.) 574; *Mackey v. Mackey*, 43 Barb. (N. Y.) 58; *Hyde v. Tuffts*, 45 N. Y. Super. Ct. 56.

Pennsylvania.—*North v. Turner*, 9 S. & R. (Pa.) 244.

Virginia.—*Norfolk, etc., R. Co. v. Read*, 87 Va. 185, citing 1 AM. AND ENG. ENCYC. OF LAW (1st ed.), p. 832.

See also *Lovell v. Hammond Co.*, 66 Conn.

ing away or wrongful conversion of personal property;¹ for trespass on lands,²

500; *Whitaker v. Gavit*, 18 Conn. 522; *Hudson v. Plets*, 11 Paige (N. Y.) 180; *McBride v. Farmers' Bank*, 26 N. Y. 450; *Merrill v. Grinnell*, 30 N. Y. 594; *Sweet v. Merry*, 109 N. Y. 83; *Foy v. Troy*, etc., R. Co., 24 Barb. (N. Y.) 382; *Van Rensselaer v. Owen*, 48 Barb. (N. Y.) 61, 33 How. Pr. (N. Y.) 16; *Westcott v. Keeler*, 4 Bosw. (N. Y.) 564; *Hall v. Cincinnati*, etc., R. Co., 1 Disney (Ohio) 58; *Dahms v. Sears*, 13 Oregon 47.

Every Demand that is Connected with a Right of Property, real or personal, and which claims redress for a violation of the right, is assignable, whether the violation is, technically speaking, a tort or simply a breach of contract. *Purple v. Hudson River R. Co.*, 4 Duer (N. Y.) 74.

Nothing is assignable in law or equity that does not directly or indirectly involve a right to property. *Dayton v. Fargo*, 45 Mich. 153.

Demands Arising from Injuries Strictly Personal (whether arising from tort or contract) are not assignable, but all others are. *McKee v. Judd*, 12 N. Y. 625, 64 Am. Dec. 515; *People v. Tioga C. Pl.*, 19 Wend. (N. Y.) 73.

All Choses in Action Embracing Demands which are Considered as Matters of Property or estate are now assignable either at law or in equity. Nothing is excluded but mere personal torts which die with the party. *Paige, J.*, in *Hoyt v. Thompson*, 5 N. Y. 320.

Choses in action in the nature of property are assignable in *Minnesota*. *Kimball v. Bryant*, 25 Minn. 496.

In *Illinois* a cause of action on a verbal contract, or for an injury to the person or property of another, is not assignable so as to pass the legal title to the assignee. *Chicago*, etc., R. Co. v. *Maher*, 91 Ill. 312.

Damage to Property from Failure to Keep Canal Clear of Obstructions.—A cause of action for the loss of property sustained by a person using a canal, in consequence of the negligence of a contractor who engaged to repair the canal and keep it clear of obstructions, is assignable. *Fulton F. Ins. Co. v. Baldwin*, 37 N. Y. 648.

Negligence in Making Arrest—A right of action for an injury occasioned by negligence in not making an arrest was held to be assignable on the ground that the injury was a wrong done to the estate of the assignor and the right of action would survive to his representative. *Dinny v. Fay*, 38 Barb. (N. Y.) 18.

So a right of action to recover damages on an undertaking to procure an order of arrest is assignable. *Banberger v. Kahn*, 43 Hun (N. Y.) 411.

Real Action.—Right to bring an action to recover real property passes to an assignee in bankruptcy. *Smith v. Coffin*, 2 H. Bl. 444.

A Claim for Damages for the Infringement of a Trade-mark is assignable, *Julian v. Hoosier Drill Co.*, 78 Ind. 408; or for the infringement of a patent, *Shaw v. Colwell Lead Co.*, 20 Blatchf. (U. S.) 417.

1. Conversion of Property.—*California.*—*Lazard v. Wheeler*, 22 Cal. 139.

Michigan.—*Final v. Backus*, 18 Mich. 218; *Brady v. Whitney*, 24 Mich. 154; *Grant v. Smith*, 26 Mich. 201; *Upham v. Dickinson*, 38 Mich. 338; *Smith v. Thompson*, 94 Mich. 384. See also *Rogers v. Windoes*, 48 Mich. 628.

Missouri.—*Smith v. Kennett*, 18 Mo. 154; *Doering v. Kenamore*, 86 Mo. 588; *Hamlin v. Carruthers*, 19 Mo. App. 567; *Goodger v. Finn*, 10 Mo. App. 226; *Dickson v. Merchants' Elevator Co.*, 44 Mo. App. 498.

New Hampshire.—*Jordan v. Gillen*, 44 N. H. 424.

New York.—*Whitney v. Slauson*, 30 Barb. (N. Y.) 276; *Whittaker v. Merrill*, 30 Barb. (N. Y.) 389; *Gould v. Gould*, 36 Barb. (N. Y.) 270, 41 Barb. (N. Y.) 654; *Genet v. Howland*, 45 Barb. (N. Y.) 566, 30 How. Pr. (N. Y.) 360; *Grocers' Nat. Bank v. Clark*, 48 Barb. (N. Y.) 26; *Alt v. Weidenberg*, 6 Bosw. (N. Y.) 176; *Robinson v. Weeks*, 6 How. Pr. (N. Y. Supreme Ct.) 161 (*overruling Gardner v. Adams*, 12 Wend. (N. Y.) 297, so far as it asserts a contrary doctrine); *Drake v. Smith*, 12 Hun (N. Y.) 532; *Weissenstein v. Elias*, 14 Hun (N. Y.) 533; *McKee v. Judd*, 12 N. Y. 624, 64 Am. Dec. 515; *Sherman v. Elder*, 24 N. Y. 381; *Richtmeyer v. Remsen*, 38 N. Y. 206; *Hicks v. Cleveland* 48 N. Y. 88, *reversing* 39 Barb. (N. Y.) 573. See also *Hodge v. Ade*, 2 Lans. (N. Y.) 314; *Gillet v. Fairchild*, 4 Den. (N. Y.) 80; *Jackson v. Losee*, 4 Sandf. Ch. (N. Y.) 381.

Pennsylvania.—*North v. Turner*, 9 S. & R. (Pa.) 244.

South Dakota.—*Erickson v. Brookings County*, 3 S. Dak. 434.

Wisconsin.—*McArthur v. Green Bay*, etc., Canal Co., 34 Wis. 139.

See also *Danforth v. Streeter*, 28 Vt. 490.

To the same effect, *Tome v. Dubois*, 6 Wall. (U. S.) 548.

Stolen Property.—Where the owner of stolen mules assigned his right to them, it was held that the assignee might maintain replevin to recover possession. *Doering v. Kenamore*, 86 Mo. 588.

Action by Holder of Bill of Lading.—The cause of action of the holder of a bill of lading against the consignee for conversion, where there appears a feature of violated agreement, express or implied, as between consignor and consignee, or otherwise, is assignable. *Hamlin v. Carruthers*, 19 Mo. App. 567.

Warehouse Receipt.—Under the *Georgia Code*, § 2244, providing that all choses in action may be assigned, the assignee of a warehouse receipt may maintain trover against the warehouseman for conversion, after a demand for the goods and a refusal to deliver them. *Zellner v. Mobley*, 84 Ga. 746, 20 Am. St. Rep. 390.

Assignment after Verdict.—A claim for money found to be due by the verdict of the jury in an action for the conversion of personal property is assignable. *Noble v. Hunter* (Kan. App. 1896), 43 Pac. Rep. 994.

The Right of Action for the Value of Property Converted is assignable when the tort is waived. *Hawk v. Thorn*, 54 Barb. (N. Y.) 164.

2. Trespass on Lands.—*More v. Massini*, 32 Cal. 590; *Chouteau v. Boughton*, 100 Mo.

as by wrongfully entering and cutting and carrying away timber or mining ores therefrom;¹ for tortiously obtaining money;² a claim against a railroad company for negligence resulting in the killing of stock on its road,³ or the destruction of property along its line by fire;⁴ or against a common carrier for the loss or injury of goods delivered to him for shipment,⁵ or for failure to provide shipping facilities when it was his duty to do so;⁶ or against an inn-keeper for money stolen from the trunk of a guest at the inn.⁷

406. *Compare* Chicago, etc., R. Co. v. Maher, 91 Ill. 312.

A Cause of Action for a Tort to Realty is assignable. *Weire v. Davenport*, 11 Iowa 49, 77 Am. Dec. 132.

A cause of action for damages to real estate, which diminish its rental value and also render it less comfortable as a residence, is assignable, this not being an action for a "personal injury" within the meaning of *New York Code of Civ. Pro.*, §§ 1910, 3343, subd. 9; *Birch v. Metropolitan El. R. Co. (C. Pl.)*, 8 N. Y. Supp. 325.

A Cause of Action for Waste is assignable. *Rutherford v. Aiken*, 3 Thomp. & C. (N. Y.) 60.

In *Rogers v. Spence*, 13 M. & W. 571, it was held that an action of trespass *quare clausum fregit* did not pass to the assignee in bankruptcy, the tort being considered essentially personal. See also *Clark v. Calvert*, 3 Moore 96, 8 Taunt. 742, 4 E. C. L. 266.

1. Cutting Timber.—*Final v. Backus*, 18 Mich. 218; *Grant v. Smith*, 26 Mich. 201; *Upham v. Dickinson*, 38 Mich. 338; *Gates v. Comstock* (Mich. 1895), 65 N. W. Rep. 544; *Webber v. Quaw*, 46 Wis. 118.

Mining Ores.—A right of action for wrongfully, and without permission, entering upon the lands of another and mining ores and minerals therefrom, and selling and converting the same, is assignable. *Hoy v. Smith*, 49 Barb. (N. Y.) 36.

2. Claim for Money Tortiously Obtained.—*Stewart v. Balderston*, 10 Kan. 131. See also *Marvin v. Inglis*, 39 How. Pr. (N. Y. Ct. App.) 329.

The Right to Recover Back Usurious Interest is assignable. *Wheelock v. Lee*, 64 N. Y. 243. Such a claim may be assigned in equity. *Breckenridge v. Churchill*, 3 J. J. Marsh (Ky.) 11. To the same effect, see *Bosanquett v. Dashwood*, Cas. temp. Talb. 38; *Gray v. Bennett*, 3 Met. (Mass.) 522. See also *Dey v. Dunham*, 2 Johns. Ch. (N. Y.) 182.

The right to recover back usurious interest may be assigned if the transfer be an absolute and unconditional sale of all interest in the judgment that may be recovered. *Spicer v. Jarrett*, 2 Baxt. (Tenn.) 454, *distinguishing* *Morrison v. Deaderick*, 10 Humph. (Tenn.) 342.

A Statutory Right of Action to Cancel or Avoid Notes, bills, securities, and other contracts, on the ground of usury, or to have the same surrendered, was held not assignable. *Boughton v. Smith*, 26 Barb. (N. Y.) 635.

The Right of a Purchaser at a Wrongful and Unlawful or Erroneous Tax Sale to have his money refunded to him was held assignable under *South Dakota Comp. Laws*, §§ 2876, 2877, and the assignee has the same right and

title to the money as the assignor had, and can maintain an action for its recovery. *Erickson v. Brookings County*, 3 S. Dak. 434.

Fees Wrongfully Received.—The right of action of a public officer to recover fees wrongfully received by a usurper of the office is assignable. *Platt v. Stout*, 14 Abb. Pr. N. Y. Supreme Ct.) 178.

3. Killing of Stock.—*Louisville, etc., R. Co. v. Goodbar*, 88 Ind. 213; *Everett v. Central Iowa R. Co.*, 73 Iowa 442; *Snyder v. Wabash, etc., R. Co.*, 86 Mo. 613, 29 Am. & Eng. R. Cas. 237; *Butler v. New York, etc., R. Co.*, 22 Barb. (N. Y.) 110; *East Tennessee, etc., R. Co. v. Henderson*, 1 Lea (Tenn.) 1; *Galveston, etc., R. Co. v. Freeman*, 57 Tex. 156.

Double Damages—Iowa.—The assignment of a right of action against a railroad company, for killing stock, carries with it all the rights of the assignor, so that the assignee by serving notice, as provided by the Iowa Code, § 1289, may recover double damages for the stock killed. *Everett v. Central Iowa R. Co.*, 73 Iowa 442.

4. Property Destroyed by Fires from Railroads.—A right of action against a railroad, for carelessly and negligently setting fire to and burning up grass, fences, etc., is assignable. *Fried v. New York Cent. R. Co.*, 25 How. Pr. (Buffalo Super. Ct.) 285; *Tyler v. Ricamore*, 87 Va. 466. See also *Small v. Chicago, etc., R. Co.*, 55 Iowa 582.

Compare, as to the law in *Kansas*, *Kansas Midland R. Co. v. Brehm*, 54 Kan. 751.

5. Claim against Common Carrier.—*Freeman v. Newton*, 3 E. D. Smith (N. Y.) 246; *Smith v. New York, etc., R. Co.*, 28 Barb. (N. Y.) 605, 16 How. Pr. (N. Y.) 277; *Norfolk, etc., R. Co. v. Read*, 87 Va. 185. See also *Waldron v. Willard*, 17 N. Y. 466; *Merrill v. Grinnell*, 30 N. Y. 594.

A claim against a common carrier for loss of goods delivered to the carrier for shipment is a cause of action arising out of contract, and is assignable. *Watson v. Hoosac Tunnel Line Co.*, 13 Mo. App. 263, 14 Mo. App. 885. *Compare* *Thurman v. Wells*, 18 Barb. (N. Y.) 500.

A carrier has a right of action for an injury to property intrusted to him to be carried, and he may therefore assign the cause of action to another who may recover thereon. *Merrick v. Brainard*, 38 Barb. (N. Y.) 574.

6. A right of action against a railroad company for loss sustained through their failure to provide facilities for hauling freight is one affecting the estate, and therefore assignable. *Davis v. St. Louis, etc., R. Co.*, 25 Fed. Rep. 786; *Chicago, etc., R. Co. v. Wolcott* (Ind. 1895), 39 N. E. Rep. 451.

7. Stanton v. Leland, 4 E. D. Smith (N. Y.) 88.

Instances of What Not Assignable.—A right of action strictly personal,¹ as for injuries to the person, as by assault and battery;² or to the character, as by slander;³ for seduction;⁴ or for malicious prosecution, or abuse of legal process,⁵ is not assignable.

Fraud and Deceit.—A right of action arising from fraud or deceit practiced on the assignor is not generally assignable;⁶ but where the injury affects the

1. Actions Strictly Personal Not Assignable—*United States.*—*Comegys v. Vasse*, 1 Pet. (U. S.) 195; *Ware v. Brown*, 2 Bond (U. S.) 267. *Maine.*—*McGlinchy v. Hall*, 58 Me. 152; *Averill v. Longfellow*, 66 Me. 237; *McGee v. McCann*, 69 Me. 79.

Massachusetts.—*Rice v. Stone*, 1 Allen (Mass.) 566; *Linton v. Hurley*, 104 Mass. 353.

Minnesota.—*Hunt v. Conrad*, 47 Minn. 557. *New York.*—*Purple v. Hudson River R. Co.*, 4 Duer (N. Y.) 74; *Hodgman v. Western R. Corp.*, 7 How. Pr. (N. Y. Supreme Ct.) 492; *Lamphere v. Hall*, 26 How. Pr. (Oneida County Ct.) 509; *People v. Tioga C. Pl.*, 19 Wend. (N. Y.) 73; *Pulver v. Harris*, 52 N. Y. 73, 62 Barb. (N. Y.) 593. See also *Gardner v. Adams*, 12 Wend. (N. Y.) 297.

Pennsylvania.—*Sommer v. Wilt*, 4 S. & R. (Pa.) 19.

Texas.—*Gulf, etc., R. Co. v. Wooten* (Tex. Civ. App. 1895), 30 S. W. Rep. 684; *Stewart v. Houston, etc., R. Co.*, 62 Tex. 246.

Washington.—*Slauson v. Schwabacher Bros. & Co.*, 4 Wash. 783.

Wisconsin.—*Noonan v. Orton*, 34 Wis. 259, 17 Am. Rep. 441; *Kusterer v. Beaver Dam*, 56 Wis. 471, 43 Am. Rep. 725.

See also *St. Joseph Mfg. Co. v. Miller*, 69 Wis. 389; *Dahms v. Sears*, 13 Oregon 47.

It is Well Recognized that Mere Personal Torts, which die with the person, such as slander, assault and battery, false imprisonment, crim. con., seduction, and the like, are not assignable. *Drake v. Beckham*, 11 M. & W. 315; *Whitaker v. Gavit*, 18 Conn. 522; *Butler v. New York, etc., R. Co.*, 22 Barb. (N. Y.) 110; *North v. Turner*, 9 S. & R. (Pa.) 244. See also *Hudson v. Plets*, 11 Paige (N. Y.) 180.

Contra—Iowa.—By statute in Iowa all causes of action survive (Code, § 2525), and hence a cause of action for a personal tort is assignable. *Weire v. Davenport*, 11 Iowa 49, 77 Am. Dec. 132; *Gray v. McCallister*, 50 Iowa 497; *Vimont v. Chicago, etc., R. Co.*, 64 Iowa 513, 69 Iowa 296; *Hawley v. Chicago, etc., R. Co.*, 71 Iowa 717. See, as to law prior to this statute, *Taylor v. Galland*, 3 Greene (Iowa) 17.

A Right of Action against a Railroad Company for personal injuries is not assignable. *Central R., etc., Co. v. Brunswick, etc., R. Co.*, 87 Ga. 386; *Stone v. Boston, etc., R. Co.*, 7 Gray (Mass.) 539; *Hodgman v. Western R. Corp.*, 7 How. Pr. (N. Y. Supreme Ct.) 492; *Purple v. Hudson River R. Co.*, 4 Duer (N. Y.) 74.

Compare, as to law in Iowa, *Vimont v. Chicago, etc., R. Co.*, 64 Iowa 513, 69 Iowa 296; *Hawley v. Chicago, etc., R. Co.*, 71 Iowa 717.

Exactng Excessive Fares.—A cause of action against a railroad, to recover the statutory penalty for exacting excessive fares, is not assignable, this being a personal right. *Mc-*

Bratney v. Rome, etc., R. Co., 17 Hun (N. Y.) 385, *affirmed* in 87 N. Y. 467.

New York Civil Damage Act.—Where a man, while intoxicated, fell into a canal and was drowned, and an action was brought, under the New York Civil Damage Act, to recover damages from the man who sold the liquor to the deceased, it was held that the guardian of the infant children of the deceased might assign their claim to recover damages to their mother, who might recover in an action under the said act. *Ludwig v. Glaessel*, 34 Hun (N. Y.) 312. See the title **CIVIL DAMAGE ACTS**.

Death by Wrongful Act.—Under New York Laws 1847, c. 450, it was held that a claim for the death of a child by the neglect or unskillfulness of the defendant's clerk, in selling morphine instead of quinine, is assignable. *Quin v. Moore*, 15 N. Y. 432. See the title **DEATH BY WRONGFUL ACT**.

2. Assault and Battery.—*McGlinchy v. Hall*, 58 Me. 152; *Averill v. Longfellow*, 66 Me. 237; *Brooks v. Hanford*, 15 Abb. Pr. (N. Y. Supreme Ct.) 342; *Pulver v. Harris*, 62 Barb. (N. Y.) 500, 52 N. Y. 75.

3. Slander.—*Renfro v. Prior*, 25 Mo. App. 402; *Nash v. Hamilton*, 3 Abb. Pr. (N. Y. Supreme Ct.) 35; *Miller v. Newell*, 20 S. Car. 123, 47 Am. Rep. 833; *Dillard v. Collins*, 25 Gratt. (Va.) 343.

In *Benson v. Flower*, W. Jones 215, it was held that a right of action for slander does not pass to the assignees in bankruptcy.

4. Seduction.—In *People v. Tioga C. Pl.*, 19 Wend. (N. Y.) 73, it was held that a right of action for debauching a stepdaughter was not assignable; and the court refused to protect the assignee against a fraudulent discharge of the action by the assignor, on the ground that a chose in action for a personal tort is not assignable either in law or equity.

A right of action for seduction of a servant does not pass to the master's assignee in bankruptcy. *Howard v. Crowther*, 8 M. & W. 601.

5. Malicious Prosecution.—*Brewer v. Dew*, 11 M. & W. 625; *Lawrence v. Martin*, 22 Cal. 174; *Hunt v. Conrad*, 47 Minn. 557; *Sommer v. Wilt*, 4 S. & R. (Pa.) 19; *Slauson v. Schwabacher Bros. & Co.*, 4 Wash. 783; *Noonan v. Orton*, 34 Wis. 259, 17 Am. Rep. 441.

Compare, as to law in Iowa, *Gray v. McCallister*, 50 Iowa 497.

The right of action for malicious and excessive distress is not assignable. *O'Donnell v. Seybert*, 13 S. & R. (Pa.) 54.

6. Right of Action for Fraud and Deceit Not Assignable—*United States.*—*Tufts v. Matthews*, 10 Fed. Rep. 609.

Michigan.—*Carroll v. Potter*, Walk. (Mich.) 355; *Morris v. Morris*, 5 Mich. 171; *Brush v. Sweet*, 38 Mich. 574; *Dickinson v. Seaver*, 44

estate of the party injured, so that the right of action would survive to his personal representatives, it may be assigned.¹

The Assignment of a Mere Right to File a Bill in Equity for fraud committed on the assignor is void as being against public policy and savoring of maintenance.²

Mich. 624; *Dayton v. Fargo*, 45 Mich. 153; *Lewis v. Rice*, 61 Mich. 97; *Stebbins v. Dean*, 82 Mich. 385; *Smith v. Thompson*, 94 Mich. 381.

New York.—*Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551; *Hyslop v. Randall*, 11 How. Pr. (N. Y. Super. Ct.) 97, 4 Duer (N. Y.) 660. See also *Borst v. Baldwin*, 30 Barb. (N. Y.) 180, 8 Abb. Pr. (N. Y.) 351, 17 How. Pr. (N. Y.) 287; *Pratt v. Wertheimer*, 39 Hun (N. Y.) 463.

Pennsylvania.—*Shoemaker v. Keeley*, 1 Yeates (Pa.) 245.

See also *Wells v. Cook*, 16 Ohio St. 67, 88 Am. Dec. 436. But see, as to the law in *Iowa*, *Clews v. Traer*, 57 Iowa 459.

A cause of action for the fraud and deceit of the defendant by the false reading of the hour of appearance named in a summons served upon the assignor, by means of which a judgment was obtained against him without defense, is not assignable. *Lamphere v. Hall*, 26 How. Pr. (Oneida County Ct.) 509, citing *Ford v. Chandler* (N. Y. 1851, unreported).

The Right of Action against a Notary Public for corruptly and falsely certifying to the execution and acknowledgment of an assignment of an interest in real estate is not assignable. *Ware v. Brown*, 2 Bond (U. S.) 267.

1. Fraud Affecting Estate.—*Johnston v. Bennett*, 5 Abb. Pr. N. S. (N. Y. Super. Ct.) 331; *Haight v. Hayt*, 19 N. Y. 464; *Graves v. Spier*, 58 Barb. (N. Y.) 349; *Jackson v. Daggett*, 24 Hun (N. Y.) 204; *Moore v. McKinstry*, 37 Hun (N. Y.) 194; *Hyde v. Tufts*, 45 N. Y. Super. Ct. 56. See also *Bonnell v. Wheeler*, 1 Hun (N. Y.) 332, affirmed in 68 N. Y. 294; *Pratt v. Wertheimer*, 39 Hun (N. Y.) 463; and *Jones v. Babcock*, 15 Mo. App. 149.

Fraudulent Misrepresentation of Solvency of Third Person.—In *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551, it was held that a cause of action arising from the fraud and deceit of the defendant in misrepresenting the financial condition of a vendee of goods was not assignable, the injury being regarded as purely personal, and not as an injury done to the personal estate of the party injured.

The decision in this case appears to have been made without reference to the *New York* statutes then in force, and its authority has been somewhat shaken by subsequent decisions in which it has been criticised and disapproved. See *Johnston v. Bennett*, 5 Abb. Pr. N. S. (N. Y. Super. Ct.) 331; *Fried v. New York Cent. R. Co.*, 25 How. Pr. (Buffalo Super. Ct.) 285; *Jackson v. Daggett*, 24 Hun (N. Y.) 204. But see *Hyslop v. Randall*, 11 How. Pr. (N. Y. Super. Ct.) 97, 4 Duer (N. Y.) 660, for a similar decision made in the same year (1855).

In a similar case, where the defendant was an active participant in the fraud perpetrated upon the vendor, and profited by the transaction, and connected himself therewith before the sale was consummated, it was held

that the cause of action arising from such deceit was assignable. *Moore v. McKinstry*, 37 Hun (N. Y.) 194, distinguishing *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551.

Money Obtained by Fraudulent Representations.—In an action brought by an assignee to recover back money fraudulently obtained from the assignor by the defendant, by fraudulent representations as to the cost of a certain vessel, the court held that the action was maintainable as for money had and received. *Byxbie v. Wood*, 24 N. Y. 607, affirming *Sheldon v. Wood*, 2 Bosw. (N. Y.) 267, distinguishing *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551.

Fraud in Sale of Real Estate.—The right of action for fraud in the purchase and sale of real estate survives, and is therefore assignable. *Graves v. Spier*, 58 Barb. (N. Y.) 349, following *Haight v. Hayt*, 19 N. Y. 464, and distinguishing *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551.

Fraud in Sale of Goods.—The right of action for fraud in procuring a sale of personal property is assignable. *Clews v. Traer*, 57 Iowa 459; *Johnston v. Bennett*, 5 Abb. Pr. N. S. (N. Y. Super. Ct.) 331, following *Haight v. Hayt*, 19 N. Y. 464, and qualifying *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551.

False Return by Sheriff.—A cause of action against a sheriff for failure to return an execution against property within the time required by law, and for making a false return, is assignable. *Jackson v. Daggett*, 24 Hun (N. Y.) 204.

Fraud by Agent.—Where an agent who purchased a mine for his principal falsely and fraudulently misrepresented to the latter the price paid for the mine, designing thereby to cheat the principal out of a sum of money, it was held that the cause of action for such deceit was assignable, the court basing its decision upon the ground that the action arose out of contract. *Dean v. Chandler*, 44 Mo. App. 338.

A Right of Action to Reform a Contract for fraud or mutual mistake is assignable. *Bentley v. Smith*, 1 Abb. App. Dec. (N. Y.) 126.

Fraud on Bank.—A right of action to recover damages for the fraudulent misapplication or conversion of property by an officer or agent of a banking association is assignable. *Grocers' Nat. Bank v. Clark*, 48 Barb. (N. Y.) 26.

A cause of action against a director of a bank, for loss sustained by the bank on account of the fraudulent sale to it of its own stock by the director, is assignable. *Shultz v. Christman*, 6 Mo. App. 338.

The Equitable Interest of a Defendant in Execution, in land, after a sale under execution, and his right to set the sale aside for irregularity and inadequacy of consideration, are assignable. *Strickland v. Hardwick*, 77 Tex. 195.

2. Bill in Equity for Fraud.—2 Story Eq. Jur., § 1040g.

England.—*DeHoghton v. Money*, L. R. 2 Ch. 164; *Prosser v. Edmonds*, 1 Y. & Coll. 481.

Qualification.—But it seems that this rule, as established by the authorities, applies only to a case where the assignment does not carry anything which has itself a legal existence and value independent of the right to sue for a fraud. It does not apply to a case where such right is merely incidental to a subsisting substantial property which has been assigned, and which is itself intrinsically susceptible of legal enforcement. In such a case the assignee is entitled to maintain an action to set aside a fraudulent conveyance of the property assigned, if his assignor might have done so.¹

Consequential Injury to Estate.—It has been held that a personal tort does not lose its nature as such because it incidentally impairs the estate of the party injured, and hence a cause of action for such torts is not assignable, notwithstanding the consequential injury to property resulting therefrom.²

Assignment after Verdict.—It has been held that a cause of action for torts purely personal cannot be assigned before final judgment, even after verdict.³

California.—*Cross v. Sacramento Sav. Bank*, 66 Cal. 462; *Sanborn v. Doe*, 92 Cal. 152; *Whitney v. Kelley*, 94 Cal. 146.

District of Columbia.—*Bailor v. Daly*, 7 Mackey (D. C.) 175.

Illinois.—*Norton v. Tuttle*, 60 Ill. 130, *distinguishing* *Whitney v. Roberts*, 22 Ill. 381.

Michigan.—*Brush v. Sweet*, 38 Mich. 574. See also *Michigan* cases cited in note 6, p. 1023.

Missouri.—*Smith v. Harris*, 43 Mo. 557; *Jones v. Babcock*, 15 Mo. App. 149, *distinguishing* *Lionberger v. Baker*, 14 Mo. App. 353.

Tennessee.—*Morrison v. Deaderick*, 10 Humph. (Tenn.) 342.

Wisconsin.—*Crocker v. Bellangee*, 6 Wis. 645, 70 Am. Dec. 489; *Milwaukee, etc., R. Co. v. Milwaukee, etc., R. Co.*, 20 Wis. 174, 88 Am. Dec. 740.

The Bare Right to File a Bill in Equity to remodel certain agreements was held not assignable. *Marshall v. Means*, 12 Ga. 61, 56 Am. Dec. 444.

The Right to Set Aside a Decree discharging an insolvent debtor for fraud is not assignable. *Sanborn v. Doe*, 92 Cal. 152.

A Grantee of Land cannot maintain a suit in equity to set aside a judgment fraudulently obtained against his grantor, by which he was adjudged not to be the owner of the land. *Whitney v. Kelley*, 94 Cal. 146.

Want of Authority to Sell.—The right to recover back the purchase money paid for lands on the ground that the vendor had no authority to sell is not assignable at law, and an action for such money cannot be maintained by a subsequent purchaser from the vendee. *Earle v. Bickford*, 6 Allen (Mass.) 549, 83 Am. Dec. 651.

When Assignee may Sue.—The mere right to file a bill in equity to set aside a conveyance for fraud is not assignable, but if the plaintiff's right does not depend upon the assignment alone, but his purchase, interest, and possession were long antecedent thereto, and the taking a deed was only a step to protect the purchase, he may sue to set aside a prior conveyance for fraud. *Smith v. Harris*, 43 Mo. 557.

1. Incidental Right to Sue.—*Emmons v. Barton*, 109 Cal. 662. It has been held that the right of instituting a suit to set aside a conveyance on equitable grounds passes by the

grantor's subsequent conveyance of the same property, so that the grantee, under the subsequent conveyance, may maintain the suit, the right to sue being regarded as a right incidental to the property conveyed. *Dickinson v. Burrell*, L. R. 1 Eq. 337, *distinguishing* *Prosser v. Edmonds*, 1 Y. & Coll. 481, *followed in* *McMahon v. Allen*, 35 N. Y. 403, 32 How. Pr. (N. Y.) 313, *reversing* 34 Barb. (N. Y.) 56. See also *Graham v. La Crosse, etc., R. Co.*, 102 U. S. 148.

The Assignment of a Judgment enables the assignee to maintain a suit in equity against the judgment debtor to set aside a prior conveyance of property in fraud of his creditors. *Lionberger v. Baker*, 14 Mo. App. 353.

Bill to Remove Cloud from Title.—In *Whitney v. Roberts*, 22 Ill. 381, where the grantor, from whom a deed of land had been procured by fraud, made a subsequent conveyance of the land to another, the subsequent grantee was allowed to maintain a bill in his own name to set aside the prior deed which had been fraudulently obtained by the first grantee, the owner of the land being here permitted to bring bill in his own name to remove the cloud on the title.

2. Consequential Injury to Estate.—*Lamphere v. Hall*, 26 How. Pr. (Oneida County Ct.) 509; *Noonan v. Orton*, 34 Wis. 259, 17 Am. Rep. 441; *Murray v. Buell*, 76 Wis. 657, 20 Am. St. Rep. 92. See also *Drake v. Beckham*, 11 M. & W. 315; *Brewer v. Dew*, 11 M. & W. 625; *Rogers v. Spence*, 13 M. & W. 571.

If, upon legal rules, injury to the person is the gist of the action, and injury to property, or to pecuniary interests, is merely matter of aggravation, the right of action dies with the person. *Fried v. New York Cent. R. Co.*, 25 How. Pr. (Buffalo Super. Ct.) 285.

A Cause of Action Arising out of a Conspiracy to monopolize the coal business of a city, and to drive a dealer out of business, is not assignable, either at common law or under *Wisconsin* Rev. Stat., § 4253, as amended by c. 280, Laws of 1887. *Murray v. Buell*, 76 Wis. 657, 20 Am. St. Rep. 92.

3. No Assignment before Judgment.—*Lawrence v. Martin*, 22 Cal. 173; *McGlinchy v. Hall*, 58 Me. 152; *Stone v. Boston, etc., R. Co.*, 7 Gray (Mass.) 539; *Rice v. Stone, r Allen* (Mass.) 566; *Linton v. Hurley*, 104 Mass.

It is held under the present statutes of *New York*, however, that a verdict is assignable, though recovered in an action for a tort to the person;¹ and such assignments have been held effectual to defeat a set-off by the defendant of a judgment against the plaintiff.²

In *Georgia* a verdict for damages in an action for a personal tort is not assignable.³

2. Particular Interests, Rights, and Contracts Considered—*a. FUTURE AND CONTINGENT INTERESTS—*(1) *Generally.*—An assignment which professes to transfer property not in existence, or not in the actual or potential possession of the assignor at the time of the assignment, is void at law; a mere possibility is not assignable.⁴

Operation of Assignment in Equity.—So in equity such an assignment cannot operate as an immediate transfer of property, for the same reason. But where one agrees to sell or mortgage property, real or personal, of which he is not possessed at the time, and receives a sufficient consideration for the contract, and afterwards becomes possessed of property answering the description in the contract, a court of equity will compel him to perform the contract, provided it is of a class of which a court of equity will decree the specific performance; and such contract will in equity transfer the beneficial

353; *Hunt v. Conrad*, 47 Minn. 557. See also *Benson v. Flower*, W. Jones 215; *Jordan v. Gillen*, 44 N. H. 424.

The character of a chose in action is not changed by verdict, so that it may become a debt and assignable before judgment thereon. *Lawrence v. Martin*, 22 Cal. 173; *Miller v. Newell*, 20 S. Car. 123, 47 Am. Rep. 833. See also *In re Charles*, 14 East 198; *Thayer v. Southwick*, 8 Gray (Mass.) 229; *Crouch v. Gridley*, 6 Hill (N. Y.) 250.

1. Verdict Assignable—*New York.*—*Zogbaum v. Parker*, 66 Barb. (N. Y.) 341, affirmed in 55 N. Y. 120, overruling *Brooks v. Hanford*, 15 Abb. Pr. (N. Y. Supreme Ct.) 342. See also *Miller v. Franklin*, 20 Wend. (N. Y.) 630.

A verdict recovered in an action for assault and battery may be assigned. See *Countryman v. Boyer*, 3 How. Pr. (N. Y. Supreme Ct.) 386.

2. Assignment of Verdict Defeats Set-off—*New York.*—Where the plaintiff in an action for a personal tort, after verdict but before judgment, assigned the verdict, "and the judgment to be entered thereon," for a valuable consideration, the defendant having notice of the assignment, it was held that such assignment operated as a covenant that the judgment should be entered in the name of the assignor for the benefit of the assignee, and became operative as an equitable assignment of the judgment when perfected, and that the defendant could not set off against this judgment a judgment subsequently recovered by him against the plaintiff. *Nash v. Hamilton*, 3 Abb. Pr. (N. Y. Supreme Ct.) 35; *Mackey v. Mackey*, 43 Barb. (N. Y.) 58, overruling *Brooks v. Hanford*, 15 Abb. Pr. (N. Y. Supreme Ct.) 342.

For a similar decision in *Oregon*, see *Ladd v. Ferguson*, 9 Oregon 180.

3. *Gamble v. Central, R., etc., Co.*, 80 Ga. 595, 12 Am. St. Rep. 276.

4. Assignment of Mere Possibilities at Law—*England.*—*Robinson v. Macdonnell*, 5 M. & S. 228. See also *Jones v. Roe*, 3 T. R. 88.

United States.—*Mitchell v. Winslow*, 2 Story (U. S.) 630.

Alabama.—*Skipper v. Stokes*, 42 Ala. 255, 94 Am. Dec. 646.

California.—*Hassie v. God Is With Us Congregation*, 35 Cal. 378.

Kentucky.—*Wheeler v. Wheeler*, 2 Metc. (Ky.) 474; *Alves v. Schlesinger*, 81 Ky. 290.

Maine.—*Johnson v. Shields*, 32 Me. 424. See also *Morrill v. Noyes*, 56 Me. 458, 96 Am. Dec. 486; *Griffith v. Douglass*, 73 Me. 532, 40 Am. Rep. 395.

Massachusetts.—*Low v. Pew*, 108 Mass. 347, 11 Am. Rep. 357. See also *Jones v. Richardson*, 10 Met. (Mass.) 482.

Michigan.—*Ely v. State Land Office Com'r*, 49 Mich. 17.

New Jersey.—*Looker v. Peckwell*, 38 N. J. L. 253. See also *Smithurst v. Edmunds*, 14 N. J. Eq. 408.

New York.—*Jackson v. Waldron*, 13 Wend. (N. Y.) 178; *Stover v. Eycleshimer*, 46 Barb. (N. Y.) 84, affirmed in 3 Keyes (N. Y.) 620, 4 Abb. App. Dec. (N. Y.) 309; *Nerjes v. Roe* (C. Pl.), 36 N. Y. Supp. 469. See also *Jackson v. Wright*, 14 Johns. (N. Y.) 193; *Deeley v. Dwight*, 132 N. Y. 59.

Pennsylvania.—*Kuhns' Estate*, 163 Pa. St. 438.

Rhode Island.—*D'Wolf v. Gardiner*, 9 R. I. 145.

Vermont.—*Brainard v. Burton*, 5 Vt. 97. See also *Hamilton v. Rogers*, 8 Md. 301.

To Prevent Maintenance and the multiplying of contentions and suits, it was an established maxim of the common law that no possibility, right, title, or any other thing that was not in possession or vested in right could be granted or assigned to strangers. *Miller v. Emans*, 19 N. Y. 384. See the title CHAMPERTY AND MAINTENANCE.

Ratification by Assignor.—A grant of goods not in existence, or which do not belong to the grantor at the time of executing the deed, is void unless the grantor ratifies the grant after he has acquired the property in the goods. *Lunn v. Thornton*, 1 C.B. 379, 50 E. C. L. 379.

interest to the assignee immediately on the acquisition of the property; and the assignor holds such property in trust for the assignee.¹

Future Profits.—As illustrating this principle, money to become due upon the performance of an existing contract,² the future freight earnings and profits of

1. Assignment of Mere Possibilities, Contingencies, etc., in Equity—England.—Theobalds v. Duffoy, 9 Mod. 102; Holroyd v. Marshall, 10 H. L. Cas. 191; Ryall v. Rowles, 1 Ves. 348, 2 White & Tudor L. Cas. 800. See also Grey v. Kentish, 1 Atk. 280; Jewson v. Moulson, 2 Atk. 417; Chauncy v. Graydon, 2 Atk. 616.

United States.—Mitchell v. Winslow, 2 Story (U. S.) 630; Hinkle v. Wanzer, 17 How. (U. S.) 353.

California.—Pierce v. Robinson, 13 Cal. 116; Bibend v. Liverpool, etc., F. etc., Ins. Co., 30 Cal. 79.

Illinois.—Ridgeway v. Underwood, 67 Ill. 419.

Maine.—Johnson v. Shields, 32 Me. 424 (per Shepley, C. J.).

Missouri.—Page v. Gardner, 20 Mo. 507.

New Jersey.—Hannon v. Christopher, 34 N. J. Eq. 459.

New York.—Field v. New York, 6 N. Y. 179, 57 Am. Dec. 435; Williams v. Ingersoll, 89 N. Y. 508; Stover v. Eycleshimer, 3 Keyes (N. Y.) 620; Ely v. Cook, 9 Abb. Pr. (N. Y. C. Pl.) 366; Seymour v. Canandaigua, etc., R. Co., 25 Barb. (N. Y.) 284.

Pennsylvania.—East Lewisburg Lumber, etc., Co. v. Marsh, 91 Pa. St. 96; Patterson v. Caldwell, 124 Pa. St. 455, 10 Am. St. Rep. 598.

Texas.—Nimmo v. Davis, 7 Tex. 26; Graham v. Henry, 17 Tex. 164.

Virginia.—Brooks v. Hatch, 6 Leigh (Va.) 534.

West Virginia.—Wellsburg First Nat. Bank v. Kimberlands, 16 W. Va. 555.

See also Smithurst v. Edmunds, 14 N. J. Eq. 408; and cases cited *infra* under the subdivision *Future and Contingent Interests*.

Agreements must Be Fair, and Not Opposed to Public Policy.—Of course the statements of the text must be taken subject to the qualification that the agreements must be fairly entered into and not in contravention of public policy. Field v. New York, 6 N. Y. 179, 57 Am. Dec. 435; Stover v. Eycleshimer, 3 Keyes (N. Y.) 620; Kuhns's Estate, 163 Pa. St. 438; Caulfield v. Van Brunt, 173 Pa. St. 428.

A Contingent Interest may be Released in Equity.—Ives v. Medcalfe, 1 Atk. 63.

Operative as Executory Agreement.—In equity it is well settled that a deed which purports to convey property which is in expectancy or to be subsequently acquired, or which is not of a nature to be grantable at law, though inoperative as a grant or conveyance, will be upheld as an executory agreement, and enforced according to its intent, if supported by valid considerations whenever the grantor is in a condition to give it effect. Bailey v. Hoppin, 12 R. I. 560; Wilcox v. Daniels, 15 R. I. 261.

All Contingent and Executory Interests Are Assignable in Equity, and will be enforced, if made for a valuable consideration; and it is settled that all contingent estates of inheritance, as well

as springing and executory uses, and possibilities, coupled with an interest, where the person to take is certain, are transmissible by descent, and devisable and assignable. 4 Kent's Com. 262.

It is settled that in equity there can be a valid assignment of funds or property to be subsequently acquired, even in cases where the acquisition depends upon contingencies and possibilities only (*per* Langdale, J.). Rodick v. Gandell, 12 Beav. 325. See also Alexander v. Wellington, 2 Russ. & M. 35; Bennett v. Cooper, 9 Beav. 252; Field v. New York, 6 N. Y. 179, 57 Am. Dec. 435.

An assignment for a valuable consideration of demands, having at the time no actual existence, but which rest in expectancy only, is valid in equity as an agreement, and takes effect as an assignment, when the demands intended to be assigned are subsequently brought into existence. East Lewisburg Lumber, etc., Co. v. Marsh, 91 Pa. St. 96; Ruple v. Bindley, 91 Pa. St. 296.

Where it appears on the face of a deed that the grantor intended to convey any future interest which he might acquire, equity will enforce the deed as an executory agreement to convey the subsequently-acquired interest. Hannon v. Christopher, 34 N. J. Eq. 459.

Much of the Apparent Conflict in the Cases on this subject arises from a failure to distinguish between an attempt to convey or assign a present interest, and merely a contract, which, in express terms or by fair construction, is to take effect upon the happening of the event upon which the estate or interest is to vest in the party seeking to transfer the same. In the one case no interest is transferred, because the contemplated subject of the transfer does not exist, and therefore cannot pass. In the other, the matter is executory, to take effect when the right or interest vests in the party contracting to transfer the same. *Per* Ingalls, J., in Stover v. Eycleshimer, 46 Barb. (N. Y.) 84.

New York.—By the provisions of the Revised Statutes a mere possibility, coupled with an interest, is capable of being assigned at law as well as in equity. Lawrence v. Bayard, 7 Paige (N. Y.) 70; Pond v. Bergh, 10 Paige (N. Y.) 140; Freeborn v. Wagner, 49 Barb. (N. Y.) 43.

2. Money to Become Due upon the performance of an existing contract is assignable in equity. Lett v. Morris, 4 Sim. 607; Buntin v. Georgan, 19 Grant's Ch. (U. C.) 167; Payne v. Mobile, 4 Ala. 333, 37 Am. Dec. 744; Greene v. Bartholomew, 34 Ind. 235; Crocker v. Whitney, 10 Mass. 319; Cutts v. Perkins, 12 Mass. 206; St. Johns v. Charles, 105 Mass. 262; Leahy v. Dugdale, 27 Mo. 437; Perkins v. Butler County, 44 Neb. 110; Risley v. Smith, 64 N. Y. 578; Sharp v. Edgar, 3 Sandf. (N. Y.) 379; York v. Conde, 147 N. Y. 486. See also Smith v. Hubbard, 85 Tenn. 306.

Whatever may have been the law formerly, and however such a transaction may be regarded now in a court of law, it is settled that

a ship,¹ and various other interests to accrue in future with regard to chattels,² may be assigned in equity.

in equity an assignment of moneys not yet due or earned, but which are expected to be earned in the future under an existing contract, is binding and will be enforced. *Perkins v. Butler County*, 44 Neb. 110.

Money due from an employer to a third party for board and lodgings of his workmen is "earnings" within the meaning of the *Massachusetts* statute of 1865, c. 43, § 2, declaring that an assignment of future earnings is invalid against a trustee process unless recorded. *Jenks v. Dyer*, 102 Mass. 235.

A Contractor may Assign the Beneficial Interest in a contract for work and labor so as to entitle the assignee to recover the contract price in an action in his own name upon the fulfillment of the contract by the assignor. *Bates v. Richards Lumber Co.*, 56 Minn. 14.

Where a contractor engaged in the performance of certain work, after having performed some of it assigned it and the money and debts already due, and all the benefit and advantage to which he was entitled or which might arise out of the contract, to another, it was held that the assignment was valid. *Leahy v. Dugdale*, 27 Mo. 437.

The assignment of claims to accrue in future against a city for work to be done and materials to be furnished, although not founded upon any obligation binding the city to furnish the assignor with work or to purchase material from him, was held valid in equity. *Field v. New York*, 6 N. Y. 179, 57 Am. Dec. 435. See also *Peirce v. Devlin* (Supreme Ct.), 22 N. Y. Supp. 208.

Ratification.—The assignment of a mere expectation of earning money, if there be no contract on which to found the expectation, is of no effect, but may be made valid by ratification after the money has been earned. *Farnsworth v. Jackson*, 32 Me. 419.

Money to Become Due on the Performance of a Nonassignable Contract may be assigned. *Norton v. Whitehead*, 84 Cal. 263, 18 Am. St. Rep. 172. See also this title, *Executory Contracts Involving Personal Trust or Liability*.

1. Earnings of a Ship.—*In re The Ship Warre*, 8 Price 269, note; *Curtis v. Auber*, 1 Jac. & W. 506; *Douglas v. Russell*, 4 Sim. 524, 1 Myl. & K. 488; *Lindsay v. Gibbs*, 22 Beav. 522. See also *Leslie v. Guthrie*, 1 Bing. N. Cas. 697, 27 E. C. L. 550. But see *Robinson v. Macdonnell*, 5 M. & S. 228.

The assignment of the head matter and whale oil to be caught in a voyage in progress at the time of the assignment is valid in equity. *Langton v. Horton*, 6 Jur. 910, 1 Hare 549, 11 L. J. N. S. Ch. 299.

The Lay or Share in the Profits of a Voyage, which a seaman in a whaling ship receives in lieu of wages, may be assigned before the commencement of the voyage. *Gardner v. Hoeg*, 18 Pick. (Mass.) 168; *Tripp v. Brownell*, 12 Cush. (Mass.) 376. See also *Parkhurst v. Dickerson*, 21 Pick. (Mass.) 307; *Osborne v. Jordan*, 3 Gray (Mass.) 277. It seems that

the assignment in these cases was treated not as an assignment of any part of the oil, but rather as an assignment by the seaman of the debt which, under the shipping articles, would become due from the owners at the end of the voyage. See *Low v. Pew*, 108 Mass. 347, 11 Am. Rep. 357.

The Future Earnings of a Railroad Company, being potentially evident, may be assigned at law. *Bittenbender v. Sunbury, etc., R. Co.*, 40 Pa. St. 275.

Assignment of Future Revenues by Canal Company.—An assignment by a canal company of its future tolls and revenues, for the purpose of securing necessary improvements and repairs of the canal, will be recognized and protected in equity when made in good faith for the benefit of public improvements. *Sedam v. Cincinnati, etc., Canal Co.*, 2 Disney (Ohio) 309.

2. Future Interests Held Assignable.—This list comprises cases decided at law, as well as those in equity. When the decision is made on equitable grounds it is so stated.

A judgment to be recovered in a pending action in *Iowa*. *Weire v. Davenport*, 11 Iowa 49, 77 Am. Dec. 132. But see in *Georgia* *Gamble v. Central R., etc., Co.*, 80 Ga. 595, 12 Am. St. Rep. 276. Machinery to be at a future time added to or substituted for existing machinery, in equity. *Holroyd v. Marshall*, 10 H. L. Cas. 191, 6 Jur. N. S. 931. See also *Hope v. Hayley*, 5 El. & Bl. 830, 85 E. C. L. 830. Manure to be made in future by the assignor's cattle. *Farrar v. Smith*, 64 Me. 74. The proceeds of future sales, in equity. *East Lewisburg Lumber, etc., Co. v. Marsh*, 91 Pa. St. 96.

The future offspring of a mare may be assigned during gestation, and will vest in the assignee when parturition takes place. *McCarty v. Blevins*, 5 Yerg. (Tenn.) 195. See also *Sawyer v. Gerrish*, 70 Me. 254.

The possessory right of a widow in the mansion house before dower is assigned. *Jones v. Manly*, 58 Mo. 559.

A share or interest in the prize money of a captured ship before condemnation. *Morrough v. Comyns*, 1 Wils. 211.

In *Williamson v. Colcord*, 13 Nat. Bank. Reg. 319, it was held that the mere expectancy and possibility of indemnity for the destruction of a vessel by a Confederate cruiser was subject to donation, even before the Geneva award.

The interest of a vendee in growing trees to be chosen by him is assignable before the election is made. *McCoy v. Herbert*, 9 Leigh (Va.) 548, 33 Am. Dec. 256.

A Debt to Fall Due in Future for services to be afterwards rendered may be assigned before the services are rendered, and such transfer, if *bona fide*, will defeat an attachment subsequently sued out against the assignor. *Payne v. Mobile*, 4 Ala. 333, 37 Am. Dec. 744.

A debt not yet due cannot be assigned in law, but in equity only. *Hassie v. God Is With Us Congregation*, 35 Cal. 378.

Expectancies.—An expectant heir may, in the lifetime of his ancestor, sell, assign, or release his expectant interest in the estate of the latter, whatever it may turn out to be upon his death, and a court of equity will enforce the contract if made in good faith and for a valuable consideration; ¹ but such

Money to become due to a newspaper at a specified date is assignable. *Page v. Gardner*, 20 Mo. 507.

The interest due and to become due by an insurance company to a subscriber to its guaranty fund. *Sumrall v. Sun Mut. Ins. Co.*, 40 Mo. 27.

The assignment of an account not yet due was held to be an assignment valid in equity which a court of law would protect. *Patton v. Coen, etc., Carriage Mfg. Co.*, 3 Colo. 265.

Lease to Commence in Future.—Where a lessee having a lease of real estate for five years, during the first year assigned all his interest under it for the last four years, it was held that such assignment, to commence at a future time, was valid. *Williams v. Downing*, 18 Pa. St. 60.

Future Crops.—A tenant may assign his interest in crops to be grown in future years of his term. *Petch v. Tutin*, 15 M. & W. 110.

A party who has an interest in land may grant all fruits that may arise upon it thereafter, and the property shall pass as soon as the fruits are extant; and a parson may grant all the tithed wool he may have in such a year, yet perhaps he shall have none. But a man cannot grant all the wool that shall grow upon his sheep that he may buy thereafter, for there he has it neither actually nor potentially. *Per Lord Hobart, in Grantham v. Hawley*, Hob. 132. See also *LaRue v. Groezinger*, 84 Cal. 281, 18 Am. St. Rep. 179; *Shultz v. Johnson*, 5 B. Mon. (Ky.) 497; *Freeman v. Underwood*, 66 Me. 229; *Sears v. Conover*, 3 Keyes (N. Y.) 113, 4 Abb. App. Dec. (N. Y.) 179. But see, as to the assignment of future crops in *Vermont*, *Brainard v. Burton*, 5 Vt. 97; *Batchelder v. Jenness*, 59 Vt. 104, *distinguishing* *Smith v. Atkins*, 18 Vt. 461.

In *Shaw v. Gilmore*, 81 Me. 396, it was held, under the rules of the common law, that a grant of the yearly crop of hay to be grown for an indefinite period of time, upon the land of the assignor, of which he retained possession, was inoperative against a subsequent purchaser from the assignor of a year's crop after it has been harvested.

Share of Unharvested Crop.—One who cultivates the land of another for a share of the crop cannot at law assign his share to a third person before the crop is gathered and divided. *McNeeley v. Hart*, 10 Ired. (N. Car.) 63, 51 Am. Dec. 377, *following* *State v. Jones*, 2 Dev. & B. (N. Car.) 544. See generally the titles CROPS and MORTGAGES.

A Chance in an Authorized Land Lottery may be assigned in equity, where there is no statutory prohibition. *Dugas v. Lawrence*, 19 Ga. 557.

Future Interests Held Not Assignable.—Alimony not yet due is not assignable. *Kempster v. Evans*, 81 Wis. 247. See also *Hackley v. Muskegon Circuit Judge*, 58 Mich. 454; *Jordan v. Westerman*, 62 Mich. 170.

A mere possibility, coupled with no inter-

est, is not assignable. Thus a sale of fish hereafter to be caught in the sea is void, and does not pass title to the fish when caught. *Low v. Pew*, 108 Mass. 347, 11 Am. Rep. 357.

The assignment of accounts to be made in the practice of medicine in future does not convey to the assignee such title or interest in the accounts, when created, as will enable him to maintain an action therefor in his own name. *Skipper v. Stokes*, 42 Ala. 255, 94 Am. Dec. 646, *following* *Purcell v. Mather*, 35 Ala. 570.

The proceeds of a fair about to be held by an agricultural society, on their grounds, not being potentially existent, are not assignable. *Huling v. Cabell*, 9 W. Va. 522, 27 Am. Rep. 562.

A widow's release of her right of dower, before it has been assigned to her, except to a party in possession or in privity of the estate, is inoperative. *Johnson v. Shields*, 32 Me. 424; *Field v. Lang*, 87 Me. 441.

1. Expectancies — *England*. — *Hinde v. Blake*, 3 Beav. 234; *Bennett v. Cooper*, 9 Beav. 252. See also *Ives v. Medcalfe*, 1 Atk. 63; *Morris v. Burroughs*, 1 Atk. 399; *Dursley v. Fitzhardinge*, 6 Ves. Jr. 251; *Carleton v. Leighton*, 3 Meriv. 667; *Lyde v. Mynn*, 4 Sim. 505, 1 Myl. & K. 683; *Thomas v. Freeman*, 2 Vern. 563. But see *In re Duggan's Trusts*, L. R. 8 Eq. 697.

Massachusetts. — *Trull v. Eastman*, 3 Met. (Mass.) 121, 37 Am. Dec. 126. See also *Quarles v. Quarles*, 4 Mass. 684; *Kenney v. Tucker*, 8 Mass. 143. *Compare*, as to rule at law, *Davis v. Hayden*, 9 Mass. 514.

New Jersey. — *Bacon v. Bonham*, 33 N. J. Eq. 614.

New York. — *Kinyon v. Kinyon*, 72 Hun (N. Y.) 452; *Stover v. Eycleshimer*, 46 Barb. (N. Y.) 84, *affirmed* in 3 Keyes (N. Y.) 620, 4 Abb. App. Dec. (N. Y.) 309.

North Carolina. — *McDonald v. McDonald*, 5 Jones Eq. (N. Car.) 211, 75 Am. Dec. 434.

Pennsylvania. — *M'Clure v. M'Clure*, 1 Phila. (Pa.) 117; *Power's Appeal*, 63 Pa. St. 443; *Fritz's Estate*, 160 Pa. St. 156; *Kuhns's Estate*, 163 Pa. St. 438.

Tennessee. — *Fitzgerald v. Vestal*, 4 Sneed (Tenn.) 258; *Steele v. Frierson*, 85 Tenn. 430.

Virginia. — *Lewis v. Madisons*, 1 Munf. (Va.) 303.

See also *Gore v. Howard*, 94 Tenn. 577; and the titles ADVANCEMENTS; CATCHING BARGAINS; and ESTATES.

A deed assigning every interest of the assignor in the estate of his father "due or to become due" to him as one of the heirs, was held to pass an interest of the assignor in a claim against the State of Virginia for his father's services in the Revolutionary War, although such interest was not known to be in existence at the time of the assignment. *Meriweather v. Herran*, 8 B. Mon. (Ky.) 162.

A Release by an Heir Apparent of his estate of expectancy with a covenant of a non-claim is, if made fairly and with the consent

assignment, if made fraudulently and without sufficient consideration, is void.¹

of the ancestor, a bar to the releasor's claim thereto by descent or devise after the death of his ancestor. *Trull v. Eastman*, 3 Met. (Mass.) 121, 37 Am. Dec. 126; *Curtis v. Curtis*, 40 Me. 24, 63 Am. Dec. 651.

A Covenant by an Heir Apparent to convey any estate, which shall come to him by descent or otherwise, is valid if made with the consent of the ancestor and for a sufficient consideration and without any advantage being taken of the covenantor. *Fitch v. Fitch*, 8 Pick. (Mass.) 480.

A Bond by an Heir Apparent that he will devise an estate which may come to him by descent is valid if entered into fairly, on an adequate consideration, with the assent of the ancestor, and if the bargain is not unconscionable, or obtained by oppression, or by taking unjust advantage of the necessities of the heir. *Jenkins v. Stetson*, 9 Allen (Mass.) 128.

An Agreement in Marriage Articles to convey to the husband a part of what shall come to the wife's father, on the death of his father, is good and enforceable in equity. *Hobson v. Trevor*, 2 P. Wms. 191.

An Agreement between Two Sons to Divide Equally whatever property they may receive from their father in his lifetime, or become entitled to under his will, or by descent or otherwise from him, is not contrary to public policy, but will be enforced in equity. *Wethered v. Wethered*, 2 Sim. 183. To the same effect, see *Harwood v. Tooke*, 2 Sim. 192.

So an agreement between two husbands to divide equally whatever legacies should come to them by the will of a certain person, whose presumptive coheirs they had married, was sustained in equity. *Beckley v. Newland*, 2 P. Wms. 182.

An Antenuptial Contract, by which a married woman agrees to relinquish any distributive share of her husband's estate, will be enforced in equity if reasonable, entered into understandingly, supported by a good consideration, and made without fraud or misrepresentations on the part of the husband. *Sullings v. Richmond*, 5 Allen (Mass.) 187; *Tarbell v. Tarbell*, 10 Allen (Mass.) 278.

Where a husband and wife joined in executing a release to the wife's father of all her expectancy or hope of inheritance of his estate, it was held that such a release was a nullity, on the ground that there was no mutuality of contract, since the parties did not stand upon an equal footing. *Needles v. Needles*, 7 Ohio St. 432, 70 Am. Dec. 85.

A Legatee, before Administration, has an inchoate title derived from the will, which may be assigned or disposed of by will. *Cecil v. Rose*, 17 Md. 92.

Mere Possibility of Inheritance.—An assignment by a son, of his expectancy in land owned by his father, which would descend to him if he survived his father and the latter should die intestate owning the same, is an assignment of a mere naked possibility, not coupled with an interest, and passes no estate in the

land, and cannot operate to defeat the assignor's title, afterwards acquired by descent, except by way of estoppel. *Hart v. Gregg*, 32 Ohio St. 502.

Fraud on Ancestor.—In *Boynton v. Hubbard*, 7 Mass. 112, it was held that a contract made by an heir apparent, without the knowledge of his ancestor, to convey, on the death of the latter, a certain undivided part of what would come to the heir by the same distribution or devise, was a fraud upon the ancestor productive of public mischief, and void as well at law as in equity.

Assent of Ancestor—Kentucky.—In Kentucky an assignment by an heir expectant, of his share in his ancestor's estate, made with the assent of the latter, who also binds himself in writing to make no other disposition of the specified share than that stipulated for in the writing of assignment, is valid. *Lee v. Lee*, 2 Duv. (Ky.) 134; *McBee v. Myers*, 4 Bush (Ky.) 356.

But a mere verbal assent to such assignment, whereby the ancestor parts with no right of disposing of the whole of his estate as he pleases, is not sufficient. *Wheeler v. Wheeler*, 2 Metc. (Ky.) 474; *Alves v. Schlesinger*, 81 Ky. 290.

Assignment to Ancestor.—The fact that the assignment is made to the ancestor himself, and not to any person capable of taking after his death, is not conclusive against the effect of the instrument. *Kinyon v. Kinyon*, 72 Hun (N. Y.) 452. See also *Power's Appeal*, 63 Pa. St. 443; *Gore v. Howard*, 94 Tenn. 577.

A Claim to a Legacy is essentially an equitable and not a legal claim, and is an assignable interest, and the assignment passes the whole right of the assignor. *King v. Berry*, 3 N. J. Eq. 44; *Kennedy v. Parke*, 17 N. J. Eq. 415. See *Parmelee v. Cameron*, 41 N. Y. 392.

1. Voluntary Assignment Void.—*Read v. Mosby*, 87 Tenn. 759. And see cases in note immediately preceding.

Where a testator bequeathed a sum of money to trustees in trust for his daughter for life, and in case of her death without issue to her next of kin, exclusive of her husband; and her mother, as presumptive next of kin, during the lifetime of the daughter executed a voluntary deed assigning her expectant interest in reversion to the husband; it was held on the death of the daughter without issue that the assignment operated only as an agreement to assign, and consequently, being voluntary, would not be enforced in equity. *Meek v. Kettlewell*, 1 Phil. 342.

Full Consideration Not Essential.—The assignment of a legacy payable five years after the testator's death, made after the death of the testator but before five years have elapsed, where there is no fraud or undue influence, will not be set aside because not made for full consideration, and because the legatee is reckless, improvident, dissipated, and weak-minded. *Parmelee v. Cameron*, 41 N. Y. 393.

Interest under a Will.—Similarly, a court of equity will uphold assignments of interests under a will, as of contingent bequests and legacies, to take effect upon the happening of some future event, as the beneficiaries coming of age, or the death of some other person.¹

(2) *Unearned Wages or Salary*—(a) **Where there Is Subsisting Contract of Employment.**—An assignment of wages or salary to be earned under an existing employment, made in good faith and for a valuable consideration, is valid.² It

1. Contingent Bequests and Legacies—England.—*Wright v. Wright*, 1 Ves. 409; *Kimp-land v. Courtney*, 2 Freem. 250; *Higden v. Williamson*, 3 P. Wms. 132. See also *Wind v. Jekyl*, 1 P. Wms. 572; *Musprat v. Gordon*, 1 Anstr. 34; *Theobalds v. Duffoy*, 9 Mod. 102.

Kentucky.—*Grayson v. Tyler*, 80 Ky. 358.

Maryland.—*Buck v. Lantz*, 49 Md. 439.

Massachusetts.—*Blanchard v. Blanchard*, 1 Allen (Mass.) 223; *Nash v. Nash*, 12 Allen (Mass.) 345; *Fay v. Sylvester*, 2 Gray (Mass.) 171; *Gardner v. Hooper*, 3 Gray (Mass.) 398; *Pierce v. Lee*, 9 Gray (Mass.) 42; *Winslow v. Goodwin*, 7 Met. (Mass.) 363; *Dunn v. Sargent*, 101 Mass. 336; *Minot v. Tappan*, 122 Mass. 335; *Belcher v. Burnett*, 126 Mass. 230; *Putnam v. Story*, 132 Mass. 205; *Wainwright v. Sawyer*, 150 Mass. 168; *Butterfield v. Reed*, 160 Mass. 361. See also *Daniels v. Eldredge*, 125 Mass. 356; *Sparhawk v. Cloon*, 125 Mass. 263; *Dodd v. Winship*, 144 Mass. 461.

New Jersey.—*Hannon v. Christopher*, 34 N. J. Eq. 459.

New York.—*Miller v. Emans*, 19 N. Y. 384; *Ham v. Van Orden*, 84 N. Y. 257; *Griffin v. Shepard*, 124 N. Y. 70; *Varick v. Edwards*, Hoffm. Ch. (N. Y.) 382, 11 Paige (N. Y.) 289; *Wilson v. Wilson*, 20 How. Pr. (N. Y. Supreme Ct.) 41; *Lawrence v. Bayard*, 7 Paige (N. Y.) 70; *Van Ness v. Day*, 7 Alb. L. J. 172. See also *Moore v. Littell*, 41 N. Y. 66.

North Carolina.—*Dozier v. Muse*, 2 Hawks. (N. Car.) 482; *Bodenhamer v. Welch*, 89 N. Car. 78; *Watson v. Smith*, 110 N. Car. 6.

Rhode Island.—*Bailey v. Hoppin*, 12 R. I. 560; *Wilcox v. Daniels*, 15 R. I. 261; *Spencer v. Greene*, 17 R. I. 727.

Texas.—*Nimmo v. Davis*, 7 Tex. 26.

See also 1 Fearn on Remainders 549-552. But see *Krumbaar v. Burt*, 2 Wash. (U. S.) 406. See the title ESTATES.

Where a testator devised his real estate to his children to be divided equally among them, and, if any of them should die without lawful issue, their proportions to be equally divided among the survivors, and several of the children released to the others all their right in the estate, it was held that the contingent remainders, as well as the vested interests, passed by the deeds of release. *Miller v. Emans*, 19 N. Y. 384, *overruling Pelletreau v. Jackson*, 11 Wend. (N. Y.) 110, and *Jackson v. Waldron*, 13 Wend. (N. Y.) 178, and *Edwards v. Varick*, 5 Den. (N. Y.) 664 (*reversing* 11 Paige (N. Y.) 289, Hoffm. Ch. (N. Y.) 382), as to the assignability of such interests; and *followed* in *Wilson v. Wilson*, 20 How. Pr. (N. Y. Supreme Ct.) 41.

A similar decision was made in *Jeffers v. Lampson*, 10 Ohio St. 101. See also *D'Wolf v. Gardiner*, 9 R. I. 145.

But in *Illinois*, where an assignment was

made of an interest under a similar will, it was held, under the facts, that the assignment was not to be construed by the court as passing a larger interest than the parties at the time intended, and therefore the assignee acquired title to the assignor's proportionate share of the estate, but not to any interest subsequently acquired by him by the right of survivorship. *Ridgeway v. Underwood*, 67 Ill. 419.

Under the New York Statute (Rev. Stat., § 35, c. 1, tit. 2, pt. 2) providing that "expectant estates are descendable, devisable, and alienable in the same manner as estates in possession," it was held, where a testator devised a portion of his estate to his son in fee, provided he should either survive his wife, or have a lawful child who should live to the age of twenty-one, that the son had a future expectant estate which was alienable. *Griffin v. Shepard*, 124 N. Y. 70. For similar decisions under this statute, see *Ham v. Van Orden*, 84 N. Y. 257; *Sheridan v. House*, 4 Abb. App. Dec. (N. Y.) 218. See also *Crooke v. Kings County*, 97 N. Y. 421; *Freeborn v. Wagner*, 49 Barb. (N. Y.) 43, *affirmed* in 2 Abb. App. Dec. (N. Y.) 175, 4 Keyes (N. Y.) 27.

A Contingent Remainder in New Jersey cannot be conveyed, except by way of estoppel, until the contingency happens. *Den v. Demarest*, 21 N. J. L. 525.

2. Assignment of Future Wages under Existing Employment—England.—*Crouch v. Martin*, 2 Vern. 595.

Connecticut.—*Hawley v. Bristol*, 39 Conn. 26; *Augur v. New York Belting, etc., Co.*, 39 Conn. 536; *Harrop v. Landers, etc., Co.*, 45 Conn. 561.

Iowa.—*Metcalfe v. Kincaid*, 87 Iowa 443.

Maine.—*Wade v. Bessey*, 76 Me. 413; *Haynes v. Thompson*, 80 Me. 125. See also *Getchell v. Maney*, 69 Me. 442; *Pullen v. Monk*, 82 Me. 412.

Maryland.—*Shaffer v. Union Min. Co.*, 55 Md. 74.

Massachusetts.—*Weed v. Jewett*, 2 Met. (Mass.) 608, 37 Am. Dec. 115; *Macomber v. Doane*, 2 Allen (Mass.) 541; *Boyley v. Leonard*, 2 Allen (Mass.) 407; *Twiss v. Cheever*, 2 Allen (Mass.) 40; *Hartley v. Tapley*, 2 Gray (Mass.) 565; *Taylor v. Lynch*, 5 Gray (Mass.) 49; *Lannan v. Smith*, 7 Gray (Mass.) 150; *Brackett v. Blake*, 7 Met. (Mass.) 335, 41 Am. Dec. 442; *Emery v. Lawrence*, 8 Cush. (Mass.) 151; *Ouimet v. Sirois*, 124 Mass. 162. See also *Gardner v. Hoeg*, 18 Pick. (Mass.) 168; *Tripp v. Brownell*, 12 Cush. (Mass.) 376; *Knowlton v. Cooley*, 102 Mass. 233; *Papineau v. Naumkeag Steam Cotton Co.*, 126 Mass. 372.

Michigan.—*Kane v. Clough*, 36 Mich. 436, 24 Am. Rep. 599.

is immaterial in such a case that the assignor works from day to day, and is hired for no specified time;¹ or that he works by the piece, and his wages per month vary;² or that he is removable at any time.³

Where the Service Is Continuous, an assignment of wages by a workman under a subsisting engagement will extend to wages earned under a renewal of this engagement at a different rate of wages.⁴

(b) **Where there Is No Subsisting Contract of Employment.**—There can be no valid assignment of future wages where they constitute a mere possibility, coupled with no interest. Thus a person under no subsisting engagement or contract for employment cannot make a valid assignment of wages to be earned under a possible future engagement.⁵ But speaking generally, it may be said that such assignments are valid in equity, where the consideration is meritorious,

New Hampshire.—*Garland v. Harrington*, 51 N. H. 409; *Runnells v. Bosquet*, 60 N. H. 38. See also *Provencher v. Brooks*, 64 N. H. 479.

Vermont.—*Thayer v. Kelley*, 28 Vt. 19, 65 Am. Dec. 220; *Carter v. Nichols*, 58 Vt. 553.

Wisconsin.—*State v. Hastings*, 15 Wis. 76. See also *Brill v. Tuttle*, 81 N. Y. 454, 37 Am. Rep. 515; *Fairgrievs v. Lehigh Nav. Co.*, 2 Phila. (Pa.) 182, 5 Am. L. Reg. 161.

Assignee in Bankruptcy—England.—It has been held in England that an assignee in bankruptcy cannot claim the wages of the bankrupt earned after the assignment, since this would deprive the latter of the means of obtaining a livelihood. *Chippendale v. Tomlinson*, 4 Doug. 318, 26 E. C. L. 380; *Williams v. Chambers*, 10 Q. B. 337, 59 E. C. L. 337.

1. **Hiring from Day to Day.**—*Taylor v. Lynch*, 5 Gray (Mass.) 49; *Lannan v. Smith*, 7 Gray (Mass.) 150. See also *Thayer v. Kelley*, 28 Vt. 19, 65 Am. Dec. 220. But see *Lightbody v. Smith*, 125 Mass. 51.

Where a person was employed under an arrangement by which he was to work whenever his employers had the work for him to do, and of this they were to give him notice, there being no agreement as to the length of time that he should continue in his employment, and he, before commencing work, assigned to another by an order upon his employers all the money he was to receive while employed by them, and this order was accepted by the employers and recorded, it was held that this was a valid assignment. *Harrop v. Landers, etc.*, Co., 45 Conn. 561.

2. *Hartley v. Tapley*, 2 Gray (Mass.) 565.

A Person Employed to Do Piece Work, but without any definite contract for the continuance of the employment, may make a valid assignment of the wages to be earned in the continuance of the employment. *Kane v. Clough*, 36 Mich. 436, 24 Am. Rep. 599.

It is immaterial whether the contract is to do a certain work for a sum named, or to work generally in the ordinary course of employment for an indefinite time. *Augur v. New York Belting, etc., Co.*, 39 Conn. 536.

Future wages to be earned under a present contract imparting to them a potential existence may be assigned, although the contract be indefinite as to time and amount. *Wade v. Bessey*, 76 Me. 413.

3. **A Municipal Officer,** appointed for a year and removable at the will of the appointing

power, may make a valid assignment of his quarter's salary before the expiration of the quarter. *Brackett v. Blake*, 7 Met. (Mass.) 335, 41 Am. Dec. 442.

4. **Renewal of Employment at Different Rate of Pay.**—*Wallace v. Walter Heywood Chair Co.*, 16 Gray (Mass.) 209; *Boylan v. Leonard*, 2 Allen (Mass.) 407.

Fraudulent Assignment.—An assignment of unearned wages, made without consideration, or for the purpose of defeating the claims of creditors, is fraudulent and invalid as against the creditors of the assignor. *Runnells v. Bosquet*, 60 N. H. 38.

An Assignment of Wages Already Earned is not rendered fraudulent and invalid by an understanding that the employer is to retain the amount previously due him out of the assignor's wages for house rent and coal furnished before the assignment. *McCormick v. Towns*, 64 N. H. 278.

5. **No Assignment of Wages by Person Not Employed.**—*Twiss v. Cheever*, 2 Allen (Mass.) 40; *Mulhall v. Quinn*, 1 Gray (Mass.) 105, 61 Am. Dec. 415; *Herbert v. Bronson*, 125 Mass. 475; *Eagan v. Luby*, 133 Mass. 543; *Lehigh Valley R. Co. v. Woodring*, 116 Pa. St. 513. See also *Hartley v. Tapley*, 2 Gray (Mass.) 565; *Lightbody v. Smith*, 125 Mass. 51; *Neumann v. Calumet, etc., Min. Co.*, 57 Mich. 97; *Runnells v. Bosquet*, 60 N. H. 38.

An assignment which professes to transfer a debt for wages not yet earned against any person by whom the assignor may thereafter be employed, followed by a subsequent notice of the assignment to the employer, is insufficient without acceptance, to make a valid transfer of the debt against the employer. *Jermyn v. Moffitt*, 75 Pa. St. 399, *followed* in *Lehigh Valley R. Co. v. Woodring*, 116 Pa. St. 513.

New Contract.—Where a school teacher, employed by a city for a term to end in June, assigned in April all money due and to become due him from the city during the ensuing year, and in September was hired by a new contract for a term of ten months, it was held that the assignment did not cover funds earned after September. *Herbert v. Bronson*, 125 Mass. 475.

Seamen's Wages—New Voyages.—See *Cooper v. Douglass*, 44 Barb. (N. Y.) 409, for a contract assigning future wages to be earned by a seaman, held not to operate beyond the particular voyage specified in the contract.

and no rights of third parties intervene.¹

(c) **By Public Officers**—**Unearned Salary of Public Officers Not Assignable.**—It is well settled, both in *England* and the *United States*, that a public officer cannot assign by anticipation the salary and fees paid to him for the purpose of maintaining the dignity of his office and securing the due discharge of its duties.²

Reason for the Rule.—The protection thus extended to those engaged in the performance of public duties is not based upon the ground of their private interest, but upon the necessity of securing the efficiency of the public service by insuring that the funds provided for its maintenance shall be received by those who are to perform the work, at the periods appointed for their payment. The assignment of such funds before they are due impairs the efficiency of the public service, and is void both in law and equity as being against public policy.³

Illustrations.—Thus it has been held that the pay of an army officer;⁴ the

1. *Edwards v. Peterson*, 80 Me. 367, 6 Am. St. Rep. 207.

2. **Public Officer cannot Assign Future Salary.**—Story Eq. Juris. (13th ed.) 1040d-1040f; *Mechem Public Offices* 3874.

England.—*Stone v. Lidderdale*, 2 Anstr. 533; *Palmer v. Bate*, 2 Brod. & B. 674, 6 E. C. L. 324; *Arbuckle v. Cowtan*, 3 B. & P. 326; *Flarty v. Odum*, 3 T. R. 681; *Lidderdale v. Montrose*, 4 T. R. 248; *Barwick v. Reade*, 1 H. Bl. 628; *Cooper v. Reilly*, 2 Sim. 560, 1 Russ. & M. 560; *Liverpool v. Wright*, 28 L. J. Ch. 868; *Oliver v. Emsonne*, 1 Dyer 2a; *Hunter v. Gardner*, 6 Wils. & Sh. 618; *Hill v. Paul*, 8 Cl. & F. 295; *Harrington v. Klopogge*, 2 Brod. & B. 678, note, 6 E. C. L. 326, note; *Arbuthnot v. Norton*, 5 Moo. P. C. 219; *Palmer v. Vaughan*, 3 Swanst. 173; *Grenfell v. Windsor*, 2 Beav. 544.

Alabama.—*Schloss v. Hewlett*, 81 Ala. 266.

Arizona.—*King v. Hawkins* (Arizona 1888), 16 Pac. Rep. 434.

California.—*Bangs v. Dunn*, 66 Cal. 72.

Kentucky.—*Webb v. McCauley*, 4 Bush (Ky.) 10; *Field v. Chipley*, 79 Ky. 260, 42 Am. Rep. 215.

Missouri.—*State v. Williamson*, 118 Mo. 146; *Beal v. McVicker*, 8 Mo. App. 202.

New Jersey.—*Schwenk v. Wyckoff*, 46 N. J. Eq. 560, 19 Am. St. Rep. 438. See also *Wayne Tp. v. Cahill*, 49 N. J. L. 144.

New York.—*Bliss v. Lawrence*, 58 N. Y. 442, 17 Am. Rep. 273; *Bowery Nat. Bank v. Wilson*, 122 N. Y. 478, 19 Am. St. Rep. 507; *Billings v. O'Brien*, 14 Abb. Pr. N. S. (N. Y. C. Pl.) 246, 45 How. Pr. (N. Y.) 392. See also *Thurston v. Fairman*, 9 Hun (N. Y.) 584.

Texas.—*El Paso Nat. Bank v. Fink*, 86 Tex. 303; *Williams v. Ford* (Tex. Civ. App. 1894), 27 S. W. Rep. 723.

Contrary Doctrine—Wisconsin.—In *State v. Hastings*, 15 Wis. 76, the future salary of a circuit judge was held to be a possibility coupled with an interest, and as such capable of being assigned. In delivering the opinion of the court, Cole, J., said: "We were referred to some English cases which held that the assignment of the pay of officers in the public service, judges' salaries, pensions, etc., was void as being against public policy; but it was not contended that the doctrine of those cases

was applicable to the condition of society or to the principles of law or of public policy in this country." This is believed to be the only American case in which it is expressly held that the unearned salary of a public officer may be assigned, and this ruling has been repeatedly *disapproved* by the courts of other states. See *Bangs v. Dunn*, 66 Cal. 72; *El Paso Nat. Bank v. Fink*, 86 Tex. 303; *Billings v. O'Brien*, 14 Abb. Pr. N. S. (N. Y. C. Pl.) 246, 45 How. Pr. (N. Y.) 392.

Cases Apparently Contra.—The cases of *Brackett v. Blake*, 7 Met. (Mass.) 335, 41 Am. Dec. 442; *Mulhall v. Quinn*, 1 Gray (Mass.) 105, 61 Am. Dec. 414; and *Macomber v. Doane*, 2 Allen (Mass.) 541, are sometimes referred to as announcing a different rule from the one stated in the text, but it is to be noted that the point of public policy was not considered by the court in these cases, the questions involved being regarded as relating altogether to the assignability of future unearned salaries in general. See *State v. Williamson*, 118 Mo. 146; *Bliss v. Lawrence*, 58 N. Y. 442, 17 Am. Rep. 273; *El Paso Nat. Bank v. Fink*, 86 Tex. 303.

Unearned Fees.—In *People v. Dayton*, 50 How. Pr. (N. Y. Supreme Ct.) 143, *affirmed* in 3 N. Y. Wkly. Dig. 341, it was held that the assignment of unearned fees does not fall within the rule sustained by the courts as to salaries. This case was *disapproved* in *Bowery Nat. Bank v. Wilson*, 122 N. Y. 478, 19 Am. St. Rep. 507, in which it was held that the same reasons apply against assigning unearned fees as against the assignment of a salary, and that such assignment is void. See *El Paso Nat. Bank v. Fink*, 86 Tex. 303; *Schloss v. Hewlett*, 81 Ala. 266; and illustrations given in the text.

3. See generally the cases cited in the note immediately preceding, and especially the opinions in the cases of *El Paso Nat. Bank v. Fink*, 86 Tex. 303; *Flarty v. Odum*, 3 T. R. 681; *Billings v. O'Brien*, 14 Abb. Pr. N. S. (N. Y. C. Pl.) 246, 45 How. Pr. (N. Y.) 392.

4. **Pay of Army Officer.**—In *Flarty v. Odum*, 3 T. R. 681, it was held that the half pay of an army officer was not assignable. In this case, Lord Kenyon said: "Emoluments of this sort are granted for the dignity of the state and for the decent support of those

salary of an assistant parliamentary counsel for the treasury in England;¹ of a clerk in the Federal Treasury Department;² of a United States inspector of customs;³ of a county assessor;⁴ of a mail carrier;⁵ of a clerk of a police court;⁶ or the fees of a master in chancery;⁷ or of a clerk of a court of chancery;⁸ or of a clerk of the peace;⁹ or of a sheriff;¹⁰ or the commissions of an executor,¹¹ cannot be assigned in advance.

b. EXECUTORY CONTRACTS INVOLVING PERSONAL TRUST OR LIABILITY—

(1) *Generally.*—In general, the assignability of a contract depends upon the nature of the contract and the character of the obligations assumed, uncontrolled by the supposed intent of the parties, except as that intent is expressed in the agreement.¹²

persons who are engaged in the service of it. It would therefore be highly impolitic to permit them to be assigned, for persons who are liable to be called out in the service of their country ought not to be taken from a state of poverty." This case was followed in *Lidderdale v. Montrose*, 4 T. R. 248; *Stone v. Lidderdale*, 2 Anstr. 533; and is the leading English case on the subject of assignments of future salary by public officers.

In the earlier case of *Stuart v. Tucker*, 2 W. Bl. 1137, it was held that though an officer's half pay was not assignable at law the use of it was assignable in equity, but this case is not regarded as authority. See *Palmer v. Bate*, 2 Brod. & B. 674, 6 E. C. L. 324; *Arbuckle v. Cowtan*, 3 B. & P. 326; *Stone v. Lidderdale*, 2 Anstr. 533.

That an officer's half pay is not assignable in *Canada*, see *Dorwin v. Waldorf*, 3 Rev. de Leg. (Can.) 248.

In *Barwick v. Reade*, 1 H. Bl. 628, it was held that the full pay of a military officer could not be assigned.

The Unearned Half Pay of a Retired United States Army Officer is not assignable. *Schwenk v. Wyckoff*, 46 N. J. Eq. 560, 19 Am. St. Rep. 438.

And the Same Is True of a Naval Officer.—*Elwyn's Appeal*, 67 Pa. St. 367.

Pensions.—In *Davis v. Marlborough*, 1 Swanst. 74, Lord Eldon said: "A pension for past services may be aliened, but a pension for supporting the grantee in the performance of future duties is inalienable." See also *Priddy v. Rose*, 3 Meriv. 86; *Ex p. Battine*, 4 B. & Ad. 690, 24 E. C. L. 143; and the title **PENSIONS**.

Officer's Commission—England.—From the same considerations of public policy, which forbid the assignment of an officer's pay, it has been held that he cannot assign his commission, *Collyer v. Fallon*, T. & R. 459; though he might do so after retiring from the army, *L'Estrange v. L'Estrange*, 1 Eng. L. & Eq. 153.

1. *Cooper v. Reilly*, 2 Sim. 560.

2. **Clerk in United States Treasury Department.**—*Bliss v. Lawrence*, 58 N. Y. 442, 17 Am. Rep. 273. This is a leading American case on this subject, and was decided after a review of most of the English and American authorities.

3. **Inspector of Customs.**—*Billings v. O'Brien*, 14 Abb. Pr. N. S. (N. Y. C. Pl.) 246, 45 How. Pr. (N. Y.) 392.

4. **County Assessor.**—*El Paso Nat. Bank v. Fink*, 86 Tex. 303.

5. **Mail Carrier.**—*State v. Williamson*, 118 Mo. 146.

6. **Clerk of Police Court.**—*Beal v. McVicker*, 8 Mo. App. 202.

7. **Fees of Master in Chancery.**—*Shannon v. Bruner*, 36 Fed. Rep. 147.

8. **Fees of Clerk of Court of Chancery.**—*Field v. Chipley*, 79 Ky. 260, 42 Am. Rep. 215.

9. **Fees of Clerk of the Peace.**—*Palmer v. Bate*, 2 Brod. & B. 673, 6 E. C. L. 324.

10. **Fees of Sheriff.**—*Bowery Nat. Bank v. Wilson*, 122 N. Y. 478, 19 Am. St. Rep. 507. See also *Currie v. Hart*, 2 Sandf. Ch. (N. Y.) 353; *Jones v. Com.*, 2 Litt. (Ky.) 357.

11. **Commissions of Executor.**—*Matter of Worthington*, 141 N. Y. 9, affirming 22 N. Y. Supp. 19.

An Allowance Granted to a Public Civil Officer, on the reduction of offices in his department, for his maintenance until he should be called on to serve again, was held to be not assignable. *Wells v. Foster*, 8 M. & W. 149. See also *Tunstall v. Boothby*, 10 Sim. 542.

Assignment by Ecclesiastic.—An assignment of all the annual income to which a person was entitled as one of the prebends or canons of Windsor was held valid, it appearing that the duties of such person were not of a public character. *Grenfell v. Windsor*, 2 Beav. 544. See also *Doe v. Ramsden*, 4 B. & Ad. 608, 24 E. C. L. 123.

College Fellowship.—An assignment of the emoluments of a fellow of a college is valid in equity, such assignments not being contrary to public policy. *Feistel v. King's College*, 10 Beav. 491.

Road Money.—An assignment of money to be appropriated in the future to a road district, to enable the overseers to do or have done the necessary work upon the roads of the several districts, is void upon grounds of public policy. *Wayne Tp. v. Cahill*, 49 N. J. L. 144.

12. *Devlin v. New York*, 63 N. Y. 8, 50 How. Pr. (N. Y.) 1, modifying 48 How. Pr. (N. Y.) 457.

See also *Carter v. State* (S. Dak. 1895), 65 N. W. Rep. 422.

Right of Assignee to Specific Performance.—Where a written contract which had been procured by fraud or mutual mistake was assigned, and neither the assignor nor the assignee at the time of the assignment had any knowledge of the means by which the contract was procured, it was held that the assignee would have the same right to maintain an action against the other original party to the contract to have it reformed or specific

(2) *General Test of Assignability*.—As a general rule, in all cases where a contract is executory in its nature, and an executor or administrator would succeed to the rights and liabilities of a deceased party to the contract, the contract is assignable by the act of the parties.¹

Parties may Prohibit Assignment.—The parties to a contract may in terms prohibit its assignment, so that neither personal representatives nor assignees can succeed to any rights in virtue of it, or be bound by its obligations.²

(3) *Applications of the General Test*.—Where *Delectus Personæ Not Material*.—A contract in which the *delectus personæ* is not material, as in an agreement for services which may be as well performed by one person as another, is assignable.³

performance decreed as the assignor would have done if he had retained the contract. *Bentley v. Smith*, 1 Abb. App. Dec. (N. Y.) 126.

1. General Test of Assignability.—*Carter v. State* (S. Dak. 1895), 65 N. W. Rep. 422; *Waltson v. Rafel*, 7 Misc. Rep. (N. Y. C. Pl.) 663; *Devlin v. New York*, 63 N. Y. 8, 50 How. Pr. (N. Y.) 1, *modifying* 48 How. Pr. (N. Y.) 457. See also *McPherson First Nat. Bank v. Geo. R. Barse Live Stock Commission Co.*, 61 Mo. App. 143; *Sears v. Conover*, 34 Barb. (N. Y.) 330, *affirmed* in 3 Keyes (N. Y.) 113, 4 Abb. App. Dec. (N. Y.) 179; *Grant v. Ludlow*, 8 Ohio St. 1.

2. Parties may Prohibit Assignment.—*Burck v. Taylor*, 152 U. S. 634; *Carter v. State* (S. Dak. 1895), 65 N. W. Rep. 422; *Devlin v. New York*, 63 N. Y. 9, 50 How. Pr. (N. Y.) 1, *modifying* 48 How. Pr. (N. Y.) 457. See *Fortunato v. Patten*, 147 N. Y. 277.

If the contract itself provides in terms that it is not transferable, it cannot be transferred, for the reason that this would be annulling an agreement which the parties had entered into. *LaRue v. Groezinger*, 84 Cal. 281, 18 Am. St. Rep. 179.

But a Collateral Covenant restraining the assignment of an agreement will not be enforced in equity, where it appears upon the face of the contract that the prohibition to assign is not the main purpose of the covenant, but a mere incident to the objects of the principal covenants which have been substantially performed. *Grigg v. Landis*, 21 N. J. Eq. 494, *reversing* 19 N. J. Eq. 350.

3. Where Delectus Personæ Not Important.—*St. Louis v. Clemens*, 42 Mo. 69; *Leahy v. Dugdale*, 27 Mo. 439; *Empire Paving, etc., Co. v. Prather*, 58 Mo. App. 487; *Sunday Mirror Co. v. Galvin*, 55 Mo. App. 412; *Rice v. Gibbs*, 33 Neb. 460; *Devlin v. New York*, 63 N. Y. 9, 50 How. Pr. (N. Y.) 1, *modifying* 48 How. Pr. (N. Y.) 457; *Rochester Lantern Co. v. Stiles, etc.*, Press Co., 135 N. Y. 209, *reversing* (Supreme Ct.) 40 N. Y. St. Rep. 851; *Galey v. Mellon*, 172 Pa. St. 443. See also *Jenkins v. Columbia Land, etc., Co.* (Wash. 1896), 43 Pac. Rep. 328.

Executory Contracts to Sell.—In *Rochester Lantern Co. v. Stiles, etc.*, Press Co., 135 N. Y. 209, one K. entered into a contract with the defendant, by which the latter agreed to make and deliver to the former certain dies to be used in the manufacture of lanterns, in which business K. proposed to engage, but was not then engaged, and it did not appear that he contemplated doing so until the dies

were furnished. The plaintiff was subsequently incorporated, and it was held that K. could assign the contract to the plaintiff, as he could any other chose in action, and by the assignment the assignee would become entitled to all the benefits of the contract; that the contract was not purely personal, in the sense that K. was bound to perform in person, as his only obligation was to pay for the dies when delivered, and that obligation could be discharged by any one.

An agreement to sell wood, under which the vendee has made certain advances, may be assigned by the latter as an ordinary running account. *Porter v. Young*, 85 Va. 49.

An executory contract to sell and deliver oil is assignable. *Tyler v. Barrows*, 6 Robt. (N. Y.) 104.

Contract for Lease of Stallion.—A contract whereby the owner of a stallion leases him for a season, for a sum of money agreed on, and reserves the right to have the horse cover nine mares during the season, is assignable, and the assignee, who is also the purchaser of the horse from the owner, is entitled to all the benefits arising out of the contract. *Doll v. Anderson*, 27 Cal. 248.

Contract to Pay Money.—In *Delaware County v. Diebold Safe, etc., Co.*, 133 U. S. 473, the court, by Gray, J., said: "A contract to pay money may doubtless be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties to it that it shall not be assignable. But when rights arising out of contract are coupled with obligations to be performed by the contractor, and involve such a relation of personal confidence that it must have been intended that the rights should be exercised and the obligations performed by him alone, the contract including both his rights and his obligations cannot be assigned without the consent of the other party to the original contract." See also *Arkansas Valley Smelting Co. v. Belden Min. Co.*, 127 U. S. 379.

An agreement to pay a certain sum of money to a person if he will withdraw his defense to a suit instituted against him is assignable, and the assignment gives a right of action in the name of the assignee. *Gray v. Garrison*, 9 Cal. 325.

Where a written contract was made to pay a railroad company a certain sum of money when its road should be completed through a particular county, provided it should run through lands owned by H., it was held that

Contracts for Public Work.—Contracts for public work, which are awarded not because of the supposed skill or knowledge of the persons receiving them, but because their bids are the lowest, are generally assignable.¹

Assignor will Remain Liable.—When the assignment of a contract is made, its obligations will still rest upon the assignor, who, in case of a default on the part of his assignee, must respond to the other party to the contract.²

Where Delectus Personæ Is Material.—Contracts in which the *delectus personæ* is material, as where a person agrees to use his personal skill and knowledge, and has been contracted with by reason of the trust and confidence placed

such contract was assignable. *Hays v. Branhan*, 36 Ind. 219.

By many modern statutes the quality of assignability is extended generally to all contracts for the payment of money, thus extending to instruments of this class some of the qualities which, under the law merchant, were peculiar to negotiable promissory notes and bills of exchange. See *Shields v. Taylor*, 25 Miss. 13; *Sirlott v. Tandy*, 3 Dana (Ky.) 142. See also the titles **BILLS OF EXCHANGE AND PROMISSORY NOTES**; and **NEGOTIABLE INSTRUMENTS**.

Annuity—Contract to Pay.—A contract to pay "if called for or needed," a certain sum yearly, is assignable. *Prindle v. Caruthers*, 15 N. Y. 425, reversing 10 How. Pr. (N. Y. Supreme Ct.) 33. See generally the title **ANNUITIES**.

Contracts in Restraint of Trade, when valid, that is, when the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given, and not so large as to interfere with the interests of the public, are assignable. *Diamond Match Co. v. Roeber*, 106 N. Y. 473, 60 Am. Rep. 464, 35 Hun (N. Y.) 421, 21 N. Y. Wkly. Dig. 353; *Barber Asphalt Paving Co. v. Brand* (Supreme Ct.), 27 N. Y. St. Rep. 883. See generally the title **RESTRAINT OF TRADE (CONTRACTS)**.

A personal covenant in a bill of sale of a restaurant and saloon business, whereby the vendor agrees not to engage in a like business for a period of five years, within half a mile of the business sold, is assignable. *Greite v. Henricks*, 71 Hun (N. Y.) 7. To the same effect see *Pemberton v. Vaughan*, 10 Q. B. 87, 59 E. C. L. 87; *Guerand v. Dandele*, 32 Md. 562, 3 Am. Rep. 164; *Webster v. Buss*, 61 N. H. 40, 60 Am. Rep. 317; *Francisco v. Smith*, 143 N. Y. 488, 67 Hun (N. Y.) 225.

A contract not to run boats on a certain line of travel, and on failure to comply with such contract to pay fifteen thousand dollars, is an instrument in writing for the payment of money, and assignable. *California Steam Nav. Co. v. Wright*, 6 Cal. 258, 65 Am. Dec. 511.

But see *Hillman v. Shannahan*, 4 Oregon 163, 18 Am. Rep. 281, where the purchaser of a music store took a bond from the seller, conditioned in a certain sum as liquidated damages, that the seller would not for a certain period of time engage in a business like the one sold, and it was held that the bond could only be enforced for the protection of the purchaser in person, and that it would not extend to his assignee; *McArthur, J., dissenting*.

A Contract of Repurchase, as a part of the consideration for the sale of live stock, the right of repurchase being optional with the

seller or his legal representatives, is assignable. *Mitchell v. Taylor*, 27 Oregon 377.

A Contract for Convict Labor is assignable, when awarded to the highest bidder, who secured the performance of his part of the contract by giving adequate security. *Horner v. Wood*, 23 N. Y. 350, affirming 15 Barb. (N. Y.) 371.

A Contract to Drill for Oil is assignable by a contractor, where it appears that the performance of the contract does not require his personal skill and judgment. *Galey v. Mellon*, 172 Pa. St. 443.

1. Contracts for Public Work.—*Taylor v. Palmer*, 31 Cal. 240; *Anderson v. De Urioste*, 96 Cal. 404; *St. Louis v. Clemens*, 42 Mo. 69; *Leahy v. Dugdale*, 27 Mo. 437; *Devlin v. New York*, 63 N. Y. 9, 50 How. Pr. (N. Y.) 1, modifying 48 How. Pr. (N. Y.) 457; *Philadelphia v. Lockhardt*, 73 Pa. St. 211; *Carter v. State* (S. Dak. 1895), 65 N. W. Rep. 422. See also *Daugherty v. Gouff*, 23 Neb. 105; *Smith v. Hubbard*, 85 Tenn. 306.

In *Devlin v. New York*, 63 N. Y. 9, 50 How. Pr. (N. Y.) 1, modifying 48 How. Pr. (N. Y.) 457, the court, by Allen, J., said: "If the service to be rendered or the condition to be performed is not necessarily personal, and such as can only, with due regard to the intent of the parties and the rights of the adverse party, be rendered or performed by the original contracting party, and the latter has not disqualified himself from the performance of the contract, the mere fact that the individual representing and acting for him is the assignee, and not the mere agent or servant, will not operate as a rescission of or constitute a cause for terminating the contract. Whether the agent for performing the contract acts under a naked power, or a power coupled with an interest, cannot affect the character or vary the effect of the delegation of power by the original contractor."

2. Assignor Still Liable.—*Rochester Lantern Co. v. Stiles, etc., Press Co.*, 135 N. Y. 209, reversing (Supreme Ct.) 40 N. Y. St. Rep. 851; *Horner v. Wood*, 23 N. Y. 350, affirming 15 Barb. (N. Y.) 371.

California Civil Code, § 1457, provides that "the burden of an obligation may be transferred with the consent of the party entitled to its benefit, but not otherwise, except as provided by section 1466," and is construed to mean that a third person may assume the obligations of a contract between other parties, but that he cannot relieve a party thereto from his obligations without the consent of the creditor. *Anderson v. De Urioste*, 96 Cal. 404.

in him personally, cannot be assigned by such person while the agreement remains executory, without the consent of the other contracting party.¹

Responsibility and Solvency Material.—Contracts which are entered into with a view to the confidence reposed in each other by the contracting parties, with the belief on one side and the other in the responsibility and solvency of the opposite parties, are not assignable.²

1. Where Delectus Personæ Important.—*Robson v. Drummond*, 2 B. & Ad. 303, 22 E. C. L. 81; *Stevens v. Benning*, 6 De G. M. & G. 223; *Delaware County v. Diebold Safe, etc., Co.*, 133 U. S. 473; *Taylor v. Palmer*, 31 Cal. 241; *Sloan v. Williams*, 138 Ill. 43; *Boykin v. Campbell*, 9 Mo. App. 495; *Rice v. Gibbs*, 33 Neb. 460; *Devlin v. New York*, 63 N. Y. 9, 50 How. Pr. (N. Y.) 1; *Ross v. Fox*, 13 Grant's Ch. (U. C.) 683.

Distinction between Assigning Contract and Assigning Money Due on Contract.—There is a wide difference between assigning moneys due under a contract and an absolute assignment of the contract itself, as the latter act disturbs that relation of personal confidence which exists between one desiring work done that requires a high order of skill and intelligence, and the contractor he may have selected as possessing these necessary qualifications. *Fortunato v. Patten*, 147 N. Y. 277. See *Delaware County v. Diebold Safe, etc., Co.*, 133 U. S. 473.

If a Contract is Personal, and the performance of the person contracted with is of the essence of the contract, as where his personal skill or judgment is required, it is not assignable. *Devlin v. New York*, 63 N. Y. 9, 50 How. Pr. (N. Y.) 1.

In *Sloan v. Williams*, 138 Ill. 43, the court, by Magruder, J., said: "A party who thus agrees to use his personal skill and knowledge, and has been contracted with by reason of the trust and confidence placed in him personally, cannot, while the agreement is still executory, substitute another in his place by assignment, in order to perform the service, without the consent of the other contracting party." See also *British Wagon Co. v. Lea*, 5 Q. B. Div. 149.

Contract for Hire of Carriage.—In *Robson v. Drummond*, 2 B. & Ad. 303, 22 E. C. L. 81, one S. contracted to furnish the defendant a carriage for a term of five years at a given price per year, payable in advance. At the end of three years S. assigned his contract to his secret partner, R., the partnership being unknown to the defendant. The latter refused to continue the contract with R. An action was brought in the name of R. and S. to recover the stipulated price for the last two years of the term, and it was held that the action could not be sustained on the ground that the defendant might have been induced to enter into the contract by reason of the personal confidence which he reposed in S.

But in the case of hiring with a right to purchase, as where A delivered to B a wagon in pursuance of a contract by which B agreed to pay a certain weekly rental, with the privilege of purchasing at a certain price, the sum which had been paid as rental to be deducted from such agreed purchase price, it was

held that where the agreed rental had been paid to an amount exceeding half the purchase price, and A sold the wagon to C, the contract was assignable, and the sale of the wagon was an equitable assignment of the contract, and that C could lawfully fulfil its terms. *Blair v. Hamilton*, 48 Ind. 32.

A Lease upon Shares is not assignable unless the lessor gives his consent, and an attempted assignment and delivery of the possession of the property to the assignee will work a forfeiture of the lease, and the lessor may take immediate steps to regain possession. *Randall v. Chubb*, 46 Mich. 311, 41 Am. Rep. 165; *Lewis v. Sheldon*, 103 Mich. 102.

Contract Involving Personal Association.—Where the owner of certain land contracts with another person to work it on shares, stipulating that he shall live with him, practically as one of the family, the latter cannot assign the contract. *Litka v. Wilcox*, 39 Mich. 94.

Contracts for Personal Services are not assignable by the employer. *Force v. Thomason*, 2 Litt. (Ky.) 166; *Halbert v. Deering*, 4 Litt. (Ky.) 9; *Henry v. Hughes*, 1 J. J. Marsh. (Ky.) 453; *Davenport v. Gentry*, 9 B. Mon. (Ky.) 427; *Hayes v. Willis*, 4 Daly (N. Y.) 259, *reversing* 11 Abb. Pr. N. S. (N. Y.) 167; *Chapin v. Longworth*, 31 Ohio St. 421.

An Employee May Ratify an Assignment made by his employer, by assenting to the substitution of the assignee as employer. *Chapin v. Longworth*, 31 Ohio St. 421.

An Obligation Payable Partly in Work and labor is not assignable, *Halbert v. Deering*, 4 Litt. (Ky.) 9; *Marcum v. Hereford*, 8 Dana (Ky.) 1; or a note given for the payment of a certain sum in work, *Prather v. McEvoy*, 8 Mo. 661; *Bothick v. Purdy*, 3 Mo. 82.

Contract for Support and Maintenance.—A contract in a deed conditioned for the support of a person is not, as a general rule, assignable, and the interest of neither party can be assigned without the consent of the other. *Bethlehem v. Annis*, 40 N. H. 34, 77 Am. Dec. 700; *Flanders v. Lamphear*, 9 N. H. 201; *Eastman v. Batchelder*, 36 N. H. 141, 72 Am. Dec. 295. See *Clinton v. Fly*, 10 Me. 292.

Under a statute (Ind. Rev. Stat., § 34, p. 361) empowering the county commissioners to award the care of paupers, it was held that the award should be made to the contractor's personal care, on account of his fitness to bestow such as was proper, and he must exercise that care himself, and that the contract was not assignable. *Burger v. Rice*, 3 Ind. 125.

An Implied Assumpsit is not assignable, *Holliman v. Rogers*, 6 Tex. 91; or a promise implied by law, *Jarman v. Howards*, 3 A. K. Marsh. (Ky.) 383.

2. Responsibility and Solvency Material.—*Humble v. Hunter*, 12 Q. B. 310, 64 E. C. L.

c. CLAIMS AGAINST THE UNITED STATES—**Statutory Enactment.**—The United States Act of 1853, entitled "An act to prevent fraud on the Treasury of the United States," reenacted in the United States Rev. Stat., § 3477, provides that all transfers and assignments of any claim upon the United States, or of any part or share thereof, or interest therein, shall be null and void, unless made after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof.

Under this statute assignments of such claims, made before the claim has been allowed, or a warrant for its payment has been issued, have been held void.¹

310; *Arkansas Valley Smelting Co. v. Belden Min. Co.*, 127 U. S. 387; *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *Lansden v. McCarthy*, 45 Mo. 106; *Boykin v. Campbell*, 9 Mo. App. 495. See also *Burck v. Taylor*, 152 U. S. 654.

In *Arkansas Valley Smelting Co. v. Belden Min. Co.*, 127 U. S. 387, the court, by Gray, J., said: "In the familiar phrase of Lord Denman, 'you have the right to the benefit you anticipate from the character, credit, and substance of the party with whom you contract.' *Humble v. Hunter*, 12 Q. B. 310, 64 E. C. L. 310; *Winchester v. Howard*, 97 Mass. 303, 93 Am. Dec. 93; *Boston Ice Co. v. Potter*, 123 Mass. 28, 25 Am. Rep. 9; *King v. Batterson*, 13 R. I. 117, 43 Am. Rep. 13; *Lansden v. McCarthy*, 45 Mo. 106. The rule upon this subject, as applicable to the case at bar, is well expressed in a recent English treatise. 'Rights arising out of contract cannot be transferred if they are coupled with liabilities, or if they involve a relation of personal confidence such that the party whose agreement conferred those rights must have intended them to be exercised only by him in whom he actually confided. *Pollock on Contracts* (4th ed.) 425.' See also *Wheeler v. Walton*, 64 Fed. Rep. 664, *affirmed* in *Winchester v. Davis Pyrites Co.*, 67 Fed. Rep. 45.

Illustrations.—In *Lansden v. McCarthy*, 45 Mo. 106, it was held that a contract to deliver meat to a hotel, to be paid for at the end of each month, could not be assigned by the hotel-keeper on the ground that the defendant's estimate of the solvency and pecuniary credit and standing of the plaintiff's assignor might have constituted an important condition of the contract, without which he would never have entered into it.

In *Boston Ice Co. v. Potter*, 123 Mass. 30, 25 Am. Rep. 9, the plaintiff had previously been supplying the defendant with ice, but the latter, becoming dissatisfied, had transferred his custom to A and made a contract with him. After this, the plaintiff bought out A, and without informing the defendant of the transfer, continued to supply him with ice. The defendant, on being informed of the transfer, refused to pay for the ice, and it was held that he was not liable, although he had consumed the ice, and was satisfied with it.

¹ But in *LaRue v. Groezinger*, 84 Cal. 281, 18 Am. St. Rep. 179, the soundness of this decision is questioned unless it be placed on the ground of extraneous circumstances showing the defendant's intention not to deal with the plaintiff.

Subscription Contract.—A contract whereby one party subscribes and agrees to pay a certain sum to another to induce the latter to build a mill in a certain town, in consideration of which, and of other subscriptions, the latter party agrees to build such mill, and put it in operation by a time specified, is a mere chose in action, not assignable at law, and cannot be sued in the name of the assignee. *Rockwell v. Daniels*, 4 Wis. 432.

But a subscription to the capital stock of a railroad company can be assigned and transferred by the company, unless prohibited by its charter, like any other contract, and the assignee can recover the amount due thereon from the subscriber. *Downie v. Hoover*, 12 Wis. 174, 78 Am. Dec. 730; *Downie v. White*, 12 Wis. 176, 78 Am. Dec. 731; *Kimball v. Spicer*, 12 Wis. 668; *Racine County Bank v. Ayres*, 12 Wis. 512.

1. **Assignments Void under United States Act of 1853.**—The following assignments have been held void under this statute: The assignment of a voucher given to a blacksmith for work done on an Indian reservation. *Harris v. U. S.*, 27 Ct. of Cl. 177. But see *Lawrence's Case*, 8 Ct. of Cl. 252.

Of a claim arising under the "captured and abandoned property act," made before a judgment is recovered. *Cote's Case*, 3 Ct. of Cl. 64. See also *Silverhill's Case*, 5 Ct. of Cl. 610; *Bate's Case*, 4 Ct. of Cl. 569; *Burke's Case*, 13 Ct. of Cl. 231.

Of a claim for damages for the revocation of a contract of the sale of old muskets. *Cooper's Case*, 1 Ct. of Cl. 85.

Of a claim for damage done to a farm by the Federal army. *Sines's Case*, 1 Ct. of Cl. 12.

Of a claim against Indians not yet examined or allowed according to the treaty between the government and the Indians. *Becker v. Sweetzer*, 15 Minn. 427.

Of a portion of a claim, by a bill of exchange. *Floyd Acceptance Case*, 1 Ct. of Cl. 270.

A voluntary transfer of a claim, by way of mortgage completed and made absolute by judicial sale. *St. Paul, etc., R. Co. v. U. S.*, 112 U. S. 733, *affirming* 18 Ct. of Cl. 405; *Flint, etc., R. Co. v. U. S.*, 112 U. S. 737, 762, *affirming* 18 Ct. of Cl. 420.

Recognition of Assignment.—Assignments of claims and powers of attorney, void under this statute, may be recognized by the accounting officers, and accounts be stated in favor of the assignees, and the payments made thereon will be conclusive upon the assignor and discharge the indebtedness. The practical effect of the law, as interpreted, is that

When the Statute Applies.—It was laid down by the United States Supreme Court that, under this statute, an assignment of a claim against the United States before a warrant has been issued for its payment, is invalid both in law and equity, for every purpose and between all parties,¹ but the courts soon began to depart from this rigid interpretation of the statute, recognizing as its sole purpose the protection of the government and not that of the parties to the assignment, and a *bona fide* assignment of unallowed claims against the government, in no way interfering with the government, will be upheld.²

assignments of claims against the government, whatever be the consideration, are mere naked powers of attorney, revocable at pleasure, and in no case obligatory upon the government. *Lopez v. U. S.*, 24 Ct. of Cl. 84.

Where the defendants filed a counterclaim against the claimants to recover back money paid to them as assignees upon an assignment declared void by the Act of 1853, the original assignors having never revoked or repudiated the assignment, and the treasury having recognized the assignment and paid the amount due on an accounting to the assignees, it was held that no action would lie to recover it back. *McKnight's Case*, 13 Ct. of Cl. 292, *affirmed* in 98 U. S. 179.

Payment to Attorney.—Payment of a claim to one who has been authorized to receive it by a power of attorney, executed before the allowance of a claim, is good as between the government and the claimant, where, at the time of payment, such power of attorney was unrevoked. *Bailey v. U. S.*, 109 U. S. 432, *affirming* 15 Ct. of Cl. 490.

Claims against Great Britain, commonly known as the Alabama claims, became, by the operation of the Act of the 5th of June, 1882 (22 Stat. L. 98), claims against the United States, and subject to the provisions of this act. *Howes v. U. S.*, 24 Ct. of Cl. 170.

That Claims against a Foreign Government for indemnity for illegal capture of vessels and cargoes may be assigned, see *Couch v. Delapaine*, 2 N. Y. 397. See also *Peugh v. Porter*, 112 U. S. 737.

Common-law Doctrine Not Extended by Statute.—This act does not give new potency to assignments and transfers of rights in action, nor change the common-law rule as to the assignability of such rights; but denies any effect to powers of attorney, orders, transfers, and assignments, which before were good in equity, and which a debtor was bound to regard when brought to his notice. *U. S. v. Gillis*, 95 U. S. 407. See also *Burke's Case*, 13 Ct. of Cl. 231.

Who may Sue.—The court will preserve the equitable rights of the assignee of a non-assignable claim, by allowing the suit to be brought in the name of the assignor, a recovery to be by the latter to the use of the former (*Jackson's Case*, 1 Ct. of Cl. 260), but the assignor must be connected with the case. *Silverhill's Case*, 5 Ct. of Cl. 610.

The assignee of a claim against the United States cannot maintain a suit thereon in the Court of Claims in his own name. *U. S. v. Gillis*, 95 U. S. 407. *Johnston's Case*, 13 Ct. of Cl. 217.

The assignee in bankruptcy of a claim for

the proceeds of captured cotton may sue thereon in his own name, and notwithstanding the decision in the case last cited, the purchaser of such claim from an assignee may maintain an action in his own name. *Burke's Case*, 13 Ct. of Cl. 231.

Assignment Prior to Enactment of Statute.—In *U. S. v. Robeson*, 9 Pet. (U. S.) 319, decided in 1835, McLean, J., said: "There is no law of Congress which authorizes the assignment of claims on the United States; and it is presumed that if such assignment is sanctioned by the Treasury Department, it is only viewed as an authority to receive the money, and not as vesting in the assignee a legal right."

As to the assignment of a claim against the United States for wrongfully preventing the owner of lands in Florida from cutting and removing timber therefrom, see *Sibbald's Estate*, 18 Pa. St. 249.

Statute Prohibiting Assignment of Contract to Furnish Supplies to United States.—The transfer of a contract to furnish supplies to the United States is prohibited by statute (U. S. Stat. at Large, vol. 12, p. 596), and the assignment of a contract in violation of the statute is void; and no action can be maintained on notes given in payment for such assignment. *Turnbull v. Farnsworth*, 1 Wash. Ter. 444. See also *St. Paul, etc., R. Co. v. U. S.*, 112 U. S. 733. And it has been held that the language of the above statute, "shall cause the annulment of the contract, so far as the United States are concerned," is imperative and absolute, and bars any action by the assignor as well as the assignee. *Wanless' Case*, 6 Ct. of Cl. 123.

1. *Spofford v. Kirk*, 97 U. S. 484.

2. **Cases in Which Statute does Not Apply.**—*Hobbs v. McLean*, 117 U. S. 567; *Freedman's Sav., etc., Co. v. Shepherd*, 127 U. S. 494; *Jernegan v. Osborn*, 155 Mass. 207; *York v. Conde*, 147 N. Y. 486; *Leonard v. Whaley*, 91 Hun (N. Y.) 304.

The sole purpose of the statute was to protect the government, and not the parties to the assignment. *Bailey v. U. S.*, 109 U. S. 432, *cited with approval* in cases *supra*.

The section refers only to claims against the United States which can be presented by the claimant to some department or officer of the United States for payment, or may be prosecuted in the Court of Claims. *Hobbs v. McLean*, 117 U. S. 567.

The Assignment of Prize Money in the hands of a claim agent, collected from the United States for the assignor, is not the assignment of a claim against the United States, and is valid. *Danklessen v. Braynard*, 3 Daly (N. Y.) 183.

The statute does not embrace cases where there has been a transfer of title by operation of law. The passing of claims to heirs, devisees, or assignees in bankruptcy is not within the evils at which it aimed. Thus it has been held that a claim against the United States would pass to the assignee in bankruptcy,¹ and a voluntary assignment of all his effects, including a claim against the government, made by an insolvent debtor for the benefit of creditors, is not within the prohibition of the act.²

Effect of Establishment of Court of Claims.—The Act of 1853 is not repealed by the Act of 1855 establishing the Court of Claims, and the Act of 1863 reorganizing that court. The act is of universal application, and covers all claims against the United States in every tribunal in which they may be asserted.³

d. PROPERTY HELD ADVERSELY—Chattels.—At common law an assignment of a chattel in the adverse possession of another, claiming it as his own, is void, the owner having only a right of action which, at common law, is not assignable.⁴ But it has been held that the owner of a chattel may sell the same after conversion and pass a good title thereto, so that the purchaser may reclaim it from the person guilty of conversion, and, upon a demand and a refusal to give it up, may maintain an action therefor in his own name.⁵

The Transfer of Stock by a stockholder of a corporation which holds a claim against the government, is not an assignment of a part of a claim, within the meaning of this act. Kellogg Bridge Co. Motion, 15 Ct. of Cl. 111.

1. Transfer by Operation of Law.—Erwin v. U. S., 97 U. S. 392. See also St. Paul, etc., R. Co. v. U. S., 18 Ct. of Cl. 405, *affirmed* in 112 U. S. 733; Howes v. U. S., 24 Ct. of Cl. 170.

A Claim for the Proceeds of Captured Cotton passes to the assignee on an assignment in bankruptcy, and the assignee may assign such claim. Burke's Case, 13 Ct. of Cl. 231.

2. Assignment for Creditors.—Goodman v. Niblack, 102 U. S. 556, *examining* Spofford v. Kirk, 97 U. S. 484, and Erwin v. U. S., 97 U. S. 392.

3. Effect of Establishment of Court of Claims.—It is laid down in Cavender's Case, 8 Ct. of Cl. 281, that the reason for the Act of 1853 was that at the time it was enacted there was no tribunal before which the validity of assigned claims against the government could be examined, since the Treasury Department was not intended for, nor adapted to, litigation; but that this reason ceased when the Court of Claims was established, and that the effect of the acts establishing this court was to provide for the litigation of such assigned claims. The view of the court in this case is in harmony with the decision in Lawrence's Case, 8 Ct. of Cl. 252, but conflicts with the decisions of the Supreme Court of the United States, and also with the earlier and later decisions of the Court of Claims.

In Cote's Case, 3 Ct. of Cl. 64, it was held that assignments of claims against the United States were made void by the statute, not only when the assignees set up the claims in the Treasury Department, but also when they attempted to sue in the Court of Claims, and that the Act of 1853 and the similar Act of 1846 (9 Stat. L. 41) were not repealed by the Act of 1863, reorganizing the Court of Claims.

In U. S. v. Gillis, 95 U. S. 407, Strong, J., said: "The two cases reported in the eighth volume of Court of Claims reports seem to

have been made with a view to reconcile, if possible, the enactment [Act of 1853] with some expressions made in the subsequent Act of 1855 establishing the Court of Claims. But the latter is not an enabling act. It gives to the court jurisdiction of all claims of a specified description, and only incidentally speaks of assignments. It * * * did not work a repeal of any provisions of the Act of 1853, nor itself make claims assignable that were incapable of assignment before its enactment. * * * The Act of 1853 is of universal application, and covers all claims against the United States in every tribunal in which they may be asserted. And such, we think, was the understanding of Congress when the Revised Statutes were enacted. In the revision, the Act of 1853 was included and reenacted. § 3477. * * * By reenacting the statute of 1853 without change it is a reasonable presumption Congress intended what it was known the court had adopted as its true construction."

See also the article "Assignment of Government Claims," 24 Am. L. Rev. 442.

4. Chattel Held Adversely Not Assignable.—Goodwyn v. Lloyd, 8 Port. (Ala.) 237; Brown v. Lipscomb, 9 Port. (Ala.) 472; Dunklin v. Wilkins, 5 Ala. 199; Price v. Talley, 18 Ala. 21; M'Goon v. Ankeny, 11 Ill. 558; O'Keefe v. Kellogg, 15 Ill. 347; Young v. Ferguson, 1 Litt. (Ky.) 298; Davis v. Herndon, 39 Miss. 484. See also Gardner v. Adams, 12 Wend. (N. Y.) 297.

5. Hall v. Robinson, 2 N. Y. 293; Cass v. New York, etc., R. Co., 1 E. D. Smith (N. Y.) 522; McGinn v. Worden, 3 E. D. Smith (N. Y.) 355. See also The Brig Sarah Ann, 2 Sumn. (U. S.) 206.

In Whitney v. Slauson, 30 Barb. (N. Y.) 276, it was said that the assignment of goods carried with it an existing right of action for a prior conversion or loss of the property.

An assignment of specific property, and all claims and demands for the same after conversion, carries the right of action for the conversion. Sherman v. Elder, 24 N. Y. 381, *reversing* 1 Hilt. (N. Y.) 476. See also

But he cannot maintain an action for the conversion without a demand.¹ It is to be noted, however, that at present a right of action for conversion is generally held to be assignable.²

Land.—At common law an assignment of land adversely held, except as a release, is void as an act of maintenance,³ and this rule applies also in equity.⁴ It seems, however, that such an assignment may take effect by estoppel between the parties, and thus legally operate to transfer the estate of the assignor, although he was not in possession when the assignment was executed.⁵

In some of the states the common-law doctrine has not been observed, and in many cases it has been modified or abrogated by statute.⁶

e. BONDS.—At Common Law bonds are not assignable, so as to enable the assignee to sue thereon in his own name, the assignment operating to transfer merely an equitable interest, as in the case of other choses in action.⁷

But a Court of Law will Recognize the Assignment of a bond and protect the rights of the assignee, so far as to refuse to give effect to a subsequent release of the debt by the original obligee.⁸

Under Modern Statutes bonds may be assigned, and the assignee may maintain an action thereon in his own name.⁹

Vogel v. Badcock, 1 Abb. Pr. (N. Y. Supreme Ct.) 176.

1. **Demand Necessary.**—*Smith v. Kennett*, 18 Mo. 154; *Van Hassell v. Borden*, 1 Hilt. (N. Y.) 128; *Howell v. Kroose*, 2 Abb. Pr. (N. Y. C. Pl.) 167; *Robinson v. Weeks*, 6 How. Pr. (N. Y. Supreme Ct.) 161; *Root v. Bonnema*, 22 Wis. 539.

Conversion after Assignment.—Personal property or chattels in the possession of another may be assigned by the rightful owner, and the assignee may maintain an action for conversion occurring after the assignment, without a demand. *Couillard v. Johnson*, 24 Wis. 533.

2. See *supra*, this title, *What may be Assigned—Choses in Action Generally*.

3. 4 Kent's Com. 446; *Ellis v. Doe*, 11 Smed. & M. (Miss.) 422; *Hoppiss v. Eskridge*, 2 Ired. Eq. (N. Car.) 54; *Den v. Shearer*, 1 Murph. (N. Car.) 114.

4. *Gwyn v. Wellborn*, 1 Dev. & B. (N. Car.) 313. See also *Hoppiss v. Eskridge*, 2 Ired. Eq. (N. Car.) 54.

5. *Hoppiss v. Eskridge*, 2 Ired. Eq. (N. Car.) 54.

6. See the title **CHAMPERTY AND MAINTENANCE**, where this subject is fully discussed.

7. **Bonds—Common-law Rule.**—*Brown v. Chambers*, 12 Ala. 697; *Skinner v. Somes*, 14 Mass. 107; *Fulcher v. Daniel*, 80 Ga. 74; *Richardson v. Beaumont*, 20 N. J. L. 578; *Smith v. Cook*, 2 McMull. (S. Car.) 58. See also *Glyn v. Baker*, 13 East 509; *Morris Canal, etc., Co. v. Fisher*, 9 N. J. Eq. 667, 64 Am. Dec. 423. See *infra*, this title, *Assignee Takes Subject to Equities*. See also the title **BONDS**.

8. **Release by Obligor.**—*Brown v. Chambers*, 12 Ala. 697. If the obligor of a bond, after notice of its being assigned, takes a release from the obligee and pleads it to an action brought by the assignee in the name of the obligee, the court will set the plea aside; nor will they, under these circumstances, allow the obligor to plead payment of the bond. *Legh v. Legh*, 1

B. & P. 447; *Andrews v. Beecker*, 1 Johns. Cas. (N. Y.) 411. See also *Prioleau v. South Western Railroad Bank*, 16 Ga. 582.

But a payment made by the obligor before notice of the assignment is good. *Bury v. Hartman*, 4 S. & R. (Pa.) 175. See *infra*, this title, *Notice*.

9. **Bonds Assignable by Statute.**—1 Stimson Am. Stat. Law, §§ 4031, 4032; *Jordan v. Thornton*, 7 Ark. 224, 44 Am. Dec. 546; *Nevill v. Hancock*, 15 Ark. 511; *Prioleau v. South Western Railroad Bank*, 16 Ga. 582; *Cochran v. Strong*, 44 Ga. 636; *Moorman v. Collier*, 32 Iowa 138; *Minor v. Edwards*, 10 Mo. 671; *Richardson v. Beaumont*, 20 N. J. L. 578. See also *Reed v. Bainbridge*, 4 N. J. L. 400; *Baggott v. Boulger*, 2 Duer (N. Y.) 160; *Wheeler v. Hughes*, 1 Dall. (Pa.) 23; *Bury v. Hartman*, 4 S. & R. (Pa.) 175; *Davis v. Barr*, 9 S. & R. (Pa.) 137; *Hoopes v. Beale*, 90 Pa. St. 82; *McDonough v. Tutt*, 31 Tex. 199; *Feazle v. Dillard*, 5 Leigh (Va.) 30; *Parker v. Kennedy*, 1 Bay (S. Car.) 398; *Exchange Bank v. Brown*, 11 Nova Scotia 335; and cases cited in note immediately succeeding.

Courts of Law have for Many Years Respected the Rights of Assignees of Bonds, but under the old maxim that they were not negotiable the assignment has been considered only in the nature of a power of attorney, authorizing the assignee to make use of the name of the obligee for the recovery of the money, and not to sue in his own name. But that is a mere matter of form, which, since the reason has ceased to exist, has constantly been giving way to a more correct view of the subject, until bonds of almost every description have become assignable and the assignees allowed to bring actions in their own names. By the statute 4 Anne, c. 6, bail bonds, and by the statute 11 George II., c. 19, replevin bonds, are permitted and may be required to be assigned. By the act of assembly of *South Carolina*, 1798, the assignees of all bonds for the payment of money are permitted to bring actions in

What bonds may be assigned in the several states will be determined by the language of the statutes. These generally provide that bonds for the payment of money, or for money or property, are assignable.¹

f. JUDGMENTS AND DECREES.—At Common Law judgments and decrees were assignable, so as to pass the equitable title to the assignee, but he was not

their own names. The same privilege is allowed by other acts of the legislature in other cases of assigned bonds. *Per* Nott, J., in *Charleston v. Price*, 1 McCord (S. Car.) 299.

The Assignee of a Bond, under the *Virginia* statute of 1795, does not acquire the legal title to the debt, but an equitable right, which, by virtue of the statute, he may assert at law in his own name, and may at his election sue at law in his own name or in that of the original obligee for his benefit. *Garland v. Richeson*, 4 Rand. (Va.) 268; *Dunn v. Price*, 11 Leigh (Va.) 210.

Where a bond is drawn payable to one, or he assigns, it is assignable by the law of the contract. *Hale v. Schults*, 3 McCord (S. Car.) 218. But see *Clark v. Farmers' Woolen Mfg. Co.*, 15 Wend. (N. Y.) 256.

1. Attachment Bonds and claims arising thereon are assignable under the *Missouri* statutes. *State v. Heckart*, 49 Mo. App. 280. See also in *South Carolina* *Hale v. Schults*, 3 McCord (S. Car.) 218; and in *Iowa* *Moorman v. Collier*, 32 Iowa 138.

Appeal Bonds may be assigned. *Craig v. Encey*, 78 Ind. 141. See also *Ullmann v. Kline*, 87 Ill. 268.

An Administration Bond is assignable by statute in *New York* by the surrogate, and an order by him directing it to be prosecuted, and declaring it assigned for that purpose, is the form of assignment contemplated by the statute. Not being a party to the bond, the surrogate cannot execute an assignment as obligee. *Baggott v. Boulger*, 2 Duer (N. Y.) 160.

As to the assignment of administration bonds in *New Brunswick*, see *In re Hunter*, 12 New Bruns. 233.

A Guardianship Bond is not assignable under the *South Carolina* Act of 1798 making bonds, etc., for the payment of money assignable. *Cobb v. Williams*, 1 Hill (S. Car.) 375.

A Replevy Bond, taken in attachment by a sheriff, is assignable by him to the plaintiff in attachment in *Alabama*, so that the latter may sue thereon in his own name. *Adkins v. Allen*, 1 Stew. (Ala.) 130; *Sartin v. Weir*, 3 Stew. & P. (Ala.) 421.

Compare, as to law in *Kentucky*, *Anderson v. Bradford*, 5 J. J. Marsh. (Ky.) 69.

A bond taken by a sheriff in an action of replevin not brought to recover goods distrained for rent is for his own security, and is not assignable in *New Jersey*. *Gordon v. Williamson*, 20 N. J. L. 77.

A replevin bond, given to a sheriff by a party to prosecute his action in replevin to judgment, is assignable in *South Carolina*. *Charleston v. Price*, 1 McCord (S. Car.) 299; *Keckley v. Harris*, 2 McMull. (S. Car.) 196. But a bond given to the sheriff under the trover Act of 1827 is not assignable. *Smith v. Cook*, 2 McMull. (S. Car.) 58.

See, as to the assignment of replevin bonds in *New Brunswick*, *Pollock v. Gardner*, 4 New Bruns. 655; *Berry v. Mitchell*, 7 New Bruns. 380; *Taylor v. Burpee*, 10 New Bruns. 191; *Wheeler v. Stewart*, 16 New Bruns. 398.

Bail Bonds.—Prior to the *Illinois* Rev. Stat. of 1845 a sheriff who had taken bail bonds to himself could not assign them to the plaintiff in judgment. *Hunter v. Gilham*, 1 Ill. 82.

Bail bonds are assignable by statute in *New Brunswick*. *Smith v. Smith*, 15 New Bruns. 420. And the executor of the assignee may bring an action thereon. *Scribner v. Gibbon*, 9 New Bruns. 182. See *Williams on Executors* 696, *citing* *Nott v. Stephens*, *Fortescue* 367.

A Prison Bounds Bond is assignable. *U. S. v. Noah*, 1 Paine (U. S.) 368; *Scott v. Wise*, 1 Cranch (C. C.) 473; *Tollison v. Miller*, *Harp.* (S. Car.) 389. *Compare* *Peck v. Glover*, 1 Nott & M. (S. Car.) 582.

See, as to the assignment of such bonds in *New Brunswick*, *Cameron v. Beardsley*, 4 New Bruns. 598; *Goodwin v. Murray*, 8 New Bruns. 595; *James v. Roach*, 11 New Bruns. 28; *McElroy v. Getty*, 12 New Bruns. 261.

An Injunction Bond was held not assignable at law in *Illinois*. *Safford v. Miller*, 59 Ill. 205.

A statutory bond required to be taken by the commissioner in equity, on granting an injunction to stay the collection of money recovered at law, is assignable under the *South Carolina* Act of 1798. *Cay v. Galliot*, 4 Strobb. (S. Car.) 282.

A Supersedeas Bond is not assignable under the *Kentucky* statute. *Yantes v. Smith*, 12 B. Mon. (Ky.) 395.

A Bond with a Collateral Condition is assignable under the *Missouri* Practice Act of 1849, so that the assignee may sue thereon in his own name. *Waterman v. Frank*, 21 Mo. 108. See also *Minor v. Edwards*, 10 Mo. 671.

Such bonds are assignable in *Mississippi*. *Alexander v. Pringle*, 27 Miss. 558. See also *Shields v. Taylor*, 25 Miss. 13.

A bond with a collateral condition was not assignable before the *Virginia* Act of 1795, and therefore the assignee of such a bond could not maintain an action on it. *Craig v. Craig*, 1 Call (Va.) 483; *Henderson v. Hepburn*, 2 Call (Va.) 232; *Lewis v. Harwood*, 6 Cranch (U. S.) 82. The assignment of such a bond, made after the Act of 1795, is good though the bond was dated before the act. *Meredith v. Duval*, 1 Munf. (Va.) 76.

Compare, as to operation of the *North Carolina* Act of 1786, *Wilkinson v. Wright*, Cam. & N. (N. Car.) 341.

A Bond Payable in Money or Otherwise, at the election of the obligor, is not assignable under the *New Jersey* statute making "bonds for the payment of money" assignable. *Richardson v. Beaumont*, 20 N. J. L. 578.

authorized to maintain an action thereon in his own name;¹ he might, however, sue in the name of his assignor;² but in equity he might sue in his own name.³

Under the Modern Practice it is not necessary to make the assignor a party to the proceedings, but the assignee of a judgment as the real party in interest may maintain an action thereon in his own name.⁴

g. CHATTEL MORTGAGES.—A mortgagee of chattels may dispose of his interest in the property mortgaged, by assignment. This assignment may be a legal assignment covering all the rights of the mortgagee under the mort-

But a bond payable in money to the obligee, or a third person named in the bond at the election of the obligor, is assignable under the statute. *Den v. Steelman*, 10 N. J. L. 193.

A sealed covenant to deliver a quantity of boards is not assignable. *Bell v. Reading*, 2 N. J. L. 132.

The Use of the Word "Assigns" is not essential to the assignability of bonds and bills obligatory under this act. *Sheppard v. Stites*, 7 N. J. L. 90. See also in *Georgia*, *Fulcher v. Daniel*, 80 Ga. 74.

See similar decisions in *North Carolina*. *Jamieson v. Farr*, 1 Hayw. (N. Car.) 182; *Campbell v. Mumford*, 1 Hayw. (N. Car.) 398. See also *Breen v. Ingram*, 1 Bay (S. Car.) 173.

A Deed Containing Mutual Covenants is not assignable under the *Illinois* statute making bonds, notes, etc., for the payment of money or property assignable. *Beezley v. Jones*, 2 Ill. 34.

As to the assignment of bonds affecting title to real estate, see *infra*, this title, *Interests in Lands—Contracts to Convey*.

1. Judgments.—*Baker v. Wood*, 157 U. S. 212; *Bunnell v. Magee*, 9 Ala. 433; *Black v. Everett*, 5 Stew. & P. (Ala.) 60; *Hughes v. Trahern*, 64 Ill. 48; *Moore v. Ireland*, 1 Ind. 531; *Richardville v. Cummins*, 5 Blackf. (Ind.) 48; *Reid v. Ross*, 15 Ind. 265; *Elliott v. Waring*, 5 T. B. Mon. (Ky.) 338, 17 Am. Dec. 69.

A Decree is not, in law, assignable, but is, like any other chose in action, transferable for a valuable consideration, and a court of equity will support the transfer. *Coates v. Muse*, 1 Brock. (U. S.) 551.

A judgment or decree is not assignable at law, so as to vest a legal title in the assignee. Such assignee takes only an equitable title which is subject to all equities which attached to it in the hands of his assignor. *U. S. v. Samperyac*, *Hempst.* (U. S.) 118.

An assignment of a judgment is utterly void at law, and cannot be noticed in a court of law. *Ferebee v. Doxey*, 6 Ired. (N. Car.) 446.

2. At Common Law, judgments may be assigned so as to transfer to the assignee an equitable interest and authorize him to sue thereon in the name of the assignor. *Haden v. Walker*, 5 Ala. 86; *Marshall v. Craig*, 3 Bibb (Ky.) 291; *Com. v. Fuqua*, 3 Litt. (Ky.) 41.

In *Alabama* the common-law rule obtains. *Johnson v. Martin*, 54 Ala. 273; *Lovins v. Humphries*, 67 Ala. 437; *Bunnell v. Magee*, 9 Ala. 433. And also in *Illinois*. *Hughes v. Trahern*, 64 Ill. 48.

In Those Jurisdictions where the Strict Rules

of the Common Law Prevail, a judgment cannot be so transferred as to vest the legal interest in the assignee, as it is a mere chose in action, and the beneficial interest only passes by the assignment. The assignee, however, has the right to enforce its collection for his benefit, and, for that purpose, to use the name of the party possessing the naked legal interest. And the courts will protect him against the acts of the assignor, and also against the acts of the debtor, after he has notice of the assignment. But he takes the judgment subject to all defenses that existed against it in the hands of the party from whom he received it. *McJilton v. Love*, 13 Ill. 486, 54 Am. Dec. 449; *Hughes v. Trahern*, 64 Ill. 48. See also *Ullmann v. Kline*, 87 Ill. 268.

3. The assignee of a judgment or decree cannot prosecute an action at law thereon in his own name, but the rule is different in equity. *Moorer v. Moorer*, 87 Ala. 545.

Judgments are assignable in equity, and equity will protect the assignment of a judgment in favor of one who has paid a valuable consideration for it, whether the assignment has been made by parol or in writing. *Brahan v. Ragland*, 3 Stew. (Ala.) 247.

4. Present Rule—Right of Assignee to Sue in His Own Name.—*Ritch v. Eichelberger*, 13 Fla. 169; *Edmonds v. Montgomery*, 1 Iowa 143; *Charles v. Haskins*, 11 Iowa 329, 77 Am. Dec. 148; *Wright v. Parks*, 10 Iowa 342; *Moore v. Nowell*, 94 N. Car. 265; *Timberlake v. Powell*, 99 N. Car. 233; *Knapp v. Standley*, 45 Mo. App. 264.

In *Georgia* all judgments are assignable under the code. *Gamble v. Central R., etc., Co.*, 80 Ga. 595, 12 Am. St. Rep. 276.

In *Ontario* a judgment is a chose in action assignable under the statute, so as to enable the assignee to sue on it in his own name. *Harper v. Culbert*, 5 Ont. Rep. 152.

A Judgment against a Sheriff for damages arising from his misconduct in office, where the tort has been merged in the judgment prior to the assignment, is assignable, and the assignee thereof may sue thereon in his own name. *Charles v. Haskins*, 11 Iowa 329, 77 Am. Dec. 148.

An Attorney-at-Law is regarded as the assignee of a judgment to the extent of the costs included therein, as a compensation for his labor and expense in prosecuting or defending the suit, and is entitled to all the rights of the assignee. *Wilkins v. Batterman*, 4 Barb. (N. Y.) 47.

For a Full Discussion of the assignment of judgments and decrees, see the title JUDGMENTS AND DECREES.

gage and transferring the legal title to the mortgaged property,¹ or it may be an equitable assignment transferring such rights only as a court of equity would enforce.²

h. **CONTRACTS OF GUARANTY.**—At common law, a contract of guaranty was not assignable, so as to enable the assignee to maintain an action thereon.³ Under enabling statutes, a general guaranty is, as a rule, assignable.⁴

Special Contract of Guaranty.—A special guaranty contemplates personal trust and confidence, and from its nature is not assignable until a right of action has arisen thereon, when it may, like any other cause of action arising upon contract, be assigned.⁵

i. **INSURANCE POLICIES.**—Policies of life, fire, or marine insurance are frequently the subject of assignment. At the common law, the rules with regard to the assignment of these instruments were the same as those governing the assignment of other choses in action.⁶ At the present day, the law upon this subject is contained in a vast number of decisions turning in many instances upon the peculiar provisions of the policies themselves, or upon special statutes. The whole subject will be found discussed in this work under the various titles where the several species of insurance contracts are treated.⁷

j. **INTERESTS IN LANDS**—(1) *Generally.*—As a General Rule every estate and interest in lands and tenements may be assigned, and also every present and certain estate or interest in incorporeal hereditaments, as rents and the like, even though the interest be future, as a term of years to commence at a

1. *Gafford v. Lofton*, 94 Ala. 333; *Robinson v. Fitch*, 26 Ohio St. 659; *Moody v. Ellerbe*, 4 Rich. (S. Car.) 21. See the title **CHATTEL MORTGAGES**.

As to what constitutes an assignment of a chattel mortgage, see *infra*, this title, *What Constitutes an Assignment—Of Chattel Interests*.

2. See the title **CHATTEL MORTGAGES**; and *infra*, this title, *What Constitutes an Assignment—Of Chattel Interests*. See also *Graham v. Newman*, 21 Ala. 497.

Some cases speak of the assignment of a chattel mortgage as the assignment of a chose in action, and therefore regard it as cognizable in a court of law only as such an assignment would be. *Zeiter v. Bowman*, 6 Barb. (N. Y.) 133.

3. **Contracts of Guaranty—Common-law Rule.**—*Dubuque First Nat. Bank v. Carpenter*, 41 Iowa 518.

An assignment would pass the equitable title, and the guaranty could be enforced for the benefit of the assignee, but in the name of the person to whom the guaranty was made. *Small v. Sloan*, 1 Bosw. (N. Y.) 352. See generally the title **GUARANTY**.

4. *Dubuque First Nat. Bank v. Carpenter*, 41 Iowa 518; *Anchor Invest. Co. v. Kirkpatrick*, 59 Minn. 378; *Everson v. Gere*, 122 N. Y. 290, *affirming* 40 Hun (N. Y.) 248; *McLaren v. Watson*, 26 Wend. (N. Y.) 425, *affirming* 19 Wend. (N. Y.) 557, 37 Am. Dec. 260; *Small v. Sloan*, 1 Bosw. (N. Y.) 352.

Prohibition against Assignment.—The parties to a contract of guaranty may, by express words, limit the right to assign it before a cause of action arises thereon, but the courts will not presume that they have done or intend to do so when the guaranty relates to negotiable paper, unless the intention to

render the guaranty unassignable clearly appears upon the face of the contract, or from the surrounding circumstances. *Everson v. Gere*, 40 Hun (N. Y.) 248, *affirmed* in 122 N. Y. 290.

In Iowa, by statute (Code, § 2086), a contract of guaranty may be assigned, although by the terms of the instrument its assignment is prohibited. *Dubuque First Nat. Bank v. Carpenter*, 41 Iowa 518.

Guaranty to Secure a Note.—A general guaranty given to secure a note may be transferred by sale or assignment before the note becomes due. *Everson v. Gere*, 40 Hun (N. Y.) 248, *affirmed* in 122 N. Y. 290.

A Written Continuing Guaranty that C will pay to B an indebtedness that may now or hereafter be owing to B by C, not to exceed a certain amount, may be assigned by B to a third person on a sale and transfer of overdue notes made by C to B. *Anchor Invest. Co. v. Kirkpatrick*, 59 Minn. 378.

Guaranty for Payment of Rent.—In *Illinois* a written guaranty upon a lease, whereby the guarantors guarantee the payment of the rent and the performance of the covenants by the lessee, is not assignable, as it is an instrument depending upon extrinsic proof before it becomes a binding contract for the payment of money, and is not within the enabling act of that state. *Potter v. Gronbeck*, 117 Ill. 404.

5. **Special Contract of Guaranty.**—*Evansville Nat. Bank v. Kaufmann*, 93 N. Y. 273, 45 Am. Rep. 204; *Everson v. Gere*, 122 N. Y. 290.

6. See *Wood v. Rutland Mut. F. Ins. Co.*, 31 Vt. 552; *Hobbs v. Memphis Ins. Co.*, 1 Sneed (Tenn.) 444.

7. See the titles **BENEFICIAL OR BENEVOLENT ASSOCIATIONS**; **FIRE INSURANCE**; **LIFE INSURANCE**; **INSURANCE**; and **MARINE INSURANCE**.

subsequent period; for the interest is vested *in presenti*, though only to take effect *in futuro*.¹

(2) *Contracts to Convey*.—A sealed contract for the conveyance of land is held to be assignable under statutes providing for the assignment of bonds for

1. Interests in Lands.—1 Bouv. Inst., § 2078.

Where A leased from B a lot of land for five years, covenanting to make certain improvements on it, and at the expiration of the five years to pay one hundred dollars for the land to B, who was then to make a title of it to A, it was held that A had an assignable interest in the land. *Robinson v. Perry*, 21 Ga. 183, 68 Am. Dec. 455. See *Barling v. Peters*, 131 Ill. 78, for an instance of an interest of one of two joint purchasers of land held assignable.

The interest in land of a person who has been defrauded thereof is assignable. *Connecticut Mut. L. Ins. Co. v. Smith*, 117 Mo. 261.

The Allotments of Land made to the French emigrants under the Act of Congress of March 3, 1817, for the encouragement of the cultivation of the vine and olive, were held to be assignable by the grantees, as well before as after the performance of the conditions of cultivation required by the government. *Jenkins v. Noel*, 3 Stew. (Ala.) 60. See also *Nixon v. Carco*, 28 Miss. 414.

Assignments of Bounty Lands and of warrants therefor prior to the issuing of the patent have been held void. *Rose v. Buckland*, 17 Ill. 309.

The right given by *United States Rev. Stat.*, § 2306, to enter a "soldier's additional homestead," is assignable. *Webster v. Luther*, 50 Minn. 77; *Tuman v. Pillsbury* (Minn. 1895), 63 N. W. Rep. 104.

The Right to Obtain a Grant to vacant land acquired by possession and occupancy is assignable. *Smith v. Rankin*, 4 Yerg. (Tenn.) 1, 26 Am. Dec. 213; *Cook v. Shute*, 1 Cooke (Tenn.) 67. But in *Whitney v. Buckman*, 13 Cal. 536, the court said that the right to a preemption in public land is not assignable, though the possession of public land, whether taken for the purpose of getting a preemption right, or for any other purpose, may be mortgaged.

Certificate of Location.—Under the acts of Congress a certificate of location, acquired by the valid location of military bounty land warrants, is assignable. *Waters v. Bush*, 42 Iowa 255.

A Certificate of Purchase of land at a mortgage foreclosure sale is assignable, subject to prior equities against the assignor. *Van Gorder v. Lundy*, 66 Iowa 448.

A Conditional Land Certificate is assignable in *Texas*. *Graham v. Henry*, 17 Tex. 164; *Merrweather v. Kennard*, 41 Tex. 273; *Davis v. Bargas* (Tex. 1895), 32 S. W. Rep. 874.

A Certificate of Settlement and entry is assignable. *Hart v. Benton*, 3 Bibb (Ky.) 420.

Warrants and Surveys of land are assignable, but not entries. *Morrison v. Campbell*, 2 Rand. (Va.) 206. See also *Vowles v. Craig*, 8 Cranch (U. S.) 371.

The Dower Interest of a widow in the real estate of her deceased husband is assignable in equity. *Strong v. Clem*, 12 Ind. 37, 74 Am. Dec. 200, *overruling* *Strong v. Bragg*, 7

Blackf. (Ind.) 62. See also *Todd v. Beatty*, *Wright (Ohio)* 460, 4 Kent's Com. 61.

A Widow's Interest in her deceased husband's estate is assignable in equity. *Powell v. Powell*, 10 Ala. 900.

Rent.—An assignment of rents, with a power of attorney to collect them as they shall become due, is a valid assignment in equity, although the assignor should die before they are collected. *Taylor v. Moore*, 5 Cranch (C. C.) 317.

Rents to accrue are assignable, and a lessor may assign the rent to become due upon a lease without assigning the reversion. *Demarest v. Willard*, 8 Cow. (N. Y.) 206; *Willard v. Tillman*, 2 Hill (N. Y.) 274. See also *Childs v. Clark*, 3 Barb. Ch. (N. Y.) 52, 49 Am. Dec. 164. See the title LANDLORD AND TENANT.

But rents in arrear are choses in action, and, in those jurisdictions in which the common-law doctrine as to the assignment of choses in action is in force, are not assignable so as to enable the assignee to sue in his own name. *Kennedy v. Kennedy*, 66 Ill. 190; *Ryerson v. Quackenbush*, 26 N. J. L. 236; *Demarest v. Willard*, 8 Cow. (N. Y.) 206. *Compare*, in *Wisconsin*, *Chapman v. Plummer*, 36 Wis. 262.

An Easement in Gross, as a right reserved to draw water, is assignable. *Goodrich v. Burbank*, 12 Allen (Mass.) 459, 90 Am. Dec. 161; *French v. Morris*, 101 Mass. 68; *Owen v. Field*, 102 Mass. 90; *Hankey v. Clark*, 110 Mass. 262; *Amidon v. Harris*, 113 Mass. 59. See also *Bloom v. West*, 3 Colo. App. 212.

A Right of Way for Conducting Water over Land is assignable under the *California* statutes. *Fudickar v. East Riverside Irrigation Dist.*, 109 Cal. 29, *overruling* a dictum in *Painter v. Pasadena Land, etc., Co.*, 91 Cal. 74.

A Reservation of a Right of Profit à Prendre is assignable. *Painter v. Pasadena Land, etc., Co.*, 91 Cal. 74.

A Reservation by a Grantor of a Privilege to Enter upon Land and Take Stone or Mineral therefrom, is not a mere personal privilege, but an interest in land, and is assignable. *Munn v. Stone*, 4 Cush. (Mass.) 146; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290.

So a Privilege to Mine on land is assignable. *Gaston v. Plum*, 14 Conn. 344.

A Right of Entry on Land for Condition Broken is not assignable. *Warner v. Bennett*, 31 Conn. 468; *Guild v. Richards*, 16 Gray (Mass.) 309; *Trask v. Wheeler*, 7 Allen (Mass.) 109; *Rice v. Boston, etc., R. Corp.*, 12 Allen (Mass.) 141; *Branch v. Wesleyan Cemetery Directors*, 29 Ohio L. J. 398. See also 4 Kent Com. 127; *Hooper v. Cummings*, 45 Me. 359; *Main v. Green*, 32 Barb. (N. Y.) 448; *McKissick v. Pickle*, 16 Pa. St. 140; even by the state, *Thompson v. Bright*, 1 Cush. (Mass.) 420.

The right of a grantor to enter upon lands upon the breach of a condition subsequent, being a mere possibility of reverter and not a

the payment of money or property.¹

(3) *Covenants—Decisions Conflicting.*—The decisions of the courts as to the assignability of covenants relating to land have not been harmonious. The general doctrine is that where land is transferred from one person to another the assignee, by reason of privity of estate, is bound by and entitled to the benefit of all covenants running with the land.² The confusion in the courts

possibility coupled with an interest, is not assignable in law or equity. *Nicoll v. New York, etc., R. Co.*, 12 N. Y. 121, *affirming* 12 Barb. (N. Y.) 460. See also *Jackson v. Catlin*, 2 Johns. (N. Y.) 248, 3 Am. Dec. 415, 8 Johns. (N. Y.) 520.

The right of entry for breach of a condition is not assignable at common law, where the estate may continue after the forfeiture incurred, but is assignable where the breach terminates the estate. *Gwynn v. Jones*, 2 Gill & J. (Md.) 173.

The right of entry for condition broken was made assignable by the *New Jersey Act of 1851*. See *Southard v. Central R. Co.*, 26 N. J. L. 13.

1. **A Bond for the Conveyance of Land** is assignable under the *Kentucky* statute making bonds, etc., for the payment of money or property assignable, and the assignee may sue in his own name. *Conn v. Jones*, Hard. (Ky.) 9; *Neyfong v. Wells*, Hard. (Ky.) 571; *Russell v. Petree*, 10 B. Mon. (Ky.) 184.

Such a bond was not assignable under the *Illinois Act of 1807*, providing that bonds for the "payment of money or any specific article" may be assigned. *Buckmaster v. Eddy*, 1 Ill. 381. See also, in *South Carolina*, *Duncan v. Wilbanks*, 3 Brev. (S. Car.) 10. See also *Anderson v. Warnock*, 3 Brev. (S. Car.) 2.

But such a bond may be assigned in equity. *Fitzpatrick v. Beatty*, 6 Ill. 454. See also *Crawford v. M'Donald*, 2 Hen. & M. (Va.) 189.

A Title Bond for Lands Acquired at an Administrator's Sale is assignable. *In re Reynolds*, 16 Nat. Bank. Reg. 158.

The interest of the obligee in a bond for title to land is assignable. *Melton v. Smith*, 65 Mo. 315.

A Penal Bond conditioned for the making of title to real estate is assignable by statute in *Alabama*, so as to vest the assignee with the right to sue thereon in his own name. *Brown v. Chambers*, 12 Ala. 697; *Skinner v. Bedell*, 32 Ala. 44. See also, in *Texas*, *Durst v. Swift*, 11 Tex. 273.

Such a bond may be assigned after a forfeiture, and the assignee may maintain a bill in equity for specific performance. *Ensign v. Kellogg*, 4 Pick. (Mass.) 1.

Under the *Ohio* statute of 1810, providing that bonds, etc., drawn for any sum or sums of money, or other property certain, may be assigned, it was held that the assignee of a bond for the conveyance of town lots, to which no value is affixed, cannot sue thereon in his own name. *M'Cutchen v. Keith*, 2 Ohio 262.

The Vendee's Interest in a Contract for the sale and conveyance of real estate may be assigned as security, and the assignee will take

the rights and interest of an equitable mortgagee. *Brayton v. Jones*, 5 Wis. 117. See also *Holman v. Criswell*, 13 Tex. 38.

A Contract, Not under Seal, to convey an interest in real estate upon the performance of certain conditions, is assignable, so as to vest an equitable interest in the assignee, which will be protected and made available by courts of law. *Dyer v. Burnham*, 25 Me. 9.

School Land Certificates, being contracts for the sale of real estate, may be assigned in writing but not otherwise. *Smith v. Clarke*, 7 Wis. 551.

At Common Law a Covenant to Make a Conveyance of Land Is Not Assignable, nor will equity regard the assignee further than, at his instance, to enforce the remedy and to protect the rights derived by the assignor under it. *Hamilton v. Brown*, 18 Pa. St. 87.

Option to Purchase.—An option to purchase may be assigned. *Rice v. Gibbs*, 33 Neb. 460. See also *Kerr v. Day*, 14 Pa. St. 112, 53 Am. Dec. 526. And an instrument, giving a person an option to purchase land upon the performance of certain conditions, performable or not at his election, may not be assignable before such person has acquired a right of property thereunder, by the performance of the conditions, but is assignable in equity after that time. *Perkins v. Hadsell*, 50 Ill. 216.

Right of Selection.—A contract to convey to A one of several pieces of land, to be selected by him, is not assignable to B so as to entitle him to the selection, the right of choice being strictly personal. *McQueen v. Chouteau*, 20 Mo. 222, 64 Am. Dec. 178.

2. **Covenants.**—*Noke v. Awder*, Cro. Eliz. 436; *Redwine v. Brown*, 10 Ga. 311; *Cox v. Fenwick*, 4 Bibb (Ky.) 538; *Moore v. Merrill*, 17 N. H. 75, 43 Am. Dec. 593; *M'Crary v. Brisbane*, 1 Nott & M. (S. Car.) 104, 9 Am. Dec. 676. See 2 Kerr on Real Property, § 1217 *et seq.*; *Spencer's Case*, 5 Coke 17b; 1 Smith Lead. Cas. (8th Amer. ed.) 145; and cases cited in notes *infra*.

A Covenant for Rent runs with the land and is binding on the assignee. *Constantine v. Wake*, 1 Sweeney (N. Y.) 239; *Stevenson v. Lambard*, 2 East 575. See generally *Holford v. Hatch*, Doug. 183; *Cox v. Bishop*, 8 De G. M. & G. 815; *Van Rensselaer v. Gallup*, 5 Den. (N. Y.) 454; *Demarest v. Willard*, 8 Cow. (N. Y.) 206; *Van Rensselaer v. Read*, 26 N. Y. 558; *Huerstel v. Lorillard*, 6 Robt. (N. Y.) 260; *Van Rensselaer v. Hays*, 19 N. Y. 68, 75 Am. Dec. 278; *Main v. Feathers*, 21 Barb. (N. Y.) 646.

So Also Is a Covenant to Repair.—See *Palmer v. Edwards*, Doug. 187, note; *Conan v. Kemise*, W. Jones 245; *Merceron v. Dowson*, 5 B. & C. 479, 11 E. C. L. 277; *Demarest v. Willard*, 8 Cow. (N. Y.) 206. See the title LANDLORD AND TENANT.

seems to have arisen mainly in a difference of opinion as to when a breach of such covenants occurs. Most of the courts consider that covenants of seisin, of the right to convey, and against incumbrances, are personal, and do not run with the land, but are completely fulfilled, or completely broken, at the instant of their execution, and, if broken, vest immediately a right of action in the covenantee, which, being a mere chose in action, was not assignable under the former rule as to the assignment of choses in action.¹

In several states, however, the courts, while in some cases admitting that there is a nominal instantaneous breach, consider the covenants as still continuing, and running with the land, so that the assignee of the covenantee may recover damages for the breach, when or after he has been evicted, or has had to discharge the incumbrances to protect his title.²

Covenant of Warranty.—It seems well settled that a covenant of warranty, or a covenant of quiet enjoyment, runs with the land, and is assignable.³

(4) *Leases.*—The right of assignment is an incident of leased property,⁴

1. Covenants of Seisin, etc., Not Assignable.—4 Kent's Com. 471.

England.—Lewes *v.* Ridge, Cro. Eliz. 863. *Connecticut.*—Mitchell *v.* Warner, 5 Conn. 497; Davis *v.* Lyman, 6 Conn. 249; Hubbard *v.* Norton, 10 Conn. 422.

Maine.—Hacker *v.* Storer, 8 Me. 228. But see, as to the effect of statutes, Trask *v.* Wilder, 50 Me. 453; Wilson *v.* Widenham, 51 Me. 566.

Massachusetts.—Bickford *v.* Page, 2 Mass. 455; Marston *v.* Hobbs, 2 Mass. 433, 3 Am. Dec. 61; Wyman *v.* Ballard, 12 Mass. 305; Smith *v.* Richards, 155 Mass. 79; Bartholomew *v.* Candee, 14 Pick. (Mass.) 167; Thayer *v.* Clemence, 22 Pick. (Mass.) 490; Slater *v.* Rawson, 1 Met. (Mass.) 450; Clark *v.* Swift, 3 Met. (Mass.) 390.

Minnesota.—Kimball *v.* Bryant, 25 Minn. 496.

New Hampshire.—Moore *v.* Merrill, 17 N. H. 75, 43 Am. Dec. 593.

New Jersey.—Chapman *v.* Holmes, 10 N. J. L. 20; Garrison *v.* Sandford, 12 N. J. L. 261; Carter *v.* Denman, 23 N. J. L. 260. See, as to effect of statutes, Andrews *v.* Rue, 34 N. J. L. 402.

New York.—Greenby *v.* Wilcocks, 2 Johns. (N. Y.) 1, 3 Am. Dec. 79. See also Hamilton *v.* Wilson, 4 Johns. (N. Y.) 72, 4 Am. Dec. 253.

Vermont.—Garfield *v.* Williams, 2 Vt. 327; Pierce *v.* Johnson, 4 Vt. 247; Swasey *v.* Brooks, 30 Vt. 692.

Wisconsin.—Pillsbury *v.* Mitchell, 5 Wis. 17.

In Ohio the doctrine is that whether a covenant of seisin and of power to convey is personal, or real and running with the land, depends upon whether the grantor is in possession or not at the time of the conveyance. If he is in actual possession, the covenant runs with the land, and is not broken until the purchaser or those claiming under him are evicted by paramount title. But if the grantor is not in actual possession, and has not title, the covenant is instantly broken, and is personal, and is a chose in action, and not assignable. Backus *v.* McCoy, 3 Ohio 211, 17 Am. Dec. 585; Devore *v.* Sunderland, 17 Ohio 52.

2. Cases Holding Contra.—Kingdon *v.* Nottle, 1 M. & S. 355, 4 M. & S. 53; Richard *v.* Bent, 59 Ill. 38, 14 Am. Rep. 1; Schofield *v.*

Iowa Homestead Co., 32 Iowa 317, 7 Am. Rep. 197; Knadler *v.* Sharp, 36 Iowa 232; Dickson *v.* Desire, 23 Mo. 151; Magwire *v.* Riffin, 44 Mo. 512; Allen *v.* Kennedy, 91 Mo. 324; M'Crary *v.* Brisbane, 1 Nott & M. (S. Car.) 104, 9 Am. Dec. 676.

In Kingdon *v.* Nottle, 4 M. & S. 53, it was held that an action might be maintained by a devisee of the grantee of land on the covenant of seisin, although broken in the lifetime of the testator, such covenant passing with the land to the devisee, the breach being considered as continuing in his time. This case is generally cited in support of the assignability of covenants of seisin, etc., but does not seem to be in accordance with the earlier English cases on the subject, and has been repeatedly *disapproved*. See 4 Kent's Com. 472; Mitchell *v.* Warner, 5 Conn. 497; Clark *v.* Swift, 3 Met. (Mass.) 390; Moore *v.* Merrill, 17 N. H. 75, 43 Am. Dec. 593.

3. Covenant of Warranty Is Assignable.—4 Kent's Com. 471.

Illinois.—Wead *v.* Larkin, 54 Ill. 489.

Massachusetts.—Slater *v.* Rawson, 1 Met. (Mass.) 450; Thayer *v.* Clemence, 22 Pick. (Mass.) 490.

New Hampshire.—Moore *v.* Merrill, 17 N. H. 75, 43 Am. Dec. 593; Russ *v.* Perry, 49 N. H. 547; Chandler *v.* Brown, 59 N. H. 370.

New Jersey.—Chapman *v.* Holmes, 10 N. J. L. 28; Garrison *v.* Sandford, 12 N. J. L. 261; Carter *v.* Denman, 23 N. J. L. 260.

New York.—Beddoe *v.* Wadsworth, 21 Wend. (N. Y.) 120.

In *Michigan* a grantee in a deed containing a covenant of warranty cannot sever his right of action thereunder and assign it while he retains the premises. Ely *v.* Hergesell, 46 Mich. 325.

The assignee of a lessee may sue for breach of covenant of quiet enjoyment. Bishop *v.* Crown Lands Com'rs, 5 Hawaiian 242.

For a Full Discussion of this branch of the subject of Assignments, see the title COVENANTS.

4. Leases—The Right of Assignment.—Greenaway *v.* Adams, 12 Ves. Jr. 395; Robinson *v.* Perry, 21 Ga. 183, 68 Am. Dec. 455; Garner *v.* Byard, 23 Ga. 289, 68 Am. Dec. 527.

For a Full Discussion of this subject, see the titles LEASES; LANDLORD AND TENANT.

and all leases, except those at will,¹ may be assigned if there is no restriction therein to the contrary.

Consent of Lessor—Statutes.—In some jurisdictions statutes in certain cases prohibit the assignment of a lease without the consent of the lessor.²

Restriction in Lease as to Assignment.—A provision in a lease that it shall not be assigned without the assent of the lessors, is for the benefit of the lessors only, and does not render the assignment, when otherwise made, absolutely void, but voidable only, at the option of the lessors or their representatives.³

In the Absence of the Word "Assigns," the right of assignment will exist as an incident to the lease. *Greenaway v. Adams*, 12 Ves. Jr. 395; *Spear v. Fuller*, 8 N. H. 174, 28 Am. Dec. 391. See also *Cooney v. Hayes*, 40 Vt. 478, 94 Am. Dec. 425.

Under *Iowa Code*, § 2084, a mining lease, containing no provision as to assignment, may be assigned. *Steele v. Mills*, 68 Iowa 406.

Lessee Remaining in Possession.—An assignment by a lessee for years of all his interest in the premises is valid, though he remains in possession of a part of the premises. An immediate change of possession is not necessary to the validity of an assignment of a chattel real. *Williams v. Downing*, 18 Pa. St. 60.

Assignment and Subletting Distinguished.—An assignment, as contradistinguished from a sublease, is a transfer for the whole term either of the whole or a portion of the demised premises, but where the lessee lets the demised premises for a less time than the period of his unexpired term, it is an under or sublease. *Cox v. Fenwick*, 4 Bibb (Ky.) 538; *Hicks v. Martin*, 25 Mo. App. 359; *Craig v. Summers*, 47 Minn. 189; *Gulf, etc., R. Co. v. Settegast*, 79 Tex. 256.

Where a reversionary interest is retained it will be a subletting. *Collamer v. Kelley*, 12 Iowa 319; *Dunlap v. Bullard*, 131 Mass. 161; *McNeil v. Kendall*, 128 Mass. 245, 35 Am. Rep. 373; *Doty v. Heth*, 52 Miss. 530; *Woodhull v. Rosenthal*, 61 N. Y. 382; *Bedford v. Terhune*, 30 N. Y. 453, 86 Am. Dec. 394.

1. Assignment by Tenant at Will.—A tenant at will has no legal right to transfer to another person the premises which he occupies, as the relation of such tenant to his landlord is merely personal, and a formal transfer by him gives no rights to the assignee, and the owner of the premises may treat the assignee as a trespasser. *Hart v. Bouton*, 152 Mass. 440; *Coughlin v. Gray*, 131 Mass. 56.

The interest of a tenant at will is not a matter of bargain and sale or assignment; and a transfer will give the assignee no right that he can hold. *Whitemore v. Gibbs*, 24 N. H. 484. And the assignment of his estate terminates the tenancy. *Cooper v. Adams*, 6 Cush. (Mass.) 87; *King v. Lawson*, 98 Mass. 309.

"If the tenant at will granteth over his estate to another, and the grantee entereth, he is a disseisor, and the lessor may have an action of trespass against him; for, although the granting was void, yet it amounteth to the determination of his will." *Co. Litt.* 57; *Cooper v. Adams*, 6 Cush. (Mass.) 87.

A Lease upon Shares is not assignable, unless the lessor consents thereto, because the

contract is personal in its nature. *Lewis v. Sheldon*, 103 Mich. 102; *Randall v. Chubb*, 46 Mich. 311, 41 Am. Rep. 165.

2. Matthews v. Whitaker (Tex. Civ. App. 1893), 23 S. W. Rep. 538; *Gulf, etc., R. Co. v. Settegast*, 79 Tex. 256. Assignments made in violation of such statute are void, and the occupation will be enjoined. *Matthews v. Whitaker* (Tex. Civ. App. 1893), 23 S. W. Rep. 538.

3. Restriction in Lease as to Assignment.—*Webster v. Nichols*, 104 Ill. 160. See also *Chipman v. Emeric*, 5 Cal. 49, 63 Am. Dec. 80; *Eldredge v. Bell*, 64 Iowa 125; *Spear v. Fuller*, 8 N. H. 174, 28 Am. Dec. 391. See generally the title LEASES.

Assignment for Benefit of Creditors.—A voluntary assignment for the benefit of creditors is not a breach of a covenant in a lease prohibiting its assignment. *Medinah Temple Co. v. Currey*, 58 Ill. App. 433; *Philadelphia, etc., R. Co. v. Catawissa R. Co.*, 53 Pa. St. 20.

Restriction against Assignment Construed.—It is well settled that a covenant in a lease not to assign will be strictly construed. *Medinah Temple Co. v. Currey*, 58 Ill. App. 433; *Boyd v. Fraternity Hall Assoc.*, 16 Ill. App. 574.

In *Doe v. Godwin*, 4 M. & S. 265, the lease contained a provision against assignment, and also a provision for forfeiture on breach of other covenants, and it was held that there was no right of reëntry for breach of the provision against assignment and that it did not create a condition, but a covenant merely.

In *Crawley v. Price*, L. R. 10 Q. B. 302, the lease contained a like provision, and it was held that the lessor could not reënter for its breach; that it was not a condition, but a covenant.

See, however, *Kew v. Trainor*, 150 Ill. 150, *affirming* 50 Ill. App. 629, where a lease provided that the lessee should not assign the lease without the consent of his lessor, and that in case of default in any of the agreements or covenants of the lease, the lessor should have a right to declare the term at an end and reënter, and it was held that it was not a mere covenant not to assign, but a power of reëntry on a breach of the covenant. See generally the title LEASES.

Covenant Not to Let or Underlet.—In *Lynde v. Hough*, 27 Barb. (N. Y.) 415, a lessee covenanted "not to let or underlet the whole or any part of the demised premises without the written consent of the landlord, under the penalty of forfeiture and damages," and it was held that by a strict and literal interpretation of this covenant, it did not include an assignment, by the lessee, of all his right and interest in the lease.

Of Course there must Be a Consenting Assignee before the assignment can be complete and valid.¹

(5) *Mortgages*.—It is a well-recognized principle that a mortgage may be assigned.²

Equity of Redemption.—It is held in *Massachusetts* that after a sale on execution of an equity of redemption the mortgagor has still an interest remaining in him, which he may convey by way of mortgage, and his right of redeeming this second mortgage is assignable.³

k. LICENSES.—A mere license is strictly confined to the original parties, is personal to the licensee, and cannot be assigned by him,⁴ and an attempted

To the same effect, see *Field v. Mills*, 33 N. J. L. 254, *rejecting* the authority of *Greenaway v. Adams*, 12 Ves. Jr. 395, and *Den v. Post*, 25 N. J. L. 285, as far as a contrary view is expressed. See, as intimating a contrary view, *Bemis v. Wilder*, 100 Mass. 446; *Shattuck v. Lovejoy*, 8 Gray (Mass.) 246; *Blake v. Sanderson*, 1 Gray (Mass.) 332; *Shumway v. Collins*, 6 Gray (Mass.) 227.

1. *Beattie v. Parrott Silver, etc., Co.*, 7 Mont. 320. Here a lease was assigned by the original lessee to the defendant corporation, which paid the rent according to the same for nearly one year, and then attempted to avoid further liability by a pretended reassignment of the lease, by an indorsement on the same, to the original lessee without his knowledge, and by notifying the lessor of the reassignment. The reassignment was adjudged invalid, and the defendant liable for the rent due under the terms of the lease, together with legal interest and costs.

2. See the title MORTGAGES.

3. *Reed v. Bigelow*, 5 Pick. (Mass.) 281; *Bigelow v. Willson*, 1 Pick. (Mass.) 485; *Clark v. Austin*, 2 Pick. (Mass.) 528.

4. **Licenses—England.**—*Howes v. Ball*, 7 B. & C. 481, 14 E. C. L. 90; *Rex v. Newton, Bridg.* 115.

United States.—*De Haro v. U. S.*, 5 Wall. (U. S.) 599.

Alabama.—*Riddle v. Brown*, 20 Ala. 412, 56 Am. Dec. 202.

California.—*Jensen v. Hunter* (Cal. 1895), 41 Pac. Rep. 14.

Connecticut.—*Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675; *Foot v. New Haven, etc., Co.*, 23 Conn. 214.

Maine.—*Emerson v. Fisk*, 6 Me. 200, 19 Am. Dec. 206.

Missouri.—*Fuhr v. Dean*, 26 Mo. 116, 69 Am. Dec. 484.

New Hampshire.—*Cowles v. Kidder*, 24 N. H. 380, 57 Am. Dec. 287; *Carleton v. Redington*, 21 N. H. 291.

New York.—*Mendenhall v. Klinck*, 51 N. Y. 246, *affirming* 50 Barb. (N. Y.) 634; *Jackson v. Babcock*, 4 Johns. (N. Y.) 418; *Wolfe v. Frost*, 4 Sandf. Ch. (N. Y.) 72.

Pennsylvania.—*Dark v. Johnston*, 55 Pa. St. 164, 93 Am. Dec. 732.

Tennessee.—*Nunnally v. Southern Iron Co.*, 94 Tenn. 397.

For a Full Discussion as to the assignment of licenses, see the titles INTOXICATING LIQUORS; LICENSE; and LICENSE (PATENT LAW).

"A license doth not extend but to him to whom it is given, and cannot be granted

over." *Rex v. Newton, Bridg.* 115; *Prince v. Case*, 10 Conn. 375, 27 Am. Dec. 675.

"A license is founded in personal confidence, and it is not assignable or descendible." *Wolfe v. Frost*, 4 Sandf. Ch. (N. Y.) 72.

In *Jackson v. Babcock*, 4 Johns. (N. Y.) 418, a permission to erect a house on the land of another, and occupy it as long as the licensee thought fit or his convenience might require, was held to be a mere power which could not be transferred to a third person, even after it had been acted on by building the house.

In *Mendenhall v. Klinck*, 51 N. Y. 246, the defendant gave to T. a license to explore and examine his lands, and in case he found or became satisfied that there was oil in the lands, and elected before a specified time to take them, he agreed to convey to him or whomsoever he should direct. T. did not examine the lands or make an election, but assigned the contract to the plaintiff who claimed the right to elect, and prayed for specific performance. It was held that prior to an election T. had no interest in the land; that the right of election was personal, and he could not transfer it.

A License to Keep a Grocery Store is not assignable. *Lewis v. U. S.*, 1 Morr. (Iowa) 199; *Munsell v. Temple*, 8 Ill. 93.

A License to a Tenant will not pass to a subtenant. *Dark v. Johnston*, 55 Pa. St. 164, 93 Am. Dec. 732; *Gronendyke v. Cramer*, 2 Ind. 382.

A Ferry Boat License is not assignable. *The Maverick*, 1 Sprague (U. S.) 23; *Blackwell v. Wiswall*, 24 Barb. (N. Y.) 355, 14 How. Pr. (N. Y.) 257, *affirmed* in 24 Barb. (N. Y.) 362, note; *Lombard v. Cheever*, 8 Ill. 469; *Harding v. The Steamboat Munich*, 5 Law Rep. 106. See *Hackett v. Wilson*, 12 Oregon 25; *Montgomery v. Multnomah R. Co.*, 11 Oregon 344; *Hackett v. Multnomah R. Co.*, 12 Oregon 24, 53 Am. Rep. 327, where the question is undecided.

A Liquor License is not assignable. *Godfrey v. State*, 5 Blackf. (Ind.) 151.

A License to Cut Timber on the lands of the grantor is not assignable. *Emerson v. Fisk*, 6 Me. 200, 19 Am. Dec. 206.

But see *Sawyer v. Wilson*, 61 Me. 529; and *Fiske v. Small*, 25 Me. 453, where it is held that an assignment of a permit to cut timber transfers to the assignee the trees afterwards cut under it, so as to enable him to maintain an action of trespass for the taking of the timber.

assignment will terminate his right to the license.¹

License Coupled with Interest Assignable.—But in the case of a license coupled with an interest, and irrevocable by the licensor, the licensee can pass his interest by assignment.²

1. LIENS—(1) Generally—Common-law Rule.—At common law, a lien is neither property nor a debt, but a mere personal right which cannot be transferred by assignment.³ An assignment of the lien will extinguish it,⁴

A License to Build a Dock on State Lands granted by the superintendent of public works is assignable, and a dock built under such a license may be sold, subject only to the right of the state to revoke the license. *Ziegele v. Richelieu*, etc., Nav. Co. (Supreme Ct.), 38 N. Y. Supp. 1022.

1. *Sterling v. Warden*, 51 N. H. 217, 12 Am. Rep. 80; *Jackson v. Babcock*, 4 Johns. (N. Y.) 418; *Dark v. Johnston*, 55 Pa. St. 164, 93 Am. Dec. 732.

In *Muskett v. Hill*, 5 Bing. N. Cas. 694, 35 E. C. L. 272, a license to search for and remove metals, and also to carry them away and convert them to the licensee's own use, was held to pass an interest capable of assignment. The license was by indenture, and was given to the licensees, their executors, administrators, and assigns, and the indenture contained an express provision that the license and authority should be assignable by deed.

In *Ross v. Fox*, 13 Grant's Ch. (U. C.) 683, it is held that the license to dig for ore comes within that class of cases in which the personal skill, knowledge, or other personal qualities of the grantee are the material ingredient in the contract, and therefore the right is not assignable.

2. "Ordinarily speaking, a license is confined strictly to the parties, and will not operate in favor of or against third persons, but this ceases to be true when the license is coupled with an interest, which will not only render it irrevocable by the licensor, but enable it to pass by or with an assignment of the interest to third persons." *Hare, J.*, in *Goff v. Obersteuffer*, 15 Leg. Int. (Pa.) 69, 3 Phila. (Pa.) 71.

3. *Daubigny v. Duval*, 5 T. R. 604; *Roberts v. Jacks*, 31 Ark. 597, 25 Am. Rep. 584; *Ruggles v. Walker*, 34 Vt. 468.

See the titles **LIENS**; **VENDOR'S LIEN**, for a full treatment of this subject.

"A lien is neither a *ius in re* nor a *ius in rem*, but a charge upon property. It is personal, and gives a right to satisfaction out of particular property to the payee, and exists only as between the vendor and vendee." *Roberts v. Jacks*, 31 Ark. 597, 25 Am. Rep. 384. See also *Meany v. Head*, 1 Mason (U. S.) 319; *Brace v. Marlborough*, 2 P. Wms. 491.

The rule as generally stated by text writers is that the right of lien is a personal right which cannot be parted with, and that a person who has a lien cannot sell his right to another, nor can he transfer the property over which the lien extends without losing his right, unless the property has been pledged to secure the payment of money advanced with an express or implied power of sale. *Ruggles v. Walker*, 34 Vt. 468.

A Factor's Lien is but a personal privilege,

and cannot be transferred. *Daubigny v. Duval*, 5 T. R. 606; *Holly v. Huggleford*, 8 Pick. (Mass.) 73, 19 Am. Dec. 303.

An Agistor's Lien will survive and pass to the personal representative of the decedent, and is therefore assignable. *McPherson First Nat. Bank v. Geo. R. Barse Live Stock Commission Co.*, 61 Mo. App. 143.

An Attorney's Statutory Lien for his compensation under a statute (Minn. Gen. Stat. 1878, c. 88, § 16) is assignable. *Sibley v. Pine County*, 31 Minn. 201.

Maritime Liens.—It has been held that a maritime lien is to be considered as restricted in its design, merely personal, and unassignable. *The A. D. Patchin*, 12 Law Rep. 21.

In *Canada* this rule prevails. See *Rankin v. The Eliza Fisher*, 32 Can. L. J. 74, *citing* *The New Eagle*, 4 No. Cas. 427, and *The Janet Wilson*, *Swabey* 261, and *The Louisa*, 6 No. Cas. 532.

But the better opinion seems to be that such a lien is assignable, and that if the assignment is absolute the assignee may proceed in admiralty in his own name to foreclose the lien. *The Sarah J. Weed*, 2 Lowell (U. S.) 555. See also *The Hull of a New Ship*, 2 Ware (U. S.) 203; *The Ship Panama*, *Olc. Adm.* 343; *The General Jackson*, 1 Sprague (U. S.) 554; *The Boston*, *Blatchf. & H.* (U. S.) 309.

The master of a vessel has a lien upon the freight and earnings of the vessel for the voyage for advances and personal responsibilities necessarily made or incurred by him during the voyage, and this lien is assignable. *Everett v. Coffin*, 6 Wend. (N. Y.) 604, 22 Am. Dec. 551; *Sorley v. Brewer*, 1 Daly (N. Y.) 79, *affirmed* in 18 How. Pr. (N. Y.) 276.

A demand against a steamboat for supplies furnished, may be assigned, and an assignment of such a claim transfers to the assignee the statutory lien given by *Iowa Code* 1851, §§ 2116-2121. *Strother v. The Steamboat Hamburg*, 11 Iowa 59.

A Lien for Freight cannot be Assigned while the assignor retains possession of the property charged therewith. And a person to whom the owner of a lien upon property has executed an assignment of the lien unaccompanied by delivery of the property itself has no claim against the person who obtains possession of the property subsequently to the assignment. *Wing v. Griffin*, 1 E. D. Smith (N. Y.) 162.

A Vendor's Lien is personal in its nature, enforceable by the vendor only, and is not assignable. *Richards v. Leaming*, 27 Ill. 431, 81 Am. Dec. 239; *Keith v. Horner*, 32 Ill. 524; *Elder v. Jones*, 85 Ill. 384; *Iglehart v. Armiger*, 1 Bland (Md.) 519. See, however, *Lagow v. Badollet*, 1 Blackf. (Ind.) 416, 12 Am. Dec. 258, where the contrary is held.

4. *Coit v. Waples*, 1 Minn. 134; *Tewksbury*

and it will not be revived by a reassignment.¹

Express Lien by Agreement.—But where by agreement a debt is secured by an express lien, the assignment of the debt secured by the lien will, as a general rule, pass to the assignee the benefit of the lien.²

(2) *Mechanics' Liens.*—There is some diversity of opinion as to whether a statutory mechanic's lien is assignable by the contractor, laborer, or material man for whose benefit the lien is allowed.³ Some authorities hold that the lien is personal and not assignable;⁴ others, that it may be assigned, and that the assignee will be subrogated to all the rights of his assignor.⁵

v. Bronson, 48 Wis. 581; *Caldwell v. Lawrence*, 10 Wis. 331.

Lien of a Bailee for Service.—At common law, the lien of a bailee for service lasts only while he retains possession. His relation to the bailor is a personal one, and grows out of the confidence the bailor is presumed to repose in the skill and fidelity of his bailee. The law implies a contract on the part of the bailee to perform the service skilfully, and then to return the chattel faithfully on payment for his service. Hence if he sells or pawns it away, he is guilty of a breach of his fidelity to the bailor, and at once forfeits his right of lien. *Rodgers v. Grothe*, 58 Pa. St. 414.

1. *Caldwell v. Lawrence*, 10 Wis. 331.

2. *Paramore v. Nabers*, 42 Iowa 659. In this case the court, by Rothrock, J., said: "It is well settled that if a debt is secured by an express lien, as where there is a mortgage, or where the vendor has not parted with the legal title, but holds the same as security for the purchase money, an assignment of the debt entitles the assignee to the benefit of the lien," citing *Hetch v. Spears*, 27 Ark. 229; *Rakestraw v. Hamilton*, 14 Iowa 147.

Lien on Brick to be Made.—A contract between the lessees of a brickyard and a brickmaker that the bricks when made shall be retained by the lessees as security for advances made by them to the brickmaker, creates a lien on each brick as made; and such contract is assignable, and the lien of the assignee is good against an attachment against the assignor. *Macomber v. Parker*, 14 Pick. (Mass.) 497.

3. In *The Victorian Number Two*, 26 Oregon 194, the court, by Bean, C. J., said: "As to the assignability of mechanics' liens, there is much diversity of opinion in the authorities. Mr. Phillips states the conflicting rules prevailing in the several states as (1) that the lien is personal and cannot be assigned; (2) that the proceedings to be taken to enforce the lien must be in the name of the assignor, but subject to this restriction, that the lien is assignable; and (3) that a lien is as assignable as any other debt, and that the proceedings for its enforcement may, if the state law permits, be carried on in the name of the assignee. Phillips on Mechanics' Liens, § 54."

For an Exhaustive Treatment of this topic, see the title MECHANIC'S LIEN.

4. *Mechanics' Liens Held Not Assignable.*—*Lovett v. Brown*, 40 N. H. 511.

Under a statute which provided that "Every person who shall, by contract with the owner of any piece of land, furnish labor or materials for erecting or repairing any building, * * *

shall have a lien," etc., the lien was held to be personal to the contractor or subcontractor, and therefore not assignable. *Fitzgerald v. First Presbyterian Church*, 1 Mich. N. P. 243.

Wisconsin.—In *Caldwell v. Lawrence*, 10 Wis. 331, it was held that the right to a lien given by statute to mechanics and others was not assignable, but was a mere personal right, which could be prosecuted by the assignee on the debt or demand. In that case, the petition for the lien was filed by the person who furnished the material before he assigned the claim to the plaintiff; and in *Tewksbury v. Bronson*, 48 Wis. 581, it was held that this was a ruling that the assignment of a claim before action by one who might enforce a specific lien therefor destroys the right to such lien, and reduces the claim to a mere personal demand.

As to the present law in *Wisconsin*, founded upon statutes passed since the above decisions, see *Iron River Bank v. School Directors* (Wis. 1895), 65 N. W. Rep. 368.

Iowa.—Prior to the enactment in Iowa of c. 44 of the laws of 1874, it was held in that state that the assignment of a claim for a mechanics' lien did not operate as a transfer of the lien. *Decorah First Nat. Bank v. Day*, 52 Iowa 680.

5. *Mechanic's Lien Held Assignable—Maine.*—*Murphy v. Adams*, 71 Me. 113, 36 Am. Rep. 299.

Missouri.—*Jones v. Hurst*, 67 Mo. 568; *Allen v. Frumet Min.*, etc., Co., 73 Mo. 688. But by statute in Missouri such liens are not assignable. *O'Connor v. Current River R. Co.*, 111 Mo. 185.

Montana.—*Mason v. Germaine*, 1 Mont. 263; *Davis v. Bilsland*, 18 Wall. (U. S.) 659.

Nebraska.—*Rogers v. Omaha Hotel Co.*, 4 Neb. 54; *Henry, etc., Co. v. Fisher*, 37 Neb. 207; *Goodman, etc., Co. v. Pence*, 21 Neb. 459.

Nevada.—*Skyrme v. Occidental Mill, etc., Co.*, 8 Nev. 219.

Oregon.—*Brown v. Harper*, 4 Oregon 90.

Rhode Island.—*McDonald v. Kelly*, 14 R. I. 335.

South Carolina.—*Oliver v. Fowler*, 22 S. Car. 534.

Virginia.—*Iæge v. Bossieux*, 15 Gratt. (Va.) 83, 76 Am. Dec. 189.

In *Tuttle v. Howe*, 14 Minn. 145, 100 Am. Dec. 205, the court, by Berry, J., said: "The claim of the material man and the lien are certainly the property of the material man, and why should he not have the right to dispose of both? There is nothing in the lien right of the nature of a personal trust. The

Right to Create or Perfect Lien Not Assignable.—A mechanic's lien is generally recognized as so far personal, that, unless the right of an assignee is recognized by statute in connection with its creation, there can be no assignment of the right to perfect or create it.¹

V. WHAT CONSTITUTES AN ASSIGNMENT—1. Form of Assignment—*a.* OF INTERESTS IN LANDS.—A discussion of the modes in which interests in lands in general may be assigned or conveyed will be found elsewhere in this work.²

Contracts to Convey Lands.—The doctrine has been asserted by some of the authorities that the assignment of a contract to convey land must be in writing, and that the delivery of the contract with a blank assignment thereon is

lien holder is not intrusted with the possession of the property bound by the lien. His lien is a security. What difference can it make to the lienor who holds the lien? His duty is to pay the debt. If he pays it, his property is discharged. If he fails to pay it, and so loses the property, of what moment is it to him whether the lien is enforced by the material man or by his assignee?" See also *The Victorian Number Two*, 26 Oregon 194.

In *Ritter v. Stevenson*, 7 Cal. 388, the rule applicable to the assignment of mortgage liens, by assignment of the note or debt, was applied to assignments of mechanics' liens.

Assignment for Benefit of Creditors.—In those jurisdictions where a mechanic's lien, after it is perfected, may be assigned, an assignee for the benefit of creditors will have a right to enforce the lien in favor of his assignor. *German Bank v. Schloth*, 59 Iowa 316.

Statute Silent as to Assignability.—Where a statute, by which a lien is created, is silent as to the assignability of the lien, the weight of authority, as well as the better reason, is in favor of its assignability. *McDonald v. Kelly*, 14 R. I. 335.

Laborers' Liens.—As the claims of laborers secured by statute lien stand substantially upon the same footing as those of mechanics as to assignability, *Duncan v. Hawn*, 104 Cal. 10; *Murphy v. Adams*, 71 Me. 113, 36 Am. Rep. 299, the weight of authority seems to be in favor of the assignability of the lien of a laborer, and the right of his assignee to assert his claim in the same manner and to the same extent as the former could in person. *Duncan v. Hawn*, 104 Cal. 10; *Murphy v. Adams*, 71 Me. 113, 36 Am. Rep. 299; *Phillips v. Vose*, 81 Me. 134; *Kerr v. Moore*, 54 Miss. 286. A contrary view, however, is held in *Dano v. Mississippi, etc.*, R. Co., 27 Ark. 564; and *Cairo, etc.*, R. Co. v. *Fackney*, 78 Ill. 116. See also *Bradley v. Spofford*, 23 N. H. 444, 55 Am. Dec. 205; *Jacobs v. Knapp*, 50 N. H. 71.

Action must Be in Name of Assignor.—In *Maine* it is held that the assignee must bring his action in the name of his assignor. *Murphy v. Adams*, 71 Me. 113, 36 Am. Rep. 299; *Phillips v. Vose*, 81 Me. 134. See also *Pearsons v. Tincker*, 36 Me. 384.

1. Right to Create Lien Not Assignable—California.—*McCrea v. Johnson*, 104 Cal. 224; *Mills v. La Verne Land Co.*, 97 Cal. 254; *Rauer v. Fay* (Cal. 1895), 42 Pac. Rep. 902.

Iowa.—*Brown v. Smith*, 55 Iowa 31; *Mer-*

chant v. Ottumwa Water Power Co., 54 Iowa 451; *Langan v. Sankey*, 55 Iowa 52.

Maine.—*Pearsons v. Tincker*, 36 Me. 384.

Missouri.—*O'Connor v. Current River R. Co.*, 111 Mo. 185; *Griswold v. Carthage, etc.*, R. Co., 18 Mo. App. 52; *Brown v. Chicago, etc.*, R. Co., 36 Mo. App. 458.

Nebraska.—*Goodman, etc., Co. v. Pence*, 21 Neb. 459.

New York.—*Rollin v. Cross*, 45 N. Y. 766; *Roberts v. Fowler*, 4 Abb. Pr. (N. Y. C. Pl.) 263, 3 E. D. Smith (N. Y.) 632.

Oregon.—*Brown v. Harper*, 4 Oregon 90.

Wisconsin.—*Caldwell v. Lawrence*, 10 Wis. 332.

This is for the reason that until perfected by filing the proper notice, it is a mere inchoate right personal to the individual which he may choose to perfect or not at his pleasure, and which, until perfected, has no tangible existence as property, and, of course, as such is not the subject of transfer. *Duncan v. Hawn*, 104 Cal. 10.

"If the mere assignment of the debt gave the assignee the right to assert the lien, then, in cases where portions of the debt were assigned to different persons, each must file a lien for the amount due to himself; and thus, instead of one lien against the property, there might be fifty, or an indefinite number, which would render the proceeding cumbersome and oppressive." The court, *per Maxwell, C. J.*, in *Goodman, etc., Co. v. Pence*, 21 Neb. 459.

Effect of Assignment of Debt.—The general rule that the assignment of a debt carries with it the lien by which it is secured, does not apply to a mechanic's lien, and, if applicable at all, it is only when the lien has been perfected, as the assignor has merely a personal right to create the lien. *Mills v. La Verne Land Co.*, 97 Cal. 254.

Assignment for Benefit of Assignor.—It seems, however, that where the assignment is made for the benefit of the assignor, and to be held by the assignee as his agent, so that the lien may be preserved, the right to create a lien may be assigned. *Rollin v. Cross*, 45 N. Y. 766.

Assignment of Contract to Perform Work.—Where a contract to perform work and furnish material is assigned, the assignee of the contract may perfect a lien for the labor performed or material furnished under the contract. *Schalk v. Norris*, 7 Misc. Rep. (N. Y. C. Pl.) 20; *English v. Lee*, 63 Hun (N. Y.) 572; *McDonald v. Kelly*, 14 R. I. 335.

2. See the titles **DEEDS; ESTATES; REAL**

in violation of the statute of frauds, and is void.¹ It seems to be the better view, however, that a contract to convey land may be assigned in equity by mere verbal agreement accompanied by delivery of the contract.²

Mortgage on Land—Legal Assignment must Be by Deed.—Under the common-law theory of a real-estate mortgage, by which it is regarded as a transfer of the legal title, no assignment thereof can properly be made at law except by deed.³

No Express Words of Assignment Necessary.—However, express words of assignment are unnecessary. Thus a quitclaim deed by a mortgagee operates as an assignment of the mortgage.⁴ So an ordinary deed purporting to convey an absolute estate in fee is sufficient to pass whatever interest the mortgagee may have in the land.⁵

Requisites of Equitable Assignment.—In equity, a mortgage is regarded as a mere incident of the debt secured, and hence the form of assignment required in equity will be regulated by the rules governing the assignment of choses in action.⁶

PROPERTY; and specific titles as **EASEMENTS**; **GRANT**; **LEASE**; **MORTGAGES**.

1. *Folsom v. McCague*, 29 Neb. 124.

School Land Certificates.—It has been held that school land certificates are contracts for the sale of real estate, and cannot be transferred except by an assignment in writing, like any other contract for the sale of real estate. Thus it has been held that although the practice has prevailed of making assignments in blank of school land certificates, and passing them from hand to hand, yet that practice cannot give to them a negotiable character, as it is not authorized by law. *Smith v. Clarke*, 7 Wis. 551; *Whitney v. State Bank*, 7 Wis. 620.

2. *Currier v. Howard*, 14 Gray (Mass.) 512.

Assignment of Title Bond for Land.—In *Holman v. Criswell*, 13 Tex. 38, it was held that a contract for the sale of land is not by statute required to be under seal, and, consequently, though the contract assume the form of a bond, the interest which the vendee has under it may be assigned by an instrument not under seal. Moreover, it was held in *Bullion v. Campbell*, 27 Tex. 653, that a parol assignment of a title bond for land upon a full and valuable consideration entitles the assignee to institute and maintain an equitable action in his own name, and the statute of frauds cannot be interposed to defeat recovery. See also *Durst v. Swift*, 11 Tex. 273.

3. **Assignment of Mortgage at Common Law—United States.**—*Cottrell v. Adams*, 2 Biss. (U.S.) 351.

Illinois.—*Barrett v. Hinckley*, 124 Ill. 32, 7 Am. St. Rep. 331.

Indiana.—*Givan v. Doe*, 7 Blackf. (Ind.) 210; *Burton v. Baxter*, 7 Blackf. (Ind.) 297.

Maine.—*Prescott v. Ellingwood*, 23 Me. 345; *Warren v. Homestead*, 33 Me. 256; *Douglass v. Durin*, 51 Me. 121. See *Mitchell v. Burnham*, 44 Me. 286; *Smith v. People's Bank*, 24 Me. 185.

Massachusetts.—*Warden v. Adams*, 15 Mass. 233; *Parsons v. Welles*, 17 Mass. 419; *Barnes v. Boardman*, 149 Mass. 115; *Adams v. Parker*, 12 Gray (Mass.) 53.

Texas.—*Henderson v. Pilgrim*, 22 Tex. 464.

Vermont.—*Torrey v. Deavitt*, 53 Vt. 331.

Shaw, C. J., in delivering the opinion of the court in *Young v. Miller*, 6 Gray (Mass.) 152,

said: "The true character of a mortgage is the pledge of real estate to secure the payment of money or the performance of some other obligation. Its object, from its creation to its redemption or foreclosure, is that of a pledge for such debt or duty. It may, in many aspects, be called a real lien, a chattel interest, a chose in action, and quasi-personal. But as it binds land and may lay the foundation of a title to real estate, it assumes, in many respects, the character of a land title. It is so in its origin, by deed; in the mode of giving it notoriety, by registration; in its transfer, by deed of assignment; its discharge, by deed of release; and in the mortgagee's remedy, by writ of entry against the mortgagor or other person in possession under him."

Alabama.—In Alabama an assignment of a mortgage to be effectual to convey the mortgagee's legal title and to enable the assignee to maintain ejectment must be by such a conveyance in form and words as is required to convey the legal title to land in ordinary cases. *Sanders v. Cassidy*, 86 Ala. 246. See also *Graham v. Newman*, 21 Ala. 497.

New Jersey.—In New Jersey, however, an assignment of a mortgage which is in writing but not under seal, is, by force of the provisions of the "act to make mortgages and other contracts assignable at law" (Nix. Dig. 613), sufficient to pass to the assignee the legal estate of the mortgagee in the mortgaged premises. *Mulford v. Peterson*, 35 N. J. L. 127.

Mechanic's Lien.—In California it has been held, under a statute declaring that every conveyance whereby real estate is aliened, mortgaged, assigned, charged, or affected must be in writing; that a mechanic's lien is in the nature of a mortgage and is a charge upon the land, and can be assigned in writing only. *Ritter v. Stevenson*, 7 Cal. 388.

4. **Mortgagee's Quitclaim Deed.**—*Dorkray v. Noble*, 8 Me. 278; *Dixfield v. Newton*, 41 Me. 221; *Conner v. Whitmore*, 52 Me. 185; *Hunt v. Hunt*, 14 Pick. (Mass.) 374, 25 Am. Dec. 400; *Freeman v. M'Gaw*, 15 Pick. (Mass.) 82; *Thompson v. Kenyon*, 100 Mass. 108; *Severance v. Griffith*, 2 Lans. (N. Y.) 38.

5. *Lawrence v. Stratton*, 6 Cush. (Mass.) 163; *Ruggles v. Barton*, 13 Gray (Mass.) 506.

6. See *infra*, this title, *Of Chattel Interests—Choses in Action*. For further discussion of

Mortgagor's Interest.—The mortgagor is deemed the owner of the legal estate in the property mortgaged so far that he may convey it subject to the mortgage at any time before his equity of redemption has been foreclosed, and, accordingly, his interest may be assigned only by deed.¹

Leases.—Under the statute of frauds, an assignment by the act of the parties² of a leasehold interest, except for a term not exceeding one year, must be by deed or note in writing.³ Under this statute, a verbal assignment will not be valid.⁴ But a writing without seal will be sufficient though the lease to be assigned is a sealed instrument.⁵ No particular form of instrument is necessary. Thus an instrument in the form of a mortgage may operate as a valid assignment.⁶

Unaccrued Rent.—Rent unaccrued is regarded as an interest in land, and may not be transferred by parol.⁷

Past Due Rent.—Where, however, rent is past due, it is a mere chose in action, and as such is assignable without writing.⁸

b. OF CHATTEL INTERESTS—(1) *In General.*—The modes of transferring chattel interests in general will be discussed elsewhere in this work.⁹

Legal Assignment of Chattel Mortgage need Not Be under Seal.—A legal assignment of a chattel mortgage may be effected by a writing not under seal.¹⁰

Requisites of Equitable Assignment of Chattel Mortgage.—In equity, a mortgage is regarded as a mere incident of the debt secured, and accordingly it may be assigned in equity in the same way as a chose in action.¹¹

this question, see *infra*, this title, *Effect of Assignment—What Passes by Assignment*. See also the title *MORTGAGES*.

1. Interest of Mortgagor in Mortgaged Premises.—*White v. Rittenmyer*, 30 Iowa 272; *State v. Buchanan*, 5 Har. & J. Md. 317, 9 Am. Dec. 534; *White v. Whitney*, 3 Met. (Mass.) 81; *Buchanan v. Monroe*, 22 Tex. 537; *Hodson v. Treat*, 7 Wis. 263.

2. For assignment of leases by operation of law, as by marriage, devise, etc., see the title LEASES.

3. Beck v. Phillips, 5 Burr. 2827; *Bedford v. Terhune*, 30 N. Y. 453, 86 Am. Dec. 394.

4. Botting v. Martin, 1 Campb. 317; *Welsh v. Schuyler*, 6 Daly (N. Y.) 412. See *Thomas v. Cox*, 6 Mo. 506.

In *Indiana* it seems that a different rule prevails. *Indianapolis Mfg., etc., Union v. Cleveland, etc., R. Co.*, 45 Ind. 281.

5. Beck v. Phillips, 5 Burr. 2827; *Holliday v. Marshall*, 7 Johns. (N. Y.) 211.

Indorsement under Seal.—It is well settled that a lessor may assign in equity his interest in a lease under seal, by an indorsement in writing under seal upon it. *Dixon v. Buell*, 21 Ill. 203. See also *Chapman v. McGrew*, 20 Ill. 101.

Indorsement Not under Seal.—In *Massachusetts* it has been held that an assignment of a lease under seal must be by a writing under seal, so as to transfer to the assignee the legal title to the instrument, and to enable him to maintain an action on its covenants. *Brewer v. Dyer*, 7 Cush. (Mass.) 337; *Bridgham v. Tileston*, 5 Allen (Mass.) 372. And it was at one time doubted whether even the equitable title would pass without such an assignment. *Wood v. Partridge*, 11 Mass. 488. But it has been decided in a later case in this state that while an assignment of a lease under seal, as a contract, must be by deed, yet as an assign-

ment of an estate it may be by an instrument sufficient to satisfy the statute of frauds. And accordingly an indorsement without seal upon the instrument, by which an assignment was made of the "right, title, and interest in and to the within lease," was held to be sufficient. *Sanders v. Partridge*, 108 Mass. 556.

Indorsing Name and Affixing Seal.—In *New York*, however, where L. wrote his name and affixed his seal on the back of a lease, and it was agreed between him and T. that C. should write an assignment over the signature and seal for the absolute conveyance of the lease to T., and should keep the lease a certain time, and C. afterwards wrote the assignment and delivered the lease to T., it was held that the affixing the hand and seal to a blank paper was not a note in writing within the statute of frauds, and that the assignment was a nullity. *Jackson v. Titus*, 2 Johns. (N. Y.) 430.

6. Russell v. Allen, 2 Allen (Mass.) 42.

7. Ex p. Hall, 10 Ch. Div. 615; *Brown v. Brown*, 33 N. J. Eq. 650.

Order on Accruing Rent.—It has been held that an order drawn by a landlord on his tenant to pay accruing rent to some third person constitutes a valid assignment of the rent. *Morton v. Naylor*, 1 Hill (N. Y.) 583; *Esling v. Zantzinger*, 13 Pa. St. 50.

8. Chapman v. Plummer, 36 Wis. 262.

9. See the titles BILLS OF EXCHANGE AND PROMISSORY NOTES; BILLS OF LADING; BILLS OF SALE; BONDS; GIFTS; JUDICIAL SALES; LIENS; MUNICIPAL SECURITIES; NEGOTIABLE INSTRUMENTS; PLEDGE AND COLLATERAL SECURITY; RAILROAD SECURITIES; SALES; and other titles treating of particular classes of chattel interests.

10. Gilchrist v. Patterson, 18 Ark. 575. See also the title *CHATTEL MORTGAGES* for a full discussion of this subject.

11. See infra, Choses in Action.

(2) *Choses in Action*—(a) **No Particular Form Necessary.**—To constitute a valid assignment of a chose in action no particular form of words or form of instrument is necessary. Any language or act which makes an appropriation of a fund amounts to an equitable assignment of that fund.¹

For further discussion of this question, see *infra*, this article, *Effect of Assignment—What Passes by Assignment*. See also the title **CHATTEL MORTGAGES**.

1. *United States*.—Spain *v.* Hamilton, 1 Wall. (U. S.) 604; Farmers, etc., Sav. Bank *v.* Kansas City Pub. Co., 3 Dill. (U. S.) 287.

California.—Ryan *v.* Maddux, 6 Cal. 247; Wiggins *v.* McDonald, 18 Cal. 126.

Illinois.—Savage *v.* Gregg, 150 Ill. 161, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 134.

Indiana.—Slaughter *v.* Foust, 4 Blackf. (Ind.) 379.

Iowa.—Conyngham *v.* Smith, 16 Iowa 471; Moore *v.* Lowrey, 25 Iowa 338, 95 Am. Dec. 790; Des Moines County *v.* Hinkley, 62 Iowa 637; Metcalf *v.* Kincaid, 87 Iowa 443, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 834.

Maine.—Lunt *v.* Stevens, 24 Me. 534.

Massachusetts.—Weed *v.* Jewett, 2 Met. (Mass.) 608, 37 Am. Dec. 115.

Mississippi.—Pass *v.* McRea, 36 Miss. 143.

Missouri.—Smith *v.* Sterritt, 24 Mo. 260; Bissell *v.* Hill, 10 Mo. App. 593.

New Hampshire.—Conway *v.* Cutting, 51 N. H. 407.

New Jersey.—Bower *v.* Hadden Blue Stone Co., 30 N. J. Eq. 172.

New York.—Smith *v.* Miller, 25 N. Y. 619; Dickenson *v.* Phillips, 1 Barb. (N. Y.) 454.

Pennsylvania.—East Lewisburg Lumber, etc., Co. *v.* Marsh, 91 Pa. St. 96; Watson *v.* Bagaley, 12 Pa. St. 164, 51 Am. Dec. 595.

Texas.—Park *v.* Glover, 23 Tex. 469.

West Virginia.—Tingle *v.* Fisher, 20 W. Va. 497; Bentley *v.* Standard F. Ins. Co. (W. Va. 1895), 23 S. E. Rep. 584, *citing* 1 AM. AND ENG. ENCYC. OF LAW (1st ed.) 835.

Informal Assignment of Claims.—An instrument under seal in this form, "I, B., do hereby certify and acknowledge that I have this 1st day of March, A. D. 1876, given up all claims I have against H., in favor of K.," was held to be sufficient as an assignment to K. of any debt due from H. to B. Crone *v.* Braun, 23 Minn. 239.

Also an assignment of "all interest [of the loser] in a certain claim for one thousand six hundred and sixty-six dollars against" the winner, is sufficient in form to transfer it, that being the true amount of the claim, and that being the only claim of the assignor against the winner. Hendrickson *v.* Beers, 6 Bosw. (N. Y.) 639.

Acceptance of Order upon Drawee by Laborers, No Assignment to Him of Claims for Labor.—A railroad subcontractor gave to men in his employ orders on a merchant for goods to a fixed amount, who delivered the same, the drawer charging the orders directly to the men, as so much money paid them. It was held not an assignment to the merchant of the claim of the men against the railroad company (Howell's Anno. Mich. Stat., § 3423, *et seq.*) for labor performed for the subcontractor, who treated the

orders as payment to the laborers which when paid extinguished the laborers' claim. Martin *v.* Michigan, etc., R. Co., 62 Mich. 458; Dudley *v.* Toledo, etc., R. Co., 65 Mich. 655.

Informal Assignment of Accounts.—Where the following language, "For value received, I assign to S. all the accounts and indebtedness in this. (Signed) H.," was written on the front leaf of a day book of the said H., it was held to be a sufficient assignment of the accounts therein. Smith *v.* Sterritt, 24 Mo. 260.

Also where an instrument of assignment describes an account marked "exhibit A," and then proceeds, "And any other bill or claim that I now, or before the maturity of this note may, have against H. for printing done or other services rendered," if the account marked "exhibit B" is for printing done for H. within a specified time, this is a sufficient assignment thereof. Bissell *v.* Hill, 10 Mo. App. 593.

Informal Assignment of Cause of Action.—Where one of two joint owners of logs told the other that if he would bring an action for their conversion he might have the benefit of it, this was held a sufficient assignment of the cause of action to authorize the latter to sue alone. Arpin *v.* Burch, 68 Wis. 619.

The Statutory Mode of Assigning Judgments is cumulative, and does not prevent a party from making an equitable assignment in any other lawful way. Gardner *v.* Mobile, etc., R. Co., 102 Ala. 635; Adams *v.* Lee, 82 Ind. 587; Burgess *v.* Cave, 52 Mo. 43. Compare Blackman *v.* Joiner, 81 Ala. 344.

See, for a Full Treatment of the assignment of judgments, the title **JUDGMENTS**.

Agreement in Articles of Dissolution of Partnership as Assignment.—In Gram *v.* Cadwell, 5 Cow. (N. Y.) 489, it was held that an agreement between partners on dissolution that one should have the settlement of their affairs, he continuing the business and assuming all debts and accounts outstanding and due, with which the firm had connection, until they should be settled, and that all the moneys contributed by the outgoing partner, except what had been drawn out by him, should be paid back by the other within a limited time, operated as an assignment to the remaining partner of the debts due the firm.

Rejection of False Description.—A person entitled to money under a contract with the S. & M. R. Co. made an assignment of his rights thereunder by a written notice and declaration thereof addressed to "N., president of the K. C., S. & M. R. Co." The S. & M. R. Co. was also known as the K. C., S. & M. R. Co., and the two companies, though nominally distinct, were virtually under the same control. It was held that the assignment was sufficiently identified with the subject-matter, and that so much of the description in the address as was false could be rejected. Adler *v.* Kansas City, etc., R. Co., 92 Mo. 242.

The Reason is plain: the fund being neither assignable at law nor capable of manual possession, an appropriation of it is all that the nature of the case admits.¹

Assignment by Separate Writing.—Accordingly, where a chose in action is evidenced by a written instrument, a valid equitable assignment thereof may be made by a separate writing,² as well as by indorsement upon the original instrument.³

May Be by Parol.—Moreover, it may be stated as a general rule that a valid equitable assignment of a debt or other chose in action, whether evidenced by a writing or not, may be made by parol,⁴ as well as by deed, and it is not

Explanation by Extrinsic Evidence.—It has been held not to be necessary that the intent and the contract of the parties fully appear in a writing by which the assignment is made, but they may be shown by extrinsic evidence. *Moore v. Lowrey*, 25 Iowa 336, 95 Am. Dec. 790; *Tingle v. Fisher*, 20 W. Va. 497. See also *Foster v. Trenary*, 65 Iowa 620.

Mere Intent to appropriate Is Not Sufficient to constitute an equitable assignment of personal property without an act of appropriation or separation from other similar property. *Putnam Sav. Bank v. Beal*, 54 Fed. Rep. 577.

Control of Subject-matter must be Surrendered.—An assignment to an estate, by the executor who is indebted to it, of an endowment policy belonging to him individually, is not an effective transfer where he merely makes an indorsement thereon which he may change at will and deposits it with the papers of the estate, but does no overt act which places it beyond his power. *Frost v. Craig* (City Ct.), 9 N. Y. Supp. 437.

Qualified Assignments.—But in *Herbstreit v. Beckwith*, 35 Mich. 93, the court refused the following charge: "That when a chose in action is assigned by parol it must be shown, in order to enable the assignee to maintain an action upon it, that the original owner surrendered all control over it and made an absolute appropriation of it." The court, in giving their opinion, said: "An assignment may be absolute or qualified, as the parties choose, so long as no one else is injured or defrauded. It is matter of everyday occurrence to make transfers to agents and attorneys for convenience of suit or release, or in trust, or by way of security, and there is no authority against it. The assignment in the present case was as collateral security, and we can see no reason for doubting its efficacy."

1. *Clemson v. Davidson*, 5 Binn. (Pa.) 392.

2. **Separate Writing.**—*Spring v. South Carolina Ins. Co.*, 8 Wheat. (U. S.) 268; *Planters', etc., Ins. Co. v. Tunstall*, 72 Ala. 142; *Franklin v. Twogood*, 18 Iowa 515; *Grand Gulf Bank v. Wood*, 12 Smed. & M. (Miss.) 482; *McGee v. Riddlesbarger*, 39 Mo. 365; *Wadsworth v. Griswold*, Harp. (S. Car.) 17; *Durst v. Swift*, 11 Tex. 273. See also *Barrett v. Hinckley*, 124 Ill. 40, 7 Am. St. Rep. 331; *French v. Turner*, 15 Ind. 62; *Allen v. Newbery*, 8 Iowa 65.

As to the assignment of bonds, promissory notes, and bills by separate instruments, see *infra*, this section.

Assignment of Judgment on Record Unnecessary.—In accordance with the rule laid down

in the text, it has been held unnecessary that a judgment should be assigned on the record, and that an assignment by a separate writing is sufficient. *Conyngham v. Smith*, 16 Iowa 471. See also *Wise v. Loring*, 54 Mo. App. 260.

3. **Assignment by Indorsement.**—*Brown v. Maine Bank*, 11 Mass. 153.

An Assignment of an Account by indorsement of the word "assigned," signed by the owner of the account, has been held to be sufficient. *Ryan v. Maddux*, 6 Cal. 247.

Indorsement of Non-negotiable Note.—Where the payee of a non-negotiable promissory note indorsed the same to a third person in the following language: "I hereby indorse the within note to I. M. Loudermilk," it was held to be a written assignment of the note to the indorsee. *Loudermilk v. Loudermilk*, 93 Ga. 443. See also the title *BILLS OF EXCHANGE AND PROMISSORY NOTES*.

4. **Parol Assignments.**—*England.*—*Tibbits v. George*, 5 Ad. & El. 107, 31 E. C. L. 293; *Heath v. Hall*, 4 Taunt. 326; *Howell v. MacIvers*, 4 T. R. 690.

United States.—*Farmers, etc., Sav. Bank v. Kansas City Pub. Co.*, 3 Dill. (U. S.) 287. *Colorado.*—*Chamberlin v. Gilman*, 10 Colo. 94.

Illinois.—*Morris v. Cheney*, 51 Ill. 454. *Iowa.*—*Barthol v. Blakin*, 34 Iowa 452; *Switzer v. Smith*, 35 Iowa 269; *Howe v. Jones*, 57 Iowa 130; *Hoffman v. Smith* (Iowa 1895), 63 N. W. Rep. 182.

Kansas.—*McCubbin v. Atchison*, 12 Kan. 166.

Kentucky.—*Newby v. Hill*, 2 Metc. (Ky.) 530.

Maine.—*Clark v. Rogers*, 2 Me. 143; *Clark v. Clough*, 3 Me. 357; *Porter v. Bullard*, 26 Me. 448.

Massachusetts.—*Crocker v. Whitney*, 10 Mass. 316; *Quiner v. Marblehead Social Ins. Co.*, 10 Mass. 476; *Cutts v. Perkins*, 12 Mass. 210; *Jones v. Witter*, 13 Mass. 304.

Michigan.—*Draper v. Fletcher*, 26 Mich. 154.

New Hampshire.—*Thompson v. Emery*, 27 N. H. 272.

New Jersey.—*Hutchings v. Low*, 13 N. J. L. 246.

New York.—*Kessel v. Albetis*, 56 Barb. (N. Y.) 362; *Murray v. Bull's Head Bank*, 3 Daly (N. Y.) 364; *Green v. Hart*, 1 Johns. (N. Y.) 580; *Runyan v. Mersereau*, 11 Johns. (N. Y.) 534; 6 Am. Dec. 393; *Prescott v. Hull*, 17 Johns. (N. Y.) 284; *Briggs v. Dorr*,

important whether it be by writing or mere words.¹

Where Instrument Assigned Is under Seal.—At one time the courts seemed to be inclined to the rule that the assignment of an instrument under seal must be by deed, on the principle that the instrument of transfer must be of as high a nature as the instrument transferred.² But it is well settled at present that an equitable assignment of an instrument under seal may be by parol as well as by deed.³

Delivery of Evidence of Debt.—In accordance with the principles above laid down, the mere delivery of a note or bond or other written obligation or evidence of debt, with the intent to assign, will of itself constitute a valid and sufficient assignment.⁴ So the passing over to the assignee a transcript

19 Johns. (N. Y.) 95; Jones v. Reynolds, 120 N. Y. 213; Hooker v. Eagle Bank, 30 N. Y. 83, 86 Am. Dec. 351.

North Carolina.—Taylor v. Smith, 116 N. Car. 531.

South Carolina.—Miller v. Newell, 20 S. Car. 123, 47 Am. Rep. 833.

Tennessee.—Cook v. Shute, Cook (Tenn.) 68.

Vermont.—Spafford v. Page, 15 Vt. 490; Noyes v. Brown, 33 Vt. 431; Hutchins v. Watts, 35 Vt. 360; Hackett v. Moxley, 65 Vt. 71.

Wisconsin.—Wooliscroft v. Norton, 15 Wis. 198.

1. Onion v. Paul, 1 Har. & J. (Md.) 114; Johnson County v. Bryson, 27 Mo. App. 341; Taylor v. Smith, 116 N. Car. 531; Riker v. Curtis (Supreme Ct.), 39 N. Y. Supp. 340; York v. Conde, 61 Hun (N. Y.) 26; Clark v. Gillespie, 70 Tex. 513; Noyes v. Brown, 33 Vt. 431; Arpin v. Burch, 68 Wis. 619. See also cases cited in note immediately preceding.

Funds in the Hands of Trustee.—An oral assignment of money held by a trustee is sufficient. Noyes v. Brown, 33 Vt. 431; Hutchins v. Watts, 35 Vt. 360.

Assignment of Account.—An assignment of an indebtedness upon an open account need not be made by an instrument in writing, but may be made orally. Onion v. Paul, 1 Har. & J. (Md.) 114; Spafford v. Page, 15 Vt. 490; Chapman v. Plummer, 36 Wis. 262.

In Iowa, however, it has been held under statute that the assignment of an open account must be in writing in order to vest in the transferee a right of action in his own name. Andrews v. Brown, 1 Iowa 154.

Transfer of Right to Compensation for Improvements.—The equitable claim of a tenant to the value of improvements or betterments made on land held by possession only, arising under *Maine* statutes of 1821, chapters 47 and 60, has been held to be assignable by parol accompanied by an actual transfer of the possession to the purchaser, it being not an interest in the land itself, but merely an equitable right to compensation for the improvements. Lombard v. Ruggles, 9 Me. 62.

In Georgia, however, an assignment of a chose in action must be in writing. Turk v. Cook, 63 Ga. 681; New York Mut. L. Ins. Co. v. Watson, 30 Fed. Rep. 653.

As to the necessity for the delivery of the note, bond, or other evidence of debt, where there is any, see *infra*, this section.

2. Perkins v. Parker, 1 Mass. 117; Wood v. Partridge, 11 Mass. 488.

3. Transfer of Instrument under Seal by Parol.

—Moore v. Waddle, 34 Cal. 145; Prioleau v. South Western Railroad Bank, 16 Ga. 582; Hoffman v. Smith (Iowa 1895), 63 N. W. Rep. 182; Allen v. Pancoast, 20 N. J. L. 68; Everett v. Bartlett, 20 N. J. L. 117; Dawson v. Coles, 16 Johns. (N. Y.) 51; Morange v. Edwards, 1 E. D. Smith (N. Y.) 414.

Thus Bonds may be transferred by a writing not under seal. Allen v. Pancoast, 20 N. J. L. 68.

As to the transfer of bonds by delivery, see note immediately following.

Judgments.—In the same way, though a judgment is regarded as a specialty, it may be assigned by a writing without seal, Becton v. Ferguson, 22 Ala. 599; Mitchell v. Hockett, 25 Cal. 538, 85 Am. Dec. 151; Stoddard v. Benton, 6 Colo. 508; Dugas v. Mathews, 9 Ga. 510; Ford v. Stuart, 19 Johns. (N. Y.) 343; or even by mere words without writing, Steele v. Thompson, 62 Ala. 323; Brahan v. Ragland, 3 Stew. (Ala.) 247; Gardner v. Mobile, etc., R. Co., 102 Ala. 635; Clark v. Moss, 11 Ark. 736; Wood v. Wallace, 24 Ind. 226; Wise v. Loring, 54 Mo. App. 260. *Compare* Blackman v. Joiner, 81 Ala. 344; Parker v. Bacon, 26 Miss. 425.

Judgment Constituting Lien on Land.—Moreover, it has been held that the statute of frauds does not require that a judgment constituting a lien on land should be assigned by a written instrument. Winberry v. Koonce, 83 N. Car. 352.

4. **Delivery of Evidence of Debt.**—*Iowa.*—Creighton v. Gordon, 1 Morr. (Iowa) 41; Switzer v. Smith, 35 Iowa 269.

Maine.—Littlefield v. Smith, 17 Me. 327; Jewett v. Dockray, 34 Me. 45.

Massachusetts.—Crain v. Paine, 4 Cush. (Mass.) 483, 50 Am. Dec. 807; Mowry v. Todd, 12 Mass. 284.

Missouri.—Boeka v. Nuella, 28 Mo. 180 (*overruling* Ashworth v. Crockett, 11 Mo. 636); Willard v. Moies, 30 Mo. 142; Blesse v. Blackburn, 31 Mo. App. 264.

New Hampshire.—Thompson v. Emery, 27 N. H. 269.

New Jersey.—Hutchings v. Low, 13 N. J. L. 246; Vreeland v. Van Horn, 17 N. J. Eq. 137.

New York.—Prescott v. Hull, 17 Johns. (N. Y.) 284; Briggs v. Dorr, 19 Johns. (N. Y.) 95.

Vermont.—Hackett v. Moxley, 65 Vt. 71.

Compare Nichols v. Gross, 26 Ohio St. 425. Thus if an officer places in the hands of a creditor's attorney a receipt taken by him for

or copy of an account may constitute a valid transfer.¹

Delivery Not Essential where there Is No Written Evidence of Debt.—Where there is no written obligation or evidence of debt, an oral assignment of the debt without any delivery, either actual or symbolical, is sufficient.²

Debt Existing in an Open Account Assignable without Delivery.—Moreover, a valid parol transfer of an account may be made without a delivery of a copy or transcript thereof.³

the safe keeping of goods which he had attached, to be prosecuted for the benefit of the creditor, this is an equitable assignment of the contract, and his liability to the creditor forms a sufficient consideration. *Clark v. Clough*, 3 Me. 357.

Insurance Policy.—The sale by one partner to another of his interest in property insured, accompanied by the delivery of the policy of insurance, operates as a valid assignment, and transfers to the purchaser all the equitable interests in the insurance. *Pierce v. Nashua F. Ins. Co.*, 50 N. H. 297, 9 Am. Rep. 235. See also *New York L. Ins. Co. v. Flack*, 3 Md. 341, 56 Am. Dec. 742; *Marcus v. St. Louis L. Ins. Co.*, 68 N. Y. 625; *Bentley v. Standard F. Ins. Co.* (W. Va. 1895), 23 S. E. Rep. 584; *Bibend v. Liverpool, etc., F., etc., Ins. Co.*, 30 Cal. 79.

A Bond may be assigned by delivery only. *Vose v. Handy*, 2 Me. 322, 11 Am. Dec. 101; *Morris Canal, etc., Co. v. Fisher*, 9 N. J. Eq. 667, 64 Am. Dec. 423; *Galway v. Fullerton*, 17 N. J. Eq. 390; *Brainerd v. New York, etc., R. Co.*, 10 Bosw. (N. Y.) 332; *Lacey v. Lacey*, 7 Pa. St. 251, 47 Am. Dec. 513.

Promissory Note.—A negotiable promissory note, payable to the order of another, may be assigned by delivery only without writing. *Jones v. Witter*, 13 Mass. 304.

Also an equitable transfer by delivery may be made of a note not negotiable. *Norton v. Piscataqua F. & M. Ins. Co.*, 111 Mass. 532. See also the title **BILLS OF EXCHANGE AND PROMISSORY NOTES**.

Certificate of Deposit.—In the same way, the delivery of a certificate of deposit, which is payable to the order of another, will constitute a sufficient assignment. *Fultz v. Walters*, 2 Mont. 165. See the title **CERTIFICATE OF DEPOSIT**.

Delivery of Order.—Where the secretary of a corporation received an order for money payable to himself in his private capacity, the amount of which when paid was designed to be applied to the payment of a debt due from the drawer to the corporation, and he afterwards passed it over to the treasurer for that purpose, of which the acceptor had notice, it was held that this was a sufficient assignment, and that a subsequent discharge from the original payee could not avail the acceptor. *Swett v. Green*, 4 Me. 384.

The Delivery of a Savings Bank Book, although unaccompanied by a written assignment, and with the intention only that it shall be held as collateral security for the payment of a debt, transfers an equitable title to the deposit represented by the book, which will prevail against a subsequent attachment of it by trustee process. *Taft v. Bowker*, 132 Mass. 277.

See *Pierce v. Boston Five Cents Sav. Bank*, 129 Mass. 425, 37 Am. Rep. 371; and also the title **SAVINGS BANKS**.

Delivery of Execution.—An equitable interest in a judgment may be assigned by the delivery of the execution thereon to the assignee. *Dunn v. Snell*, 15 Mass. 481.

1. Transferring Copy of Account.—*Waldron v. Baker*, 4 E. D. Smith (N. Y.) 440. In *Spafford v. Page*, 15 Vt. 490, there was a verbal assignment of a book debt, followed three days after by the delivery of a transcript of the account, and it was held that the assignment was valid. See also *Whittle v. Skinner*, 23 Vt. 532.

So where the account of the original proprietors of a water power against several persons holding portions of the power under them, for their several shares of the expense of certain repairs, was put in the hands of the person who made the repairs, with directions to collect the same and apply it in payment for his work, it was held to be assignable without any formal writing. *Wooliscroft v. Norton*, 15 Wis. 108.

2. Rollison v. Hope, 18 Tex. 446.

Funds in the Hands of a Trustee.—A trustee had lawfully in his hands money belonging to the defendant, to which the latter had a present right. The defendant was indebted to the claimant, an attorney, who also had in his hands for collection demands in favor of various clients against the defendant. For the purpose of securing the payment of the claims on demand, and also those of his clients, the defendant verbally assigned to the claimant his claim against the trustee, and the claimants gave the trustee notice of such assignment previous to the commencement of the suit. It was held that the assignment to the claimant was valid, though not in writing, and though there was no delivery to the assignee of any evidence of a claim against the trustee. *Noyes v. Brown*, 33 Vt. 431. Compare *Whittle v. Skinner*, 23 Vt. 531.

3. Assignment of Open Account.—*Risley v. Phenix Bank*, 83 N. Y. 318, 38 Am. Rep. 421; *Chapman v. Plummer*, 36 Wis. 262.

In Maine it has been held that to make an oral assignment of a debt due on account valid, there must be at least a symbolical or constructive delivery, although the delivery may be evidenced by a less significant act than is required for the assignment of a chose in action, which is capable of manual delivery, like an execution, note, or bond, and in that case the acts of the three parties, the one selling, another buying, and the third agreeing to account to the buyer—done contemporaneously—amounted to a constructive delivery. *White v. Kilgore*, 77 Me. 571.

Delivery Necessary where there Is a Note or Other Written Obligation.—But where there is a note, bond, or other written obligation evidencing the debt, it has been said that there must be a delivery of the instrument.¹ Thus an indorsement by the assured upon an insurance policy directing the insurers to pay a portion of the amount due to a third person, such indorsement being notified to the insurers, but the instrument remaining in the hands of the assured, has been held not to constitute an assignment.²

Qualification of Rule.—The rule is, however, subject to this qualification, that where an assignment of a chose in action is made by a separate paper, it will be valid, though the written evidence of the chose in action may not be delivered.³

(b) **Operation of Some Particular Forms as Assignments**—*aa. ORDER ON DESIGNATED FUND.*—It is a general rule that an order payable out of a particular fund operates as an equitable assignment of the fund not only as between the drawer and payee, but as regards the drawee also,⁴ notwithstanding the

1. **Assignment of Notes and Written Obligations.**—*Palmer v. Merrill*, 6 Cush. (Mass.) 282, 52 Am. Dec. 782. But see *Noyes v. Brown*, 33 Vt. 431, criticising *Whittle v. Skinner*, 23 Vt. 531.

It has been said that where the chose in action is a note or bond, or other written obligation, its retention by the alleged assignor will in most cases be strong if not conclusive, evidence that the assignment has not been completed. *Risley v. Phenix Bank*, 83 N. Y. 328, 38 Am. Rep. 421.

2. *Palmer v. Merrill*, 6 Cush. (Mass.) 282, 52 Am. Dec. 782.

Indorsement on Bond without Delivery.—In the same way it has been held that an indorsement of a transfer upon a bond will not constitute a valid assignment, where no delivery of it appears. *Bristow v. Hall*, 16 Tex. 566.

3. **Delivery of Separate Paper of Assignment.**—*Spring v. South Carolina Ins. Co.*, 8 Wheat. (U. S.) 268; *Planters', etc., Ins. Co. v. Tunstall*, 72 Ala. 142; *Adams v. Robinson*, 69 Ga. 627; *Ducasse v. Keyser*, 28 La. Ann. 419; *McGee v. Riddlesbarger*, 39 Mo. 365; *Grand Gulf Bank v. Wood*, 12 Smed. & M. (Miss.) 482; *Wadsworth v. Griswold*, Harp. (S. Car.) 17.

Thus where a party conveyed real estate by deed of mortgage and also "all his notes, bonds, accounts, and evidences of debt," his title to such choses in action, although not delivered, passed to the mortgagee as against an execution creditor. *McGee v. Riddlesbarger*, 39 Mo. 365.

Promissory Note.—A valid assignment of a promissory note may be made by a separate instrument of writing without indorsement or delivery of the note. *Planters', etc., Ins. Co. v. Tunstall*, 72 Ala. 142; *Grand Gulf Bank v. Wood*, 12 Smed. & M. (Miss.) 482; *McGee v. Riddlesbarger*, 39 Mo. 365.

Bill of Exchange.—In the same way a valid assignment of a bill of exchange may be made by a separate writing without an indorsement or delivery of the bill. *Adams v. Robinson*, 69 Ga. 627; *Titcomb v. Thomas*, 5 Me. 282; *Hutchings v. Low*, 13 N. J. L. 246.

Insurance Policy.—Where the assignment of an insurance policy was executed by a writing under seal, it was held not to be necessary that the assignment should be accompanied by an

actual delivery of the policy. *Spring v. South Carolina Ins. Co.*, 8 Wheat. (U. S.) 268.

Equitable Interest Only Passes.—But it has been held that a deed of assignment by which notes, bills receivable, and other choses in action are assigned, passes but the equitable interest to the assignee. *Barrett v. Hinckley*, 124 Ill. 40, 7 Am. St. Rep. 331; *French v. Turner*, 15 Ind. 62; *Franklin v. Twogood*, 18 Iowa 517; *Grand Gulf Bank v. Wood*, 12 Smed. & M. (Miss.) 482. Compare *Allen v. Newbery*, 8 Iowa 65.

4. **Order on Particular Fund as Assignment.**—*England.*—*Row v. Dawson*, 1 Ves. 331; *Yeates v. Groves*, 1 Ves. Jr. 280; *Ex p. South*, 3 Swanst. 392; *Burn v. Carvalho*, 4 Myl. & C. 690; *Dickinson v. Marrow*, 14 M. & W. 713; *Rodick v. Gandell*, 15 Eng. L. & Eq. 22. See also *Watson v. Wellington*, 1 Russ. & Myl. 602.

Canada.—*Robertson v. Grant*, 3 Ch. Chamb. (Ont.) 331. See also *Muir v. Waddell*, 14 Grant's Ch. (U. C.) 488.

Alabama.—*Curry v. Shelby*, 90 Ala. 277.

California.—*Pope v. Huth*, 14 Cal. 404; *Joyce v. Wing Yet Lung*, 87 Cal. 424.

Iowa.—*Des Moines County v. Hinkley*, 62 Iowa 637.

Kansas.—*Snyder v. Board of Education*, 16 Kan. 543.

Louisiana.—*Edwards v. Daley*, 14 La. Ann. 385.

Maine.—*Legro v. Staples*, 16 Me. 252; *Robbins v. Bacon*, 3 Me. 346; *Wheeler v. Evans*, 26 Me. 133; *Johnson v. Thayer*, 17 Me. 401.

Massachusetts.—*Osborne v. Jordan*, 3 Gray (Mass.) 277; *Taylor v. Lynch*, 5 Gray (Mass.) 49; *Lannan v. Smith*, 7 Gray (Mass.) 150; *Foss v. Lowell Five Cents Sav. Bank*, 111 Mass. 285; *Kingman v. Perkins*, 105 Mass. 111; *Kimball v. Leland*, 110 Mass. 325.

Missouri.—*Walker v. Mauro*, 18 Mo. 564; *Luthy v. Woods*, 6 Mo. App. 67; *Boyer v. Hamilton*, 21 Mo. App. 520.

New Hampshire.—*Conway v. Cutting*, 51 N. H. 407.

New Jersey.—*Shannon v. Hoboken*, 37 N. J. Eq. 125; *Kirtland v. Moore*, 40 N. J. Eq. 106; *Bradley, etc., Co. v. Berns*, 51 N. J. Eq. 437.

order may not be accepted by the latter party.¹

Actual Existence of Fund Unnecessary.—In this case it is not essential that the fund assigned should have an actual existence; it is sufficient if it exists potentially.² Thus an equitable assignment may as well be made of a fund

New York.—Morton *v.* Naylor, 1 Hill (N. Y.) 583; Clark *v.* Mauran, 3 Paige (N. Y.) 373; Bradley *v.* Root, 5 Paige (N. Y.) 632; Richardson *v.* Rust, 9 Paige (N. Y.) 243; People *v.* Flour City L. Assoc., 85 Hun (N. Y.) 506; Sansone *v.* Alexander, 16 Misc. Rep. (N. Y. Supreme Ct.) 368; Vreeland *v.* Blunt, 6 Barb. (N. Y.) 182; Lawrence *v.* Fox, 20 N. Y. 268; Wells *v.* Williams, 39 Barb. (N. Y.) 567; Brill *v.* Tuttle, 81 N. Y. 456, 36 Am. Rep. 515; Throop Grain Cleaner Co. *v.* Smith, 110 N. Y. 83.

North Carolina.—Howell *v.* Boyd Mfg. Co., 116 N. Car. 806.

Texas.—Harris County *v.* Campbell, 68 Tex. 22, 2 Am. St. Rep. 467.

Vermont.—Blin *v.* Pierce, 20 Vt. 25.

Order to be Paid out of Wages.—An order upon drainage commissioners to issue bonds payable to a third person or order in such sum as may be due the maker thereof for labor performed, they promising to comply therewith upon ascertaining the sum due, amounts to an equitable assignment of the wages. Koch *v.* Quick, 29 Ill. App. 635.

Delivery of Bank Book with Order for Payment of Amount Therein.—The delivery of a bank book with an order for the payment of the whole amount represented by it constitutes a valid assignment of the fund standing to the credit of the drawer in the bank. Kingman *v.* Perkins, 105 Mass. 111; Kimball *v.* Leland, 110 Mass. 325; Foss *v.* Lowell Five Cents Sav. Bank, 111 Mass. 287; Sheedy *v.* Roach, 124 Mass. 472, 26 Am. Rep. 680.

Draft Attached to Account Stated.—A draft on a debtor by a creditor, attached to an account as stated between them for the full amount due, operates as an assignment of the fund to the payee. Boyer *v.* Hamilton, 21 Mo. App. 520; Moore *v.* Davis, 57 Mich. 256.

Order to be Paid out of Prize Moneys.—The execution and delivery to the plaintiff of a written order by a third party, addressed to the defendant, directing the latter to pay over to the plaintiff certain prize moneys collected for his account from the United States government by the defendant, was held sufficient to transfer the equitable title to the plaintiff so as to entitle him to maintain an action against the defendant for the money. Danklessen *v.* Braynard, 3 Daly (N. Y.) 183.

Order Held under Peculiar Circumstances to be Drawn on Particular Fund.—At the time money was obtained of a bank, on the note of a contractor with the material man as a surety, with which to pay the material man, it was agreed between them and the owner of the building that the owner should pay the note out of the first money due the contractor after the note was due. It not being paid, the material man paid it, and thereafter the contractor gave him an order for the amount on the owner, who promised to pay it as soon as the money was due the contractor. It was held

that there was an equitable assignment of that amount out of the money to come due. Wood *v.* Amarillo Imp. Co. (Tex. 1895), 31 S. W. Rep. 503. In this case the court said: "The circumstances show that it was the intention of the parties that the note was to be paid out of the fund, and we think it is also apparent that it was contemplated that the draft should be paid from the same source."

1. Effect as to Drawee—California.—Wheatley *v.* Strobe, 12 Cal. 97, 73 Am. Dec. 522.

Iowa.—McWilliams *v.* Webb, 32 Iowa 577; Cutler *v.* McCormick, 48 Iowa 406. See also Schollmier *v.* Schoendelen, 78 Iowa 426, 16 Am. St. Rep. 455. Compare Poole *v.* Carhart, 71 Iowa 37.

Massachusetts.—Macomber *v.* Doane, 2 Allen (Mass.) 541; Tripp *v.* Brownell, 12 Cush. (Mass.) 376.

New Jersey.—Kirtland *v.* Moore, 40 N. J. Eq. 106; Trenton Public Schools *v.* Heath, 15 N. J. Eq. 22.

New York.—Lauer *v.* Dunn, 115 N. Y. 406.

Pennsylvania.—Nesmith *v.* Drum, 8 W. & S. (Pa.) 9, 42 Am. Dec. 260.

Vermont.—Blin *v.* Pierce, 20 Vt. 25.

Virginia.—Switzer *v.* Noffsinger, 82 Va. 518.

Order on Seaman's Wages.—An order by a whaling seaman for the balance that may be due him on settlement of his voyage, made and delivered to the payee before the voyage commences, purporting to be for value received, and intended as security for future advances by the payee, addressed to the agent and owner of the whaling vessel, although not accepted by him, constitutes an assignment of such seaman's wages, and if advances are made upon it, it becomes irrevocable, and the assignor cannot maintain an action against the owners of the vessel for his wages. Tripp *v.* Brownell, 12 Cush. (Mass.) 376.

A Draft upon a Particular Fund, in the Hands of an Attorney for Collection, is an equitable assignment of it, and, although not accepted by the attorney, yet it is not afterwards subject to be attached for the debt of the drawer. Nesmith *v.* Drum, 8 W. & S. (Pa.) 9, 42 Am. Dec. 260. See also Edwards *v.* Daley, 14 La. Ann. 385.

2. Fund need Not Have Actual Existence—England.—Crowfoot *v.* Gurney, 2 Moore & S. 473; Lett *v.* Morris, 4 Sim. 607.

Connecticut.—Augur *v.* New York Belting, etc., Co., 39 Conn. 536; Harrop *v.* Landers, etc., Co., 45 Conn. 561.

Illinois.—Warren *v.* Columbus First Nat. Bank, 149 Ill. 9.

Maine.—McLellan *v.* Walker, 26 Me. 114.

New York.—Peyton *v.* Hallett, 1 Cai. (N. Y.) 363; Morton *v.* Naylor, 1 Hill (N. Y.) 583; M'Menomy *v.* Ferrers, 3 Johns. (N. Y.) 71; Shuttleworth *v.* Bruce, 7 Robt. (N. Y.) 160; Risley *v.* Smith, 64 N. Y. 578; Brill *v.*

to come into the hands of the drawee, by virtue of an agency, as of the money actually in hand.¹

Where Order is Given to Agent.—Where the supposed assignor retains the subject under his own control by delivering the order, not to the assignee but to his own agent, the transaction is not allowed to have the effect of an equitable assignment,² unless it has been rendered irrevocable by being made known to the assignee by or on behalf of the assignor.³

Tuttle, 81 N. Y. 456, 37 Am. Rep. 515. Compare Hutter v. Ellwanger, 4 Lans. (N. Y.) 9; Schreyer v. New York, 40 N. Y. Super. Ct. 255.

Pennsylvania.—Nesmith v. Drum, 8 W. & S. (Pa.) 9, 42 Am. Dec. 260; East Lewisburg Lumber, etc., Co. v. Marsh, 91 Pa. St. 96; Ruple v. Bindley, 91 Pa. St. 296.

Texas.—Milmo Nat. Bank v. Convery (Tex. Civ. App. 1894), 27 S. W. Rep. 828.

Virginia.—Brooks v. Hatch, 6 Leigh (Va.) 534.

In *Massachusetts* it has been held that where one who had contracted with the owner of a lot of land to cut the brush thereon for an entire sum, after the work was begun and before it was completed gave a third person an order on the owner for "all the money that belongs to me for cutting brush," the order was perfected and operated as an assignment of all that should be earned upon the contract. St. Johns v. Charles, 105 Mass. 262. See also Lannan v. Smith, 7 Gray (Mass.) 150; Tripp v. Brownell, 12 Cush. (Mass.) 376; Taylor v. Lynch, 5 Gray (Mass.) 49. But see the later decisions in this state. Lightbody v. Smith, 125 Mass. 51; White v. Coleman, 130 Mass. 316.

1. Pope v. Huth, 14 Cal. 404.

2. **Mere Delivery of Order to Agent.**—Rodick v. Gandell, 15 Eng. L. & Eq. 22; Morrell v. Wootten, 16 Beav. 197; Gerrard v. Lauderdale, 2 Russ. & Myl. 451; Brockmeyer v. Washington Nat. Bank, 40 Kan. 744; Beers v. Spooner, 9 Leigh (Va.) 153; *In re Cleary*, 9 Wash. 605. See also Kimball v. Donald, 20 Mo. 578, 64 Am. Dec. 209.

A Direction by a Landlord to the Agent Who Collected His Rent to pay the mortgagee of the property the rent collected in payment of interest on the mortgage is not an equitable assignment of the rent, and does not entitle the mortgagee to receive the rent as against the assignee for the benefit of the landlord's creditors. *In re Cleary*, 9 Wash. 605.

Direction by Client to Attorney.—A, having claims in the hands of an attorney for collection, gave him a verbal direction to pay part of the money, when collected, to B, in satisfaction of a debt due B from a third person. It was held that A, in his lifetime, or his administrator after his death, might revoke this direction to the attorney and demand the money. Beers v. Spooner, 9 Leigh (Va.) 153.

Direction of Change of Account to Credit of Another.—Where the plaintiff having a fund in the hands of the defendants, his bankers, directed them to place the same to the credit of accounts to be opened by them for the purpose in the names of his children, who were of tender years, but after the defendants had

done so they continued to recognize the authority and directions of the plaintiff in the management of the fund, and it did not appear that he had been indebted to the children, or had received any consideration upon the transfer of the credits, or that the children ever had notice thereof or received possession of the security, it was held that the change in the accounts under such circumstances was neither a transfer of the fund or securities themselves, nor a gift *in presenti* nor *in futuro*. Geary v. Page, 9 Bosw. (N. Y.) 290.

3. Information Given to Assignee by Assignor.

—A, having goods in the hands of B as his agent at a foreign port, and being under liability to C, by a letter to C promised that he would direct, and by a subsequent letter to B did direct, B to deliver over the goods to D, as the agent of C at that port. Before the delivery of the goods, a commission of bankruptcy issued against A under an act of bankruptcy committed while his letter was on its way to B, and the goods were delivered by B to D in ignorance of the bankruptcy. It was held that C had a good title in equity to the goods. Burn v. Carvalho, 4 Myl. & C. 690.

Notice Given to Assignee by Agent.—In Hodgson v. Anderson, 3 B. & C. 842, 10 E. C. L. 247, it was held that a person having once given an order for the payment of his debt to a third person, has no right to revoke that order, provided there is a pledge by the person to whom the authority is given that he will pay the debt according to the authority. See also Sharpless v. Welsh, 4 Dall. (Pa.) 279.

The case of Rodick v. Gandell, 15 Eng. L. & Eq. 22, seems to be somewhat in conflict with the doctrine as above laid down.

Where Agent Directed to Hand Over Securities for Payment of Notes Delivers the Notes.—An agent was directed by his principal to obtain securities for the payment of certain protested notes and to hand them over when obtained to a creditor of the principal. The letter containing this order was inclosed by the principal in another letter to the creditor himself, and was by the creditor delivered to the agent, who thereupon agreed to deliver the securities as directed when they should be received. He was, however, unable to obtain the securities, and finally handed the notes themselves over to the creditor, but meantime the principal had died. It was held that the transactions amounted to an assignment of the notes to the creditor for value; that it was no objection that the agent was not expressly directed to transfer the notes, but only the securities; and that the death of the principal did not affect the title of the assignee. Nicolet v. Pillot, 24 Wend. (N. Y.) 240.

bb. BILL OF EXCHANGE.—**When Accepted.**—The doctrine has been asserted that a proper bill of exchange does not of itself operate as an equitable assignment to the payee of funds of the drawer in the hands of the drawee, even after an unconditional acceptance, since, it is said, the drawee becomes bound by reason of the contract of acceptance, irrespective of the funds in his hands.¹ But the weight of authority seems to sustain the view that the true theory of a bill of exchange is that when accepted it operates as an equitable assignment.²

When Not Accepted.—It is well settled, however, by the authorities, both in the *United States* and *England*, that an ordinary bill of exchange or draft payable generally, and not drawn upon a particular fund, if not accepted, does not constitute a valid equitable assignment.³

Where Notice is Given to One of the Assignees.

—A, being indebted to several persons in Philadelphia, remitted a bill to B in his favor, A saying at the same time that in a few days he would send directions about its disposition, which he accordingly did, and apportioned the proceeds of the bill among certain of his creditors. Communication of this fact was made by B to one of the creditors. Subsequently, this creditor laid a foreign attachment upon A's fund in the hands of the acceptor of the bill and of B. It was held that B became a trustee for the creditors from the time of receiving A's appropriation, and that the creditor thereupon acquired such an interest in the trust fund as could not be divested or affected by the attachment. The court, in giving the opinion, said: "If, indeed, no notice had been given to any of the creditors, we do not think that any of the creditors would have acquired a vested interest in the fund by the terms of the correspondence between Moore and Burn, but it is a material fact for the consideration of the jury that the plaintiff received information, not only of his own apportionment, but of the distributive shares of all the creditors, and that he never objected to this appropriation of the fund until he issued his attachment. If the jury shall think from this fact that the plaintiff ratified or acquiesced in the distributive appropriation, the law will not permit him afterwards to monopolize the fund in the way the present suit contemplates." *Sharpless v. Welch*, 4 Dall. (Pa.) 280.

Where a Letter of Attorney has been Executed.

—In *Pennsylvania* it has been held that a power of attorney to collect certain moneys and pay them to certain creditors, though it is in its nature revocable, is no longer so after the collection of the moneys and holding them ready for distribution according to the terms of the trust, and that the transaction may operate as an assignment by vesting the right of the property irrevocably in the beneficiaries. *Watson v. Bagaley*, 12 Pa. St. 164, 51 Am. Dec. 595. See also *Beans v. Bullitt*, 57 Pa. St. 221.

1. Bill of Exchange—When Accepted.—3 Pomeroy's Eq. Jurisprudence, § 1284; *Wheeler v. Stone*, 4 Gill (Md.) 47; *Cowperthwaite v. Sheffield*, 3 N. Y. 243; *Marine, etc., Ins. Bank v. Jauncey*, 3 Sandf. (N. Y.) 257; *Luff v. Pope*, 5 Hill (N. Y.) 413, reversing 7 Hill (N. Y.) 577. But see *Harris v. Clark*, 3 N.

Y. 117, 51 Am. Dec. 352; *Pilchier v. Brayton*, 17 Hun (N. Y.) 429.

2. Story on Bills, § 13; 1 *Daniel on Negotiable Instruments*, § 18; *Buckner v. Sayre*, 18 B. Mon. (Ky.) 745; *Wedge v. Moore*, 6 Cush. (Mass.) 8. See also *Mandeville v. Welch*, 5 Wheat. (U. S.) 277; *Canton First Nat. Bank v. Dubuque Southwestern R. Co.*, 52 Iowa 378, 35 Am. Rep. 280; *Lambert v. Jones*, 2 Patt. & H. (Va.) 144.

Story, J., in delivering the opinion of the court in *Mandeville v. Welch*, 5 Wheat. (U. S.) 286, said: "It is said that a bill of exchange is in theory an assignment to the payee of a debt due from the drawee to the drawer. This is undoubtedly true where the bill has been accepted, whether it be drawn on general funds or a specific fund, and whether the bill be in its own nature negotiable or not, for in such a case the acceptor, by his assent, binds and appropriates the funds for the use of the payee."

3. Bill of Exchange when Not Accepted—England.—*Williams v. Everett*, 14 East 582; *Shand v. Du Buisson*, L. R. 18 Eq. 283. See the Bills of Exchange Act of 1882.

United States.—*Mandeville v. Welch*, 5 Wheat. (U. S.) 277. Compare *Corser v. Craig*, 1 Wash. (U. S.) 424; *Walker v. Seigel*, 2 Cent. L. J. 508.

Alabama.—*Sands v. Matthews*, 27 Ala. 399.

California.—*Cashman v. Harrison*, 90 Cal. 297; *Wheatley v. Strobe*, 12 Cal. 92, 73 Am. Dec. 522.

Colorado.—*Meldrum v. Henderson* (Colo. App. 1895), 43 Pac. Rep. 148.

Georgia.—*Baer v. English*, 84 Ga. 403.

Illinois.—*Abt v. American Trust, etc., Bank*, 159 Ill. 467 (declaring the law in *New York*).

Iowa.—*Canton First Nat. Bank v. Dubuque Southwestern R. Co.*, 52 Iowa 380, 35 Am. Rep. 280.

Maine.—*Hall v. Flanders*, 83 Me. 242.

Maryland.—*Sheppard v. State*, 3 Gill (Md.) 290.

Michigan.—*Grammel v. Carmer*, 55 Mich. 201, 54 Am. Rep. 363.

Minnesota.—*Lewis v. Trader's Bank*, 30 Minn. 134.

Mississippi.—*Bush v. Foote*, 58 Miss. 5, 38 Am. Rep. 310.

Missouri.—*Commerce Bank v. Bogy*, 44 Mo. 13; *Chase v. Alexander*, 6 Mo. App. 505;

Where a Particular Fund for Reimbursement is Designated.—Moreover, the designation by the drawer of a particular fund out of which the drawee is subsequently to reimburse himself for such payment, or of a particular account to which it is to be charged, will not convert the draft into an assignment of the fund.¹

Kimball v. Donald, 20 Mo. 578, 64 Am. Dec. 209.

Nevada.—*Jones v. Pacific Wood, etc., Co.*, 13 Nev. 359, 29 Am. Rep. 308.

New York.—*Gunther v. Darmstadt*, 14 Daly (N. Y.) 368; *Brill v. Tuttle*, 81 N. Y. 457, 37 Am. Rep. 515; *Weinhauer v. Morrison*, 49 Hun (N. Y.) 498; *Harris v. Clark*, 3 N. Y. 118, 51 Am. Dec. 352; *Phillips v. Stagg*, 2 Edw. Ch. (N. Y.) 108; *Harrison v. Williamson*, 2 Edw. Ch. (N. Y.) 430; *Hurd v. Johnson Park, etc., Invest. Co.*, 13 Misc. Rep. (Buffalo Super. Ct.) 643.

Pennsylvania.—*Greenfield's Estate*, 24 Pa. St. 232; *Hopkins v. Beebee*, 26 Pa. St. 85.

Texas.—*Jones v. Cunningham* (Tex. App. 1889), 15 S. W. Rep. 38; *Harris County v. Campbell*, 68 Tex. 28, 2 Am. St. Rep. 467.

Compare Anderson v. De Soer, 6 Gratt. (Va.) 363.

Draft Drawn for Exact Amount of Fund.—In *Shand v. Du Buisson*, L. R. 18 Eq. 283, it was held that a bill of exchange drawn for the exact amount of a fund due the drawer was not an equitable assignment. The court, in giving the opinion, said: "It is entirely new to me to hear that a bill of exchange in an ordinary mercantile transaction in the shape in which this appears can amount to an equitable assignment of the debt. The note might have been indorsed to any individual, or to any number of people who might have indorsed it in succession. A mercantile instrument it is in its origin, and in that shape it remains, and has no other validity or effect, and to call it an assignment of a debt would be to call it not by its right name."

So where a person was indebted to certain other persons to the amount of two thousand nine hundred and forty dollars and forty-two cents, and gave to them the following instrument of writing:

On the first day of August, 1879, pay to the order of Bush, Redwood & Co., twenty-nine hundred and forty and 42-100 dollars, for value received, and charge to account of

F. T. SANFORD.

and the instrument was not accepted by the drawee, in an action by the payee against the drawee it was held that being an ordinary bill of exchange it could not operate as an equitable assignment of the indebtedness. *Bush v. Foote*, 58 Miss. 5, 38 Am. Rep. 310.

Contrary View.—There are a few cases, however, holding a view opposite to that laid down in the text. Thus in *Corser v. Craig*, 1 Wash. (U. S.) 424, where A, having funds in the hands of B, drew a bill of exchange in favor of C, who indorsed it to D and E, to whom he was indebted, and the bill being protested for nonacceptance D and E brought a suit against B, the drawee, in the name of C, the indorser, and before judgment an attachment was laid upon the funds in the hands of B as the property of C and judgment obtained against B as the garnishee, it was held that the attachment would not affect the right of D and E to recover the amount of

the bill from the drawer, the right to the funds in the hands of the drawee being completely vested in D and E by the indorsement of the bill. *Washington, J.*, in giving the opinion in this case, said: "If the drawee refuse to accept and pay the bill, the right of the holder to the debt once assigned to him is not thereby impaired, although he may not be entitled to recover the same in his own name for the want of a promise to pay. But he may sue the drawer, or the drawee in the name of the drawer, for the debt originally due, in consequence of the implied contract of the assignor of a chose in action that the debtor shall pay, and on failure, that the assignor will. The bill being retained after protest, by the assignee, is evidence that the amount has not been paid by the drawer or any of the indorsers. I see no possible mischief which can result from this doctrine. For if, after payment refused and protest made, the drawee should pay over the funds in his hands to the drawer or to his order, without notice from the first assignee that he should retain the bill and look to him for the amount, so far as he was bound to pay, this would be a good defense against a suit brought in the name of the drawer."

But the doctrine thus declared cannot be sustained as the present law in the federal courts in view of later decisions. *Mandeville v. Welch*, 5 Wheat. (U. S.) 277. See also *Christmas v. Russell*, 14 Wall. (U. S.) 69.

California.—In *Wheatley v. Strobe*, 12 Cal. 97, 73 Am. Dec. 522, where a bill was for the whole amount, it was held that after presentment, though worthless as a bill for want of acceptance, it operated as an assignment of the debt or fund as against attachment at the suit of the drawer's creditors. In delivering the opinion of the court, *Field, J.*, said: "The want of a written acceptance does not affect the right of Howel [the holder] to the money due, but only the mode of enforcing it. With the acceptance he could have sustained an action upon the order; without it, he must recover upon the original demand by force of the assignment." In a recent case in this state, however, the doctrine of the text has been supported. *Cashman v. Harrison*, 90 Cal. 297.

In *North Carolina* the doctrine as laid down above, in *Wheatley v. Strobe*, 12 Cal. 97, has been followed. *Nimocks v. Woody*, 97 N. Car. 1, 2 Am. St. Rep. 268. See also *Kahnweiler v. Anderson*, 78 N. Car. 133.

1. Fund for Reimbursement Designated.—*MacLeed v. Snee*, 2 Stra. 762; *Banner v. Johnston*, L. R. 5 H. L. 157; *In re Entwistle*, 3 Ch. Div. 477; *Robey, etc., Co.'s Perseverance Ironworks v. Ollier*, L. R. 7 Ch. 695; *Whitney v. Eliot Nat. Bank*, 137 Mass. 354, 50 Am. Rep. 316; *Kimball v. Donald*, 20 Mo. 578, 64 Am. Dec. 209; *Schmittler v. Simon*, 101 N. Y. 554, 54 Am. Rep. 737; *Kelley v. Brooklyn*, 4 Hill (N. Y.) 263; *Gunther v. Darmstadt*, 14

Draft as Evidence of Assignment.—However, an unaccepted draft, payable generally, may be evidence of an assignment, and, with other circumstances showing that such was the intention, will vest in the holder an exclusive claim to the fund.¹

cc. CHECK—Authorities Conflicting.—Considerable controversy has arisen as to whether an unaccepted or uncertified check may operate as an assignment.

Doctrine in Some Jurisdictions.—As between the drawer or his assignee, and the holder thereof for value, it is maintained by some of the authorities that when a depositor draws his check on his general account at a bank, having funds to a sum equal to or greater than the check, it imports the existence of a debt due from the drawee to the drawer, and operates of itself to transfer the sum

Daly (N. Y.) 368; *Brill v. Tuttle*, 81 N. Y. 454, 37 Am. Rep. 515.

Wages Designated as Fund for Reimbursement.—Thus an order requesting the defendant to pay to the plaintiff, or order, nine pounds ten shillings, “as my quarterly half pay to be due from the 24th of June to the 27th of September next, by advance,” was held to be drawn on the general credit of the drawer and to be a bill of exchange, though a particular fund was specified from which the drawee might reimburse himself. The court said: “The mention of the half pay is only by way of direction how he shall reimburse himself, but the money is still to be advanced on the credit of the person.” *MacLeod v. Snee*, 2 Stra. 762.

Designation of Particular Account to be Charged.—Where bills of exchange were in the ordinary form of negotiable sight bills, except that they each contained the direction to “charge the same to account of 250 bbls. of meal, ex schooner *Aurora Borealis*,” they were held not to operate as equitable assignments. *Whitney v. Eliot Nat. Bank*, 137 Mass. 351, 50 Am. Rep. 316.

Where a bill of exchange was in the following language: “Twenty days after sight of this second of exchange (first unpaid) pay to the order of L. A. Benoist & Co., twenty-five hundred dollars, value received, and charge the same to account sugar, Belcher, rice, Simonds, and account sales,” it was held that it was a bill of exchange, and could not, before acceptance, take effect as an equitable assignment of the fund, so as to defeat attaching creditors. *Kimball v. Donald*, 20 Mo. 578, 64 Am. Dec. 209.

Doctrine in New York.—In New York it has been held that where an order designates a particular account to which it is to be charged, but is otherwise in the form of a negotiable instrument, it will be regarded as a bill of exchange and not an order on a particular fund which would operate as an assignment, especially where the surrounding circumstances tend to the same conclusion. *Kelley v. Brooklyn*, 4 Hill (N. Y.) 263; *Gunther v. Darmstadt*, 14 Daly (N. Y.) 368; *Shaver v. Western Union Tel. Co.*, 57 N. Y. 459.

Thus where a building contractor drew in favor of his subcontractor the following order on the owner of the building: “Please pay Abraham Steers, or order, two thousand dollars, and charge the same to the balance due on my contract for the erection of two buildings [describing them],” it was held that

the fact that the order was, by its terms, negotiable, indicated the intention of the parties that it should partake of the character of commercial paper, which, taken in connection with the fact that the drawer knew that there was nothing due him at the time, and that payments had been made for the work without reference to the time of the payment stipulated in the contract, was sufficient to sustain the finding that the order was inoperative as an assignment. *Gunther v. Darmstadt*, 14 Daly (N. Y.) 368.

However, it has been held that where a particular fund is designated in a non-negotiable draft and the language is ambiguous, evidence of the surrounding circumstances may be resorted to for the purpose of determining whether payment was intended to be absolute, or whether it should be made only out of the designated fund. *Brill v. Tuttle*, 81 N. Y. 454, 37 Am. Rep. 515.

For further instances where a draft charged to a particular account has been held to operate as an assignment, see *Lowery v. Steward*, 25 N. Y. 239, 82 Am. Dec. 346; *Parker v. Syracuse*, 31 N. Y. 376; *Munger v. Shannon*, 61 N. Y. 251; *Ehrichs v. DeMill*, 75 N. Y. 370.

1. Draft as Evidence of Assignment.—*Canton First Nat. Bank v. Dubuque Southwestern R. Co.*, 52 Iowa 380, 35 Am. Rep. 280; *Commerce Bank v. Bogy*, 44 Mo. 13. See also *Moore v. Davis*, 57 Mich. 256.

Intent to Assign Shown by Correspondence Accompanying Draft.—A draft, payable generally, has been held to operate as an equitable assignment where an intent to assign was shown by the correspondence accompanying the draft, though in this case the drawee accepted the draft, the judge remarking, however, that it was not essential to a valid transfer of the debt that the drawee should assent to it. *Throop Grain Cleaner Co. v. Smith*, 110 N. Y. 83.

Circumstances Held Not to Show Intent.—Where a draft is given on a bank in the ordinary course of business, it has been held not sufficient to constitute it an equitable assignment of a fund that the draft is drawn by a bank against its reserve fund in another city, and is given in exchange for clearing house certificates upon the president's representation that it owes a heavy debt at the clearing house which it is unable to meet, and his statement showing the amount of the reserve fund against which the draft is drawn. *Fourth-Street Nat. Bank v. Yardley*, 55 Fed. Rep. 851.

named to the payee, and the drawer or his assignee cannot arbitrarily stop its payment.¹ Moreover, according to some of the decisions, an unaccepted check may operate to transfer the money named therein so as to give the payee the right to sue, not only in equity,² but in an action at law,³ in his own name, for the recovery of the amount against the drawee.

Prevailing Doctrine.—But the doctrine which prevails in *England*,⁴ and is sustained by the weight of authority in the *United States*,⁵ is that an unaccepted

1. As between Drawer and Payee.—*Roberts v. Corbin*, 26 Iowa 315, 96 Am. Dec. 146; *Pease v. Landauer*, 63 Wis. 20, 53 Am. Rep. 247. See also *In re Brown*, 2 Story (U. S.) 502; *Bell v. Alexander*, 21 Gratt. (Va.) 6.

As between Checkholder and Assignee of Insolvent Drawer.—Thus where the drawer of a check becomes insolvent and makes a general assignment before the check is accepted, the check will operate as an equitable assignment of the amount drawn for as between the checkholder and the assignee. *Roberts v. Corbin*, 26 Iowa 315, 96 Am. Dec. 146; *Pease v. Landauer*, 63 Wis. 20, 53 Am. Rep. 247.

2. Payee's Right to Sue Drawee in Equity.—*Munn v. Burch*, 25 Ill. 35; *Gordon v. Muchler*, 34 La. Ann. 604.

An examination of the facts in the case of *Munn v. Burch*, 25 Ill. 35, however, will show very clearly that the question supposed to have been decided by it did not arise at all, for the check which was in question had actually been received by the bank on which it was drawn and actually charged up to him on his pass book. But though the court went beyond the case and expressed an unnecessary opinion, this decision has nevertheless been followed as authoritative in *Illinois*. See note immediately following.

3. Payee's Right to Maintain Action at Law against Drawee.—*Chicago M. & F. Ins. Co. v. Stanford*, 28 Ill. 168, 81 Am. Dec. 270; *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212, 22 Am. Rep. 185; *Chicago Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 398; *Ridgely Nat. Bank v. Patton*, 109 Ill. 479; *Lester v. Given*, 8 Bush (Ky.) 357; *Vanbibber v. State Bank*, 14 La. Ann. 486, 74 Am. Dec. 442; *Gordon v. Muchler*, 34 La. Ann. 604 (*overruling* *Case v. Henderson*, 23 La. Ann. 49, 8 Am. Rep. 590; *Fogarties v. State Bank*, 12 Rich. (S. Car.) 518, 78 Am. Dec. 468). See also *Brown v. Leckie*, 43 Ill. 497; *Springfield M. & F. Ins. Co. v. Peck*, 102 Ill. 265; *National Bank of America v. Indiana Banking Co.*, 114 Ill. 483; *Roberts v. Corbin*, 26 Iowa 315, 96 Am. Dec. 146; *Weinstock v. Bellwood*, 12 Bush (Ky.) 140.

Thus it has been held that where a check is drawn by a depositor on a bank having sufficient of his funds to meet the check, the holder, on giving notice to the bank, has the right to be paid, and if payment be refused he may maintain an action of assumpsit against the bank on the implied promise which the law raises in his behalf. *Fogarties v. State Bank*, 12 Rich. (S. Car.) 518, 78 Am. Dec. 468.

In an action against the drawee of an instrument in the following language, "Pay to A and B for account of C and Co. ten hundred eighteen and twenty-three one-hundredths dollars," and signed by the depositor, it was held

that the instrument was a valid bank check, and would operate to transfer to the payees an amount of the drawer's funds on deposit equal to the sum named on its face. *Ridgely Nat. Bank v. Patton*, 109 Ill. 479.

Right of Successive Holders to Sue.—In *Illinois* it has been held that a transfer of a check carries with it title to the amount named in the check to each successive holder, and subsequently a right of action against the bank. *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212, 22 Am. Rep. 185.

Check for Greater Amount than Deposit.—But in *Illinois* it has been held that where the check is for a greater amount than one has on deposit, it does not pass to the holder any title to the deposit. *Pabst Brewing Co. v. Reeves*, 42 Ill. App. 154.

4. Doctrine in England.—*Hopkinson v. Forster*, L. R. 19 Eq. 74; *Schroeder v. Central Bank*, 34 L. T. N. S. 735.

In *Hopkinson v. Forster*, L. R. 19 Eq. 74, it was held in an interpleader suit instituted by the bankers, on which a check was drawn for the purpose of ascertaining the rights of the claimants to a fund in their hands, that a check is not an equitable assignment of the drawer's balance at his banker's. The court said: "A check is clearly not an assignment of money in the hands of a banker; it is a bill of exchange payable at a banker's. The banker is bound by his contract with his customer to honor the check when he has sufficient assets in his hands; if he does not fulfil his contract he is liable to an action by the drawer, in which heavy damages may be recovered if the drawer's credit has been injured. I do not understand the expressions attributed to Mr. Justice Byles in the case of *Keene v. Beard*, 8 C. B. N. S. 372, 98 E. C. L. 372, but I am quite sure that learned judge never meant to lay down that a banker who dishonors a check is liable to a suit in equity by the holder."

Canada.—The case of *Hopkinson v. Forster*, L. R. 19 Eq. 74, has been followed by a decision in Canada. *Caldwell v. Merchants' Bank*, 26 U. C. C. P. 294.

5. Prevailing Doctrine in United States.—*Indiana*.—*Harrison v. Wright*, 100 Ind. 515, 50 Am. Rep. 805.

Maryland.—*Moses v. Franklin Bank*, 34 Md. 574.

Massachusetts.—*Bullard v. Randall*, 1 Gray (Mass.) 605, 61 Am. Dec. 433.

New York.—*Lunt v. Bank of North America*, 49 Barb. (N. Y.) 221; *Duncan v. Berlin*, 60 N. Y. 151; *Atty.-Gen. v. Continental L. Ins. Co.*, 71 N. Y. 325; *Tyler v. Gould*, 48 N. Y. 682; *Dykers v. Leather Mfg. Bank*, 11 Paige (N. Y.) 612; *Union Mills First Nat. Bank v. Clark*, 134 N. Y. 368.

check drawn in the ordinary form, not describing any particular fund, or using words of transfer of the whole or any part of any amount standing to the credit of the drawer, is of the same legal effect as a bill of exchange, and does not amount to an assignment at law or in equity of the money to the credit of the holder, but is simply an order which may be countermanded, and the payment of which may be forbidden by the drawer at any time before it is actually cashed.

Pennsylvania.—Loyd *v.* McCaffrey, 46 Pa. St. 410.

Tennessee.—Akin *v.* Jones, 93 Tenn. 353; Imboden *v.* Perrie, 13 Lea (Tenn.) 504.

As between Payee and General Assignee.—As between the payee of an unaccepted check and one for whose benefit a general assignment has been made, it has been held that the check will be inoperative as an assignment. Lunt *v.* Bank of North America, 49 Barb. (N. Y.) 221. See also Atty.-Gen. *v.* Continental L. Ins. Co., 71 N. Y. 325; Harrison *v.* Wright, 100 Ind. 515, 50 Am. Rep. 805.

In Mount Joy First Nat. Bank *v.* Gish, 72 Pa. St. 13, where B. drew a check on the bank before his assignment, which was not presented until afterwards, it was held that this was not an appropriation to the payee, and that the amount which remained in the bank should pass to B.'s assignees.

In the Federal Courts.—According to some of the United States Circuit Court decisions a check operates as an equitable assignment, as between the holder and the assignee in insolvency of the drawer, where it is made and delivered prior to the assignment. Cincinnati First Nat. Bank *v.* Coates, 8 Fed. Rep. 540; German Sav. Inst. *v.* Adae, 8 Fed. Rep. 106.

The case of German Sav. Inst. *v.* Adae, 8 Fed. Rep. 106, was a bill of interpleader in equity, by which a bank, holding the fund in question, declared its readiness to pay as the court might order, and it was held that where there is no controversy as to the rights of the bank or drawee, it does not lie in the mouth of the drawer or of his assignee to say that a check does not amount to an equitable assignment.

In a comparatively recent decision in the Supreme Court of the United States, however, where a bill in equity was filed by creditors against a person who had become insolvent, and among the claims was a check drawn by the defendant upon a certain bank just before his failure, it was held that the check did not operate as an equitable assignment of funds in the bank against which the check was drawn. Florence Min. Co. *v.* Brown, 124 U. S. 385. See also Rosenthal *v.* Mastin Bank, 17 Blatchf. (U. S.) 318; Essex County Nat. Bank *v.* Montreal Bank, 7 Biss. (U. S.) 193.

As between Payee and Attaching Creditor.—It has been held in many states, that where a check has not been presented and accepted it will not operate as an assignment so as to defeat a subsequent attachment. Duncan *v.* Berlin, 60 N. Y. 151; Loyd *v.* McCaffrey, 46 Pa. St. 410; Imboden *v.* Perrie, 13 Lea (Tenn.) 504.

In Duncan *v.* Berlin, 60 N. Y. 151, it was held that where the balance due a depositor in a bank is levied on by attachment against the

depositor, the bank may not deduct an outstanding check given by the depositor to a third person which had not previously been presented and accepted, although a clerk of the bank prior to the levy told the holder that it would be paid.

Also where a debtor, being sued, and the bank summoned as his trustees, gave his creditor a check for a part of his general deposit in the bank, which the creditor delivered to the cashier when absent from the bank, together with an order for the discharge of this trustee process when the amount of the check should be transferred from the debtor's account to his own on the books of the bank, it was held that this did not constitute such an assignment of a part of the funds of the debtor in the bank as would hold against a trustee process served on the bank by another creditor before the amount of the check was so transferred on the books of the bank, although the drawing of the check had been verbally assented to by the cashier when absent from the bank. Bullard *v.* Randall, 1 Gray (Mass.) 605, 61 Am. Dec. 433.

Payee's Right to Sue Drawee.—The weight of authority in this country is that a check may not operate as an assignment so as to make a bank liable in an action at law to the holder of a check drawn upon it by a general depositor for its refusal to pay the check, though the bank has sufficient funds of the drawer wherewith to pay it.

United States.—National Bank of the Republic *v.* Millard, 10 Wall. (U. S.) 152; Washington First Nat. Bank *v.* Whitman, 94 U. S. 343.

Alabama.—National Commercial Bank *v.* Miller, 77 Ala. 168, 54 Am. Rep. 50.

Arizona.—Satterwhite *v.* Melczer (Arizona 1890), 24 Pac. Rep. 184.

Colorado.—Colorado Nat. Bank *v.* Boettcher, 5 Colo. 185, 40 Am. Rep. 142.

Maryland.—Moses *v.* Franklin Bank, 34 Md. 574.

Massachusetts.—National Bank *v.* Eliot Bank, 5 Am. L. Reg. 711; Carr *v.* National Security Bank, 107 Mass. 45, 9 Am. Rep. 6.

Michigan.—Brennan *v.* Merchants', etc., Nat. Bank, 62 Mich. 343.

New Jersey.—Creveling *v.* Bloomsbury Nat. Bank, 46 N. J. L. 255, 50 Am. Rep. 417.

New York.—Viets *v.* Union Nat. Bank, 31 Hun (N. Y.) 484; Citizens' Nat. Bank *v.* Importers, etc., Nat. Bank, 44 Hun (N. Y.) 386.

North Carolina.—Hawes *v.* Blackwell, 107 N. Car. 196, 22 Am. St. Rep. 870.

Pennsylvania.—Northumberland First Nat. Bank *v.* McMichael, 106 Pa. St. 460, 51 Am. Rep. 529.

See also Rockville Nat. Bank *v.* Lafayette Second Nat. Bank, 69 Ind. 479.

dd. POWER OF ATTORNEY—Where It is Coupled with an Interest.—If it appears from a power of attorney that it is intended to give an authority coupled with an interest, it may operate as an assignment of a chose in action, though not otherwise.¹

Nor is an action maintainable against the drawer's assignees. *Chapman v. White*, 6 N. Y. 413, 57 Am. Rep. 464.

It has been held also that the holder of an unaccepted check may not bring suit in equity against the bank on which it is drawn. *Pickle v. Muse*, 88 Tenn. 380, 17 Am. St. Rep. 900.

Missouri.—In *Lewis v. International Bank*, 13 Mo. App. 202, it was held that as between the drawer and the payee or holder, the delivery of a check is an appropriation of that much of the fund on deposit. Moreover, the decisions have gone further and held that the holder of a check may maintain an action at law against a bank having funds of the drawer where presentation has been duly made and payment demanded. *McGrade v. German Sav. Inst.*, 4 Mo. App. 330; *Zelle v. German Sav. Inst.*, 4 Mo. App. 401; *State Sav. Assoc. v. Boatmen's Sav. Bank*, 11 Mo. App. 292; *Senter v. Continental Bank*, 7 Mo. App. 532.

In the Supreme Court of this state, however, it seems that the doctrine of the foregoing decisions has been repudiated, though the decisions in the Supreme Court turned partly on the fact that the checks in question were for a part of a debt only. *Dickinson v. Coates*, 79 Mo. 250, 49 Am. Rep. 228; *Merchants' Nat. Bank v. Coates*, 79 Mo. 168; *Coates v. Doran*, 83 Mo. 337.

Where Deposit is Made for Express Purpose of Paying Check.—Where money is placed in the hands of a bank expressly to provide for checks to be drawn against the bank, it has been held that the bank or its assignee will be liable to the holder of the checks. *Seligman v. Wells*, 1 Fed. Rep. 302; *Saylor v. Bushong*, 100 Pa. St. 23, 45 Am. Rep. 353.

Thus, where a depositor settled his account with his bank, and left the exact amount of an outstanding check expressly for its payment, and the bank tacitly retained the money and settled on that basis, the bank was held to be liable to the holder on the implied acceptance. *Saylor v. Bushong*, 100 Pa. St. 23, 45 Am. Rep. 353.

Where Check is Charged on the Books of the Bank.—Also, in *National Bank of the Republic v. Millard*, 10 Wall. (U. S.) 152, the court, in giving their opinion, said: "It may be, if it could be shown that the bank had charged the check on its books against the drawer and settled with him on that basis, that the plaintiff could recover on the count for money had and received, on the ground that the rule *ex æquo et bono* would be applicable, as the bank, having assented to the order, and communicated its assent to the paymaster [the drawer], would be considered as holding the money thus appropriated for the plaintiff's use, and therefore under an implied promise to him to pay it on demand."

This suggestion has been followed in a de-

cision in *Pennsylvania*. *Seventh Nat. Bank v. Cook*, 73 Pa. St. 483, 13 Am. Rep. 751.

Check Drawn on Fund Belonging in Equity to Payee.—In *Hemphill v. Yerkes*, 132 Pa. St. 546, 19 Am. St. Rep. 607, it was held that a check drawn against the holder of a specific fund deposited in the bank in the name of the drawer, but belonging in equity to the payee, transfers to the payee upon its delivery to him the legal title to the deposit even as against the drawee.

1. *Gausson v. Morton*, 10 B. & C. 731, 21 E. C. L. 157; *Rogers v. Lindsey*, 13 How. (U. S.) 441; *Halliburton v. Nance*, 40 Ark. 161; *Bergen v. Bennett*, 1 Cai. Cas. (N. Y.) 1, 2 Am. Dec. 281; *Knapp v. Alvord*, 10 Paige (N. Y.) 205, 40 Am. Dec. 241; *DeForest v. Bates*, 1 Edw. Ch. (N. Y.) 394; *Raymond v. Squire*, 11 Johns. (N. Y.) 47; *Clayton v. Fawcett*, 2 Leigh (Va.) 19; *Wooliscroft v. Norton*, 15 Wis. 198.

Thus it has been held that where A delivers a note to B to receive the amount and apply it to the payment of a note from A to B, this is an equitable assignment of the note and vests an authority coupled with an interest in B, and B will not be guilty of conversion by refusing to deliver the note to A. *Canfield v. Monger*, 12 Johns. (N. Y.) 347.

Order Given for Purpose of Collection Merely.—An order by a client upon his attorney, for money collected by him, is no transfer of the debt to the payee if he was the agent of the client and the order was given merely for the purpose of collection. *Halliburton v. Nance*, 40 Ark. 161.

Where Power of Attorney Contains Words of Assignment.—A letter of attorney to receive all the money due from A to the constituent and to give a discharge therefor in the constituent's name with a clause stating that this is "an assignment of the same," constitutes an assignment of the debt to the attorney, though the letter is not in terms irrevocable, and does not expressly authorize the attorney to receive the money to his own use. *Weed v. Jewett*, 2 Met. (Mass.) 608, 37 Am. Dec. 115.

Power of Attorney for a Consideration.—It has been held that a power of attorney for a consideration in the case of an ordinary chose in action is irrevocable, and consequently operates as an assignment. *Bromley v. Holland*, 7 Ves. Jr. 28; *People v. Tioga C. P.*, 19 Wend. (N. Y.) 73.

Thus in *New York* it has been held on this ground that where a female out at service was debauched, and the person with whom she resided by power of attorney authorized her stepfather to prosecute a suit in his name for the seduction, saving the constituent harmless from all damages, costs, and charges, but not declaring that the fruits of the suit should belong to the stepfather, it was held that the instrument was operative as an assignment. *People v. Tioga C. P.*, 19 Wend. (N. Y.) 73.

Interest must Be in Subject-matter of Power.—The interest in question, according to the weight of authority, must be in the subject-matter on which the power is to be exercised, and not in that which is produced by the exercise of the power.¹

ee. **MERE EXECUTORY AGREEMENT TO APPROPRIATE.**—To constitute a valid assignment there must be a perfected transaction between the parties, intended to vest in the party to be provided for a present right in the chose in action in question, even where the circumstances do not admit of its immediate exercise.² In accordance with this doctrine, a mere executory agreement by a debtor to pay a certain debt out of a designated fund then due or to become due cannot operate as an equitable assignment, since the alleged assignor would in that case retain control over the subject-matter.³

Instrument Irrevocable in Terms.—In *New York* it has been held that the mere expression in a power of attorney that it is irrevocable does not make it so, nor give it the effect of an assignment. Thus where two partners, the firm being dissolved, constituted the third their attorney irrevocable in their behalf to ask, demand, receive, and give acquittances for debts due to the firm, it was held that this did not operate as a transfer. *Napier v. McLeod*, 9 Wend. (N. Y.) 120.

But in *Massachusetts* it has been held that a letter of attorney, irrevocable in terms, to receive a sum of money to the attorney's own use is *prima facie* an assignment, but, being not a direct but only a constructive assignment, it is capable of being explained by extrinsic evidence. *Gerrish v. Sweetser*, 4 Pick. (Mass.) 374.

1. Interest must Be in Subject-matter of Power.—*Hunt v. Rousmanier*, 8 Wheat. (U. S.) 174; *Hawley v. Smith*, 45 Ind. 183; *Langdon v. Langdon*, 4 Gray (Mass.) 186; *Webb v. Walker*, 7 Cush. (Mass.) 46; *Fuller v. Emerson*, 7 Cush. (Mass.) 203. See also the title AGENCY, vol. 1, p. 1217.

The payee of a promissory note, not negotiable, for one hundred and twenty dollars, delivered it to a third person, taking back the following writing: "Received a note [describing it], for which I am to collect and account to the said payee the sum of one hundred and ten dollars, when the note is collected, or return said note back to said payee if I choose." It was held that the writing did not prove an assignment coupled with an interest, but a mere power to collect, deducting a small sum for services or charges, and that the power was revoked by a subsequent payment made to the original payee and accepted by him in discharge of the note, though of a sum less than was due on the note and made with notice of the assignment. *Langdon v. Langdon*, 4 Gray (Mass.) 186. In this case Shaw, C. J., said: "If it appear from the whole instrument that it is intended to give a power coupled with an interest, it will operate as an assignment. But it must be an interest legal or equitable in the subject-matter on which the power is to operate, and not merely in the fees and commissions of the agency, or in the thing to be acquired by the execution of the power."

2. Christmas v. Russell, 14 Wall. (U. S.) 69; *Holmes v. Evans*, 129 N. Y. 140.

Where the Transaction is Perfected.—Where

the defendant verbally agreed to assign to the claimant a demand in his favor against the trustee, whereupon the trustee was called in, and in the claimant's presence was informed by the defendant that he had transferred his claim against him to the claimant, and was requested by the defendant to pay it to the claimant, and it was understood by all three of the partners that the trustee was to account to the claimant for the defendant's demand, it was held that the assignment from the defendant to the claimant was a present and perfected one, and not a mere agreement to assign. *Hutchins v. Watts*, 35 Vt. 360.

3. Executory Agreement to Pay out of Particular Fund.—*United States*.—*Christmas v. Russell*, 14 Wall. (U. S.) 69; *Dillon v. Barnard*, 21 Wall. (U. S.) 430; *Ex p. Tremont Nail Co.*, 16 Nat. Bank Reg. 448.

Illinois.—*Story v. Hull*, 143 Ill. 506; *Wyman v. Snyder*, 112 Ill. 99.

Indiana.—*Ford v. Garner*, 15 Ind. 298.

Missouri.—*Pearce v. Roberts*, 27 Mo. 179.

New York.—*Rogers v. Hosack*, 18 Wend. (N. Y.) 319; *Hoyt v. Story*, 3 Barb. (N. Y.) 262; *Rupp v. Blanchard*, 34 Barb. (N. Y.) 627; *Dickenson v. Phillips*, 1 Barb. (N. Y.) 454; *Wood v. Mitchell* (Supreme Ct.), 14 N. Y. Supp. 7, 26 Abb. N. Cas. (N. Y.) 129.

Ohio.—*Christmas v. Griswold*, 8 Ohio St. 558.

Vermont.—*Whittle v. Skinner*, 23 Vt. 531.

Virginia.—*Eib v. Martin*, 5 Leigh (Va.) 141.

West Virginia.—*Feamster v. Withrow*, 9 W. Va. 296.

Compare *Gallinger v. Pomeroy*, 3 Greene (Iowa) 178, 54 Am. Dec. 496; *Kingsbury v. Burrill*, 151 Mass. 199; *Terney v. Wilson*, 45 N. J. L. 782; *Richardson v. Rust*, 9 Paige (N. Y.) 243; *York v. Conde*, 61 Hun (N. Y.) 26.

It was said by Mr. Justice Swayne, in *Christmas v. Russell*, 14 Wall. (U. S.) 70: "An agreement to pay out of a particular fund, however clear in its terms, is not an equitable assignment. * * * The assignor must not retain any control over the fund, any authority to collect, or any power of revocation. If he does, it is fatal to the claim of the assignee. The transfer must be of such a character that the fund holder can safely pay and is compellable to do so, though forbidden by the assignor."

Promise to Pay out of Proceeds of a Note.—An oral promise by a debtor to pay certain creditors out of the proceeds of a note due the debtor, no writing to such effect being made,

(c) **Partial Assignments—Rule at Law.**—It is a well-established rule, adopted in courts of law, that an assignment of a part only of a chose in action is void unless made with the consent or ratification of the debtor.¹

Thus an **Order** for part only of the debt or liability of the drawee does not amount to an assignment of that part unless the drawee consents to the appropriation by the acceptance of the order, or an obligation to accept may be fairly implied from the custom of trade or the course of business between the parties as a part of their contract.²

and the note not being delivered to any one for such purpose, does not transform the note into a trust fund for the benefit of such creditors. *Marshall v. Strange* (Ky. 1888), 9 S. W. Rep. 250.

Promise to Pay out of Proceeds of Ore to be Mined.—A promise to pay a debt out of the proceeds of ore to be mined is not an equitable assignment of such proceeds. *Silent Friend Min. Co. v. Abbott* (Colo. App. 1895), 42 Pac. Rep. 318.

Promise to Pay out of Proceeds of Lawsuit.—An agreement by a client to pay his attorney a reasonable compensation for his services, out of the proceeds of a proposed lawsuit, has been held not to amount to an equitable assignment of an interest in the subject-matter of the litigation. *Story v. Hull*, 143 Ill. 506, *affirming* 41 Ill. App. 109. *Baker, J.*, in delivering the opinion of the court in this case, said: "Here the agreement that the compensation of appellant should come out of the proceeds of the proposed litigation was simply a promise by the heirs that they would pay such compensation out of such proceeds, and depended for its performance upon the mere personal responsibility of such heirs."

Contract to Pay a Specified Part of Proceeds of Debt, "when Received and in Manner as Received."—However, it has been held that if a person, after having purchased a mortgage debt, receives funds from another person and contracts in writing to pay him a specified part of the proceeds of the debt, "when received, and in manner as received," a specific performance of such contract may be enforced in equity, although there may be a remedy at law. *Buck v. Swazey*, 35 Me. 42, 56 Am. Dec. 681.

English Doctrine.—In England, it seems that an agreement between a debtor and a creditor that the debt owing shall be paid out of a specific fund coming to the debtor may operate as an appropriation of such debt. *Rodick v. Gandell*, 1 De G. M. & G. 763; *Riccard v. Prichard*, 1 Kay & J. 277.

But according to *Thomson v. Simpson*, L. R. 5 Ch. 659, there must be the clearest evidence of the appropriation.

1. Claim for Wages.—Under this rule an assignee of a portion of a claim for wages, the entire claim being due and payable at one time, cannot sue the debtor in the absence of an acceptance by the debtor of such partial assignment or agreement to pay the same. *Kansas City, etc., R. Co. v. Robertson* (Ala. 1896), 19 So. Rep. 432.

So an employer is under no legal obligation to recognize a partial assignment of the future earnings of his employee. *Getchell v. Maney*, 69 Me. 442; *Carter v. Nichols*, 58 Vt. 553.

And a partial assignment of a clerk's salary, to be paid as it becomes due, will not enable the assignee to maintain an action against the employer. *Fairgrievies v. Lehigh Nav. Co.*, 2 Phila. (Pa.) 182.

Where a Part of Earnings under Contract has Become a Separate and Distinct Demand.—However, where a contract provided that payments equal to eighty-five per cent. of the contract value of the work to be done were to be made monthly, and fifteen per cent. of the contract value of the work done each month was to be retained and to be paid within ninety days after the entire completion of the work, it was held that the retained percentage became a separate and distinct demand which could be assigned. *Adler v. Kansas City, etc., R. Co.*, 92 Mo. 242.

Promissory Note.—In the same way at law a portion of a promissory note cannot be so assigned as to enable the assignee to bring an action in his own name for his portion of the note. *Miller v. Bledsoe*, 2 Ill. 530, 32 Am. Dec. 37; *Hutchinson v. Simon*, 57 Miss. 628; *Lindsay v. Price*, 33 Tex. 280; *Frank v. Kaigler*, 36 Tex. 305. See also *Conover v. Earl*, 26 Iowa 167; *Hughes v. Kiddell*, 2 Bay (S. Car.) 324.

Judgments.—So the owner of a judgment at law cannot assign to another person a part thereof without the consent of the debtor. *Love v. Fairfield*, 13 Mo. 300, 53 Am. Dec. 148; *Loomis v. Robinson*, 76 Mo. 488; *Hopkins v. Stockdale*, 117 Pa. St. 365.

Where Equity is Administered in Courts of Law.—In most of the states courts of law administer equity, and in that case a partial assignment may be enforced at law. *Brown v. Dunn*, 50 N. J. L. 111. See also note immediately following.

2. Order for Part of Fund—United States.—*Tiernan v. Jackson*, 5 Pet. (U. S.) 580; *Mandeville v. Welch*, 5 Wheat. (U. S.) 277. *Alabama.*—*Sands v. Matthews*, 27 Ala. 402. *Colorado.*—*Snedden v. Harmes*, 5 Colo. App. 477.

Georgia.—*Daniels Bros. & Co. v. Meinhard*, 53 Ga. 359.

Illinois.—*Moore v. Gravelot*, 3 Ill. App. 442. See also *Creighton v. Hyde Park*, 6 Ill. App. 272.

Kansas.—*German F. Ins. Co. v. Bullene*, 51 Kan. 764.

Kentucky.—*Weinstock v. Bellwood*, 12 Bush (Ky.) 139.

Louisiana.—*Poydras v. Delamare*, 13 La. 98.

Maine.—*Robbins v. Bacon*, 3 Me. 346.

Maryland.—*Eichelberger v. Murdock*, 10 Md. 373, 69 Am. Dec. 140; *Wilson v. Carson*, 12 Md. 54.

The Reason of This Principle is plain—a creditor will not be permitted to split up a single cause of action into many actions without the assent of his debtor, since it may subject the latter to many embarrassments and responsibilities not contemplated in his original contract.¹

Rule in Equity.—In a court of equity, however, the objections to a partial assignment of the demand which are formidable in a court of law disappear, and where one assigns a definite portion of a debt or chose in action to a third person, whether by an order in his favor or otherwise, it is a valid equitable assignment *pro tanto* which a court of equity will recognize and enforce.²

Massachusetts.—Bullard *v.* Randall, 1 Gray (Mass.) 605, 61 Am. Dec. 433; Palmer *v.* Merrill, 6 Cush. (Mass.) 282, 52 Am. Dec. 782; Dana *v.* Boston Third Nat. Bank, 13 Allen (Mass.) 445; Gibson *v.* Cooke, 20 Pick. (Mass.) 15, 32 Am. Dec. 194; Knowlton *v.* Cooley, 102 Mass. 233; Papineau *v.* Naumkeag Steam Cotton Co., 126 Mass. 372.

Ohio.—Stanbery *v.* Smythe, 13 Ohio St. 495.

Where Debtor Assents to Assignment.—It is well settled that an assignment, by order, of a part of a debt, if assented to by the debtor in such a manner as to imply a promise to pay it to the assignee, is good as against a trustee process or against an assignee in insolvency. Marziou *v.* Pioche, 8 Cal. 536; Des Moines County *v.* Hinkley, 62 Iowa 637; Taylor *v.* Lynch, 5 Gray (Mass.) 49; Lannan *v.* Smith, 7 Gray (Mass.) 150; Bourne *v.* Cabot, 3 Met. (Mass.) 305; St. Louis Fourth Nat. Bank *v.* Noonan, 88 Mo. 377.

Where, however, the acceptance of the order is conditional, it will operate as an assignment only in the event of the condition being fulfilled. Thayer *v.* Havener, 6 Me. 212; Gill *v.* Weller, 52 Md. 8; Rosenstock *v.* Ortwine, 46 Md. 388.

Where No Injury can Accrue to the Debtor from a partial assignment, as where it is made not to create but to escape the mischief, which is the only reason of the rule prohibiting partial assignments, it will be valid. Thus, where two plaintiffs, for the purpose of bringing a joint action, each assigned to the other half interests in notes due them by the same debtor, the assignments were held to be valid. Beardslee *v.* Morgner, 4 Mo. App. 139.

On the same principle it has been held that one of two payees of a note may assign all his interest in such note to the other payee, who may sue as the legal owner of the note. Smith *v.* Oldham, 5 Mo. 483.

Equitable Doctrine Recognized in Courts of Law.

—In the present liberal state of the law in some of the states as to equitable assignments, an order on a part of a fund will be recognized as an assignment in a common-law action, though it is not assented to by the debtor. Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423; Pueblo Cent. Nat. Bank *v.* Spratlen (Colo. App. 1896), 43 Pac. Rep. 1048; Risley *v.* Phenix Bank, 83 N. Y. 318, 38 Am. Rep. 421; Chambers *v.* Lancaster (Supreme Ct.), 38 N. Y. Supp. 253; Taylor *v.* Bates, 5 Cow. (N. Y.) 376; Lowery *v.* Steward, 25 N. Y. 239, 82 Am. Dec. 346; Wheeler *v.* Wheeler, 9 Cow. (N. Y.) 34; Hall *v.* Buffalo, 2 Abb. App. Dec. (N. Y.) 301; Morton *v.* Naylor, 1 Hill (N. Y.) 583; Lauer *v.* Dunn, 115 N. Y. 406; People *v.* Comptroller,

77 N. Y. 45; Crouch *v.* Muller, 141 N. Y. 495; Caldwell *v.* Hartuppee, 70 Pa. St. 74; Budd *v.* Himmelberger, 4 Pa. Dist. Rep. 545. See also Jones *v.* New York, 90 N. Y. 387; McEwen *v.* Johnson, 7 Cal. 260. Compare Jermyn *v.* Moffitt, 75 Pa. St. 399; Hopkins *v.* Beebe, 26 Pa. St. 85.

Thus an order given by a contractor on the owner of a building which he was erecting, and requesting the owner "to pay to the order of H. one thousand forty-nine dollars and forty-seven cents, when the same is due me by the terms of the contract," was held in a court of law to be an equitable assignment of the fund to become due to the amount named in the order. Hurd *v.* Johnson Park Invest. Co., 13 Misc. Rep. (Buffalo Super. Ct.) 643.

1. Mandeville *v.* Welch, 5 Wheat. (U. S.) 277; Gibson *v.* Cooke, 20 Pick. (Mass.) 15, 32 Am. Dec. 194.

2. **Rule in Equity — England.**—Addison *v.* Cox, L. R. 8 Ch. 76; Watson *v.* Wellington, 1 Russ. & Myl. 602; Lett *v.* Morris, 4 Sim. 607; Tibbits *v.* George, 5 Ad. & El. 107, 31 E. C. L. 293; Brice *v.* Bannister, 3 Q. B. Div. 569; *Ex p.* Moss, 14 Q. B. Div. 310; Yeates *v.* Groves, 1 Ves. Jr. 280.

Canada.—Farquhar *v.* Toronto, 12 Grant's Ch. (U. C.) 186.

United States.—Dowell *v.* Cardwell, 4 Sawy. (U. S.) 217; Christman *v.* Russell, 14 Wall. (U. S.) 69; Trist *v.* Child, 21 Wall. (U. S.) 441; Peugh *v.* Porter, 112 U. S. 737.

California.—Grain *v.* Aldrich, 38 Cal. 514, 99 Am. Dec. 423.

Illinois.—Phillips *v.* Edsall, 127 Ill. 535; Warren *v.* Columbus First Nat. Bank, 149 Ill. 9.

Maine.—Buck *v.* Swazey, 35 Me. 41, 56 Am. Dec. 681; National Exch. Bank *v.* McLoon, 73 Me. 498; Horne *v.* Stevens, 79 Me. 262.

Mississippi.—Moody *v.* Kyle, 34 Miss. 506.

New Jersey.—Trenton Public Schools *v.* Heath, 15 N. J. Eq. 22.

New York.—Field *v.* New York, 6 N. Y. 179, 57 Am. Dec. 435; Cook *v.* Genesee Mut. Ins. Co., 8 How. Pr. (N. Y. Supreme Ct.) 514; Pattison *v.* Hull, 9 Cow. (N. Y.) 747; People *v.* Flour City L. Assoc., 85 Hun (N. Y.) 506; Hall *v.* Buffalo, 1 Keyes (N. Y.) 193.

North Carolina.—Etheridge *v.* Vernoy, 74 N. Car. 800.

Pennsylvania.—Budd *v.* Himmelberger, 4 Pa. Dist. Rep. 545.

Tennessee.—Gardner *v.* Smith, 5 Heisk. (Tenn.) 256.

Texas.—Goldman *v.* Blum, 58 Tex. 630;

Where the Part Assigned Is Vague and Indefinite.—But a partial assignment may not be enforced where it is vague and indefinite as to the parts intended to be

Harris County v. Campbell, 68 Tex. 22, 2 Am. St. Rep. 467; Clark v. Gillespie, 70 Tex. 513.

Virginia.—Brooks v. Hatch, 6 Leigh (Va.) 534. See also Shenandoah Valley R. Co. v. Miller, 80 Va. 833.

West Virginia.—Wellsburg First Nat. Bank v. Kimberlands, 16 W. Va. 555.

See also Des Moines County v. Hinkley, 62 Iowa 637; Whitney v. Cowan, 55 Miss. 626; Stanbery v. Smythe, 13 Ohio St. 495; Claflin v. Kimball, 52 Vt. 7.

Reason of the Equitable Rule.—In National Exch. Bank v. McLoon, 73 Me. 498, Peters, J., in delivering the opinion of the court, said: "In equity the interests of all parties can be determined in a single suit. The debtor can bring the entire fund into court and run no risks as to its proper distribution. If he be in no fault, no costs need be imposed upon him or they may be awarded in his favor. If he be put to extra trouble in keeping separate accounts, he can, if it is reasonable, be compensated for it. In many ways a court of equity can, while a court of law with its present modes cannot, protect the rights and interests of all parties concerned."

Government Claims.—In Peugh v. Porter, 112 U. S. 737, it was held that an instrument, by which A, as attorney in fact by substitution, for good consideration, assigns to B an interest in claims to be established against a foreign government in a mixed commission, is valid in equity, although made before the establishment of the claim, and creation of the fund, and may work a distinct appropriation of the fund in B's favor to the extent of the assignment.

Promissory Note.—A part interest in a promissory note has been held to be assignable in equity though not in law. Groves v. Ruby, 24 Ind. 418; Hutchinson v. Simon, 57 Miss. 628.

The assignment by one of two holders of a note, of his half to the other, has been held to be a good assignment in equity. Fordyce v. Nelson, 91 Ind. 447.

Order on Proceeds of Judgment.—So an order for part of the proceeds of a judgment has been held to be an equitable assignment *pro tanto*. Moore v. Robinson, 35 Ark. 297.

But in Thomas v. Porter, 3 Bush (Ky.) 177, such an order was held not to be an assignment, but evidence of an indebtedness which might be enforced on refusal to accept or pay the order.

Order on Debt Owed by County.—An order for six hundred dollars in favor of M. & Co., drawn by a contractor having a claim against a county for eight hundred and ninety-eight dollars, directed "to the county commissioners," payable out of the amount due him for putting blinds in the courthouse, and containing a recital that a part of his claim, sufficient to pay the amount of his order, was thereby transferred to M. & Co., for a valuable consideration, is a valid assignment, and operates to make the assignees the owners of the part of the debt so assigned, at and from

the date of the order. Harris County v. Campbell, 68 Tex. 22, 2 Am. St. Rep. 467.

Order Given in Violation of Agreement.—D. sold a store to J., receiving a note in part payment, but before the note matured J. sold the store and refused to pay the note, alleging want of consideration. Under an agreement between the purchaser, D., and J., the purchaser placed a sum of money in the hands of P. to be paid to J. on a specified date, if no claims were made against the store, D. at the same time giving the purchaser notice of his claims against such fund. It was held that an order by J. on P. to pay a part of this fund to a third person, made before the date specified for the payment of such fund to J., and without the consent of the other parties interested in the fund, did not operate as an equitable assignment to such person, and vested no title thereby in him. Duffy v. Dawson, 2 Misc. Rep. (N. Y. C. Pl.) 401.

Opposing Doctrine in Some Jurisdictions.—But in some states the doctrine in equity upon the question of partial assignments has been confused with the doctrine at law. Thus, in Missouri, in the case of Burnett v. Crandall, 63 Mo. 410, it was held that where a claimant assigns one-half of a judgment, without the consent of the party liable therefor, the assignee cannot recover in a suit in equity on the portion so assigned. Rice v. Dudley, 30 Mo. App. 384. See also Gibson v. Finley, 4 Md. Ch. 75.

Consent of Debtor.—It has been held, however, in Missouri that the debtor may consent to a partial assignment, and that such consent constitutes a waiver of his right to object thereto. Johnson County v. Bryson, 27 Mo. App. 341; St. Louis Fourth Nat. Bank v. Noonan, 88 Mo. 372.

In Massachusetts, also, the courts have gone so far as to decide that an assignment of a fractional part of a claim is good in equity where the person who is to pay raises no objection. Kingsbury v. Burrill, 151 Mass. 199.

Thus it has been held that an assignment for value, without the consent of the debtor, of a part of a debt due under an existing contract between the debtor and the assignor, may be enforced by a bill in equity by the assignee against the debtor, and the assignee in insolvency of the assignor, if the debtor in his answer admits that the debt is due and asks that the rights of the different claimants of the fund be determined by the court. James v. Newton, 142 Mass. 366, 56 Am. Rep. 692.

As between Assignor and Assignee.—In Minnesota it has been held that, though an assignment of a part of an entire demand may be invalid as to the debtor, it may, nevertheless, be binding and enforceable as between the assignor and assignee. Canty v. Lattner, 37 Minn. 239.

Where a Municipality Is a Party.—In Pennsylvania it has been held that while a partial assignment of a contract between individuals may be enforced in equity, yet where a municipality is a party to the contract it is not

assigned, as where it purports to transfer "a part interest" in a claim for rent, without indicating the amount or proportion to be assigned.¹

Bill of Exchange as Assignment pro Tanto.—Bills of exchange, unless accepted, may not operate as assignments *pro tanto* of funds in the debtor's hands, either in an action at law or in equity. However, the reason of the rule is not because of the attempt to assign a part only of the fund, but arises from the very nature of the bill itself, namely, that it was drawn generally and not upon a designated fund, and it applies whether the bill purports to transfer the whole or a part of the fund.²

Check as Assignment pro Tanto.—According to the weight of authority, uncertified checks also, like bills of exchange, do not operate as assignments *pro tanto* of the fund upon which they are drawn at law or in equity,³ though there are

bound to recognize a partial assignment of it. Philadelphia Appeals, 86 Pa. St. 179.

But in *New York* the rule is different. Thus where one who had performed work for a municipal corporation under an agreement by which he was to be paid in orders on the general fund, to be paid from the tax of a certain year, afterwards, for valuable considerations, gave orders on the comptroller of the city to pay the former orders, when they should become due, to certain third persons, and the later orders so drawn by the contractor were presented to the comptroller and filed in his office, it was held that they operated as assignments *pro tanto* of the moneys due to the contractor, and, being payable from a particular fund to arise at a future date, were not bills of exchange and need not be accepted to make the drawee liable. *Hall v. Buffalo*, 2 Abb. App. Dec. (N. Y.) 301.

In *Massachusetts* the law on this question is said to be in accord with the law in *New York* as just laid down. See *James v. Newton*, 142 Mass. 378, 56 Am. Rep. 692.

In *Oregon* also it has been decided that the partial assignment of a claim against a city is not against public policy, and, in the absence of a statute to the contrary, is valid. *Little v. Portland*, 26 Oregon 235.

Equitable Partial Assignments Enforced in Admiralty.—An instrument assigning all the assignor's "right, title, and interest, in and to compensation" for certain salvage services, and directing payment to the assignee of "the sum of three thousand two hundred dollars out of the same," was held to constitute merely an equitable assignment *pro tanto* to the extent of three thousand two hundred dollars, notwithstanding the general words used in the first part of the instrument, and it was held that, in a proceeding of an equitable nature in a court of admiralty to distribute a fund in the registry of the court, such partial assignment would be recognized, the rule of law against splitting up causes of action not being applicable. *The Elmbank*, 72 Fed. Rep. 610.

1. Vague and Indefinite Partial Assignments.—*Raines's Case*, 11 Ct. of Cl. 648.

Illustrations.—An agreement of a party to pay his attorney a "reasonable compensation" for his legal services, out of the proceeds of the litigation, has been held to be void for uncertainty, and inoperative as an assignment. *Story v. Hull*, 143 Ill. 506.

But in *Texas* it has been held that where the proofs of a debt are placed with an attorney with instructions to collect the same, and retain out of the proceeds the amount due him as fees for other work, the transaction is an equitable assignment, though the amount thereof was not at the time agreed upon as against subsequent garnishing creditors. *Milmo Nat. Bank v. Convery* (Tex. Civ. App. 1894), 27 S. W. Rep. 828. The court, in this case, said: "It is enough, we take it, that the transaction should afford evidence of what part of the fund the assignment was intended to operate on, and, if this is capable of being rendered certain by evidence, it may be done. * * * We have found one case which expresses a different rule. *Story v. Hull*, 143 Ill. 506. But the question was not necessary to be passed on in that case, and the decision was not made to depend upon it."

Also where an instrument was in the following language: "This is to certify that in consideration of a one thousand-dollar bond on the town of Harrison to me in hand paid by * * * I, D., treasurer, etc., * * * do hereby agree to assign, transfer, and set over unto the said F., such an interest, etc., * * * as will secure to said F. the repayment of the sum realized by me on the said bond," it was held to be sufficiently clear to operate as an assignment, though no particular or specified interest was carved out or separated. *Bower v. Hadden Blue Stone Co.*, 30 N. J. Eq. 174.

2. Bills of Exchange.—*Christmas v. Russell*, 14 Wall. (U. S.) 69; *Holbrook v. Payne*, 151 Mass. 383, 21 Am. St. Rep. 456; *Bush v. Foote*, 58 Miss. 5, 38 Am. Rep. 310; *Chase v. Alexander*, 6 Mo. App. 506; *Brill v. Tuttle*, 81 N. Y. 457, 37 Am. Rep. 515; *People v. Remington*, 45 Hun (N. Y.) 347; *Marysville Bank v. Windisch-Muhlhauser Brewing Co.*, 50 Ohio St. 151.

And this is so even though the instrument is not negotiable. *Shaver v. Western Union Tel. Co.*, 57 N. Y. 461.

3. Checks.—*Marysville Bank v. Windisch-Muhlhauser Brewing Co.*, 50 Ohio St. 151. See also *Covert v. Rhodes*, 48 Ohio St. 66.

For other cases, see *supra*, this title, *Check*.

The ground of the decisions denying to checks an operation as partial assignments is that they are drawn generally and not upon a particular fund. However, in a few cases, checks have been held inoperative as assignments on the ground that it is not allowable to

several authorities in this country maintaining the contrary view.¹

2. The Consideration—In the Assignment of Land Interests—In General.—A discussion of the question of consideration in the transfer of land interests in general will be found under the appropriate titles elsewhere in this work.²

Leases.—It seems that for the assignment of a lease no consideration need be proved, the liability of the assignee to pay rent being regarded as a sufficient consideration.³

Mortgages.—It may be stated generally that the question whether the assignment of a mortgage was with or without consideration is of no importance to the mortgagor, except as the want of it may enable him to make available any defense he might have had as against the mortgagee.⁴

Contracts to Convey Land.—In the same way, it has been held that a party contracting to convey land may not question the validity of an assignment of the contract on the ground that it was made without consideration.⁵

In the Assignment of Chattel Interests—In General.—The question of consideration in its application to the assignment of chattels in general will be discussed elsewhere in this work.⁶

Choses in Action as between Assignor and Assignee.—It may be laid down as a general rule that as between the assignor and the assignee, or between subsequent purchasers or creditors of the assignor and the assignee, a consideration is necessary to complete an assignment of a chose in action.⁷ Thus, to make an

a creditor to split up his cause of action by assigning parts of it without the concurrence of the debtor, thus creating as many new causes of action as there are assignments. *Snedden v. Harmes*, 5 Colo. App. 477; *Dickinson v. Coates*, 79 Mo. 250, 49 Am. Rep. 228; *Merchants' Nat. Bank v. Coates*, 79 Mo. 168; *Coates v. Doran*, 83 Mo. 337; *Dowell v. Vandalia Banking Assoc.*, 62 Mo. App. 482.

1. In Equity.—Thus it has been held in a suit in equity that a check may constitute an assignment *pro tanto* of funds in a bank to the credit of the drawer. *Munn v. Burch*, 25 Ill. 35; *Gordon v. Muchler*, 34 La. Ann. 604.

Caton, C. J., in delivering the opinion of the court in *Munn v. Burch*, 25 Ill. 35, said: "The general rule is that the creditor cannot divide up his demand against the debtor and require the latter to pay it in parcels. But everybody knows, and courts no less than commercial men, that an exception to this rule exists as to deposits in bank. It has been so long and so universal a custom with bankers to receive deposits from time to time, as the convenience of the depositor may require, and to allow him to draw out his funds on checks, in parcels, in such sums as he sees fit, that the mere fact of opening a deposit account with a banker implies a contract on the part of the banker to allow the depositor to withdraw his deposits in parcels."

Action at Law.—Moreover, this effect has been given to checks even in an action at law. *Chicago M. & F. Ins. Co. v. Stanford*, 28 Ill. 168, 81 Am. Dec. 270; *Union Nat. Bank v. Oceana County Bank*, 80 Ill. 212, 22 Am. Rep. 185; *Lester v. Given*, 8 Bush (Ky.) 357; *Fogarties v. State Bank*, 12 Rich. (S. Car.) 518, 78 Am. Dec. 468. See also *Roberts v. Corbin*, 26 Iowa 315, 96 Am. Dec. 146.

² See the titles CONSIDERATION; DEEDS; MORTGAGES; and the like.

³ **Leases.**—*Barker v. Keate*, 1 Mod. 262; 2 Taylor's Landlord and Tenant, § 428.

4. Mortgages.—*Adair v. Adair*, 5 Mich. 204, 71 Am. Dec. 779; *Matteson v. Morris*, 40 Mich. 52; *Warner v. Gouverneur*, 1 Barb. (N. Y.) 36; *Knox v. Galligan*, 21 Wis. 470.

Under this rule it has been held that an assignment of a mortgage to an attorney at law for the purpose of claiming the mortgage debt was valid as against a creditor of the mortgagor. *Russum v. Wanser*, 53 Md. 92.

A mortgage being regarded in equity as an incident of the debt secured, the consideration required in an equitable assignment of a mortgage will be regulated by the rules governing choses in action in that regard. See *infra*, note 7.

5. Contracts to Convey Land.—*Ensign v. Kellogg*, 4 Pick. (Mass.) 1. See also *Durst v. Swift*, 11 Tex. 273.

⁶ See the title SALES.

7. Consideration as between Assignor and Assignee.—*White v. Kilgore*, 77 Me. 571; *Perkins v. Parker*, 1 Mass. 117; *Prescott v. Hull*, 17 Johns. (N. Y.) 284; *Tallman v. Hoey*, 89 N. Y. 537; *Cannaday v. Shepard*, 2 Jones Eq. (N. Car.) 224; *Kennedy v. Ware*, 1 Pa. St. 445, 44 Am. Dec. 145.

Presumption as to Consideration.—It has been held that it will be presumed that the assignment of a balance due under a contract was made for value. *Garver v. Lynde*, 7 Mont. 108.

In the same way, it has been held that an order disclosed by one summoned as trustee to pay over the money in his hands, though not expressed to be for value received, was *prima facie* an assignment. *Adams v. Robinson*, 1 Pick. (Mass.) 461. See also *State v. Hastings*, 15 Wis. 75.

Also where an administrator contested the consideration of an order by the deceased for the amount of a claim placed in the hands of an attorney for collection, the burden of proof was held to be on him to establish the want of consideration. *Edwards v. Daley*, 14 La. Ann. 385.

unaccepted order drawn on a particular fund effectual as an assignment, it must appear that a consideration was paid therefor.¹

Character of Consideration Required—In General.—Where a consideration is required to complete the assignment, it should be legal² and valuable.³

But in *New York* it has been held that there will be no presumption of valuable consideration in the case of an unaccepted order drawn upon a particular fund. *Tallman v. Hoey*, 89 N. Y. 537. The court, in giving the opinion in this case, said: "It is undoubtedly true that where an actual assignment exists, it is presumed, in the absence of proof of the facts, to have been made upon adequate consideration. But here no actual assignment was ever executed. The equitable rule which transforms a mere order into an assignment is brought into play by a just necessity existing and established, and not by a mere possibility or presumption."

Mutual Agreement between Joint Owners of Note to Assign to Survivor.—It has been held that a verbal agreement between two parties making a note payable to them jointly, that upon the death of either without living issue it shall belong to the survivor, is valid. *Avery, J.*, in delivering the opinion of the court, said: "When the two sisters agreed with each other to hold the note in which each had an individual moiety as joint tenants subject to the right of survivorship, these mutual rights of survivorship, when once created, were assignable equities constituting mutual considerations sufficient to support the agreement." *Taylor v. Smith*, 116 N. Car. 531.

1. Consideration Necessary to Make Order Operative as Assignment.—*Brokaw v. Brokaw* (N. J. Eq. 1886), 4 Atl. Rep. 66; *Tallman v. Hoey*, 89 N. Y. 537. See also *Brill v. Tuttle*, 81 N. Y. 457, 37 Am. Rep. 515.

2. Assignment Invalid on Account of Illegal Consideration.—An assignment by a married woman of her distributive share [consisting of choses in action] in the estate of a deceased person, in consideration of the assignee's forbearing to arrest the assignor's husband for embezzlement and promising to continue him in his employment and pay his salary to her, was held to be void for want of a legal consideration, and the fact that part of the consideration was legal would not sustain the agreement. *Decker v. Morton*, 1 Redf. (N. Y.) 477.

3. Consideration must Be Valuable.—*Tallman v. Hoey*, 89 N. Y. 537; *Brill v. Tuttle*, 81 N. Y. 457, 37 Am. Rep. 515; *Kennedy v. Ware*, 1 Pa. St. 445, 44 Am. Dec. 145.

Instances of Valuable Consideration.—Y., who was indebted to his brother's estate, objected to executing notes therefor, because he had not received proper credits; but on the agreement of his brother's widow and devisee to assign them to Y.'s children the latter executed notes for the debt. The assignments were made the day the notes were executed, but were retained by the widow, who afterwards erased the assignments on the notes, and sued the maker thereon in her own name, and obtained judgment by default. In an action by the children to establish their property in the notes, it was held that the maker's contention for ad-

ditional credits, the agreement of the widow to assign the notes to the children, and their execution in view of such agreement, were a valuable consideration for the assignment. *Williamson v. Yager*, 91 Ky. 282.

Also an assignment under seal, to a town, of a sum of money held in trust for the assignor purporting to be "in consideration of one dollar and other valuable considerations," and the object of which was expressed to be to repay expenses incurred by the town for the support of the assignor as a pauper, and, if anything should be left after paying for past charges, to pay for his support in the future, has been held to be valid. *O'Donnell v. Smith*, 142 Mass. 505.

Instance of Consideration Held Not to Be Valuable.—Where an order was drawn to compensate a payee for his time and attention already bestowed, and to be bestowed, in looking after the comfort and welfare of the drawer during the remainder of his life, and also to reimburse him for such small expenditures as he might be required from time to time to make and for such as he had to some extent already made, it was held that the order did not have the support of such a consideration as to make it an equitable assignment. *Brokaw v. Brokaw* (N. J. Eq. 1886), 4 Atl. Rep. 66.

Consideration need Not Be Adequate.—It has been held that a bond may be assigned for much less than its nominal amount, and such assignment will be enforced in a court of equity as well as in a court of law, if no fraud or usury appears in the transaction. *Kenner v. Hord*, 2 Hen. & M. (Va.) 14. See also *Hansbrough v. Baylor*, 2 Munf. (Va.) 36.

When Amount of Consideration Will Be Important.—The amount of the consideration is, under some circumstances, important in determining whether, within the rule on the subject, the purchaser paid value, for the amount paid may be so disproportionate to the real value of the security purchased that the claim to have paid value will be treated as a pretense, and the security as having been obtained without paying anything for it; and it is also and more commonly important, as bearing on the questions of notice and good faith. Thus it has been held that in determining whether the judgment plaintiff and real owner of an assigned judgment is estopped to assert his ownership as against a subsequent assignee on the ground that the subsequent assignee occupies the position of a purchaser for value in good faith and without notice and in reliance on the apparent ownership, the amount of the consideration paid by him is important. *Baker v. Wood*, 157 U. S. 212.

Assignment under Seal.—In the absence of any evidence throwing doubt upon the *bona fides* of an assignment it has been held that an assignment under seal of a chose in action imports a valuable consideration. *Horn v. Thompson*, 31 N. H. 562; *Hancock's Appeal*, 34 Pa. St. 155.

Natural Love and Affection as Consideration.—Thus it has been held that a parol assignment of a judgment without delivery is not sufficient if made in consideration of natural love and affection.¹

Security of Debt as Consideration.—But there will be a sufficient consideration if the assignment is made as a security instead of in payment of a debt.²

Preëxisting Debt.—Moreover, it is no objection to an assignment of a chose in action, that the consideration for which it was made is a preëxisting debt.³

Executed Voluntary Assignment.—An established exception to the rule as laid down above requiring a consideration to complete an assignment of a chose in action exists, however, in the case of an executed voluntary assignment, as where it has been perfected by delivery, or its equivalent.⁴

As between Assignee and Party Liable for Chose in Action Assigned.—In an action by the assignee of a chose in action against the debtor, it is in general no defense that the assignment was made without consideration, as the matter in no respect affects his liability.⁵

See also *Gleason v. Gage*, 7 Paige (N. Y.) 121.

1. **Natural Love and Affection as Consideration.**—*Kennedy v. Ware*, 1 Pa. St. 445, 44 Am. Dec. 145.

2. **Security of Debt as Consideration.**—*Taft v. Bowker*, 132 Mass. 277; *Wheeler v. Wheeler*, 9 Cow. (N. Y.) 34; *Stover v. Eycleshimer*, 3 Keyes (N. Y.) 620.

It is a sufficient consideration for the operation of an order as an assignment that it secures a debt due from the assignor to the assignee. *Blin v. Pierce*, 20 Vt. 25.

The delivery of a savings bank book, although unaccompanied by a written assignment and with the intention only that it shall be held as collateral security for the payment of a debt, transfers an equitable title to the deposit represented by the book which will prevail against a subsequent attachment of it by trustee process. *Taft v. Bowker*, 132 Mass. 277.

Assignment Made as an Indemnity to Sureties.—It has been held that the parol assignment of a debt may be made as an indemnity to sureties who agree to pay the bond as such upon the faith of the indemnity. *Newby v. Hill*, 2 Metc. (Ky.) 530.

3. **Preëxisting Debt as Consideration.**—*Merchants' Bank v. McClelland*, 9 Colo. 608; *Putnam v. Story*, 132 Mass. 205; *Stover v. Eycleshimer*, 3 Keyes (N. Y.) 620.

4. **Executed Voluntary Assignment.**—*Keke-wich v. Manning*, 12 Eng. L. & Eq. 120; *Voyle v. Hughes*, 23 Eng. L. & Eq. 271; *Jones v. Deyer*, 16 Ala. 221; *McNulty v. Cooper*, 3 Gill & J. (Md.) 214; *Hunter v. Hunter*, 19 Barb. (N. Y.) 631; *Hackett v. Moxley*, 65 Vt. 71. See also *Penfold v. Mould*, L. R. 4 Eq. 562; *Cox v. Hill*, 6 Md. 204; *Curry v. Powers*, 70 N. Y. 212, 26 Am. Rep. 577; *Bond v. Bunting*, 78 Pa. St. 210.

Promissory Note.—The gift of a promissory note, perfected by delivery, needs no consideration. *Stewart v. Hidden*, 13 Minn. 43; *Grover v. Grover*, 24 Pick. (Mass.) 261, 35 Am. Dec. 319.

Bond.—Also if the transfer of a bond is consummated by delivery, it may take effect as a gift. *Moore's Succession*, 40 La. Ann. 531; *McNulty v. Cooper*, 3 Gill & J. (Md.) 214; *Gregory v. Freeman*, 22 N. J. L. 405; *Lacey*

v. Lacey, 7 Pa. St. 251, 47 Am. Dec. 513; *Dunbar v. Woodcock*, 10 Leigh (Va.) 660.

Gift of Deposit in a Savings Bank by Delivery of Bank Book.—It has been repeatedly held that a deposit in a savings bank may be the subject of a valid *donatio mortis causa*, as well as of a gift *inter vivos*, and that such a gift may be proved by the delivery of a bank book to the donee or to a third person for the donee, accompanied by an assignment. *Schollmier v. Schoendelen*, 78 Iowa 426, 16 Am. St. Rep. 455; *Kimball v. Leland*, 110 Mass. 325; *Foss v. Lowell Five Cents Sav. Bank*, 111 Mass. 285; *Sheedy v. Roach*, 124 Mass. 472, 26 Am. Rep. 680; *Davis v. Ney*, 125 Mass. 590, 28 Am. Rep. 272.

Moreover, it has been held that the gift may be proved by delivery of the bank book, although unaccompanied by an assignment. *Camp's Appeal*, 36 Conn. 88; *Pierce v. Boston Five Cents Sav. Bank*, 129 Mass. 425, 37 Am. Rep. 371. See the title SAVINGS BANKS.

Delivery of Check.—It has been held that where the delivery of a check is coupled with an intent to assign a present interest in the money represented thereby, and no revocation is attempted, the intention of the donor will be given effect, and the transaction will be deemed to transfer a right to the payment of the check, as well after the death of the drawer as before. *May v. Jones*, 87 Iowa 188.

Where Donee Is in Possession of Chose in Action.—It has been held that where a note is already in the possession of the donee, proof of an actual manual tradition at the time of making the gift is not essential. *Wing v. Merchant*, 57 Me. 383.

For a more complete discussion of the question of voluntary assignments, see the title GIFTS.

5. **As between Assignee and Party Liable for Chose in Action Assigned—California.**—*Moore v. Waddle*, 34 Cal. 145.

Colorado.—*Welch v. Mayer*, 4 Colo. App. 440.

Indiana.—*Pugh v. Miller*, 126 Ind. 189; *Morrison v. Ross*, 113 Ind. 186.

Iowa.—*Whittaker v. Johnson County*, 10 Iowa 161; *Wardner, etc., Co. v. Jack*, 82 Iowa 435.

Maine.—*Norris v. Hall*, 18 Me. 332.

3. Notice—Choses in Action as between Assignor and Assignee.—It is not necessary to the validity of the assignment of a chose in action, as between the assignor and assignee, that notice should be given to the party from whom the debt is due.¹

As between Assignor's Creditor and Assignee.—Moreover, as against one claiming under the assignor as creditor, the failure of the assignee to give notice of an assignment is immaterial, for the right of the creditor does not rise higher than that of the debtor, and is subject to all equities that could have been enforced against him.²

New York.—Beach v. Raymond, 2 E. D. Smith (N. Y.) 496; Moore v. Robertson, 25 Abb. N. Cas. (N. Y. Supreme Ct.) 173; Richardson v. Mead, 27 Barb. (N. Y.) 178; Allen v. Brown, 51 Barb. (N. Y.) 86, *affirmed* in 44 N. Y. 228.

In *Burnett v. Gwynne*, 2 Abb. Pr. (N. Y. C. Pl.) 79, it was held that the fact that an assignment of a chose in action was made without consideration, apart from circumstances tending to show that it was colorably made, is not material.

Where a Cause of Action is Assigned, it has been held that the party liable cannot question the fact whether or not such assignment was made for a consideration. *Sammis v. Wightman*, 31 Fla. 10.

Whether an Account Sued on by an Assignee is assigned for a valuable consideration or not, is immaterial as a defense by the debtor. *Deach v. Perry* (Supreme Ct.), 6 N. Y. Supp. 940, 2 Silv. Sup. Rep. (N. Y.) 99; *Young v. Hudson*, 99 Mo. 102.

Also in *Caulfield v. Sanders*, 17 Cal. 569, it was held to be no defense that the account was assigned for a nominal consideration.

Assignment to Enable Several Claims to be Adjusted in One Suit.—It has been held that the fact that an assignment was made without consideration for the purpose only of enabling the assignee to have several like claims adjusted in a single suit does not impair the validity of the transfer or prejudice the debtor. *Briscoe v. Eckley*, 35 Mich. 112.

Where Chose in Action was Assigned for Collection.—It has been held to be no objection to a suit by an assignee of a chose in action in his own name, that no consideration for the assignment was shown, and that the account was assigned to him to collect for the use of the assignors. *Young v. Hudson*, 99 Mo. 102.

As to How Far Want of Consideration may enable the debtor to make available any defense he might have had against the assignor, see *infra*, this article, *Effect of Assignment—Assignee Takes Subject to Equities*.

1. Notice—As between Assignor and Assignee.—*Rodick v. Gandell*, 1 De G. M. & G. 763; *In re Hay's Trusts*, 2 De G. J. & S. 365; *Jackson v. Wamms*, 14 Colo. 58; *Bishop v. Holcomb*, 10 Conn. 444; *Wood v. Partridge*, 11 Mass. 488 (*per Parker, C. J.*); *MacDonald v. Kneeland*, 5 Minn. 352; *Countryman v. Boyer*, 3 How. Pr. (N. Y. Supreme Ct.) 386; *Muir v. Schenck*, 3 Hill (N. Y.) 228, 38 Am. Dec. 633.

Thus the Assignment of an Insurance Policy without notice to the underwriter has been held as between the assignor and assignee to vest an equitable interest in the assignee. *Wakefield v. Martin*, 3 Mass. 558.

Omission to Give Notice, Evidence of the Understanding of the Parties.—In *Rodick v. Gandell*, 1 De G. M. & G. 763, Lord Truro said: "Although it is not necessary to the validity of an assignment of a debt as between the assignor and assignee that notice should be given to the party from whom the debt is due, * * * the omission to give any such notice may operate as strong moral evidence of the intention and understanding of the parties."

2. As between Assignee and Creditors of Assignor.—*Pickering v. Ilfracombe R. Co.*, L. R. 3 C. P. 235; *Dix v. Cobb*, 4 Mass. 508; *Thayer v. Daniels*, 113 Mass. 129; *MacDonald v. Kneeland*, 5 Minn. 352; *Smith v. Sterritt*, 24 Mo. 260; *Williams v. Ingersoll*, 89 N. Y. 508; *Pellman v. Hart*, 1 Pa. St. 263; *U. S. v. Vaughan*, 3 Binn. (Pa.) 394, 5 Am. Dec. 375; *Noble v. Thompson Oil Co.*, 79 Pa. St. 354, 21 Am. Rep. 66. See also *Beavan v. Oxford*, 6 De G. M. & G. 492.

As between the Assignee of a Note and Attaching Creditor.—Thus where a note has been assigned and transferred by a debtor *bona fide* in payment of a debt before service of an execution attachment, the assignee is entitled to the money due by the garnishee, and not the attaching creditor, although the garnishee had no notice of such attachment previous to the service of the attachment. *Pellman v. Hart*, 1 Pa. St. 263. In this case the court said: "Immediately on the assignment as between the assignor, who is the original promisor to the assignee, and the latter, the equitable title vests in the assignee, which of course cannot be taken to pay the debt of the assignor. * * * A general creditor, unless a purchaser without notice, is in no better situation than the debtor, and cannot sell a greater interest than the debtor has."

Contrary View in Some Jurisdictions.—In some states, however, this doctrine has been denied. *Bishop v. Holcomb*, 10 Conn. 444; *Vanbuskirk v. Hartford F. Ins. Co.*, 14 Conn. 141, 36 Am. Dec. 473; *Clodfelter v. Cox*, 1 Sneed (Tenn.) 330, 60 Am. Dec. 157; *Dews v. Olwill*, 3 Baxt. (Tenn.) 432; *Ward v. Morrison*, 25 Vt. 593. See also *Foster v. Mix*, 20 Conn. 395; *Harrop v. Landers, etc., Co.*, 45 Conn. 561; *Woodbridge v. Perkins*, 3 Day (Conn.) 364; *Adams v. Willimantic Linen Co.*, 46 Conn. 320; *McWilliams v. Webb*, 32 Iowa 577; *Manning v. Matthews*, 70 Iowa 503; *State Ins. Co. v. Sax*, 2 Tenn. Ch. 507; *Dale v. Kimpton*, 46 Vt. 76.

Where Creditor Has Knowledge of Prior Assignment.—In *Bishop v. Holcomb*, 10 Conn. 444, A, being indebted by note not negotiable to B, the latter assigned it for a valuable consideration to C without notice to A, after which D, a creditor of B, having knowledge of such as-

As between Successive Assignees—English Rule.—It is a well-established rule in England, that as between successive assignees of a chose in action he will have the preference who first gives notice to the debtor, even if he be a subsequent assignee, provided that at the time of taking it he had no notice of the prior assignment.¹

Authorities in United States Conflicting—English Rule Adopted in Some Jurisdictions.—In this country the authorities are greatly at variance on this question. In the federal courts² and in many of the state courts,³ the English rule has been adopted.

Rule in Other Jurisdictions.—But in other states this doctrine is denied, and it is held that the assignment of a chose in action is complete upon the mutual assent of the assignor and the assignee, and does not gain additional validity as against subsequent assignees by notice to the debtor.⁴

As between the Debtor and Assignee.⁵—But to complete the assignment of a demand or chose in action as against the debtor or custodian of the fund, he must be informed that the obligation has been transferred; until informed of the assignment he is entitled to regard the assignor as the owner, and may accept a release from him, or purchase a debt which he owes, and use it as a set-off.⁶ But when notified of the transfer, the debtor can henceforth do no

signment, attached such note by process of foreign attachment as still the property of B; it was held that D, not coming in a *bona fide* character, could not prevail against the assignment.

1. English Rule.—*Dearle v. Hall*, 3 Russ. 1; *Loveridge v. Cooper*, 3 Russ. 30; *Foster v. Blackstone*, 1 Myl. & K. 297.

In *Dearle v. Hall*, 3 Russ. 1, Sir Thomas Plumer, M. R., said: "In *Ryall v. Rowles* (1 Ves. 348) the judges held that in the case of a chose in action you must do everything towards having possession which the subject admits; you must do that which is tantamount to obtaining possession, by placing every person, who has an equitable or legal interest in the matter, under an obligation to treat it as your property. For this purpose you must give notice to the legal holder of the fund; in the case of a debt, for instance, notice to the debtor is for many purposes tantamount to possession. If you omit to give that notice you are guilty of the same degree and species of neglect as he who leaves a personal chattel, to which he has acquired a title, in the actual possession and under the absolute control of another person."

Simultaneous Notices.—Where notices of assignments are simultaneous, the assignments will take priority according to their dates. *Addison v. Cox*, L. R. 8 Ch. 76; *Calisher v. Forbes*, L. R. 7 Ch. 109.

2. In the Federal Courts.—*Spain v. Hamilton*, 1 Wall. (U. S.) 623; *Judson v. Corcoran*, 17 How. (U. S.) 612; *Laclede Bank v. Schuler*, 120 (U. S.) 511.

Thus where a general assignment of a fund in a bank for the benefit of creditors was brought to the attention of the bank before it was notified of a check which had been previously drawn upon the fund, it was held that the general assignment gained priority over the check. *Laclede Bank v. Schuler*, 120 U. S. 511.

3. States Adopting English Rule.—*Merchants', etc., Bank v. Hewitt*, 3 Iowa 93, 66 Am. Dec.

49; *Murdoch v. Finney*, 21 Mo. 138. See also *Smith v. Sterritt*, 24 Mo. 260; *Ward v. Morrison*, 25 Vt. 593; *Switzer v. Noffsinger*, 82 Va. 518.

4. States Rejecting the English Rule.—*Kennedy v. Parke*, 17 N. J. Eq. 415; *Muir v. Schenck*, 3 Hill (N. Y.) 228, 38 Am. Dec. 633; *Hopkins v. Banks*, 7 Cow. (N. Y.) 650; *Fairbanks v. Sargent*, 104 N. Y. 108; *Brander v. Young*, 12 Tex. 332.

5. See *infra*, this title, *Rights of Parties—Of the Party Liable*.

6. As between Debtor and Assignee—England.—*Stocks v. Dobson*, 4 De G. M. & G. 11.

United States.—*Baker v. Wood*, 157 U. S. 212.

Colorado.—*Boston, etc., Smelting Co. v. Pless*, 9 Colo. 112.

Connecticut.—*Adams v. Leavens*, 20 Conn. 73.

Iowa.—*Cutler v. McCormick*, 48 Iowa 406.

Minnesota.—*Dodd v. Brott*, 1 Minn. 270, 66 Am. Dec. 541.

New York.—*Callanan v. Edwards*, 32 N. Y. 483.

Oregon.—*Rayburn v. Hurd*, 20 Oregon 229.

Pennsylvania.—*Rider v. Johnson*, 20 Pa. St. 190; *Louden v. Tiffany*, 5 W. & S. (Pa.) 367.

Virginia.—*Switzer v. Noffsinger*, 82 Va. 518; *Stebbins v. Bruce*, 80 Va. 389.

Discharge of Judgment before Notice of Assignment.—Where a judgment was assigned by the creditor, and the debtor, before notice of the assignment, paid the judgment in good faith, the court set aside an execution issued on it, and satisfied the judgment of record. *Dodd v. Brott*, 1 Minn. 270, 66 Am. Dec. 541. See also *Boston, etc., Smelting Co. v. Pless*, 9 Colo. 112.

Claims Acquired before Notice as Set-off.—The maker of a note under seal before notice by him of the transfer of the note acquired a claim against the payee arising on a bond of the payee to a third person. It was held that the claim, having been acquired before notice of the assignment of the note, was available as

act to prejudice the title of the assignee.¹

Character of Notice Required.—No formal or express notice is necessary. It is enough if such information is communicated to the debtor as gives him fully

an offset in a suit by the equitable assignee. *Rider v. Johnson*, 20 Pa. St. 190. See also *Louden v. Tiffany*, 5 W. & S. (Pa.) 367.

In *New Jersey*, however, it has been held that a failure to give to the debtor notice of the assignment will not subject the assignee to merely equitable claims of the debtor, which do not attach to the debt itself, and which accrue to him after the assignment, and among the claims which do not attach to the debt, but are only collateral, is a claim of set-off. Thus where there was an agreement between an attorney and his client that the attorney should have a lien upon a certain judgment, to be recovered for a specified sum as compensation for his services, constituting a valid equitable assignment of the judgment, it was held that the equity of the assignee was superior to the claim of the judgment debtor to set off against the judgment a judgment against the plaintiff which he, the debtor, had purchased after the entry of the judgment against himself, and before he had notice of the assignment. *Terney v. Wilson*, 45 N. J. L. 284.

Failure to Give Notice a Protection to a Debtor Garnisheed.—It has been held that the true rule in relation to one summoned as a debtor of the principal debtor of a nonnegotiable debt, is that the assignee of the debt should give notice to the garnishee of the assignment in time to enable him to show such assignment in his answer, or at least before judgment against him; having received such notice, if he neglects to show it in defense he cannot resist a subsequent claim of the assignee, and, on the other hand, having shown such assignment he cannot be charged as garnishee. *Walters v. Washington Ins. Co.*, 1 Iowa 404, 63 Am. Dec. 451; *Wood v. Partridge*, 11 Mass. 488. See also *Richards v. Griggs*, 16 Mo. 416, 57 Am. Dec. 240; *Bishop v. Garcia*, 14 Abb. Pr. N. S. (N. Y. Super. Ct.) 69.

Assent of Debtor Unnecessary.—The debtor is bound from the time of the notice, although he may not concur in the arrangement. *Morrell v. Wootten*, 16 Beav. 197; *Bell v. London*, etc., R. Co., 15 Beav. 548; *Spring v. South Carolina Ins. Co.*, 8 Wheat. (U. S.) 268; *Savage v. Gregg*, 150 Ill. 161; *Morris v. Cheney*, 51 Ill. 451; *Cutler v. McCormick*, 48 Iowa 406; *Garland v. Harrington*, 51 N. H. 409.

1. *California*.—*McCarthy v. Mt. Tecarte Land, etc., Co.* (Cal. 1896), 43 Pac. Rep. 391.

Connecticut.—*Chestnut-Hill Reservoir Co. v. Chase*, 14 Conn. 123; *Fanton v. Fairfield County Bank*, 23 Conn. 485.

Illinois.—*Chapman v. Shattuck*, 8 Ill. 49.

Maine.—*Bartlett v. Pearson*, 29 Me. 9; *Milliken v. Loring*, 37 Me. 408.

Massachusetts.—*Jenkins v. Brewster*, 14 Mass. 291.

Missouri.—*Laughlin v. Fairbanks*, 8 Mo. 367.

New Hampshire.—*Thompson v. Emery*, 27 N. H. 272.

New York.—*Wheeler v. Wheeler*, 9 Cow. (N. Y.) 34.

Vermont.—*Cummings v. Fullam*, 13 Vt. 434; *Campbell v. Day*, 16 Vt. 558; *Blake v. Buchanan*, 22 Vt. 548; *Loomis v. Loomis*, 26 Vt. 198.

Claim Acquired Subsequently to Notice No Set-off.—Upon the assignment of a book account for a valuable consideration and with notice to the defendant, he cannot avail himself of an account which accrued against the assignor after the assignment and notice as a defense to a suit by the assignee in the name of the assignor to enforce the payment of the account which had been assigned. *Cummings v. Fullam*, 13 Vt. 434; *Bartlett v. Pearson*, 29 Me. 9.

Release Subsequent to Notice Inoperative—The assignee of a chose in action will be protected against the release of his assignor made after notice of the assignment to the debtor. *Webb v. Steele*, 13 N. H. 230; *Wheeler v. Wheeler*, 9 Cow. (N. Y.) 34.

Subsequent Discharge of a Note.—Thus in an action against the maker of a note for the amount specified therein, brought by the assignee in the name of the payee after an assignment of all the payee's interest with notice to the maker, the defendant cannot avail himself of a discharge obtained from the payee subsequently to the assignment. *Chestnut-Hill Reservoir Co. v. Chase*, 14 Conn. 123; *Blake v. Buchanan*, 22 Vt. 548; *Campbell v. Day*, 16 Vt. 558; *Loomis v. Loomis*, 26 Vt. 198.

Also a Judgment Debtor who, although he has notice of the assignment of the judgment, pays the amount thereof to the judgment creditor, will have no discharge of the judgment. *Laughlin v. Fairbanks*, 8 Mo. 367.

Subsequent Payment of Trustee Judgment.—Also if one summoned as trustee is notified that the debt by him owing has been assigned to a third person, and neglects to disclose such assignment, the trustee judgment and payment of it on a legal demand furnish to him no protection against the claims of the assignee. *Milliken v. Loring*, 37 Me. 408. See also *Fanton v. Fairfield County Bank*, 23 Conn. 485.

Any Compromise or Adjustment of the cause of action by the original party made after notice of the assignment will be void as against him. *Chapman v. Shattuck*, 8 Ill. 49; *Ashby v. Winston*, 34 Mo. 311.

Thus A sued B in debt upon an appeal bond; at the return term B moved to dismiss the suit, and filed a stipulation signed by the parties setting forth that the suit had been settled and that it was to be dismissed at the cost of B; the plaintiff's attorney resisted the motion and filed an affidavit stating that he and his client had agreed that he should receive the balance of seven dollars, due for professional services, out of the proceeds of the judgment in the suit, that B had notice of the agreement prior to the execution of the stipulation filed by him, and finally that the settlement of the suit

to understand that the alleged assignee is the owner of the chose in action,¹ and it has been held sufficient if the debtor has such knowledge of the facts and circumstances as will serve to put him on inquiry.²

Mortgages.—A discussion of the question of notice in connection with mortgages will be found elsewhere in this work.³

VI. EFFECT OF ASSIGNMENT—1. Generally.—The assignee of a chose in action stands exactly in the shoes of his assignor. He succeeds to all of his rights and privileges, but acquires no greater right than his assignor had in the thing assigned.⁴

was made without his knowledge or consent. It was held that the court properly dismissed the suit. *Chapman v. Shattuck*, 8 Ill. 49.

1. Character of Notice Required.—*Dale v. Kimpton*, 46 Vt. 76. See also *Whitman v. Winchester Repeating Arms Co.*, 55 Conn. 247.

Thus the maker of a bond payable to R is charged with notice that it has become the property of G, where, on making a payment, he is given a receipt signed R, *per* an agent, reciting receipt of the money for G, and subsequent payments made by the maker to R will be made at his peril. *National Fertilizer Co. v. Thomason* (Ala. 1896), 19 So. Rep. 415.

Placing Judgment upon Files of Court.—Where a part of a judgment was assigned and afterwards a settlement was made of the controversy, the judgment creditor receiving payment in full of the judgment, it was held that the judgment debtor was released from further liability where no notice to him of the assignment was shown except placing the assignment upon the files of the District Court, and a written reference thereto on the files in the Supreme Court. *Boston, etc., Smelting Co. v. Pless*, 9 Colo. 112. See also *Stewart v. Kirkland*, 19 Ala. 162.

Demand of Payment.—It has been held that a demand of payment will not constitute sufficient notice, for this may as well have been made in the character of agent as of owner. *Meghan v. Mills*, 9 Johns. (N. Y.) 64.

Where Notice Incorrectly Describes an Order as a Note.—Where the contractor, with the owner of land, for the erection of a building thereon, executed to C., who had furnished material, an order in the following language: "Please pay to George W. Crouch, Jr., one thousand dollars (\$1,000) and deduct the same from the amount of my contract for building your house on Sullivan Street," and the order was shown to the drawee, a German, who did not understand English, and was described as a note for him to sign for the amount stated therein, it was held, in an action against the drawee to recover the amount of the order, that this was not due notice and that he was only liable for the amount remaining unpaid on the contract when the action was brought. *Crouch v. Muller*, 141 N. Y. 495.

Communication may Be Casual.—It has been held that the communication by which the notice is imparted may be merely casual, and for no definite purpose, and yet be sufficient notice. *Dale v. Kimpton*, 46 Vt. 76.

Notice must Be Given by Assignee on His Procurement.—It has been held that the notice must be given by the assignee's procurement. *Dale v. Kimpton*, 46 Vt. 76. But it is not

necessary that the assignee should personally give the notice, or that the agent of the assignee for giving notice directly employed by him for that purpose should himself give the notice. *Barron v. Porter*, 44 Vt. 587.

2. Countryman v. Boyer, 3 How. Pr. (N. Y. Supreme Ct.) 386. See also *Johnson v. Bloodgood*, 1 Johns. Cas. (N. Y.) 51, 1 Am. Dec. 93; *Anderson v. Van Alen*, 12 Johns. (N. Y.) 343.

Notice of the assignment of a contract written in English, in order to be effectual against a defendant who does not understand English, should be sufficient, precise, and complete enough to put the defendant fully on his guard as to the fact of the assignment, and he should have understood it. Whether notice was given, or, if given, was sufficient to put a prudent man on inquiry, is a question of fact for the jury. *Renton v. Monnier*, 77 Cal. 449.

3. See the title MORTGAGES.

4. England.—*Davies v. Austen*, 1 Ves. Jr. 247; *Ex p. Lloyd*, 17 Ves. Jr. 245.

United States.—*U. S. v. Buford*, 3 Pet. (U. S.) 12; *Judson v. Corcoran*, 17 How. (U. S.) 612. See also *Spring v. South Carolina Ins. Co.*, 8 Wheat. (U. S.) 268.

Alabama.—*Harrison v. Marshall*, 6 Port. (Ala.) 65.

California.—*Myers v. South Feather Water Co.*, 10 Cal. 579. See also *Bullard v. Kinney*, 10 Cal. 60.

Connecticut.—*Willes v. Pitkin*, 1 Root (Conn.) 47.

Illinois.—*Dole v. Olmstead*, 41 Ill. 344, 89 Am. Dec. 386; *Padfield v. Green*, 85 Ill. 529; *Ellis v. Sisson*, 96 Ill. 105; *Strong v. Clawson*, 10 Ill. 346. See also *Carr v. Waugh*, 28 Ill. 418.

Indiana.—*Salem Bank v. Caldwell*, 16 Ind. 469.

Kentucky.—*Gossom v. Sharp*, 7 Dana (Ky.) 140.

Maine.—*Warren v. Ireland*, 29 Me. 62.

Maryland.—*Maccubbin v. Cromwell*, 2 Har. & G. (Md.) 443.

Massachusetts.—*Stone v. Hubbard*, 7 Cush. (Mass.) 595; *Greene v. Hatch*, 12 Mass. 195.

Michigan.—*Hooper v. Van Husen* (Mich. 1895), 63 N. W. Rep. 522; *Howell v. Medler*, 41 Mich. 641; *Storey v. Dutton*, 46 Mich. 539.

Minnesota.—*MacDonald v. Kneeland*, 5 Minn. 352.

Mississippi.—*Buckner v. Calcote*, 28 Miss. 432.

Missouri.—*Broadwell v. Yantis*, 10 Mo. 398; *Bidwell v. St. Louis Floating Dock, etc., Ins. Co.*, 40 Mo. 42; *Archer v. Merchants', etc., Ins. Co.*, 43 Mo. 434; *Blakeman v. Benton*, 9 Mo. App. 107.

2. Assignee Takes Subject to Equities—*a. GENERALLY.*—The assignee of a nonnegotiable chose in action takes the same subject to all equities, burdens, and offsets existing between the original parties, prior to the assignment or notice given of the assignment.¹

New Hampshire.—Sanborn *v.* Little, 3 N. H. 539.

New York.—Murray *v.* Lylburn, 2 Johns. Ch. (N. Y.) 441; Commercial Bank *v.* Colt, 15 Barb. (N. Y.) 506; McChain *v.* McKeon, 2 Duer (N. Y.) 645; French *v.* Stevenson (Supreme Ct.), 32 N. Y. St. Rep. 766; Spicer *v.* Snyder, 58 Hun (N. Y.) 605, 12 N. Y. Supp. 744; Cutts *v.* Guild, 57 N. Y. 229; Greene *v.* Warnick, 64 N. Y. 220, reversing 4 Hun (N. Y.) 703; Fairbanks *v.* Sargent, 117 N. Y. 320; Travelers' Ins. Co. *v.* Healey, 86 Hun (N. Y.) 524. See also Congress, etc., Spring Co. *v.* High Rock Congress Spring, etc., Co., 45 N. Y. 291, 6 Am. Rep. 82, reversing 57 Barb. (N. Y.) 526; Demarest *v.* Willard, 8 Cow. (N. Y.) 206.

Oregon.—Brower, etc., Lumber Co. *v.* Miller (Oregon 1896), 43 Pac. Rep. 659; Solomon *v.* Bushnell, 11 Oregon 277, 50 Am. Rep. 475.

Pennsylvania.—McCullough *v.* Houston, 1 Dall. (Pa.) 441; Hamilton *v.* Brown, 18 Pa. St. 87.

Rhode Island.—Brown *v.* Roger Williams Ins. Co., 5 R. I. 394.

South Carolina.—Moody *v.* Ellerbe, 4 S. Car. 21.

South Dakota.—Weber *v.* Tschetter, 1 S. Dak. 205.

Wisconsin.—Parmalee *v.* Wheeler, 32 Wis. 429.

See also Bush *v.* Bush, 3 J. J. Marsh. (Ky.) 501; Kennedy *v.* Woolfolk, 3 Hayw. (Tenn.) 195; Conrad *v.* Trustees of Grand Grove, etc., 64 Wis. 258.

1. Choses in Action—Generally—England.—Ord *v.* White, 3 Beav. 357; Dibbs *v.* Goren, 11 Beav. 483; Cockell *v.* Taylor, 15 Beav. 103; Smith *v.* Parkes, 16 Beav. 115; Rolt *v.* White, 31 Beav. 520; Athenæum L. Assur. Soc. *v.* Pooley, 3 De G. & J. 294; Young *v.* Kitchen, 3 Exch. Div. 127; Mangles *v.* Dixon, 3 H. L. Cas. 702; *In re* Natal Investment Co., L. R. 3 Ch. 355; Tooth *v.* Hallett, L. R. 4 Ch. 242; *In re* Knapman, 18 Ch. Div. 300; *In re* China Steamship Co., L. R. 7 Eq. 240; Douglas *v.* Russell, 4 Sim. 524.

United States.—Shaw *v.* Shaw, 4 Cranch (C. C.) 715; Winchester *v.* Hackley, 2 Cranch (U. S.) 342; Brashear *v.* West, 7 Pet. (U. S.) 608; Dunham *v.* Cincinnati, etc., R. Co., 1 Wall. (U. S.) 254; Galveston, etc., R. Co. *v.* Cowdrey, 11 Wall. (U. S.) 459; U. S. *v.* New Orleans R. Co., 12 Wall. (U. S.) 362.

Alabama.—Kirksey *v.* Mitchell, 8 Ala. 402; Spence *v.* Whitaker, 3 Port. (Ala.) 297.

Arkansas.—Smith *v.* Carder, 33 Ark. 709.

Colorado.—Longan *v.* Carpenter, 1 Colo. 205.

Connecticut.—Bacon *v.* Warner, 1 Root (Conn.) 350; Adams *v.* Leavens, 20 Conn. 73.

Delaware.—Robinson *v.* Jefferson, 1 Del. Ch. 244; Burton *v.* Willin, 6 Houst. (Del.) 522.

Georgia.—Guerry *v.* Perryman, 6 Ga. 119; Jack *v.* Davis, 29 Ga. 219; Gilmore *v.* Bangs, 55 Ga. 403; Cohen *v.* Prater, 56 Ga. 203.

Illinois.—Kleeman *v.* Frisbie, 63 Ill. 482; Sutherland *v.* Reeve, 151 Ill. 384; Roberts *v.* Clelland, 82 Ill. 538; Ellis *v.* Sisson, 96 Ill. 105; Commercial Nat. Bank *v.* Burch, 141 Ill. 519.

Indiana.—Wagner *v.* Winter, 122 Ind. 57.

Iowa.—Zugg *v.* Turner, 8 Iowa 223; Cottle *v.* Cole, 20 Iowa 481; Sayre *v.* Wheeler, 31 Iowa 112; Reynolds *v.* Martin, 51 Iowa 324; Wing *v.* Page, 62 Iowa 87; Steele *v.* Mills, 68 Iowa 406.

Massachusetts.—Willis *v.* Twambly, 13 Mass. 204.

Michigan.—Warner *v.* Whittaker, 6 Mich. 133, 72 Am. Dec. 65; Hull *v.* Swarthout, 29 Mich. 249; Matteson *v.* Morris, 40 Mich. 52; Edson *v.* Gates, 44 Mich. 253; Seligman *v.* Ten Eyck, 49 Mich. 104.

Minnesota.—State *v.* Lake City, 25 Minn. 404.

Missouri.—Sumrall *v.* Sun Mut. Ins. Co., 40 Mo. 27; Bobb *v.* Taylor, 56 Mo. 311; Chouteau *v.* Allen, 70 Mo. 290.

Montana.—Wells *v.* Clarkson, 2 Mont. 230, 379.

New Hampshire.—Sanborn *v.* Little, 3 N. H. 539.

New Jersey.—Williamson *v.* New Jersey Southern R. Co., 29 N. J. Eq. 311.

New York.—Murray *v.* Gouverneur, 2 Johns. Cas. (N. Y.) 438, 1 Am. Dec. 177; Seymour *v.* Wilson, 19 N. Y. 417; Blydenburgh *v.* Thayer, 34 How. Pr. (N. Y. Ct. App.) 88, 3 Keyes (N. Y.) 293; Wood *v.* Perry, 1 Barb. (N. Y.) 114; Commercial Bank *v.* Colt, 15 Barb. (N. Y.) 506; Peabody *v.* Fenton, 3 Barb. Ch. (N. Y.) 451; Evans *v.* Ellis, 5 Den. (N. Y.) 640; McCready *v.* Rumsey, 6 Duer (N. Y.) 574; Miner *v.* Hoyt, 4 Hill (N. Y.) 193, affirmed in 7 Hill (N. Y.) 525; Taylor *v.* Bates, 5 Cow. (N. Y.) 376; Ely *v.* McNight, 30 How. Pr. (N. Y. Supreme Ct.) 97; Clute *v.* Robison, 2 Johns. (N. Y.) 595; Livingston *v.* Hubbs, 2 Johns. Ch. (N. Y.) 512; Niagara Bank *v.* McCracken, 18 Johns. (N. Y.) 493; Chamberlain *v.* Gorham, 20 Johns. (N. Y.) 144; Covell *v.* Tradesman's Bank, 1 Paige (N. Y.) 131; Gay *v.* Gay, 10 Paige (N. Y.) 369; Deming *v.* Bailey, 2 Robt. (N. Y.) 1; Seymour *v.* Lewis, 19 Wend. (N. Y.) 512; Callanan *v.* Edwards, 32 N. Y. 483.

North Carolina.—King *v.* Lindsay, 3 Ired. Eq. (N. Car.) 77.

Oregon.—Rayburn *v.* Hurd, 20 Oregon 229.

South Carolina.—Burkett *v.* Moses, 11 Rich. (S. Car.) 432.

Tennessee.—Young *v.* South Trudegar Iron Co., 85 Tenn. 189, 4 Am. St. Rep. 752.

Texas.—Tyler Car, etc., Co. *v.* Wettermark (Tex. Civ. App. 1896), 34 S. W. Rep. 807.

Vermont.—Walker *v.* Sargeant, 14 Vt. 247; Barney *v.* Grover, 28 Vt. 391.

Virginia.—Hamilton *v.* Glenn, 85 Va. 901.

Wisconsin.—Rockwell *v.* Daniels, 4 Wis. 432.

b. LATENT EQUITIES OF THIRD PERSONS—Nonnegotiable Securities.—While there is some conflict of authority in the adjudged cases as to how far a *bona fide* assignee of nonnegotiable instruments will be bound by latent equities of third persons unconnected with the assignment, the weight of authority strongly leans to the view that he is not to be held subject to such equities.¹

See also *In re Bolt*, etc., *Iron Co.*, 14 Ont. Rep. 211, 16 Ont. App. 397.

The Application to Particular Classes of Instruments, such as bonds, insurance policies, judgments, and mortgages, of the principle stated in the text, must be sought under the titles where those instruments are treated at large.

Negotiable Instruments are, of course, before maturity, subject to a different rule, and a *bona fide* transferee takes them under the law merchant free from equities. See the titles **BILLS OF EXCHANGE AND PROMISSORY NOTES; NEGOTIABLE INSTRUMENTS; MUNICIPAL SECURITIES; RAILROAD SECURITIES**; and other titles where particular classes of negotiable instruments are treated.

Executory Agreement for Sale of Land.—A creditor who takes an assignment of an executory agreement for the sale of land, in payment of a preëxisting indebtedness, takes only the equitable estate of his assignor, though at the time of the assignment he may have reason to and does believe that the agreement is executed, and that his assignor has the legal title. *Brown v. Devitt*, 131 Pa. St. 455.

An assignment by the purchaser of a contract for the sale of land does not render the assignee liable to the vendor for the purchase-money. *Suydam v. Dunton*, 84 Hun (N. Y.) 506.

The assignee of the vendee's interest in a contract for the sale and purchase of land, who has entered into possession, is not personally liable to pay moneys thereafter to become due upon the contract without an express or implied agreement to be liable. *Adams v. Wadhams*, 40 Barb. (N. Y.) 225. See also *Lavelle v. Gordon*, 15 Mont. 515.

If the original purchaser of land assigns his interest in the contract therefor to another, on condition that the latter shall pay the purchase-money for the whole, and obtain a title to half the land, and such assignee, without making the payment, assigns the contract to the original vendor, the latter holds it subject to the condition imposed on his assignor, and if he refuses to give or procure for the original purchaser a title to one-half the land, the latter will be restored to his original equities. *Reed v. Jones*, 8 Wis. 392.

Negotiable Paper Secured by Deed of Trust or Mortgage.—When negotiable paper is secured by a mortgage, or deed of trust, the assignment of the first carries with it the security, but this is true only in equity, and as to such security the assignee takes subject to all defenses and equities existing between the original parties. *Kleeman v. Frisbie*, 63 Ill. 482.

The assignee of that one of several notes secured by mortgage, which is the last to become due, takes the same subject to all risks as

to the adequacy of the proceeds to a complete security, and subject to the notes previously become due, which are secured by the same mortgage. *Wood v. Trask*, 7 Wis. 566, 76 Am. Dec. 230. See also *Marine Bank v. International Bank*, 9 Wis. 57; *Lyman v. Smith*, 21 Wis. 674.

Contract between Assignor and Joint Owner—When Binding on Assignee.—It was held in *Clark v. Carrington*, 7 Cranch (U. S.) 308, that a person who, upon receiving an assignment of a share of property, as security for debt, agrees to comply with the contract of the assignor with a joint owner of the property, is bound to fulfil that contract, although it exceed in amount the value of the share of the property transferred to him.

When Liability on Assigned Contract Begins.—Where A., the assignee of a contract, agreed, expressly, to carry out all the conditions of the contract for and instead of the assignor, it was held that the liability of such assignee dated from the time of the execution of such contract, and not from its assignment. *Bach v. Boston*, etc., *Consol. Copper*, etc., *Min. Co.*, 16 Mont. 467.

Liability of Assignee of Contract under an Agreement.—The assignor of a building contract stipulated with the assignee to turn over to the assignee all the money received on such contract, the assignee on his part agreeing to apply all such sums received to the payment of claims arising out of the contract. It was held that the assignee was not liable for the payment of such claims beyond the amounts actually received by him under the agreement. *Brown v. German-American Title*, etc., *Co.* (Pa. 1896), 34 Atl. Rep. 335.

Assignment of Share of Distributee.—An assignment, by a distributee of an estate, of his share or interest therein, though made for value, passes such interest, subject to the right of the administrator, by suit in equity, to have it applied to the satisfaction of indebtedness of the distributee to the estate. *Ford v. O'Donnell*, 40 Mo. App. 51.

1. Latent Equities as to Nonnegotiable Instruments—England.—*Davies v. Austen*, 1 Ves. Jr. 247; *Redfearn v. Ferrier*, 1 Dow P. C. 50; *Dearle v. Hall*, 3 Russ. 1; *Loveridge v. Cooper*, 3 Russ. 30.

United States.—*Greene v. Darling*, 5 Mason (U. S.) 201; *Judson v. Corcoran*, 17 How. (U. S.) 612; *Bayley v. Greenleaf*, 7 Wheat. (U. S.) 46; *Baker v. Wood*, 157 U. S. 212. See also *U. S. v. Sturges*, 1 Paine (U. S.) 528. *Alabama.*—*Tison v. People's Sav.*, etc., *Assoc.*, 57 Ala. 323; *Goldthwaite v. Montgomery First Nat. Bank*, 67 Ala. 549.

California.—*Bridgeport First Nat. Bank v. Perris Irrigation Dist.*, 107 Cal. 55. See also *Wright v. Levy*, 12 Cal. 257.

Illinois.—*Silverman v. Bullock*, 98 Ill. 11;

New York Doctrine.—The earlier decisions in New York were to the above

Himrod v. Gilman, 147 Ill. 293. See also *Olds v. Cummings*, 31 Ill. 188; *Walker v. Dement*, 42 Ill. 272. Compare *Sumner v. Waugh*, 56 Ill. 531.

Indiana.—In Indiana, the question as to latent equities seems to depend upon whether the assignee obtains a legal or an equitable title. In the former case he is protected; otherwise not. *Stoner v. Brown*, 18 Ind. 464; *Shirk v. North*, 138 Ind. 210. See also *Robeson v. Roberts*, 20 Ind. 155, 83 Am. Dec. 308; *Sims v. Wilson*, 47 Ind. 226; *Summers v. Hutson*, 48 Ind. 228.

Iowa.—*Hale v. First Nat. Bank*, 50 Iowa 642; *Isett v. Lucas*, 17 Iowa 503, 85 Am. Dec. 572; *Crosby v. Tanner*, 40 Iowa 136. Compare *Burtis v. Cook*, 16 Iowa 194.

Kentucky.—*White v. Prentiss*, 3 T. B. Mon. (Ky.) 449.

Maryland.—*Ohio L. Ins., etc., Co. v. Ross*, 2 Md. Ch. 25; *Kemp v. M'Pherson*, 7 Har. & J. (Md.) 320. See also *Beard v. Hubble*, 9 Gill (Md.) 420; *Robinson v. Marshall*, 11 Md. 251.

Massachusetts.—*Sleeper v. Chapman*, 121 Mass. 404; *Thayer v. Daniels*, 113 Mass. 129; *Kingman v. Perkins*, 105 Mass. 111.

Michigan.—*Bloomer v. Henderson*, 8 Mich. 395, 77 Am. Dec. 453.

Mississippi.—*Duke v. Clark*, 58 Miss. 465; *Craig v. Vicksburg*, 31 Miss. 216.

Missouri.—*Garland v. Harrison*, 17 Mo. 282.

New Jersey.—It is an established rule in New Jersey that while the purchaser for value of a chose in action is bound by the equities existing against it in the hands of the original obligor, he is not bound by the latent equities in favor of third parties, of which he had no notice. *Danbury v. Robinson*, 14 N. J. Eq. 213, 82 Am. Dec. 244; *Putnam v. Clark*, 29 N. J. Eq. 412; *Losey v. Simpson*, 11 N. J. Eq. 246; *Woodruff v. Depue*, 14 N. J. Eq. 168; *Starr v. Haskins*, 26 N. J. Eq. 414; *DeWitt v. Van Sickle*, 29 N. J. Eq. 209; *Vredenburg v. Burnet*, 31 N. J. Eq. 229. See also *Appleton v. Small*, 31 N. J. Eq. 382.

Ohio.—*Swartz v. Leist*, 13 Ohio St. 419.

Pennsylvania.—*Pryor v. Wood*, 31 Pa. St. 142; *Traley v. Peale*, 2 Phila. (Pa.) 269; *Mott v. Clark*, 9 Pa. St. 399, 49 Am. Dec. 566; *McConnell v. Wenrich*, 16 Pa. St. 365; *Hendrickson's Appeal*, 24 Pa. St. 363; *Faull v. Tinsman*, 36 Pa. St. 110; *Horton v. Miller*, 44 Pa. St. 256; *Blair v. Mathiott*, 46 Pa. St. 262; *Mullison's Estate*, 68 Pa. St. 212; *Kountz v. Kirkpatrick*, 72 Pa. St. 376, 13 Am. Rep. 687; *McMasters v. Wilhelm*, 85 Pa. St. 218; *Appeal of Mifflin County Nat. Bank*, 98 Pa. St. 150; *Davis v. Barr*, 9 S. & R. (Pa.) 137. See *Com. v. Pittsburgh*, 34 Pa. St. 496.

South Carolina.—*Robertson v. Segler*, 24 S. Car. 387.

Virginia.—*Moore v. Holcombe*, 3 Leigh (Va.) 597, 24 Am. Dec. 683.

Wisconsin.—*Croft v. Bunster*, 9 Wis. 503.

The Scope of this Section will be confined, so far as possible, to latent equities of third persons in connection with the assignment.

Not Subject to Latent Equities of Third

Parties.—In *Murray v. Lylburn*, 2 Johns. Ch. (N. Y.) 441, Chancellor Kent said: "The assignee can always go to the debtor and ascertain what claims he may have against the bond or other chose in action which he is about purchasing from the obligee; but he may not be able, with the utmost diligence, to ascertain the latent equity of some third person against the obligee. He has not any object to which he can direct his inquiries; and, for this reason, the claim of the assignee, without notice of a chose in action, was preferred in the late case of *Redfearn v. Ferrier*, 1 Dow P. C. 50, to that of a third party setting up a secret equity against the assignor. Lord Eldon observed in that case that if it were not to be so, no assignments could ever be taken with safety. I am not aware that this decision was the introduction of any new principle in the case of actual *bona fide* purchases or assignments by contract."

In *Bridgeport First Nat. Bank v. Perris Irrigation Dist.*, 107 Cal. 55, the court said: "The law does not require that the assignee for value, of a thing in action, shall take it subject to the latent equities of third persons, of which he has no notice, but only that the assignment shall be subject to the equities existing in favor of the debtor." See also *Wright v. Levy*, 12 Cal. 257.

In *Silverman v. Bullock*, 98 Ill. 11, the court said: "Although this is the first case that has arisen in this state for the application of the doctrine, we must regard it as settled by the cases cited that the assignee of a mortgage takes it subject only to equities existing in favor of the mortgagor as against the assignor, and not subject to latent equities in favor of third persons in the subject involved in the assignment, of which he had no notice."

Though the assignee of a bond takes it subject to any equity of the obligor that attached to it in the hands of the obligee, he does not take it subject to any equity of a third person, not a party to the bond, of which he had no notice. *Moore v. Holcombe*, 3 Leigh (Va.) 597, 24 Am. Dec. 683.

Illustrations.—In the case of a legacy payable at twenty-one, the executrix in good faith advanced for the support of the infant a larger sum than the legacy amounted to; upon coming of age, the legatee assigned the legacy to a third party who had no notice of the equity of the executrix, and it was held that the assignee could recover against her. *Davies v. Austen*, 1 Ves. Jr. 247.

Where a mortgage and judgment were entered of record on the same day, and a verbal agreement was made between the parties that the mortgage was to have priority of lien over the judgment, it was held that, though this was binding on the parties to it, it was not binding on the assignee of the judgment, who had no actual notice of the agreement. *Hendrickson's Appeal*, 24 Pa. St. 363.

A rule was issued in supplementary proceedings requiring the defendant and a judgment debtor of his to show cause why the indebtedness of the latter should not be applied

effect, but these have been subsequently repudiated, and a much modified doctrine applied.¹

to the plaintiff's demand, and enjoining the defendant meanwhile from assigning this judgment. This order was served on the next day, one hour after the defendant had assigned this judgment to another creditor, in pursuance of a previous promise, the defendant having no knowledge of the order, nor of facts sufficient to have put him upon the inquiry. It was held that the assignment was valid, and that the assignee, being an innocent party, was entitled to hold on to the assignment. *Robertson v. Segler*, 24 S. Car. 387.

Stipulations of Assignor.—When several notes falling due at different times are secured by a mortgage, the mortgagee can legally stipulate with an assignee of a part that he shall have a preferred lien on the security over the assignees of the other notes. *Walker v. Dement*, 42 Ill. 272.

And this agreement need not be expressed, but may be inferred from circumstances. *Bank of England v. Tarleton*, 23 Miss. 173.

Fraudulent Mortgage.—An assignee, for value and without notice, of a mortgage of personal property, given in fraud of creditors, acquires a good title against the creditors of the original grantor. *Sleeper v. Chapman*, 121 Mass. 404.

Assignment of Wife's Chose in Action.—Where a husband assigned a bond given to him for his wife's interest in real estate, without receiving value therefor, but by an instrument under seal expressing the transfer to be for value, and the assignee during the coverture assigned the same to another for value, the second assignee, not having knowledge or the means of knowledge that the former assignment was without consideration, is entitled to the bond or its proceeds against the claim of the wife who brought suit after obtaining a divorce. *McConnell v. Wenrich*, 16 Pa. St. 365.

A View Contrary to the Statement in the Text has been held by some courts. Thus it was said in *Downer v. South Royalton Bank*, 39 Vt. 25, that the assignee of a chose in action takes it subject not only to all the equities between the assignor and debtor, but to equities residing in a third person against the assignor. *Shropshire Union R., etc., Co. v. Reg.*, L. R. 7 H. L. 496, citing *Rice v. Rice*, 2 Drew. 73; *Waldron v. Sloper*, 1 Drew. 193; *Brooks v. Record*, 47 Ill. 30; *Trabue v. Bankhead*, 2 Tenn. Ch. 412. See *Burtis v. Cook*, 16 Iowa 194. See also the following note.

Where a person becomes the equitable assignee of certificates of stock of a railway company, it is his duty to inquire what is the real position of the person pretending to mortgage it, for if such person has only the legal title by having the certificates in his possession, but is in truth merely the trustee for another, the equitable mortgagee would be unable to enforce his claim in opposition to the original *cestui que trust*. *Shropshire Union R., etc., Co. v. Reg.*, L. R. 7 H. L. 496.

Where, pending a litigation carried on in

equity in the name of the assignor, the fund to which the assignor is eventually found entitled is loaned to him, under order of the court, upon note with good security, the assignee, who subsequently and after the insolvency of the assignor intervenes for the assertion of his rights, must stand in the shoes of the assignor, and, as the latter would have no equity against his sureties, neither has the former. *Trabue v. Bankhead*, 2 Tenn. Ch. 412.

1. New York Doctrine.—In New York the decisions have been far from uniform. On the one hand it was laid down by Chancellor Kent in *Murray v. Lylburn*, 2 Johns. Ch. (N. Y.) 441, that an assignee cannot be affected by a latent equity in a third party, and this view was approved and followed in *Livingston v. Dean*, 2 Johns. Ch. (N. Y.) 479; *James v. Morey*, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475 (*per Sutherland, J.*); *Covell v. Tradesman's Bank*, 1 Paige (N. Y.) 131; *Corning v. Murray*, 3 Barb. (N. Y.) 652. See *Hovey v. Hill*, 3 Lans. (N. Y.) 167; *Mickles v. Townsend*, 18 N. Y. 575 (opinion of Strong, J.). Compare *Murray v. Ballou*, 1 Johns. Ch. (N. Y.) 566.

On the other hand, in the early case of *Bebee v. State Bank*, 1 Johns. (N. Y.) 529, 3 Am. Dec. 353, the point arose and was decided adversely to the assignee, *Kent, C. J., dissenting*. And in *Bush v. Lathrop*, 22 N. Y. 535, the views of Chancellor Kent were expressly repudiated, it being held by Denio, J., that there is no distinction between latent equities in third parties and those between the original parties. *Schaefer v. Reilly*, 50 N. Y. 61; *Greene v. Warnick*, 64 N. Y. 220; *Union College v. Wheeler*, 61 N. Y. 88; *Simpson v. Del Hoyo*, 94 N. Y. 189; *Evertson v. Evertson*, 5 Paige (N. Y.) 644. See *Muir v. Schenck*, 3 Hill (N. Y.) 228, 38 Am. Dec. 633.

The doctrine as laid down in *Bush v. Lathrop*, 22 N. Y. 535, is subject, however, to modification on the ground of estoppel. *McNeil v. Tenth Nat. Bank*, 46 N. Y. 325, 7 Am. Rep. 341; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41, 14 Am. Rep. 173; *Armour v. Michigan Cent. R. Co.*, 65 N. Y. 111, 22 Am. Rep. 603.

In *Fairbanks v. Sargent*, 104 N. Y. 108, the court said: "*Bush v. Lathrop*, 22 N. Y. 535, has been criticised in subsequent cases, and so far modified as to exclude from the operation of the principles there laid down the case of a purchase in good faith of a nonnegotiable instrument from an assignee of the real owner, upon whom he has by assignment conferred the apparent absolute ownership, when such purchase has been made in reliance upon the title apparently acquired by such assignee. This modification is placed upon the ground of estoppel, and it is held that the real owner has, by the act of investing another with the apparent ownership of the property, estopped himself from disputing the title of one who thereafter acquires it in good faith from such assignee." The court also said: "We understand the rule stated in *Bush v. Lathrop*, 22 N. Y. 535, with the exception mentioned,

Negotiable Instruments.—Bills and notes form a class of choses in action peculiar to themselves, due to the influence of the law merchant. Their assignment, with or without indorsement, will be fully treated elsewhere in this work.¹

3. What Passes by Assignment²—*a.* **GENERALLY.**—By a complete assignment of a chose in action the whole interest of the assignor in the thing assigned passes to the assignee,³ and also the security for the debt, for it is a familiar and well-settled rule of law that the assignment of a debt carries with it every remedy and security for such debt available by the assignor as incident thereto, although they are not specially named in the instrument of assignment.⁴

stands in full force unquestioned (*Ballard v. Burgett*, 40 N. Y. 314; *Weaver v. Barden*, 49 N. Y. 286; *Moore v. Metropolitan Nat. Bank*, 55 N. Y. 41, 14 Am. Rep. 173).⁵

1. See the title **BILLS AND NOTES**.

2. **The Interpretation of Instruments of Assignment** often determines in a sense what passes by the instrument to the assignee. For such matters, see generally the title **CONTRACTS**, and the judicial definitions and interpretations of words and phrases in this work.

3. **All Assignor's Interest Passes to Assignee.**—*Davies v. Austen*, 1 Ves. Jr. 247; *Judson v. Corcoran*, 17 How. (U. S.) 612; *Gayle v. Benson*, 3 Ala. 234; *Harrison v. Marshall*, 6 Port. (Ala.) 65; *Myers v. South Feather Water Co.*, 10 Cal. 579; *Padfield v. Green*, 85 Ill. 529.

Assignment to Secure Indorsement.—The interest conveyed by an assignment to secure the assignee against loss and liability as an indorser, is commensurate only in degree and duration with the liability it secures. *Hamlin v. European, etc., R. Co.*, 72 Me. 83.

Rule as to the Assignment of Life Insurance Policy.—It seems to be the rule in the *United States* that a transfer by a debtor to his creditor of a life insurance policy, by an assignment absolute on its face, entitles the creditor to no greater interest than the debt and interest, together with such premiums and interest as he has paid thereon. *Cawthon v. Perry*, 76 Tex. 383; *Lewy v. Gilliard*, 76 Tex. 400; *Roller v. Moore*, 86 Va. 512. See also *Page v. Burnstine*, 102 U. S. 664; *Bohleber v. Waelidin*, 69 Hun (N. Y.) 79.

The reason given for this deviation from the general doctrine stated in the text seems to be that a construction of the instrument of transfer which would give the creditor any more interest would be against public policy, in that it would make him interested in the speedy termination of the life of the assured, and at the same time would be a mere speculation on the chances of life. *Price v. Knights of Honor*, 68 Tex. 361; *Cawthon v. Perry*, 76 Tex. 383; *Schonfield v. Turner*, 75 Tex. 324. For further discussion of this subject, see the title **LIFE INSURANCE**.

The Assignment of Shares of Stock in a corporation passes the profits in such shares not yet ascertained and declared. *Kane v. Bloodgood*, 7 Johns. Ch. (N. Y.) 90, 11 Am. Dec. 417.

Right of Action for Fraud.—It was held in *Borst v. Baldwin*, 30 Barb. (N. Y.) 180, that the assignment of a judgment does not convey a right which the assignor may have to set

aside stipulations concerning the judgment on the ground of fraud, the assignment being an affirmation of such stipulation. See also *Zabriskie v. Smith*, 13 N. Y. 322, 64 Am. Dec. 551; and *supra*, this title, *What may be Assigned—Choses ex Delicto*.

An Assignment of a Continuing Contract which has been partly performed does not of itself transfer a right of action for a previous breach of contract. *Love v. Van Every*, 18 Mo. App. 196.

Assignment of Title Bond—Rents.—The assignment of a title bond for real estate does not invest the assignee with the right to rents of the premises that had fully accrued before such assignment; *aliter*, if the assignment was made before the rent had accrued. *Van Driel v. Rosierz*, 26 Iowa 575.

4. **Assignment of Debt Carries Remedy.**—*The Wasp*, 1 L. R. Adm. 367; *Denver Brick, etc., Co. v. McAllister*, 6 Colo. 261; *Cross v. Mofat*, 11 Colo. 210; *Donk Bros. & Co. v. Alexander*, 117 Ill. 330; *Lahmers v. Schmidt*, 35 Minn. 434; *Schlieman v. Bowlin*, 36 Minn. 198; *Ross-Meehan Brake Shoe Foundry Co. v. Pascagoula Ice Co.*, 72 Miss. 608; *Boatmen's Sav. Bank v. Grewe*, 84 Mo. 477; *Craig v. Parkis*, 40 N. Y. 181, 100 Am. Dec. 469; *Bowdoin v. Colman*, 6 Duer (N. Y.) 182; *Rose v. Baker*, 13 Barb. (N. Y.) 230; *Miller v. Hoyle*, 6 Ired. Eq. (N. Car.) 269; *Painter v. Harding*, 3 Phila. (Pa.) 449; *Mehaffy v. Share*, 2 P. & W. (Pa.) 361; *Foster v. Fox*, 4 W. & S. (Pa.) 92. See also *In re Phillips's Estate*, 71 Cal. 285; *Runyan v. Mersereau*, 11 Johns. (N. Y.) 534, 6 Am. Dec. 393.

Assignment of a Judgment.—An assignment of a judgment against a corporation carries with it the remedy against the trustees; and a release of one of the trustees by the assignor, after the assignment and after the releasee has notice of the transfer, will not defeat the claim of the assignee. *Bolen v. Crosby*, 49 N. Y. 183.

An assignment of a judgment for a debt carries the debt, and, if the latter be secured by a mortgage, carries the mortgage interest. *Pattison v. Hull*, 9 Cow. (N. Y.) 747; *Farmers', etc., Bank v. Fordyce*, 1 Pa. St. 454.

By the assignment of a judgment, the right which the plaintiff at law has to recover against the sheriff for neglect or violation of his duty before the assignment, respecting executions which are issued on the judgment, does not pass to the assignee, nor is it extinguished by the assignment. *Com. v. Fuqua*, 3 Litt. (Ky.) 41.

But when the Security Is a Personal One, for the benefit of the assignor alone, it will not pass to the assignee with the debt assigned.¹

b. MORTGAGES—(1) Mortgages of Land—(a) Legal Assignment—aa. TRANSFER OF DEBT WITHOUT FORMAL ASSIGNMENT OF MORTGAGE.—In accordance with the legal theory of a mortgage, the mere transfer of the debt for which the mortgage was given as security will not operate as an assignment at law of the mortgage.²

bb. ASSIGNMENT OF MORTGAGE WITHOUT THE DEBT.—The assignment of a mortgage, unaccompanied by a transfer of the note, bond, or debt, to secure which the mortgage was given, will convey at most only the naked legal estate to the assignee, which he will hold as trustee for the owner of the note or the debt secured by the mortgage.³

The assignment of a judgment in execution conveys the right of plaintiff's interest in the further enforcement of it, but not his interest in the money which the sheriff has previously collected on it. *Robinson v. Towns*, 30 Ga. 818.

Equitable Assignment of Vendor's Lien.—An unqualified indorsement of a promissory note, given for the purchase-money of land, is an equitable assignment of the vendor's lien; and an unqualified assignment of the judgment recovered by the indorsee upon the note carries with it the same lien. *Griffin v. Camack*, 36 Ala. 695, 76 Am. Dec. 344; *Tanner v. Hicks*, 4 Smed. & M. (Miss.) 294.

The equitable lien of the vendor of land will pass to his assignee of a note taken from the vendee in part payment of the purchase-money, and will not be lost, though the assignee neglect to sue the maker for so long a time as to discharge the assignor from liability upon his indorsement. *Roper v. McCook*, 7 Ala. 318. See also *Conner v. Banks*, 18 Ala. 42, 52 Am. Dec. 209; *Kelly v. Payne*, 18 Ala. 371; *Wells v. Morrow*, 38 Ala. 125; *Perry v. Roberts*, 30 Ind. 244, 95 Am. Dec. 689; *Forwood v. Dehoney*, 5 Bush (Ky.) 174; *Guy v. Butler*, 6 Bush (Ky.) 508; *Lindsey v. Bates*, 42 Miss. 397.

Landlord's Lien on Crop.—In *Alabama* the landlord's statutory lien on his tenant's crop for the rent for the current year exists independent of the remedy by attachment, given to enforce it, and passes by an assignment of the note given for the rent. *Westmoreland v. Foster*, 60 Ala. 448.

A Mechanic's Lien passes by an assignment of the debt. *Leftwich Lumber Co. v. Florence Mut. Bldg., etc., Assoc.*, 104 Ala. 584; *Jones v. Hurst*, 67 Mo. 568.

Reformation of Contract on Account of Fraud.—The assignment of a contract carries with it a right of action to reform the contract on account of fraud. *Bentley v. Smith*, 1 Abb. App. Dec. (N. Y.) 126.

Assignment of Note Carrying Debt.—The assignment of a note given for a debt, where it appears that such was the intention of the parties, may be considered as an assignment of the debt, in case the note proves unavailable. *Chestnut Hill Reservoir Co. v. Chase*, 14 Conn. 130.

1. Personal Guaranty.—Thus where the defendant guaranteed payment of a certain bond and mortgage "to C., the personal owner and

holder of said bond and mortgage, his executors and administrators," it was held that the guaranty was a personal one, confined to C., his executors and administrators, and that the assignee of the bond and mortgage could not maintain an action thereon. *Smith v. Starr*, 4 Hun (N. Y.) 123, affirmed in 70 N. Y. 155. See *supra*, this title, *What may be Assigned—Contracts of Guaranty*.

Implied Lien of Vendor.—It was held in *Lindsey v. Bates*, 42 Miss. 397, that the assignment of a note, given for the purchase-money of land, does not carry with it the implied lien of the vendor, and that this lien is an incumbrance upon the land which can only be held by a vendor, and the assets may be marshaled so as to put a vendor altogether upon his equitable lien for the benefit of other creditors. And no third person can, as an assignee of the vendor, derive any benefit from such lien; nor can it, like an express lien, be assigned because it is not expressed in writing on any separate contract, but exists only as an inseparable equitable incident of the contract of purchase, and is raised by construction of equity in favor of the vendor only. And upon the assignment of the note the vendor's implied lien ceases to exist.

2. Transfer of Debt without Assignment of Mortgage.—*Cottrell v. Adams*, 2 Biss. (U. S.) 351; *Smith v. Kelley*, 27 Me. 237, 46 Am. Dec. 595; *Warren v. Homestead*, 33 Me. 256; *Young v. Miller*, 6 Gray (Mass.) 152; *Adams v. Parker*, 12 Gray (Mass.) 53; *Wolcott v. Winchester*, 15 Gray (Mass.) 461.

Thus a Writ of Ejectment may not be maintained by such assignee. *Cottrell v. Adams*, 2 Biss. (U. S.) 351.

Nor may a Writ of Entry be brought in the name of such assignee. *Adams v. Parker*, 12 Gray (Mass.) 53.

Suit may be Brought in the Mortgagee's Name.—However, it seems that an action at law may be brought in the name of the mortgagee for the use of the assignee, but in this case the assignment is equitable, and not legal. *Graham v. Newman*, 21 Ala. 497; *Bourland v. Kipp*, 55 Ill. 376; *Kilgour v. Gockley*, 83 Ill. 109; *Partridge v. Partridge*, 38 Pa. St. 78.

3. Assignment of Mortgage without the Debt.—*Swan v. Yapple*, 35 Iowa 248.

The language used in the decisions of many states is that the assignment of a mortgage without the debt is a mere nullity. *Johnson v. Cornett*, 29 Ind. 59; *Lunt v. Lunt*, 71 Me.

Where there is No Separate Obligation for the Mortgage Debt.—It should be mentioned as a qualification of the rule requiring the transfer of the debt along with the assignment of the mortgage, that where a mortgage has been made and no separate obligation has been given for the payment of the money secured by the mortgage, an assignment of the mortgage necessarily transfers all the rights and interests under it.¹

Where the Mortgagee Is in Possession.—Moreover, the rule is subject to the further qualification that where the mortgagee has possession by virtue of his mortgage, or where, though he is out of possession, the condition has been broken, a conveyance or assignment of the mortgaged premises will be a valid transfer of his right of possession.²

(b) **Equitable Assignment**—*aa.* ASSIGNMENT OF MORTGAGE BY TRANSFER OF DEBT.—In equity a mortgage is regarded as a mere incident to the debt secured, and hence a transfer of the debt or principal thing without any formal assignment, delivery, or even mention of the mortgage, operates to pass the mortgage, in the absence of agreement to the contrary.³

377; Thayer *v.* Campbell, 9 Mo. 280; Bell *v.* Morse, 6 N. H. 205; Dearborn *v.* Taylor, 18 N. H. 153; Hobson *v.* Roles, 20 N. H. 41; Furbush *v.* Goodwin, 25 N. H. 425; Jackson *v.* Willard, 4 Johns. (N. Y.) 41; Jackson *v.* Blodget, 5 Cow. (N. Y.) 202.

1. Dorkray *v.* Noble, 8 Me. 278; Welch *v.* Priest, 8 Allen (Mass.) 165; Hunt *v.* Hunt, 14 Pick. (Mass.) 374, 25 Am. Dec. 400; Freeman *v.* McGaw, 15 Pick. (Mass.) 82; Severance *v.* Griffith, 2 Lans. (N. Y.) 38.

Thus where land is conveyed in a mortgage and no separate obligation is given for the payment of the money, a deed of quitclaim and release of the land from the mortgagee to a stranger is sufficient to assign the mortgage and all his right and interest under it. Dorkray *v.* Noble, 8 Me. 278.

It was held in Severance *v.* Griffith, 2 Lans. (N. Y.) 38, that the assignment of a mortgage given without bond or other extrinsic written evidence of the debt secured, and containing no express covenant to pay it, transfers to the assignee all the mortgagee's claim under the mortgage, viz., his remedy against the land.

2. Pickett *v.* Jones, 63 Mo. 195; Wallace *v.* Goodall, 18 N. H. 439; Hinds *v.* Ballou, 44 N. H. 619.

3. **Transfer of Debt without Mortgage**—*United States*.—Batesville Institute *v.* Kauffman, 18 Wall. (U. S.) 151.

Alabama.—Duval *v.* McLoskey, 1 Ala. 708; Cullum *v.* Erwin, 4 Ala. 452; Center *v.* Planters', etc., Bank, 22 Ala. 743.

California.—Hurt *v.* Wilson, 38 Cal. 263.

Colorado.—Longan *v.* Carpenter, 1 Colo. 205; Fassett *v.* Mulock, 5 Colo. 466.

Connecticut.—Lawrence *v.* Knap, 1 Root (Conn.) 248, 1 Am. Dec. 42.

Florida.—Stewart *v.* Preston, 1 Fla. 11, 44 Am. Dec. 621.

Illinois.—Ryan *v.* Dunlap, 17 Ill. 40, 63 Am. Dec. 334; Herring *v.* Woodhull, 29 Ill. 92, 81 Am. Dec. 296; Pardee *v.* Lindley, 31 Ill. 174, 83 Am. Dec. 219; Olds *v.* Cummings, 31 Ill. 188; Mapps *v.* Sharpe, 32 Ill. 13; Edgerton *v.* Young, 43 Ill. 464; White *v.* Sutherland, 64 Ill. 181; Miller *v.* Larned, 103 Ill. 562.

Iowa.—Crow *v.* Vance, 4 Iowa 434; Pope

v. Jacobus, 10 Iowa 262; Sangster *v.* Love, 11 Iowa 580; Vandercook *v.* Baker, 48 Iowa 199. See also Wood *v.* Sands, 4 Greene (Iowa) 214.

Kansas.—Kurtz *v.* Sponable, 6 Kan. 395.

Kentucky.—Waller *v.* Tate, 4 B. Mon. (Ky.) 529.

Louisiana.—Perot *v.* Levasseur, 21 La. Ann. 529.

Massachusetts.—Sturtevant *v.* Jaques, 14 Allen (Mass.) 526; Morris *v.* Bacon, 123 Mass. 58, 25 Am. Rep. 17; Barnes *v.* Boardman, 149 Mass. 114.

Missouri.—Anderson *v.* Baumgartner, 27 Mo. 80; Mitchell *v.* Ladew, 36 Mo. 526, 88 Am. Dec. 156.

New York.—Green *v.* Hart, 1 Johns. (N. Y.) 580; Runyan *v.* Mersereau, 11 Johns. (N. Y.) 534, 6 Am. Dec. 393; Everson *v.* Booth, 19 Johns. (N. Y.) 486; Jackson *v.* Blodget, 5 Cow. (N. Y.) 202; Wyman *v.* Smead, 31 How. Pr. (N. Y. Supreme Ct.) 1.

Ohio.—Swartz *v.* Leist, 13 Ohio St. 419.

Pennsylvania.—Cathcart's Appeal, 13 Pa. St. 416.

South Carolina.—Wright *v.* Eaves, 10 Rich. Eq. (S. Car.) 582.

Vermont.—Keyes *v.* Wood, 21 Vt. 331.

See also Martin *v.* Mowlin, 2 Burr. 969; Smith *v.* Moore, 11 N. H. 55; Blake *v.* Williams, 36 N. H. 39.

Assignment of Debt Carries Mortgage.—A mortgage of either real or personal estate is but an accessory or incident to the debt or the security which is given as the evidence of the debt. The assignment of the security passes the interest in the mortgage, and the mortgage cannot exist as an independent debt. If, by special agreement, it does not accompany the security assigned, it is *ipso facto* extinguished, and ceases to be a subsisting demand. Langdon *v.* Buel, 9 Wend. (N. Y.) 80. See also Jackson *v.* Willard, 4 Johns. (N. Y.) 41; Lucas *v.* Harris, 20 Ill. 165; Vansant *v.* Allmon, 23 Ill. 30.

Security Passes by Mere Delivery of Note.—The interest of a mortgagee in land is a mere chattel, and when a mortgage is given to secure a note payable to bearer, the interest of the mortgagee in the land will pass, by the mere

bb. ASSIGNMENT OF MORTGAGE WITHOUT TRANSFER OF DEBT.—But an assignment of a mortgage without a transfer of the debt in courts of equity, as in courts of law, carries no beneficial interest in the mortgage to the assignee.¹

(2) *Chattel Mortgages*—Assignment of Mortgage and Note Secured Thereby.—An assignment of a mortgage of personal property, along with the note secured thereby, will operate to convey to the assignee the legal title to the mortgage.²

Assignment of Mortgage without Debt Secured.—The assignment of a mortgage, however, without the debt secured by it, passes no right whatever to the assignee.³

Assignment of Debt Alone.—But if a mortgagee assigns a debt, to secure the payment for which a mortgage is given, whether the same be done before or after forfeiture, the equitable interest of the mortgagee passes to the assignee.⁴

(3) *Partial Assignments*—Mortgages on Land.—If part of several notes secured by the same mortgage is assigned by the mortgagee, it is a rule of equity that

delivery of the note, as an incident to the debt. *Southerin v. Mendum*, 5 N. H. 420; *O'Neal v. Seixas*, 85 Ala. 80.

Effect Changed by Stipulation.—It was held in *Cannon v. Kreipe*, 14 Kan. 324, that while the assignment of a note or debt carries with it ordinarily all securities therefor, yet this is not necessarily so, and the effect of the assignment may be changed by stipulation.

Maine Rule.—In Maine the interest of the mortgagee of land cannot pass at law to a third person without an assignment in some form in writing under seal, although the contract secured by the mortgage has been assigned by writing without seal. *Prescott v. Ellingwood*, 23 Me. 345; *Smith v. Kelley*, 27 Me. 237, 46 Am. Dec. 595; *Dwinel v. Perley*, 32 Me. 197; *Lyford v. Ross*, 33 Me. 197; *Mitchell v. Burnham*, 44 Me. 286; *Johnson v. Leonard*, 68 Me. 239.

1. *Mortgage Transferred without Debt*—*Alabama*.—*Duval v. McLoskey*, 1 Ala. 708.

California.—*Peters v. Jamestown Bridge Co.*, 5 Cal. 334, 63 Am. Dec. 134.

Illinois.—*Hamilton v. Lubukee*, 51 Ill. 415, 99 Am. Dec. 562.

Iowa.—*Pope v. Jacobus*, 10 Iowa 262; *Wood v. Sands*, 4 Greene (Iowa) 214.

Maine.—*Johnson v. Candage*, 31 Me. 28.

Michigan.—*Bailey v. Gould*, Walk. (Mich.) 478.

New Hampshire.—*Smith v. Moore*, 11 N. H. 55; *Ellison v. Daniels*, 11 N. H. 274; *Rigney v. Lovejoy*, 13 N. H. 247.

New York.—*Merritt v. Bartholick*, 36 N. Y. 44; *Wilson v. Troup*, 2 Cow. (N. Y.) 195, 14 Am. Dec. 458; *Aymar v. Bill*, 5 Johns. Ch. (N. Y.) 570; *Jackson v. Bronson*, 19 Johns. (N. Y.) 325; *Power v. Lester*, 17 How. Pr. (N. Y. Supreme Ct.) 413, affirmed in 23 N. Y. 527.

South Carolina.—*Cleveland v. Cohrs*, 10 S. Car. 224.

Assignment of Mortgage without Debt.—The delivery of a mortgage by the mortgagee, unaccompanied by the bond as collateral security for a debt of the mortgagee, does not transfer the title to the mortgage. *Merritt v. Bartholick*, 36 N. Y. 4, affirming 47 Barb. (N. Y.) 253.

In *Jackson v. Willard*, 4 Johns. (N. Y.) 42,

Kent, C. J., in delivering the opinion of the court, said: "Until foreclosure, or at least until possession taken, the mortgage remains in the light of a chose in action. It is but an incident attached to the debt, and in reason and propriety it cannot and ought not to be detached from its principal. The mortgage interest, as distinct from the debt, is not a fit subject of assignment. It has no determinate value. If it should be assigned the assignee must hold the interest at the will and disposal of the creditor who holds the bond. * * * It is difficult to conceive what right can be sold which does not carry the debt with it. * * * It would be absurd in principle and oppressive in practice for the debt and the mortgage to be separated and placed in different and independent hands."

It is well settled that a mortgage passes by the assignment of the bond to which it is collateral, on the ground that the interest follows the principal debt, but the bond does not pass by an assignment of the mortgage. The assignment of the mortgage without the bond in such a case is a nullity. *Cooper v. Newland*, 17 Abb. Pr. (N. Y. Supreme Ct.) 342.

2. *Effect of Assignment of Mortgage and Note Secured.*—Where a mortgage of personal property and the note secured thereby are embodied in the same instrument of writing, an assignment indorsed thereon and signed by the mortgagee will operate to convey to the assignee the legal title to the mortgage. *Gafford v. Lofton*, 94 Ala. 333.

3. *Effect of Assignment of Mortgage without Debt.*—*Carter v. Bennett*, 4 Fla. 283; *Hamilton v. Browning*, 94 Ind. 244. But see *Campbell v. Birch*, 60 N. Y. 215.

Where there Is No Separate Evidence of Debt.—But an oral assignment of a chattel mortgage and the debt secured thereby, which was not otherwise evidenced, accompanied by delivery of the mortgage, passes at law the mortgage to the assignee. *Hyma v. Three Rivers Nat. Bank*, 79 Mich. 167.

4. *Effect of Assignment of Debt Alone.*—*Prout v. Root*, 116 Mass. 470; *Campbell Printing Press, etc., Co. v. Roeder*, 44 Mo. App. 324; *Langdon v. Buel*, 9 Wend. (N. Y.) 80. See also *Ramsdell v. Tewksbury*, 73 Me. 197.

a *pro rata* portion of the mortgage security accompanies it in the absence of any contract to the contrary.¹

Chattel Mortgages.—And the same rule operates in case of the assignment of a specific part of an indebtedness secured by a chattel mortgage.²

4. Rights of Parties—*a.* OF THE ASSIGNEE—(1) *Generally*—Assignee Succeeds to Rights of Assignor.—As has been already stated, the assignee of a chose in action succeeds to all the rights of the assignor,³ and these rights, whether legal or equitable, will be recognized and protected by courts of law against all persons having notice of the assignment.⁴

(2) *Against the Assignor*—(a) **Assignor Loses Control by Assignment.**—Where there has been an absolute assignment in good faith and for a valuable consideration of the whole interest of the assignor in a chose in action, the assignor's control over it ceases immediately after the assignment and notice, and he can do nothing thereafter to prejudice or defeat the rights of the assignee.⁵

1. Mortgages on Land.—Phelan *v.* Olney, 6 Cal. 478; Grapengether *v.* Fejervary, 9 Iowa 163, 74 Am. Dec. 336; Cooper *v.* Ulmann, Walk. (Mich.) 251; Anderson *v.* Baumgartner, 27 Mo. 80; Potter *v.* Stevens, 40 Mo. 229; Pattison *v.* Hull, 9 Cow. (N. Y.) 747; Keyes *v.* Wood, 21 Vt. 331. See also *Mechanics' Bank v. Niagara Bank*, 9 Wend. (N. Y.) 410; Swartz *v.* Leist, 13 Ohio St. 419. For a complete discussion of this question, see the title MORTGAGES.

2. Chattel Mortgages.—Holway *v.* Gilman, 81 Me. 185; Studebaker Bros. Mfg. Co. *v.* McCargur, 20 Neb. 500; Emmons *v.* Dowe, 2 Wis. 322. For further discussion of the subject, see the title CHATTEL MORTGAGES.

3. See *supra*, this title, *Effect of Assignment—Generally*.

Effect of Partial Assignment.—The assignment by a joint owner of a decree, of a part of his interest therein, does not change the legal title and right to control the decree, nor make the assignee a partner therein. Hanks *v.* Harris, 29 Ark. 323.

Where a Contractor Assigned an Undivided Half Interest in the contract it was held that the assignee, by the assignment, became not a tenant in common, but a joint contractor with the assignor. Horner *v.* Spreckels, 5 Hawaii 430.

Where a Contract is Assigned for the Sole Purpose of Enabling the Assignee to Collect and apply certain moneys coming to the assignors thereon, and then to be reassigned, the assignees are not authorized, without the consent of the assignors, to assume the performance of the contract, or to change its terms by agreement with the contracting party. Litchfield *v.* Garratt, 10 Mich. 426.

Assignment as Security.—Where a creditor takes an assignment of partnership property as security for a debt, and as an indemnity against an indorsement, the title to the property, with the right of possession and absolute dominion over it, is vested in him, subject only to the right of the assignors to redeem. Harris *v.* Schultz, 40 Barb. (N. Y.) 315.

4. See *supra*, this title, *Choses in Action Generally—Modern Doctrine; and Notice*.

The Assignee of a Chose in Action will be Protected against garnishment by a creditor of the assignor. Dressor *v.* McCord, 96 Ill. 389; Carr *v.* Waugh, 28 Ill. 418; Savage *v.* Gregg,

150 Ill. 161; Dehner *v.* Helmbacher Forge, etc., Mills, 7 Ill. App. 47. See also Chamberlin *v.* Gilman, 10 Colo. 94; Hodson *v.* McConnel, 12 Ill. 170. See the title GARNISHMENT.

As to the Assignee's Exemption from Attachment proceedings, see the title ATTACHMENT.

5. Assignor can Do Nothing to Defeat Rights of Assignee—United States.—Welch *v.* Mandeville, 1 Wheat. (U. S.) 233, 5 Wheat. (U. S.) 277.

Illinois.—Fitzpatrick *v.* Beatty, 6 Ill. 454; Hughes *v.* Trahern, 64 Ill. 48.

Maine.—Pollard *v.* Somerset Mut. F. Ins. Co., 42 Me. 221.

New Hampshire.—Sanborn *v.* Little, 3 N. H. 539.

New York.—Boynton *v.* Clinton, etc., Mut. Ins. Co., 16 Barb. (N. Y.) 254; Allen *v.* Hudson River Mut. Ins. Co., 19 Barb. (N. Y.) 445; Eels *v.* Finch, 5 Johns. (N. Y.) 193. See also Tillou *v.* Kingston Mut. Ins. Co., 7 Barb. (N. Y.) 570; Buffalo Steam Engine Works *v.* Sun Mut. Ins. Co., 17 N. Y. 401.

Pennsylvania.—Buchanan *v.* Taylor, Add. (Pa.) 154. See also Beale *v.* Farmers', etc., Bank, 5 Watts (Pa.) 529.

Vermont.—Blin *v.* Pierce, 20 Vt. 25; Halloran *v.* Whitcomb, 43 Vt. 306.

Virginia.—Mackie *v.* Davis, 2 Wash. (Va.) 219, 1 Am. Dec. 482 (*per* Roane, J.).

West Virginia.—Clarke *v.* Hogeman, 13 W. Va. 718.

See also Winn *v.* Ft. Worth, etc., R. Co. (Tex. Civ. App. 1896), 33 S. W. Rep. 593.

The Assignor of a Judgment has No Control of it nor of the execution issued upon it; and if a sheriff, with notice of the assignment, acting under the directions of the assignor, fails to discharge his duty relative to the execution, he will be liable to a suit therefor, brought for the benefit of the assignee. State *v.* Herod, 6 Blackf. (Ind.) 444.

The Assignor of a Bond cannot Maintain an Action upon it without the consent or request of the assignee. Nor can he revoke the assignment without the consent of the assignee. Reed *v.* Nevins, 38 Me. 193.

The Assignment of a Promissory Note confers upon the assignee a right to sue in the name of the assignor, which can neither be controlled by him nor objected to by the maker of the note. Rockwood *v.* Brown, 1 Gray (Mass.) 261.

Assignor cannot Interfere with Suit.—The assignee of a chose in action is entitled to recover thereon exactly as the assignor might have done had there been no assignment,¹ and, whenever necessary, may use the name of the assignor in a suit to enforce his rights;² and when a suit is brought by the assignee in the name of the assignor, the latter cannot interfere therewith for any other purpose than to secure indemnity against costs.³ He cannot dismiss a suit brought by the assignee in his name for his own use.⁴

Release by Assignor Inoperative.—Nor can a release or discharge of the debtor by the assignor operate to the disadvantage of the assignee.⁵

Breach of Contract by Assignor.—Where A conveyed to B an interest in a contract and afterwards canceled the contract, it was held that B could recover damages from A for violation of his agreement. *Alston v. Gillespie*, 78 Ga. 665.

Assignor Loses Legal Interest by Assignment.—Where A, in consideration of his indebtedness to B, and to secure B for his future services and expenses in the management of A's business, and for one dollar received of B, assigned to B all the interest which A had in a policy of insurance and a bill of lading, and constituted B his attorney in his name, but for B's own use, to sue for, collect, and compromise all claims which A had by virtue of such policy and bill of lading, and A afterwards received two thousand dollars on such claims, it was held, in an action of account brought by A against B, charging B as the bailiff of A and the receiver of his moneys, that A, by the assignment, had parted with all his legal interest in the policy and bill of lading, and consequently could not sustain the action brought; his only remedy, if he had any, being in chancery. *Dexter v. Hitchcock*, 10 Conn. 209.

Assignor Liable for Collections Made.—Where a timber contract with a railroad company was assigned for a valuable consideration, it was held that an increased allowance, made by the company after the assignment, passed to the assignee, and, it having been collected by the assignor, in whose name the dealings with the company still continued, the assignee could recover it in an action of assumpsit for money had and received. *Winslow v. Elliott*, 5 Jones (N. Car.) 111.

The Assignment of a Part of a Claim Makes the Assignor Responsible to the assignee for the amount assigned and collected, and the law implies an agreement on the part of the assignor to use reasonable diligence to recover the claim. *Hubbard v. Prather*, 1 Bibb (Ky.) 478.

Right of Assignor to an Account.—Where a contractor assigned a claim for money to become due under the contract, as collateral security to several persons, who, with his consent, assigned their interests to another, and he as coplaintiff with the assignor recovered the amount due, it was held that the assignor had a right to an accounting against the last assignee only, for the balance remaining after paying the other assignees. *Noonan v. Mechanic's, etc., Bank (C. Pl.)*, 19 N. Y. Supp. 393, reversing 17 N. Y. Supp. 845.

Effect of Adjustment of Assigned Claim.—Where a contractor assigned the contract, and whatever might be payable to him thereunder

for the performance of the work, to a third person, as collateral security for moneys advanced and to be advanced to enable the assignor to perform his contract, and after such assignment the parties to the original contract adjusted their differences as to the amount payable under the contract, it was held that the fact of the assignment would not avoid such adjustment either in favor of the assignor or of the assignee in a suit in equity instituted by them against the other party to the contract, if the amount fixed by the adjustment exceeded that due the assignee by the assignor. *Howard v. Pensacola, etc., R. Co.*, 24 Fla. 560.

Fraud by Assignor.—Where the assignor of a certificate of purchase of lands purchased at a tax sale, by fraudulently procuring the certificate from the widow of the assignee and erasing the assignment obtained a deed to himself, it was held that equity would not permit him, or one not an innocent purchaser holding under him, to hold the title so obtained. *Bird v. Jones*, 37 Ark. 195.

1. *Howell v. Medler*, 41 Mich. 641. See *supra*, this title, *Effect of Assignment—Generally*.

2. See *infra*, this title, *Against the Party Liable—Right to Sue*.

3. **Assignor cannot Interfere Except to Secure Indemnity against Costs.**—*Southwick v. Hopkins*, 47 Me. 362.

The equitable assignee of a chose in action may sue for it in the name of the assignor when necessary, and the court will protect him against any acts of the nominal plaintiff, designed to defeat the suit. But this right to sue in the assignor's name is in many cases attended with the condition that the assignor be indemnified against the consequence of an adverse termination of the suit. Thus the assignor of a chose in action is entitled to an indemnity against costs, in a suit brought by the assignee in his name, where the defense set up is that since the assignment the defendant has paid the debt to the assignee. *Gordon v. Drury*, 20 N. H. 353.

4. **Assignor may Not Dismiss Suit.**—*Anderson v. Miller*, 7 Smed. & M. (Miss.) 586; *Deaver v. Eller*, 7 Ired. Eq. (N. Car.) 24; *McCullum v. Cox*, 1 Dall. (Pa.) 139.

5. **Release by Assignor Inoperative.**—*United States.*—*Welch v. Mandeville*, 1 Wheat. (U. S.) 233.

Colorado.—*Fassett v. Mulock*, 5 Colo. 466. *Kentucky.*—*Marr v. Hanna*, 7 J. J. Marsh. (Ky.) 642, 23 Am. Dec. 449.

Massachusetts.—*Parker v. Grout*, cited in 11 Mass. 157, note; *Eastman v. Wright*, 6 Pick. (Mass.) 316; *Cutler v. Haven*, 8 Pick.

Declarations and Admissions of the assignor, made subsequent to the assignment, will not be admitted for the purpose of defeating the rights of the assignee.¹

(b) **Right to Recover from Assignor on Failure to Realize on Subject Assigned**²—*aa. GENERALLY—Warranty of Title.*—The assignor of a bond impliedly warrants that he has a right to pass to the assignee what his assignment purports to pass.³ The assignor of a debt warrants that his title thereto, whatever it may be, is vested in the assignee by the assignment, and that no act of his own shall defeat the right of the assignee to recover thereon.⁴

Warranty of Validity of Assigned Claim.—As a general rule the assignor of a claim impliedly warrants that it is valid and that the debtor or obligor is liable to pay it, and if in fact the claim is invalid, the assignor is liable to the assignee for the amount paid for the assignment.⁵ So, also, the assignee

(Mass.) 490; *St. Johns v. Charles*, 105 Mass. 262.

Mississippi.—*Parker v. Kelly*, 10 Smed. & M. (Miss.) 184.

Nebraska.—*Lipp v. South Omaha Land Syndicate*, 24 Neb. 692.

New Hampshire.—*Webb v. Steele*, 13 N. H. 230; *Dunklee v. Greenfield Steam Mill Co.*, 23 N. H. 245.

New York.—*Eels v. Finch*, 5 Johns. (N. Y.) 193; *Briggs v. Dorr*, 19 Johns. (N. Y.) 95; *Wheeler v. Wheeler*, 9 Cow. (N. Y.) 34. See also *Traders' Ins. Co. v. Roberts*, 9 Wend. (N. Y.) 404; *Bracket v. Eastman*, 17 Wend. (N. Y.) 32.

Vermont.—*Lampson v. Fletcher*, 1 Vt. 168, 18 Am. Dec. 676.

See also *Lunt v. Stevens*, 24 Me. 534; *Swartz v. Leist*, 13 Ohio St. 419. See *supra*, this title, *What may be Assigned—Bonds*.

The Assignee may Release the debtor so as to bar a suit by the assignor. *Dade v. Herbert*, 1 Cranch (C. C.) 85; *Allen v. Randolph*, 4 Johns. Ch. (N. Y.) 693.

Release by Tenant in Common.—Where A assigns a chose in action to B, who agrees to collect it in the name of A at his own expense, and reimburse himself from the proceeds, A and B are tenants in common of the chose, and a release by A will at law discharge the cause of action. If the release has been made by fraud and connivance between A and the debtor, B's only remedy is in equity. *Weakly v. Hall*, 13 Ohio 167, 42 Am. Dec. 194.

1. Admissions of Assignor.—*Matthews v. Houghton*, 10 Me. 420; *Hackett v. Martin*, 8 Me. 77; *Kimball v. Huntington*, 10 Wend. (N. Y.) 675, 25 Am. Dec. 590; *Frear v. Everson*, 20 Johns. (N. Y.) 142; *Halloran v. Whitcomb*, 43 Vt. 306.

The General Rule as stated in *Truax v. Slater*, 86 N. Y. 630, is that the mere declarations of an assignor of a chose in action, forming no part of the *res gestæ*, are not competent to prejudice the title of his assignee, whether the assignee is one for value, or merely a trustee for creditors, and whether such declarations are antecedent or subsequent to the assignment. See also *Vidvard v. Powers*, 34 Hun (N. Y.) 223; *Bush v. Roberts*, 111 N. Y. 278, 7 Am. St. Rep. 741; *VanAernam v. Granger*, 86 Hun (N. Y.) 476.

For a Full Discussion of the admissibility of the declarations and admissions of the as-

signor, see the title **ADMISSIONS**, vol. 1, p. 681.

False Declarations.—If the assignor of a chose in action, by false declarations made after assignment, frustrates the effect of the assignment, he will be liable to his assignee for the damage. *Bulkley v. Landon*, 3 Conn. 76 (*per* Hosmer, C. J.).

The Assignor will Not be Admitted as a Witness for the debtor in an action brought against him in the name of the assignor for the benefit of the assignee. *Hackett v. Martin*, 8 Me. 77. See the title **WITNESSES**.

2. As to the rights of the assignee of negotiable instruments against the assignor, see the title **BILLS AND NOTES**. See generally the title **IMPLIED WARRANTY**.

3. Warranty.—*Hazer v. Yost*, 54 Ark. 485; *Emmerson v. Claywell*, 14 B. Mon. (Ky.) 15, 58 Am. Dec. 645.

4. Assignor's Warranty against His Own Act.—The assignor of a debt, without warranty, does not stipulate by the assignment that the debt is absolutely due or that it will be paid by the debtor, but he does agree by necessary implication that his title to the claim, such as it is, is thereby vested in the assignee, and that no act of his own shall deprive his assignee of the right and authority to collect it of the debtor. Thus where an assigned claim was collected by a third person under an authority given by the assignor before the assignment, and the debtor consequently refused to pay the assignee, it was held that the latter, in the absence of fraud in the assignor, was not entitled to recover of him the whole of the amount collected, but was entitled to recover the amount of the consideration paid for the assignment, with interest from the time of presenting his claim to the debtor. *Eaton v. Mellus*, 7 Gray (Mass.) 566.

5. Warranty of Validity of Assigned Claim.—By the assignment of an instrument or other contract in writing, even not negotiable, for a full and fair price, the assignor impliedly warrants that it is valid and that the maker or obligor is liable upon it, unless it clearly appears that the parties intended the contrary. *Hurd v. Hall*, 12 Wis. 112; *Lawton v. Howe*, 14 Wis. 241; *Giffert v. West*, 33 Wis. 617; *Daskam v. Ullman*, 74 Wis. 474; *Stroh v. Hess*, 1 W. & S. (Pa.) 153; *Flynn v. Allen*, 57 Pa. St. 482.

The Assignor of a Debt Warrants Its Existence at the time of the assignment, and that it ex-

may recover from the assignor the costs expended by him in the prosecution of an unfounded claim.¹

bb. ON DEFAULT OF PARTY LIABLE—Question of Warranty.—In some jurisdictions it is held that the assignment of a chose in action, such as a bond or judgment, does not imply a warranty that it will be paid, and the assignor will not be liable to the assignee on default of the debtor unless he has rendered himself liable by an express contract, or has been guilty of fraud.² In other

ists as the parties understood it, with all the securities contemplated by the assignment, though there is no express warranty. *Toler v. Swayze*, 2 La. Ann. 880.

The Assignor of a Judgment warrants that there is such a judgment and that the defendant is liable to pay it, and if in fact the judgment has been paid, the assignor is liable to the assignee for the amount paid for the assignment. *Lile v. Hopkins*, 12 Smed. & M. (Miss.) 299, 51 Am. Dec. 115.

The assignor of a judgment, where nothing is said on the subject, impliedly warrants that the judgment is due and unpaid; and a stipulation that "the assignors warrant their title and power to convey the same, only to the extent of the consideration paid," is a limitation not upon the extent of the title warranted, but of the liability of the assignors in case of its failure. The assignee in such case may recover the same proportion of the consideration paid which the amount already paid on the judgment bears to the whole amount of the judgment, with interest in each case. *Furniss v. Ferguson*, 15 N. Y. 437, 34 N. Y. 485.

Reversal of Assigned Judgment.—If a judgment of a county court be assigned, and afterwards reversed by the superior court of law, the assignee may thereupon sue the assignor, without carrying the case to the court of appeals. *Arnold v. Hickman*, 6 Munf. (Va.) 15.

Where a Decree was Assigned as a mode of payment for property purchased by the assignor, it was held that the assignor, by guaranteeing payment to the assignee, in legal effect warranted that he had a valid decree, which, with good faith and reasonable diligence on the part of the assignee, would be effectual for the payment of the assignor's debt to him. *Hanks v. Harris*, 29 Ark. 323.

The Assignor of a Tax Certificate Impliedly Warrants that the paper is not a forgery, but there the implication of warranty ceases. He does not impliedly warrant that the description of the land is good and sufficient, that the taxes for which the land was sold were legally assessed and levied, and remained due and unpaid, or that due notices have been issued to perfect a tax title. *Strong v. Leoffler*, 85 Ill. 73.

Failure of Consideration of Bond before Assignment.—If the assignee of a bond, who supposed he was purchasing a good and valid bond, fails to recover from the obligor, by reason of the failure of the consideration before the assignment, he may recover from the assignor the money paid for the assignment, whether the assignor guaranteed the bond or not. *Kauffelt v. Leber*, 9 W. & S. (Pa.) 93.

Forged Instruments.—Where an agreement under seal for the conveyance of certain lands

was assigned without recourse, accompanied by the delivery of a paper purporting to be a grant, together with certificates as to the title, which papers proved to be forgeries, it was held that the assignor was not liable, there being no proof of fraud or knowledge of fraud on his part. *Crawford v. McDonald*, 2 Hen. & M. (Va.) 189.

1. *Cartwright v. Carpenter*, 7 How. (Miss.) 328, 40 Am. Dec. 66, following *Butler v. Sudeth*, 6 T. B. Mon. (Ky.) 541.

The assignee of a chose in action, with implied warranty of its validity, may bring an action for its collection, and, if defeated, may recover from his assignor the costs incurred by him. *Giffert v. West*, 33 Wis. 617.

2. **Assignor Held Not Liable in Absence of Fraud or Express Contract—Bonds.**—*Garrettsie v. VanNess*, 2 N. J. L. 17, 2 Am. Dec. 333; *Harris v. Clark*, 2 N. J. L. 146; *Davenport v. Barnes*, 2 N. J. L. 196; *Boylan v. Dickerson*, 3 N. J. L. 24; *Stout v. Stevenson*, 4 N. J. L. 202; *Looney v. Pinckston*, 1 Overt. (Tenn.) 384. See also *Walker v. Scott*, 2 Nott & M. (S. Car.) 286; *Parker v. Kennedy*, 1 Bay (S. Car.) 398. Compare, in *New Jersey*, as to promissory notes, *Mehelm v. Barnett*, 1 N. J. L. 101.

Judgments.—*Mohler's Appeal*, 5 Pa. St. 418, 47 Am. Dec. 413; *Jackson v. Crawford*, 12 S. & R. (Pa.) 165, 14 S. & R. (Pa.) 290.

The Assignor of a Promissory Note is responsible for nothing but the genuineness of his claim. *Lyons v. Divelbis*, 22 Pa. St. 185.

The Assignor of a Bond is not liable upon default of the obligor, unless he has expressly promised to be answerable or has been guilty of fraud. If the circumstances were equally in the knowledge of both the assignor and assignee, and the latter took the risk, he must bear the loss. But it will be otherwise if there is an undertaking by the assignor and reasonable diligence by the assignee. *Graham v. Goudy*, Add. (Pa.) 55.

The Covenant Implied by the Assignment of a Bond is not a guarantee, but "that the assignee should receive the money from the obligor to his own use, and if the obligee should receive it, then that the assignor should be answerable over for it." Where the assignor has dealt fairly he is done with the bond and all responsibility arising from it. *Lloyd v. McNamara*, 19 Pa. St. 130; *Cummings v. Lynn*, 1 Dall. (Pa.) 444.

The Assignor of a Judgment is not liable to refund the consideration paid, upon the insolvency of the obligor, unless he has expressly agreed to do so. *Robinson v. White*, 4 Litt. (Ky.) 237; *Anderson v. Bradford*, 5 J. J. Marsh. (Ky.) 69. But see *Kentucky* cases in notes following as to liability of the assignor of a bond.

jurisdictions, however, it is held that the assignor of a nonnegotiable obligation for the payment of money will be liable to the assignee in case the latter is unable to recover from the obligor after the exercise of due diligence,¹

The Assignment of an Executory Contract for the purchase of land is governed by the same rule as a sale of goods where the vendor is not in possession; that is, the assignee buys at his peril, and if he does not protect himself by a warranty, he cannot, in the absence of fraud, defend an action for the purchase-money, or recover it back if paid, on account of a defect of title or failure of consideration. *Griel v. Lomax*, 86 Ala. 132.

Where the Assignor of a Bond Guaranteed the Payment of the balance due upon it, having before the assignment executed a release, of which the assignee was ignorant, it was held that the assignee might recover from the assignor on his guaranty. *Willson v. Winn*, 2 Bay (S. Car.) 517.

Where A, the obligee of a bond, assigned it to B, who assigned it to C, agreeing to hold himself answerable for the ultimate payment, and C assigned it to D, it was held that C, by diligent prosecution against those who stood before B in the order of liability, or by showing the inutility of such a prosecution, became entitled to a right of action against B upon his contract of indemnity, and that suit might be brought against B for the use of D, the equitable assignee of C. *Lewis v. Hoblitzell*, 6 Gill & J. (Md.) 259.

Where a mortgagee assigns a mortgage and the bond accompanying the same to another, covenanting in the assignment that they shall be paid when due, such a covenant is an absolute guaranty of payment, entitling the assignee to prosecute the assignor thereon immediately after default in payment of the amount due upon the bond and mortgage; and the benefit thereof will pass to a subsequent assignee under an assignment of the security executed by the covenantor. *Cady v. Sheldon*, 38 Barb. (N. Y.) 103.

An Agreement by the Assignor of a Debt to Show Good Cause for Its Payment, should he be called on to protect the payment, means that he will show the debt to be a valid and subsisting legal obligation against the debtor. *Prudden v. Nester*, 103 Mich. 540.

Covenant against Liability.—Where a bond was assigned in general terms with a verbal agreement that the assignor should not be responsible, it was held that he would not be responsible even to a subsequent assignee having no notice of such agreement. *Stubbs v. Burwell*, 2 Hen. & M. (Va.) 536.

Where a judgment was assigned with an understanding that when obtained it was to be collected at the risk and expense of the assignee, and he failed to recover, it was held that there was no breach of the agreement or failure of consideration so as to entitle the assignee to recover from the assignor. *Underwood v. Morgan*, 11 Johns. (N. Y.) 425.

An Assignment without Recourse of a bond exempts the assignor from all liability by reason of the insolvency of the obligor, and if the bond is genuine and the amount of money it calls for was owing and unpaid at the time

of the assignment, the assignee is not entitled to recourse the bond by reason of any failure or inability on his part to make the money. He takes upon himself all risk of collecting the money, providing it was in fact what it seemed to be, a genuine valid subsisting debt. *Houston v. McNeer* (W. Va. 1895), 22 S. E. Rep. 80.

It was held in *Kentucky* that a decree would not lie against the assignor of a forged bond on his implied liability, if the assignment was without recourse. *Coffman v. Allin*, Litt. Sel. Cas. (Ky.) 200.

Where a judgment which had been partly paid, there being no record of such payment, was assigned in the following form: "We hereby sell and assign all our right, title, and interest in this judgment to M. without recourse on us," it was held that the assignors were not liable to the assignee for the amount paid on the judgment, no fraud being shown. *Scofield v. Moore*, 31 Iowa 241.

Fraud by Assignor.—Where a bond was assigned without recourse, and the assignee sued to recover his money back, on the ground of fraudulent representation, it was held that to avoid such contract the representation must be of a material fact and be false within the knowledge of the assignor, and be made with intent on his part that the assignee should act upon it, and the assignee must have, in ignorance of its falsity, relied upon it and been thereby misled to his injury and damage. *Houston v. McNeer* (W. Va. 1895), 22 S. E. Rep. 80. See the title **FRAUD AND MISREPRESENTATION**.

1. Assignor Held Liable on Failure to Recover from Obligor.—*Bennett v. Moore*, 5 Harr. (Del.) 350; *Mackie v. Davis*, 2 Wash. (Va.) 219, 1 Am. Dec. 482; *Peay v. Morrison*, 10 Gratt. (Va.) 149; *Welsh v. Ebersole*, 75 Va. 651; *Thomas v. Linn* (W. Va. 1894), 20 S. E. Rep. 878. See also *Scates v. Wilson*, 9 Leigh (Va.) 473; *Dunn v. Price*, 11 Leigh (Va.) 210, and cases cited in notes immediately following.

The Word "Assign" Implies an Agreement or covenant, if the assignment be under seal, that the assignee shall be permitted to receive the money, and that the obligee will not, by any act of his, defeat him. It raises a promise or agreement between the assignor and assignee, unless it appears that the assignee gave for it a sum inferior in value to the money and property called for in the bond, that if the money, by using proper diligence, could not be got from the obligor, then the assignor would pay it to the assignee. *McGee v. Lynch*, 3 Hayw. (Tenn.) 106.

The Assignee of a Bond may Recover from the Assignor, although he took the bond knowing of the claim of a third person to it, unless he has contracted to take the assignment, risking the claim of such third person. *Emmerson v. Claywell*, 14 B. Mon. (Ky.) 15, 58 Am. Dec. 645.

An Express Agreement by the Assignor of a bond, to be responsible for the payment

at least to the extent of the consideration paid for the assignment.¹ But the assignee cannot proceed against the assignor until he has exercised due diligence in an unsuccessful attempt to recover from the obligor.²

Assignment of Bond for Conveyance of Land.—It seems that the assignor of a bond for the conveyance of land does not undertake by the assignment that a conveyance will be made according to the obligations of the bond. His undertaking is that he is the absolute owner of the bond, and has an indefeasible right to demand what the bond calls for. He can pass to his assignee only such rights as he himself has.³ The assignor, therefore, will not in general

thereof, should the obligor prove insolvent, does not vary the nature of the undertaking nor affect the assignor's liability, as, without an express stipulation to the contrary, he would have been so liable by the mere operation of law. *Goodall v. Stuart*, 2 Hen. & M. (Va.) 105; *Campbell v. Hopson*, 1 A. K. Marsh. (Ky.) 228.

Evidence of Warranty of Chattel.—Where the vendor of a slave assigned to his vendee the bill of sale of his own vendor, containing a cause of warranty, it was held that the mere assignment was not of itself evidence of warranty. *Houston v. Burney*, 2 Smed. & M. (Miss.) 583.

1. Consideration Paid for Assignment, Measure of Recovery.—*Spratt v. M'Kinney*, 1 Bibb (Ky.) 595; *Duncan v. Littell*, 2 Bibb (Ky.) 424; *Mackie v. Davis*, 2 Wash. (Va.) 219, 1 Am. Dec. 482; *Thomas v. Linn* (W. Va. 1894), 20 S. E. Rep. 878.

The Assignee's Right of Recourse upon the Assignor rests upon the ground that there was a valuable consideration for the assignment. In all cases, however, the actual consideration may be shown, and this constitutes the measure of recovery by the assignee against the assignor. *Welsh v. Ebersole*, 75 Va. 651 (*per* Staples, J.).

Consideration for Assignment Exceeding Consideration for Bond.—Where the assignee of a title bond fails to obtain the title and recovers the consideration from the obligor, he has no remedy for the difference between the sum so recovered and the larger sum he paid for the assignment of the bond; though, that difference remaining unpaid, a court of equity might refuse its aid to enforce payment. *Seebree v. Harper*, 4 Dana (Ky.) 64.

2. Due Diligence of Assignee.—The assignee cannot proceed against the assignor until he has exercised due diligence to recover from the obligor.

Delaware.—*Bennett v. Moore*, 5 Harr. (Del.) 350.

Indiana.—*James v. Nicholson*, 6 Blackf. (Ind.) 288.

Kentucky.—*Smallwood v. Woods*, 1 Bibb (Ky.) 542; *Spratt v. M'Kinney*, 1 Bibb (Ky.) 595; *Thompson v. Caldwell*, 2 Bibb (Ky.) 290; *Campbell v. Hopson*, 1 A. K. Marsh. (Ky.) 228; *Berry v. Kenney*, 5 B. Mon. (Ky.) 120; *Morrison v. Glass*, 5 B. Mon. (Ky.) 240; *McMurray v. Wood*, 9 Dana (Ky.) 45; *Passmore v. Prather*, 9 Dana (Ky.) 57; *Chambers v. Keene*, 1 Metc. (Ky.) 289.

Maryland.—*Boyer v. Turner*, 3 Har. & J. (Md.) 285; *Parrott v. Gibson*, 1 Har. & J. (Md.) 398.

Virginia.—*Smith v. Triplett*, 4 Leigh (Va.) 590; *Wood v. Duval*, 9 Leigh (Va.) 6. See the title **BILLS AND NOTES**.

What is due diligence depends on the particular circumstances of each case, *Smith v. Triplett*, 4 Leigh (Va.) 590; *Barksdale v. Fenwick*, 4 Call. (Va.) 492; *Collins v. Warburton*, 3 Mo. 202. See also *Mackie v. Davis*, 2 Wash. (Va.) 219, 1 Am. Dec. 482; and is a question of law, the facts being found by the jury. *Smallwood v. Woods*, 1 Bibb (Ky.) 542. See also *Bennett v. Moore*, 5 Harr. (Del.) 350; *Stout v. Stevenson*, 4 N. J. L. 202.

When Assignor Becomes Liable.—In general, the return of the sheriff of "no effects," on an execution in favor of an assignee of a bond against the obligor, is sufficient to charge the assignor, so that, in an action against him, no proof that the obligor was not insolvent can be admitted. *Goodall v. Stuart*, 2 Hen. & M. (Va.) 105. See also, as to what is sufficient to charge assignor, *Johnston v. Hackley*, 6 Munf. (Va.) 448; *McClung v. Arbuckle*, 6 Munf. (Va.) 315.

The Assignee of a Bond is Bound to Give Notice to the obligee of any discount or defense set up against it by the obligor, otherwise he takes upon himself the consequences. *Drayton v. Thompson*, 1 Bay (S. Car.) 263.

Default of Assignee.—Where a creditor takes from his debtor an assignment of a debt due from a third person as a security for his demand, and by his wilful default the debt becomes irrecoverable, he must bear the loss. *Williams v. Price*, 1 Sim. & S. 581, 2 L. J. Ch. 105.

3. Title Bond.—*Hazer v. Yost*, 54 Ark. 485; *Grote v. Clerihan*, 32 Ill. App. 323.

The assignment of a bond for the conveyance of land imposes no warranty of title upon the assignor, except a contingent obligation in case the obligor fails to make the title or pay the damages after being prosecuted therefor with due diligence. *Moredock v. Rawlings*, 3 T. B. Mon. (Ky.) 73; *Bedal v. Stith*, 3 T. B. Mon. (Ky.) 290; *Tribble v. Davis*, 3 J. J. Marsh. (Ky.) 633; *Stafford v. Steele*, 7 J. J. Marsh. (Ky.) 342.

The assignor of a title bond is not liable for a defect of title or quantity, unless bound by contract or by his fraud. *Barnes v. Smith*, 5 J. J. Marsh. (Ky.) 311.

Liability for Costs in Defending Title.—In *Tribble v. Davis*, 3 J. J. Marsh. (Ky.) 633, it was held that the obligor in a bond for the conveyance of land, and not the assignor, is responsible to the assignee for costs in defending the title.

be liable for the title, though such assignments, like other contracts, may be set aside for fraud.¹

(3) *Against the Party Liable—Right to Sue*—(a) *At Law—Assignee may Sue in Name of Assignor.*—The rigorous doctrine of the ancient common law that choses in action could not be assigned has been disregarded in effect since an early period. Courts of law evaded it by holding that that could be done indirectly which could not be done directly; that the assignee of a chose in action, while he could not sue thereon in his own name, might, nevertheless, bring a suit to his own use in the name of his assignor.²

The assignee of a title bond has no right to make a new contract with the vendor and pay more than was due from the original vendee and charge the assignor of such bond for such advancement, though such assignor may be equitably bound to pay a sum necessarily expended in procuring the title. *Combs v. Tarlton*, 2 B. Mon. (Ky.) 191.

1. *Brothers v. Porter*, 6 B. Mon. (Ky.) 106; *Moredock v. Rawlings*, 3 T. B. Mon. (Ky.) 73.

If the assignee of an executory contract for the purchase of land be induced to enter into the contract of assignment by the fraudulent misrepresentations or concealment of the assignor, the contract is void, and the assignee may recover the consideration from the assignor. *Griel v. Lomax*, 86 Ala. 132.

2. See generally, for a full discussion of this branch of the subject, *ENCYC. OF PLEADING AND PRACTICE*, title *EQUITABLE ASSIGNMENTS*.

Assignee may Sue in Name of Assignor—England.—2 Bl. Com. 442; *Pollock on Contracts* (Wald's ed.) 207; *Rolt v. White*, 31 Beav. 520.

Canada.—*Ham v. Ham*, 6 U. C. C. P. 37; *Dennison v. Knox*, 24 U. C. Q. B. 119; *Walsh v. Hart*, 3 Nova Scotia 400.

United States.—*New York Guaranty Co. v. Memphis Water Co.*, 107 U. S. 205; *Burke's Case*, 13 Ct. of Cl. 231 (*per Nott, J.*). See also *Corser v. Craig*, 1 Wash. (U. S.) 424.

Alabama.—*Goodwyn v. Lloyd*, 8 Port. (Ala.) 237.

Connecticut.—*Colbourn v. Rossiter*, 2 Conn. 503; *Lyon v. Summers*, 7 Conn. 399; *Sanford v. Nichols*, 14 Conn. 324.

Illinois.—*Chapman v. Shattuck*, 8 Ill. 49.

Iowa.—*Roberts v. Smith*, 1 Morr. (Iowa) 426.

Kentucky.—*Marshall v. Craig*, 3 Bibb (Ky.) 291.

Maine.—*Pollard v. Somerset Mut. F. Ins. Co.*, 42 Me. 221; *McDonald v. Laughlin*, 74 Me. 480.

Massachusetts.—*Clark v. Swift*, 3 Met. (Mass.) 390; *Rice v. Stone*, 1 Allen (Mass.) 566; *Moore v. Coughlin*, 4 Allen (Mass.) 335; *Rockwood v. Brown*, 1 Gray (Mass.) 261; *Eastman v. Wright*, 6 Pick. (Mass.) 316; *Crain v. Paine*, 4 Cush. (Mass.) 483; *Palmer v. Merrill*, 6 Cush. (Mass.) 282, 52 Am. Dec. 782 (*per Shaw, C. J.*); *Pitts v. Holmes*, 10 Cush. (Mass.) 92; *Dix v. Cobb*, 4 Mass. 511; *Leach v. Greene*, 116 Mass. 534; *Walker v. Brooks*, 125 Mass. 241. See also *Hay v. Green*, 12 Cush. (Mass.) 282; *Foss v. Nutting*, 14 Gray (Mass.) 484; *Brigham v. Clark*, 20

Pick. (Mass.) 43; *Parkhurst v. Dickerson*, 21 Pick. (Mass.) 307.

Mississippi.—*Scott v. Metcalf*, 13 Smed. & M. (Miss.) 563. See also *Field v. Weir*, 28 Miss. 56.

New Hampshire.—*Currier v. Hodgdon*, 3 N. H. 82; *Cameron v. Little*, 13 N. H. 23 (*per Upham, J.*).

New Jersey.—*Norris v. Douglass*, 5 N. J. L. 942; *Morrow v. Vernon Tp.*, 35 N. J. L. 490.

New York.—*Hodgman v. Western R. Corp.*, 7 How. Pr. (N. Y. Supreme Ct.) 492; *Ontario Bank v. Mumford*, 2 Barb. Ch. (N. Y.) 596.

Ohio.—*Townsend v. Carpenter*, 11 Ohio 21.

Rhode Island.—*Clarke v. Thompson*, 2 R. I. 146 (*per Greene, C. J.*).

Tennessee.—*East Tennessee, etc., R. Co. v. Henderson*, 1 Lea (Tenn.) 1.

Vermont.—*Halloran v. Whitcomb*, 43 Vt. 306.

See also *Master v. Miller*, 4 T. R. 320; *Stebbins v. Bruce*, 80 Va. 389.

Assignor may Sue for Assignee.—The assignor of a chose in action may sue for the benefit of the assignee. *Winch v. Keeley*, 1 T. R. 619; *Winchester v. Hackley*, 2 Cranch (U. S.) 342.

Where there is an absolute assignment of a beneficial interest in a debt, the assignor may sue as trustee for the assignee, notwithstanding his subsequent execution of a composition deed. *The Wasp*, L. R. 1 Adm. & Ecc. 367.

Assignee cannot Sue in His Own Name.—*Clapp v. Shepard*, 2 Met. (Mass.) 127; *Smock v. Taylor*, 1 N. J. L. 206; *Guthrie v. White*, 1 Dall. (Pa.) 268.

However favorably the assignment of choses in action is considered in equity, and although protected in law whenever it can be done consistently with legal principles, yet they are not so assignable as that they can be sued on in the name of the assignee. *Usher v. D'Wolfe*, 13 Mass. 290.

A sale of a chose in action by an assignee in bankruptcy does not divest him of the legal title and authorize the purchaser to sue in his own name. *Camack v. Bisquay*, 18 Ala. 286; *McNutt v. King*, 59 Ala. 597; *Leach v. Greene*, 116 Mass. 534; *Hay v. Green*, 12 Cush. (Mass.) 282. See *Paulding v. Lee*, 20 Ala. 753.

A Policy of Insurance is not assignable at common law, so as to enable the assignee to sue thereon in his own name, but charters of insurance companies, in many cases, contain a clause authorizing the assignee of a policy to bring an action thereon in his own name. *Flanagan v. Camden Mut. Ins. Co.*, 25 N. J. L. 506. See generally, *Perry v. Merchants' Ins.*

Assignment a Declaration of Trust.—It is through the equitable doctrine of trusts that the assignee of a chose in action is protected, and the form of assigning a chose in action is in the nature of a declaration of trust, and an agreement to permit the assignee to make use of the name of the assignor in an action to recover.¹ The assignor by the assignment gives authority to the assignee to use his name in any legal proceedings which may become necessary to give full effect to the assignment, and he becomes a trustee for the assignee;² but it seems that he will not be responsible for any unauthorized or illegal acts done by the assignee in his name.³

(b) **In Equity—When Assignee of Legal Choses may Sue in Equity.**—As a general rule a court of equity will not entertain a suit brought by the assignee of a chose in action, which is a mere legal demand, but will leave him to his remedy at law by a suit in the name of the assignor. Where, however, special circumstances render it necessary for the assignee to come into a court of equity for relief, in order to prevent a failure of justice, he will be allowed to sue in that court upon a mere legal demand.⁴

Co., 25 Ala. 355; Pollard v. Somerset Mut. F. Ins. Co., 42 Me. 221; Folsom v. Belknap County Mut. F. Ins. Co., 30 N. H. 231; Granger v. Howard Ins. Co., 5 Wend. (N. Y.) 200; Ferriss v. North American F. Ins. Co., 1 Hill (N. Y.) 71; Mann v. Herkimer County Ins. Co., 4 Hill (N. Y.) 187; Howard v. Albany Ins. Co., 3 Den. (N. Y.) 301. See the title INSURANCE.

1. **Assignment a Declaration of Trust.**—2 Bl. Com. 442; Ellis v. Secor, 31 Mich. 185, 18 Am. Rep. 178; Morrison v. Deaderick, 10 Humph. (Tenn.) 342; Hartman v. Dowdel, 1 Rawle (Pa.) 279; Bury v. Hartman, 4 S. & R. (Pa.) 175; Pierce v. McKeehan, 3 Pa. St. 136, 45 Am. Dec. 635; Tritt v. Colwell, 31 Pa. St. 228. See also Scott v. Metcalf, 13 Smed. & M. (Miss.) 563.

2. Chapman v. Shattuck, 8 Ill. 49; Phillips v. Wilson, 25 Ill. App. 427; Eastman v. Wright, 6 Pick. (Mass.) 316 (*per* Morton, J.); Ham v. Ham, 6 U. C. C. P. 37. See also Mosher v. Allen, 16 Mass. 451.

The Assignment of a Bank Book, with an order for payment of the deposit in a savings bank, does not authorize the assignee to sue the bank at law in his own name, unless the bank expressly promises to pay him, but the assignment gives him the right to sue in the name of the assignor, or, after his death, of his administrator, with or without his consent; and payment by the bank to him after notice of the assignment does not affect the rights of the assignee. Foss v. Lowell Five Cents Sav. Bank, 111 Mass. 285. See generally the title SAVINGS BANKS.

3. **Assignee must Use Only Lawful Processes.**—Permission by the assignor of a chose in action to use his name in enforcing it gives the assignee authority to use only lawful processes, and hence the assignor will not be responsible for unauthorized and illegal acts done by the assignee in his name. Park v. Toledo, etc., R. Co., 41 Mich. 352.

But in Brown v. Feeter, 7 Wend. (N. Y.) 301, it was held that the assignor of a judgment, in whose name suit was brought, was liable for an execution issued upon the judgment after it was satisfied. And in Worden v. Orange County Bank, 2 Wend. (N. Y.) 245,

the assignor of a judgment was held liable for costs awarded in setting aside for irregularity an execution issued by the assignee.

4. **Assignee Having Remedy at Law cannot Sue in Equity.**—2 Chitty on Contracts (11th Am. ed.) 1360; Hammond v. Messenger, 9 Sim. 327, 2 Jur. 655; Ross v. Munro, 6 Grant's Ch. (U. C.) 431; Hayward v. Andrews, 106 U. S. 672; Burke's Case, 13 Ct. of Cl. 231 (*per* Nott, J.); Adair v. Winchester, 7 Gill & J. (Md.) 114; Ontario Bank v. Mumford, 2 Barb. Ch. (N. Y.) 596; Carter v. United Ins. Co., 1 Johns. Ch. (N. Y.) 463; Smiley v. Bell, 1 Mart. & Y. (Tenn.) 378, 17 Am. Dec. 813; Moseley v. Boush, 4 Rand. (Va.) 392 (*per* Green, J.). See also Motteux v. London Assur. Co., 1 Atk. 545; McGehee v. Dougherty, 10 Ala. 863; Chicago, etc., R. Co. v. Nichols, 57 Ill. 464; Chicago, etc., R. Co. v. Russell, 57 Ill. 467; Cobb v. Thompson, 1 A. K. Marsh. (Ky.) 507; Gover v. Christie, 2 Har. & J. (Md.) 67.

Where the Assignee Has an Adequate Remedy at Law, a court of chancery has no jurisdiction in the matter. Jones v. Burtch, 5 Blackf. (Ind.) 372.

The assignee of a chose in action on which a complete and adequate remedy exists at law cannot, merely because his interest is an equitable one, bring a suit in equity for the recovery of the demand. Hayward v. Andrews, 106 U. S. 672; New York Guaranty Co. v. Memphis Water Co., 107 U. S. 205.

A court of equity will not entertain a bill by the assignee of a strictly legal right merely upon the ground that he cannot bring an action at law in his own name, nor unless it appears that the assignor prohibits and prevents such an action from being brought in his name, or that an action so brought would not afford the assignee an adequate remedy. Walker v. Brooks, 125 Mass. 241. In this case, Gray, C. J., referring to a passage from Story Eq. Jur., § 1057*a*, in opposition to the doctrine above stated, said: "The adjudged cases, including those cited by the learned commentator, upon being examined, fail to support his position, and show that the doctrine of Hammond v. Messenger, 9 Sim. 327 [referred to by Story] is amply sustained by ear-

Assignee of Equitable Choses may Sue in His Own Name.—Where the subject of the assignment is within the cognizance of a court of equity, the assignee of an equitable chose in action may sue thereon in equity in his own name.¹

(c) **On Promise of Debtor.**—It is well settled that if the debtor assents to the assignment and promises to pay the assignee, the assignee of a debt or other chose in action may maintain an action in his own name against the debtor on the promise.²

Express and Implied Promise.—It is held in some jurisdictions that in order to

liar authorities in England and in this country." This conclusion he verifies by a review of the following cases: *Dhegetoff v. London Assur. Co.*, Mosely 83, 4 Bro. P. C. 436; *Motteux v. London Assur. Co.*, 1 Atk. 545; *Cator v. Burke*, 1 Bro. Ch. 434; *Rose v. Clark*, 1 Y. & Coll. C. C. 534; *Carter v. United Ins. Co.*, 1 Johns. Ch. (N. Y.) 463; *Ontario Bank v. Mumford*, 2 Barb. Ch. (N. Y.) 596; and other cases.

In *Lenox v. Roberts*, 2 Wheat. (U. S.) 373, the assignee of all the property of a banking corporation was allowed to maintain a bill in equity in his own name upon a promissory note, which had not been formally indorsed to him, for the reason that, as the act of incorporation had expired, no action could be maintained at law by the bank itself.

Contra—Ohio.—In *Townsend v. Carpenter*, 11 Ohio 21, it is held that the assignee of a non-negotiable note might sue the maker in chancery to enforce payment. This decision is not in line with the other American decisions and is unsupported by any reference to authorities. See *Walker v. Brooks*, 125 Mass. 241.

1. Assignee may Sue in Equity in His Own Name.

—2 Chitty on Contracts (11th Amer. ed.) 1360; *Pomeroy Remedies and Remedial Rights*, § 145; *Graham v. Abercrombie*, 8 Ala. 552; *Powell v. Powell*, 10 Ala. 900; *Dixon v. Buell*, 21 Ill. 203; *Olds v. Cummings*, 31 Ill. 188; *Slaughter v. Foust*, 4 Blackf. (Ind.) 379; *Moor v. Veazie*, 32 Me. 343, 52 Am. Dec. 655; *Bigelow v. Willson*, 1 Pick. (Mass.) 485; *Dobyns v. McGovern*, 15 Mo. 662; *Hopkins v. Hopkins*, 4 Strobb. Eq. (S. Car.) 207, 53 Am. Dec. 663; *Hagar v. Buck*, 44 Vt. 285. See also *Trecothick v. Austin*, 4 Mason (U. S.) 16; *Miller v. Whittier*, 32 Me. 203; *Whitney v. M'Kinney*, 7 Johns. Ch. (N. Y.) 144.

In equity the assignee of a chose in action must sue in his own name, and not as at law in the name of the assignor. *Varney v. Bartlett*, 5 Wis. 276; *Field v. Maghee*, 5 Paige (N. Y.) 539; *Rogers v. Trader's Ins. Co.*, 6 Paige (N. Y.) 583.

2. Assignee may Sue in His Own Name on Promise to Pay.

—2 Story Eq. Jur., § 1039.

England.—*Fenner v. Meares*, 2 W. Bl. 1269; *Innes v. Dunlop*, 8 T. R. 595; *Surtees v. Hubbard*, 4 Esp. 203. See also *Crowfoot v. Gurney*, 9 Bing. 372, 23 E. C. L. 309; *Israel v. Douglas*, 1 H. Bl. 239; *Hodgson v. Anderson*, 3 B. & C. 842, 10 E. C. L. 247; *Clarke v. Adair*, cited in 4 T. R. 343; *Williams v. Everett*, 14 East 582.

United States.—*Tiernan v. Jackson*, 5 Pet. (U. S.) 580 (*per Story*, J.); *Burke's Case*, 13 Ct. of Cl. 231 (*per Nott*, J.).

Illinois.—*Carlyle v. Carlyle Water, etc., Co.*, 140 Ill. 445 (*citing AM. AND ENG. ENCYC. OF LAW*).

Maine.—*Lang v. Fiske*, 11 Me. 385; *Smith v. Berry*, 18 Me. 122; *Warren v. Wheeler*, 21 Me. 484.

Maryland.—*Gordon v. Downey*, 1 Gill (Md.) 41; *Allstan v. Contee*, 4 Har. & J. (Md.) 351; *Barger v. Collins*, 7 Har. & J. (Md.) 213.

Massachusetts.—*Crocker v. Whitney*, 10 Mass. 316; *Mowry v. Todd*, 12 Mass. 281; *Burrows v. Glover*, 106 Mass. 324; *Bourne v. Cabot*, 3 Met. (Mass.) 305; *Derby v. Sanford*, 9 Cush. (Mass.) 263 (*per Shaw*, C. J.). See also *Coolidge v. Ruggles*, 15 Mass. 387; *Wilson v. Hill*, 3 Met. (Mass.) 66.

New Hampshire.—*Currier v. Hodgdon*, 3 N. H. 82; *Wiggin v. Damrell*, 4 N. H. 69; *Morse v. Bellows*, 7 N. H. 549, 28 Am. Dec. 372 (*per Upham*, J.). See also *Thompson v. Emery*, 27 N. H. 269.

New Jersey.—*Flanagan v. Camden Mut. Ins. Co.*, 25 N. J. L. 506.

New York.—*Compton v. Jones*, 4 Cow. (N. Y.) 13. See also *Ford v. Adams*, 2 Barb. (N. Y.) 349; *Weston v. Barker*, 12 Johns. (N. Y.) 276, 7 Am. Dec. 319.

Pennsylvania.—*De Barry v. Withers*, 44 Pa. St. 356.

Rhode Island.—*Clarke v. Thompson*, 2 R. I. 146.

Tennessee.—*Mt. Olivet Cemetery Co. v. Shubert*, 2 Head (Tenn.) 116.

Vermont.—*Hodges v. Eastman*, 12 Vt. 358; *Allis v. Jewell*, 36 Vt. 547; *Wood v. Rutland, etc., Mut. F. Ins. Co.*, 31 Vt. 552 (*per Aldis*, J.).

The assignee of a debt may maintain an action in his own name against the debtor, where the latter has promised to pay him, and it makes no difference whether such debt be a written obligation or be due upon an express or implied promise by parol, as for goods sold or services performed, or whether the assignment is to the assignee for his own benefit or for the benefit of creditors. *Clarke v. Thompson*, 2 R. I. 146.

Promise by Agent.—A promise made by the treasurer of a corporation to pay the assignee of a claim against the corporation is sufficient to authorize the assignee to sue the corporation in his own name, unless it be shown that the treasurer had no authority to bind the corporation. *Mt. Olivet Cemetery Co. v. Shubert*, 2 Head (Tenn.) 116.

A Promise by One of Two Joint Makers of a note to pay it to a mere equitable assignee will not authorize the latter to sue both in his own name. *McCoon v. Biggs*, 2 Hill (N. Y.) 121.

sustain such an action the promise must be express,¹ but it has been held by other courts that the promise may be implied from the acts of the debtor as well as expressly proved.²

Consideration for Promise.—It is the established rule in the *United States* that an assignment for a valuable consideration, with notice to the debtor, imposes on him an equitable and moral obligation to pay the assignee, which is a good consideration for an express promise to that effect.³ This has been held to be a sufficient consideration in *England* also,⁴ but some of the recent authorities there seem to consider that a new and additional consideration, as forbearance or something equivalent, should induce the promise of the debtor to the assignee.⁵

(d) **Under Statutes.**—The rule of law requiring the assignee of a chose in action to sue in the name of the assignor is now generally abolished, and it is provided by statute in most states that the assignee, as the real party in interest, may maintain the action in his own name;⁶ and in some states the

1. Express Promise.—*Parkhurst v. Dickerson*, 21 Pick. (Mass.) 307; *Dubois v. Doubleday*, 9 Wend. (N. Y.) 317.

Mere Consent to Assignment Not Sufficient.—In order for the assignee of an insurance policy to recover in his own name, there must be an express promise by the obligor to be responsible to the assignee, even though the assignment be made with his consent. *Jessel v. Williamsburgh Ins. Co.*, 3 Hill (N. Y.) 88.

2. Implied Promise.—*Carlyle v. Carlyle Water, etc., Co.*, 140 Ill. 445; *Barger v. Collins*, 7 Har. & J (Md.) 213; *Stewart v. Rogers*, 19 Md. 98.

3. Consideration for Promise—Connecticut.—The assignment of a chose in action will be a good consideration for the promise of the debtor to pay the assignee, who may maintain an action in his own name on such promise. 1 *Swift's Digest* (Rev.) of the Laws of Connecticut 438.

Maine.—*Smith v. Berry*, 18 Me. 122; *Warren v. Wheeler*, 21 Me. 484.

Massachusetts.—*Crocker v. Whitney*, 10 Mass. 319 (but see *Rand's* note to this case); *Derby v. Sanford*, 9 Cush. (Mass.) 263 (*per Shaw, C. J.*). See also *Skinner v. Somes*, 14 Mass. 107.

New Hampshire.—*Currier v. Hodgdon*, 3 N. H. 82; *Morse v. Bellows*, 7 N. H. 549, 28 Am. Dec. 372 (*per Upham, J.*); *Edson v. Fuller*, 22 N. H. 183.

Rhode Island.—*Clarke v. Thompson*, 2 R. I. 146.

Vermont.—*Moar v. Wright*, 1 Vt. 57; *Bucklin v. Ward*, 7 Vt. 195; *Stiles v. Farrar*, 18 Vt. 444. See also *Phalan v. Stiles*, 11 Vt. 82.

Contra—Illinois.—To enable the assignee of a chose in action to sue thereon in his own name there must be something more than a mere promise on the part of the debtor to pay the assignee. There must be a communication and a new arrangement between all the parties, by which the assignor's claim upon his debtor, and his liability to the assignee, are extinguished. *McKinney v. Alvis*, 14 Ill. 33. See also *Lindley v. Simpson*, 45 Ill. App. 648. And see, as to rule in *Georgia*, *Kendrick v. Glover*, 1 Ga. Dec. 63.

See further that the assignment of a chose in action is a good consideration for a promise,

Greene v. Bartholomew, 34 Ind. 235; *Whittle v. Skinner*, 23 Vt. 531.

4. English Rule.—*Innes v. Dunlop*, 8 T. R. 595. See also *Fenner v. Meares*, 2 W. Bl. 1269; *Price v. Seaman*, 4 B. & C. 525, 10 E. C. L. 400.

5. 1 Chit. Pl. 18. See also *Wharton v. Walker*, 4 B. & C. 163, 10 E. C. L. 302; *Oble v. Dittlesfield*, 1 Vent. 153; *Forth v. Stanton*, 1 Saund. 210, and note 1.

It would seem that in *England* the rule at present is to require the consideration of forbearance or some other new consideration, to enable the assignee to proceed in his own name. See *DeBarry v. Withers*, 44 Pa. St. 356; *Moar v. Wright*, 1 Vt. 57.

See generally the title *CONSIDERATION*.

6. Statutory Right of Assignee to Sue in His Own Name.—1 *Stimson Am. Stat. Law* 4032. *Arizona.*—*Sroufe v. Soto* (*Arizona*, 1896), 43 Pac. Rep. 221.

Arkansas.—The assignee of bonds, bills, notes, etc., for the payment of money or property, may sue thereon in his own name. *Block v. Walker*, 2 Ark. 4; *Purdy v. Brown*, 4 Ark. 535; *Owen v. Lavine*, 14 Ark. 389; *Worthington v. Curd*, 15 Ark. 491.

California.—*Lazard v. Wheeler*, 22 Cal. 139; *More v. Massini*, 32 Cal. 590.

Indiana.—*Strong v. Clem*, 12 Ind. 37, 74 Am. Dec. 200.

Iowa.—*Goodnow v. Litchfield*, 63 Iowa 275.

Kansas.—*Stewart v. Balderston*, 10 Kan. 131.

Maine.—*National Exch. Bank v. McLoon*, 73 Me. 498.

Michigan.—*Final v. Backus*, 18 Mich. 218; *Cook v. Bell*, 18 Mich. 387; *Grant v. Smith*, 26 Mich. 201; *Upham v. Dickinson*, 38 Mich. 338.

A written contract for the sale of land is such a chose in action as can be sued on by the assignee in his name, under *Michigan Comp. L.*, § 4159, *Laws* 1863, p. 102. The statute embraces every right of property which was ever assignable in equity or capable of survivorship to the executor. *Cook v. Bell*, 18 Mich. 387.

Minnesota.—*Tuttle v. Howe*, 14 Minn. 145, 100 Am. Dec. 205.

Missouri.—*Goodger v. Finn*, 10 Mo. App.

assignee may sue either in his own name or in that of the assignor.¹

Effect of the Statutes.—It has been held that this statutory provision, and the further clause found in the statutes of several states, that this section shall not be deemed to authorize the assignment of a thing in action not arising out of contract, does not affect the assignability of choses in action in any respect; no new right of action is created, nor authority given to assign a right of action not before assignable.² The only change made by the

226; *Walker v. Mauro*, 18 Mo. 564; *Smith v. Schibel*, 19 Mo. 140; *Long v. Constant*, 19 Mo. 320, 61 Am. Dec. 559; *Peters v. St. Louis, etc.*, R. Co., 24 Mo. 586; *Long v. Heinrich*, 46 Mo. 603; *Snyder v. Wabash, etc.*, R. Co., 86 Mo. 623, 29 Am. & Eng. R. Cas. 237. The assignee of an open account cannot recover thereon in Missouri in his own name without some proof of the assignment. *Turner v. Hayden*, 33 Mo. App. 15.

Nebraska.—*Mills v. Murry*, 1 Neb. 327.

Nevada.—*Carpenter v. Johnson*, 1 Nev. 331.

New Jersey.—Under the Practice Act of 1855, the assignee of a chose in action for a valuable consideration, if the assignor be dead, may sue for and recover the same in his own name. But it is an essential condition that the assignment be made for a valuable consideration. *Andrews v. Rue*, 34 N. J. L. 402.

New York.—*Johnston v. Bennett*, 5 Abb. Pr. N. S. (N. Y. Super. Ct.) 331; *Platt v. Stout*, 14 Abb. Pr. (N. Y. Supreme Ct.) 178; *Billings v. Jane*, 11 Barb. (N. Y.) 621; *Butler v. New York, etc.*, R. Co., 22 Barb. (N. Y.) 110; *Smith v. New York, etc.*, R. Co., 28 Barb. (N. Y.) 605, 16 How. Pr. (N. Y.) 277; *Genet v. Howland*, 45 Barb. (N. Y.) 566, 30 How. Pr. (N. Y.) 360; *Van Rensselaer v. Owen*, 48 Barb. (N. Y.) 61, 33 How. Pr. (N. Y.) 16; *Graves v. Spier*, 58 Barb. (N. Y.) 349; *Sheldon v. Wood*, 2 Bosw. (N. Y.) 267; *Drake v. Smith*, 12 Hun (N. Y.) 532; *Jackson v. Daggett*, 24 Hun (N. Y.) 204; *Sharp v. Edgar*, 3 Sandf. (N. Y.) 379; *Hastings v. McKinley*, 1 E. D. Smith (N. Y.) 273; *Munson v. Riley*, 2 E. D. Smith (N. Y.) 130; *Monahan v. Story*, 2 E. D. Smith (N. Y.) 393; *McKee v. Judd*, 12 N. Y. 624, 64 Am. Dec. 515; *Richtmeyer v. Remsen*, 38 N. Y. 206.

Where a contract for the payment of money has been assigned for the benefit of a third person, the assignee may sue thereon in his own name, under the *New York* Code, as a trustee of an express trust. *Cummins v. Barkalow*, 1 Abb. App. Dec. (N. Y.) 479, 4 Keyes (N. Y.) 514.

North Carolina.—*Moore v. Nowell*, 94 N. Car. 265.

Ohio.—*Hall v. Cincinnati, etc.*, R. Co., 1 Disney (Ohio) 58; *Allen v. Miller*, 11 Ohio St. 374.

Oregon.—*Little v. Portland*, 26 Oregon 235.

Texas.—*Devine v. Martin*, 15 Tex. 30; *Smalley v. Taylor*, 33 Tex. 668.

The common-law rule that the legal title of a chose in action was not assignable is not in force in *Texas*, and an assignee of such right of action, holding both the legal and equitable title, should sue thereon in his own name. *Winn v. Fort Worth, etc.*, R. Co. (Tex. Civ. App. 1896), 33 S. W. Rep. 593.

Virginia.—*Tyler v. Ricamore*, 87 Va. 466.

West Virginia.—*Thomas v. Linn* (W. Va. 1894), 20 S. E. Rep. 878.

Wisconsin.—*Smith v. Chicago, etc.*, R. Co., 23 Wis. 267; *Tyson v. McGuineas*, 25 Wis. 656; *Webber v. Quaw*, 46 Wis. 118.

Canada.—*Blair v. Ellis*, 34 U. C. Q. B. 466.

An Assignment by Way of a Pledge to secure the payment of money is not such an assignment as would enable the assignee, under 35 Vict., c. 12, § 1, O., to sue in his own name. *Hostrawser v. Robinson*, 23 U. C. C. P. 350.

Accrued Cause of Action—Michigan.—The right to transfer an accrued cause of action is secured in Michigan by statute, and such a right cannot be defeated. Thus a provision in a fire insurance policy that it shall be forfeited if assigned without the company's consent cannot defeat an assignment of such a policy made after the loss without the consent of the company. *Roger Williams Ins. Co. v. Carrington*, 43 Mich. 252.

Real Party in Interest.—The assignee of a chose in action, by a valid written assignment, is the "real party in interest," although the money, if recovered, is to go to others. *Allen v. Brown*, 44 N. Y. 228, *affirming* 51 Barb. (N. Y.) 86; *Meeker v. Claghorn*, 44 N. Y. 349; *Sroufe v. Soto* (Arizona, 1896), 43 Pac. Rep. 221; *Anderson v. Reardon*, 46 Minn. 185; *Struckmeyer v. Lamb* (Minn. 1896), 65 N. W. Rep. 930. See also *Ward v. Hughes*, 8 Ont. Rep. 138. But see *Hall v. Erwin*, 60 Barb. (N. Y.) 349. *Compare, in Nebraska*, *Hoagland v. Van Etten*, 23 Neb. 462.

The assignee of a note and account sued on is the "real party in interest," within the meaning of the *Colorado* Code, although the consideration for the assignment is not to be paid until after recovery. *Bassett v. Inman*, 7 Colo. 270.

Right of Assignor to Sue.—If the assignment divests the assignor of all title, both legal and equitable, to a cause of action, he is not entitled to sue. *Beck v. Rosser*, 68 Miss. 72; *East Texas F. Ins. Co. v. Coffee*, 61 Tex. 287.

But if, notwithstanding the assignment, the legal title remains in him he can maintain the suit. *Allison v. Phoenix Assur. Co.*, 87 Tex. 593. See *Winn v. Fort Worth, etc.*, R. Co. (Tex. Civ. App. 1896), 33 S. W. Rep. 593.

1. Action in Name of Assignor or of Assignee.—*McDonald v. Laughlin*, 74 Me. 480; *Park v. Toledo, etc.*, R. Co., 41 Mich. 352. See also *Mims v. Swartz*, 37 Tex. 13.

Under the *South Carolina* Act of 1798, the assignee of a bond was not compelled to sue in his own name; he might sue in the name of the assignor. *Coachman v. Hunt*, 2 Rich. (S. Car.) 450.

2. Question of Assignability Not Affected by Statute.—*Pomeroy on Remedies and Remedial Rights*, § 144.

statutes is to transfer with the beneficial interest the right of action also in those cases where the court, before the statutes were enacted, would recognize and protect the rights of the assignee.¹

b. OF THE PARTY LIABLE²—**Before Notice.**—The debtor or party liable on an assigned chose in action is not affected by the assignment until he has notice thereof, and consequently he may set up against the claims of the assignee any defense acquired before notice that would avail him against the assignor, had there been no assignment. Thus payment by the debtor to the assignor, or any compromise or release of the assigned claim by the latter before notice, will be valid against the assignee and discharge the debtor.³

But after Notice the debtor cannot do anything to prejudice the rights of the assignee; he cannot avail himself of any subsequent payment, discharge, or release of the claim assigned, nor acquire any new obligations of the assignor and offset them to the prejudice of the assignee.⁴

United States.—*Davis v. St. Louis, etc., R. Co.*, 25 Fed. Rep. 786.

Missouri.—*Snyder v. Wabash, etc., R. Co.*, 86 Mo. 623, 29 Am. & Eng. R. Cas. 237, *overruling Wallen v. St. Louis, etc., R. Co.*, 74 Mo. 521.

New York.—*Thurman v. Wells*, 18 Barb. (N. Y.) 500; *Butler v. New York, etc., R. Co.*, 22 Barb. (N. Y.) 110; *Purple v. Hudson River R. Co.*, 4 Duer (N. Y.) 74.

Oregon.—*Hillman v. Shannahan*, 4 Oregon 163, 18 Am. Rep. 281.

Wisconsin.—*McArthur v. Green Bay, etc., Canal Co.*, 34 Wis. 139.

See also *Hawkins v. Watkins*, 5 Ark. 485; *Phillips v. Wilson*, 25 Ill. App. 427; *Hyslop v. Randall*, 11 How. Pr. (N. Y. Super. Ct.) 97, 4 Duer (N. Y.) 660; *Myers v. Davis*, 22 N. Y. 489; *Wheeler v. Hughes*, 1 Dall. (Pa.) 23; *Feazle v. Dillard*, 5 Leigh (Va.) 30.

The *Iowa Code* of 1851 did not narrow the assignability of claims, nor are those claims which are specifically named in chapter 58 the only assignable claims. *Weire v. Davenport*, 11 Iowa 49, 77 Am. Dec. 132.

1. *Hodgman v. Western R. Corp.*, 7 How. Pr. (N. Y. Supreme Ct.) 492.

The object of the rule that every action must now be prosecuted in the name of the real party in interest was to abolish the distinction between the former practice of courts of common law and chancery, and give full effect, at law as well as in equity, to assignments of rights of action by requiring the assignee to sue in his own name. *Cummings v. Morris*, 25 N. Y. 625.

2. **Rights of the Debtor.**—This branch of the subject is so intimately connected with the question of notice that it has already been partially considered under that head, and it is designed here to give only a summary of the general principles involved. See *supra*, this title, *Notice*.

For a Full Discussion of the right of the debtor to claim a set-off against the assignee, see the title *SET-OFF, RECOUPMENT, AND COUNTERCLAIM*.

As to the Effect of Payment to the original creditor after assignment, see the title *PAYMENT*.

3. See note (2) *supra*.

Payment of a debt to the assignor after the assignment, but before notice of it is given to

the debtor, is a good payment, and discharges the debtor. *Renton v. Monnier*, 77 Cal. 449; *Thayer v. Havenor*, 6 Me. 212; *Bury v. Hartman*, 4 S. & R. (Pa.) 175. See also *Pulliam v. Cantrell*, 77 Ga. 563; *James v. Morey*, 2 Cow. (N. Y.) 246, 14 Am. Dec. 475. See the title *PAYMENT*.

Assignee Not Protected where Debtor Acts in Good Faith.—As a general and well-established rule the assignee of a demand is not protected against the subsequent dealings of his assignor with the debtor, where the latter acts in good faith. *Huntington v. Potter*, 32 Barb. (N. Y.) 300 (*per Johnson, J.*).

4. See note (2) *supra*.

After the Debtor Has Knowledge of the Assignment he is inhibited from doing any act which may prejudice the rights of the assignee. Payment by him to the nominal creditor, after notice of the assignment, and without the consent of the assignee, will be no defense to an action brought for the benefit of the assignee; and any adjustment or compromise of the cause of action by the original parties made after such notice will be void as against the assignee. *Creighton v. Hyde Park*, 6 Ill. App. 272.

Where a bankrupt, before he filed his petition in bankruptcy, assigned a claim due to him which was then in the hands of his attorney for collection, and the debtor was duly notified of the transfer, and the claim was, notwithstanding the transfer, included in the schedule of the bankrupt and sold by his assignee in bankruptcy, and afterwards paid by the debtor to the purchaser at the assignee's sale, it was held that such payment was no discharge of the debt. *Anderson v. Miller*, 7 Smed. & M. (Miss.) 586.

After notice the debtor cannot acquire obligations of the assignor, and offset them to the detriment of the assignee. *Norwood v. Pettis*, 10 La. Ann. 259.

Admissions—Release.—That the debtor cannot avail himself of admissions or other acts of the assignor after the assignment, or of any release after notice, see *supra*, this title, *Rights of Assignee—Against Assignor*; and the title *ADMISSIONS*, vol. I, p. 681.

Set-off.—The assignee for value of a chose in action will not be affected by a set-off in favor of the debtor who has had notice of the assignment and consented thereto. *Dennison*

v. Knox, 24 U. C. Q. B. 119. See the title SET-OFF, RECOUPMENT, AND COUNTER-CLAIM.

Mutual Accounts—Set-off.—The assignee of a balance due on mutual accounts, after notice to the debtor of the assignment, has an equitable right, which the court will protect, to the balance due at the time of notice, which cannot be diminished by any claim of the other party subsequently accruing or procured, and if the assignee brings an action in the name of the assignor, for the whole amount of this account, against the other party, and the latter brings a cross action also for the full amount of his account, and both actions proceed to judgment, under the provisions of the *Maine* statutes, the judgment debt in the lesser claim may, by leave of court, be set off in payment of so much of the larger; but the costs of that suit cannot be set off in further payment of the balance of the larger judgment without the consent of the assignee. *Bartlett v. Pearson*, 29 Me. 9.

Defense to Counterclaim.—The assignee may set up against the debtor any defense against a counterclaim that the assignor might have done. *Miller v. Centerville*, 57 Iowa 640.

Fraud on Debtor.—In an action of debt brought by the assignee of a bond against the obligor, it was held that a plea that the consideration given for the bond was fraudulent was a good defense. *Ewing v. Miller*, 1 Mo. 234, criticised in *Buford v. Byrd*, 8 Mo. 240.

Estoppel.—Where a subscriber to the stock of a corporation gave a bond and mortgage

for the amount of his subscription, and these were deposited with the state comptroller, who assigned them with the knowledge and without the objection of the stockholder, it was held that the latter was estopped from denying their validity, on the ground that they had been obtained from him by fraudulent representations. *Hubbard v. Briggs*, 31 N. Y. 518.

When, after notice of the assignment, the debtor promises the assignee to pay the debt, or by his conduct induces him to believe that he will, under such circumstances as that a retraction of the promise, if permitted, would operate as a fraud upon the assignee, the debtor is thereby estopped from afterwards setting up any defense which he may have had against the assignee. *Henry v. Brown*, 19 Johns. (N. Y.) 49; *Foster v. Newland*, 21 Wend. (N. Y.) 94; *Petrie v. Feeter*, 21 Wend. (N. Y.) 172; *Feazle v. Dillard*, 5 Leigh (Va.) 30; *Stebbins v. Bruce*, 80 Va. 389.

Question of Notice Immaterial—Iowa.—Under §§ 2086, 2087 of the Iowa Code, it was held that the party liable on an open account may set up against the assignee any defense he could have urged against the assignor at the time of bringing suit. It is wholly immaterial whether the defense arose before or after notice, the point of time fixed by the statute being the commencement of the suit. *Wing v. Page*, 62 Iowa 87; *Zugg v. Turner*, 8 Iowa 223; *Reynolds v. Martin*, 51 Iowa 324. See also *Bailey v. Union Pac. R. Co.*, 62 Iowa 354.

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